

Why Corporate Counsel Should Use Pre-Suit Mediation to Avoid Costly Litigation

Any business dispute that could result in litigation can interrupt or end normal business transactions and relationships, and can divert the allocation of corporate resources to activities that do not move the business forward, which would adversely impact the company's bottom line.

Corporate counsel want to give legal advice that allows the company to flourish without roadblocks. One of the most formidable roadblocks is litigation. Any business dispute that could result in litigation can interrupt or end normal business transactions and relationships, and can divert the allocation of corporate resources to activities that do not move the business forward, which would adversely impact the company's bottom line.

Managing corporate litigation is one of the most important functions that corporate counsel perform. Often corporate counsel's duty is to end disputes, not elongate them. The best way to avoid lengthening a dispute is not to allow it to migrate into litigation.

Pre-suit mediation is one of the best—but surprisingly least used—tools available to corporate counsel. When a business dispute arises, pre-suit mediation should immediately be considered in an

attempt to avoid the costly roadblock that is litigation.

Litigation Is Costly in More Ways Than One

Litigation is costly in terms of both time and money. On the bench, we would see attorney's fees that would reach into the millions of dollars. And that is per party. Litigation often results in lost business opportunities and the attendant lost income. Litigation puts a huge stress on all persons involved as well as on their relationships with one another. Litigation can cause harm to the reputation of the company. Litigation can cause the company to lose customers.

Litigation puts the outcome of the business dispute into the hands of a jury or judge. Both are company outsiders who may not understand what is best for the company. A judge or jury now controls the outcome of the



Joseph Farina and John Thornton are JAMS neutrals and former Miami-Dade circuit judges. Courtesy photo

business dispute. And in the present environment where delays are inherent in the judicial system, even the most diligent judges are hard put to expeditiously move cases forward.

Finally, litigation is public. Anyone can anonymously research a dispute by viewing the public court file. The press can view the court file and attempt to talk to the parties or witnesses to the dispute. The press can conduct its own investigation and offer its own characterization of it. Dirty laundry may be uncovered. The public and the press can attend court hearings as well as the trial.

The Advantages of Pre-Suit Mediation

If successful, pre-suit mediation ends the dispute. There is no litigation, with all of its potential attendant harms. And even if pre-suit mediation is not successful, the issues for potential litigation are narrowed, thus reducing the monetary cost of litigation.

Pre-suit mediation is private and confidential, and occurs outside the public court system. All parties, attorneys, attendees and mediators are bound to confidentiality, which begins when the parties agree to mediation and ends at the earliest of settlement, impasse, or termination of mediation. And pre-suit mediation can be immediately scheduled, as opposed to litigation which takes years to resolve—longer if there are appeals.

Pre-suit mediation is substantially less costly than litigation. It can be accomplished in a less formal, less adversary atmosphere than litigation. It can result in a settlement document, which is private and confidential, and can be tailored to the needs of the parties to the dispute. It keeps the parties in control because the judge or jury is not determining the outcome. Since ninety-nine percent of all civil suits end without a trial, pre-suit mediation must be worth the effort, especially when compared to the cost of lengthy litigation.

The Mediators' Perspective

As mediators, we have seen the perils of waiting too long to unleash the negotiating skills of business professionals. Time and treasure is spent responding to

unending and expensive discovery—exemplified by electronically stored information requests—rather than jump-starting the return to business by utilizing pre-suit mediation.

During many business-centric mediations, which were unfortunately scheduled at the brink of trial, business principals wish they had met and talked sooner. Mediators help business negotiations get started. We explore the negotiating atmosphere, and help set the stage to enhance prospects for settlement. We provide cover for business principals to participate in negotiations by asking them to join us in discussing settlement, thereby permitting them to save face.

Direct, face-to-face negotiations between or amongst business principals may start during the opening or joint session, although this will more likely occur later, probably during a caucus, with or without the mediator. When and how to begin varies with each mediation. Timing depends on many factors, guided by the mediator's experience, including the personalities of the parties, their prior business relationship(s), and the need for closure.

Pre-suit mediation can resolve business problems sooner because business principals are engaged sooner. After all, time is money, and good relationships matter.

Successful Pre-Suit Mediation Results Can Prevent Business Interruptions

The principals of any business, including their knowledge,

judgment, relationships, and expertise, are the company's most valuable assets. It is in the company's best interests to start negotiating with the other side of a business dispute as early as possible after consultation with corporate counsel. Months, if not years, of the corporate representative and other high-level principals spending countless hours locating documents and emails, preparing and sitting for depositions, analyzing litigation strategy, attending evidentiary hearings, and preparing for and testifying at trial are not likely in the best long-term interests of the company, its principals, or its employees. Additionally, the stress to the individuals involved in the demands of litigation easily rob attention and energy which is better devoted to business uninterrupted and the company's bottom line.

If the business of business is business, pre-suit mediation should be one of the first tools extracted from corporate counsel's toolbox.

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