

Mediate pre-litigation, if it makes sense

By James Larson

There are many good reasons to consider mediating before suing. With sufficient voluntary disclosures and careful preparation, you may wrap up the case early, efficiently and with mutual satisfaction. But unless both sides are adequately prepared and committed to the process, pre-filing mediation can be unhelpful.

What Kinds of Cases?

Pre-litigation mediation may be considered in virtually all kinds of cases, including individual claims (e.g., personal injury) and commercial (e.g., breach of contract). Cross-overs include trade secrets and attorney fees.

While generalizations are often inadequate, it's fair to say that there's usually an emotional factor in the first category of cases. Hurt feelings and anger are common in employment discrimination cases, for instance. This is not to say that emotions don't also run high in business cases, particularly in trade secret and some breach of contract cases, in which the parties have personally invested their integrity, hard work and pride in a business relationship.

Following are examples of the cases that would benefit from early mediation.

Too Much Pain to Litigate

Without doubt, going to court can be painful, draining and the outcome uncertain. The protracted process of interviews, investigation, probing and embarrassing cross-examination at deposition and trial can be more than some parties may wish to endure. The added emotional distress and anxiety attached to a jury verdict and possible appeal both prolongs the healing process and diminishes the value of the end result for all parties.

Consider a case where a promising young medical student dies when he falls backward and hits his head on a table during a confrontation

with hostile partygoers at a popular nightclub. His parents, bereaved beyond imagination, prepare to sue for wrongful death. But the prospect of reliving the experience deters them.

The parties agree to early mediation. They select the critical information to exchange beforehand. The defendants have a strong case for no liability, but the plaintiffs hold the sympathy factor, and demonstrate the emotional impact of their case by presenting a video of the young man's memorial service. The case may settle immediately, or shortly thereafter, and the family will be spared the continuing pain.

Too Embarrassing to Litigate

Sometimes a lawsuit can resemble a "holdup" to the defending party, such as when the facts underlying the case are not only embarrassing and inflammatory, but downright scandalous. Even if "the facts" are untrue or not proven, the mere publication of the allegations can have a devastating impact on individual reputations and a company's business, or could start a cascade of similar claims.

The question is how plaintiffs intend to prove their allegations. The plaintiff's counsel carefully culls their potential evidence and present several samples — including a live witness — to the defendant in the course of mediation. Several confidential, controlled conversations between counsel follow the initial mediation session. After another session, and direct conversations between counsel, the matter settles without public ado.

Parting Can Be Painful but Dignified

It can be painful when an employer decides that a long-term, previously effective, and devoted executive should be replaced. Emotions can take over and obscure sound legal and business reasons for making the change, unless fair compensation and a dignified parting can be arranged.

In such a case one or both parties

may enlist a neutral mediator to assist. Part of the task is to provide the employee a supportive environment and opportunity to be heard. The parties may then — with the mediator's help — focus on a fair, compensatory and practical severance of the employment relationship without getting lost in the bitter weeds of discontent.

The Real Parties Need to Talk

Many business disputes are best settled by the parties themselves. In the mediation, the neutral may suggest that he or she preside over a direct conversation between the parties, to diffuse their anger, distrust and hostility between one another.

Trade secrets cases are a good example of disputes that are susceptible to settlement without litigation. Customer lists, business methods and other proprietary information can ignite in the context of one party leaving a small, closely held enterprise, in which all sides feel personally invested. Mutual suspicion about each other's motives can obfuscate the parties' interests in figuring out how they both can continue doing business without protracted and expensive litigation.

Face-to-face conversations, including voluntary exchanges of information and data — without counsel — are a useful settlement tactic in such situations. Good faith, honest and objective direct discussions can go a long way to settle disputes before they get into court and avoid costly and cumbersome discovery battles over access to personal computers, phones and other devices.

Conclusion

Part of the problem in mediation is bringing each side to an understanding of the other's side and the effects of the incident on the individuals and institutions involved. While common understanding and agreement may rarely result, at least the risks of jury perceptions of each side may drive negotiations to a practical, realistic and satisfactory settlement.

Avoiding the expense of a motion to dismiss, complex discovery issues involving claims of privilege, expert witnesses, and cross motions for summary judgment may be a boon both to a grieving plaintiff who has lost a dear relative in a shooting, and the government agency struggling to survive on an over-burdened budget. Sometimes, even the underlying community policy issues may be addressed and changes implemented, which litigation may not have achieved.

These days, many cases do not settle at the first mediation or settlement conference for a variety of reasons — insufficient information on one side or the other, an important case dispositive legal issue, or an uncertain damages outlook. Antitrust, intellectual property, and many class actions fall into this category. In these cases, a carefully prepared case management plan may include mediation early and often commencing before a complaint is filed, and proceeding — if necessary — throughout the stages of litigation up to trial.

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