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Pre-Suit Mediation: An Alternative to the Alternative

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Alternative Dispute Resolution has long been heralded as a cost efficient method of resolving disputes. It is, of course, founded on the premise that to the extent protracted and expensive litigation and the uncertainty of result can be avoided, the parties to the dispute benefit in equal measure. While in its formative years ADR processes were typically invoked on the eve of or close to trial, there is an increasing recognition that "early intervention" should be on the parties' and counsel's checklist of options as a dispute begins to simmer.

The logical extension of early intervention is pre-suit mediation. Either immediately on the eve of or following an employee termination, a catastrophic accident, or a roiling business dispute, to cite a few examples, agreements to refrain from filing suit pending mediation are playing an increasing role in the ADR process. But before considering the pluses and minuses of pre-suit mediation a quick spoiler alert. Pre-suit mediation is not for every case. In selected matters, pre-suit mediation can be enormously helpful; in the wrong dispute, or with the wrong set of parties (or counsel), it can be counter-productive.

Not every dispute is amenable to pre-suit mediation. Based on my experience, the following types of cases are "high-value targets":

- Personal injury matters where liability is not disputed, damages are extensive and policy limits may not be sufficient to adequately compensate the injured party.
- Employment cases where a high ranking executive is either leaving voluntarily or subject to termination and avoidance of negative publicity is mutually beneficial. In my experience these cases are often set against the backdrop of questions involving the enforcement of restrictive covenants and intellectual property disputes.
- Commercial business disputes in which prompt and private resolution is necessary to allow one or both companies to move forward with an acquisition or sale.

While these examples are not exhaustive, what they share in common is the parties' recognition that the filing of a lawsuit is potentially disadvantageous for one or the other; that avoiding the glare of publicity is important and that the cost and risk of protracted litigation is far less attractive than a prompt and speedy resolution of the dispute.

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Implicit in this description is the recognition that there is an overlap of interests even amongst potentially feuding parties. For example in personal injury cases, the opportunity to achieve a prompt and fair settlement will ideally coincide with the insurer's interest in avoiding extra-contractual damages or exposing the insured to personal risk. In the world of executive compensation disputes, preserving the good name and reputation of both the executive and the company is often critical. And in potentially explosive business disputes, especially in startup companies, a delay of months, let alone years, in resolving disputes can be fatal.

As you consider the possibility of pre-suit mediation, it is worthwhile considering the following questions:

- **What are our assumptions about what can be accomplished?**

Perhaps the greatest risk to a successful pre-suit mediation is a lack of shared assumptions and expectations. For example, in personal injury matters, plaintiff and defendant can confuse the suggestion for a pre-suit mediation with an assumption about the expected result. For the plaintiff, this can involve a misapprehension that the policy limits will be automatically offered or that the excess carrier will be significantly involved. The flip is true of the defendant. The carrier may incorrectly assume that a "discount" off the policy will be considered or that the excess carrier will be shielded from involvement in the settlement.

In employment and business disputes, the parties may misperceive the short term needs of the other side with each assuming that an immediate settlement is a matter of business necessity.

To the extent that counsel can have an honest and open conversation about their client's expectations, the greater opportunity for a successful pre-suit resolution and the less likelihood of a fundamental misunderstanding about the range of possible outcomes.

- **Do we forfeit a strategic advantage by agreeing to pre-suit mediation?**

From a litigation perspective the concern is that strategies, tactics, theories and facts may be revealed that will weaken the hand down the road. This is always a matter of judgment and balance. My experience is that there a very few "gotcha" moments in today's discovery intensive proceedings and that, on balance, revealing information pre-suit that will move the other party to a settlement is generally worth the risk.

- **What should my client and I do to prepare for a pre-suit mediation?**

There are a number of preliminary steps that can increase the chance of an early negotiated resolution of an incipient suit. These include the following:

1. If you are the plaintiff, draft and share with the other side a proposed complaint or at the least provide a detailed statement of potential claims.

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2. If you are the potential defendant, share your client's response to the alleged claims that will be asserted.
3. Enter into a tolling agreement if the statute of limitations is a potential issue.
4. If the dispute involves technical or financial issues, be prepared to have the accountants, engineers or other experts present at the mediation and available to discuss directly with the mediator the matters that are in dispute.
5. In the case of business disputes, consider having the principals meet and discuss the issues with the mediator or amongst themselves. Frequently, a direct conversation amongst sophisticated business people can quickly unwrap a difficult issue. Depending on the nature of the relationships those conversations are sometimes best had without counsel. I often observe, "These folks put the deal together; they are very capable of taking it apart."

Under the right circumstances, pre-suit mediation can be a win-win for the parties. As soon as a potential litigation matter reaches counsel's desk, the opportunity to resolve it without expensive and time consuming litigation should be explored with both client and opposing counsel.

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