

Hold the Lawsuit

Pre-Litigation Mediation Resolves Disputes

By **Martin I. Reisig**

There is a path toward more satisfied clients. Businesses want to focus on their business, use assets wisely, and preserve beneficial relationships. Customers and suppliers want to be treated with respect and, when appropriate, be fairly compensated for losses. Nobody really wants litigation.

Plaintiffs who file lawsuits and defendants who force them to prematurely file are not on the right track toward resolving disputes; there is a smarter approach for businesses and individuals who would rather solve problems and perhaps preserve relationships than spend endless time and money in litigation.

Over the last several years, I have had the privilege of conducting numerous pre-litigation mediations for a large retail chain store. These have been positive and successful experiences, leading me to the conclusion that more businesses would benefit from following a pre-litigation settlement model.

First, a brief description of the model. This business has an active pre-suit mediation program for customer personal-injury claims throughout the United States. The company is represented by experienced “settlement counsel,” formerly its in-house counsel. All potential plaintiff claims originating from attorneys are reviewed, and many are selected for early pre-litigation mediation.

Counsel and claimants are invited to submit a full-demand package including medical records, bills, and other supporting information. These are reviewed and evaluated, and mediations are scheduled for willing participants. Typically, these mediations are two hours long, with four scheduled each day. The potential settlement paperwork is prepared in advance. Each year, approximately 450 cases are mediated, with a 90 percent settlement rate at the initial mediation. The other 10 percent typically require minimal further information before settlement.

When plaintiff counsel provides adequate information, the business responds to a “customer” with whom it wants to maintain a good and continuing relationship. The parties have not yet become hardened adversaries. At these mediations, plaintiff counsel and their clients have the opportunity to explain the problem. Counsel for the retail store listens and may raise concerns, but the atmosphere is cooperative. While some mediations are successfully conducted with everyone staying together, in these particular mediations, after the initial get-together, greetings, and overview, we most often separate and begin to consider resolutions using the mediator as a go-between.

The legal issues are alluded to, but are not always center stage. Plaintiff counsel and their clients are often surprised



at how well and respectfully they are received. Experienced former in-house counsel knows the cost and relationship value of fair and timely settlements.

Compare this pre-litigation mediation approach to the scenario in which plaintiffs file complaints and defendants file counterclaims. The situation typically escalates, and the door is open to uncooperative responses. Allegations do not endear the parties and their counsel to each other. It is more responsible to at least attempt early resolution with the potential rewards of cost, time, and relationship savings. The pre-litigation model makes it much easier to have a solution-oriented focus without the negative baggage generated by accusations, posturing, and perceived insults.

The lesson learned is that early mediation prevents the conflict from escalating and preserves an important relationship while resolving a dispute in a timely and economical manner for everyone. While the methodology of early mediation will vary greatly, the same policy of de-escalation and early involvement applies to a range of business, government, tort, malpractice, and employment disputes.

A sampling of better-known companies reported to be aggressively using mediation programs includes American Express, DuPont, Hertz Claim Management, Johnson & Johnson, Lockheed Martin, Publix Supermarkets, The Home Depot, Toro, and Wells Fargo.¹ Similarly, hospitals including Drexel University, Johns Hopkins, the University of Michigan, and the University of Pittsburgh Medical Center have been actively engaged in early mediation programs with injured patients.² The era of “always deny and defend” may be coming to a close to the benefit of hospitals’ bottom line, but just as importantly to the financial, health, and emotional benefit of their current and future patients.³

To amplify my point, consider Richard C. Boothman, chief risk officer at the University of Michigan Health System, who testified before Congress as follows:

Litigation was never meant to be the first resort for resolving disputes. Reform must offer the opportunity, incentive or if necessary, impose a requirement that the parties talk to each other before resorting to litigation as a means for resolving disputes.⁴

Consistent with this call to talk first is the Michigan Ethics Committee’s assertion:

A Lawyer has an obligation to recommend alternatives to litigation when an alternative is a reasonable course of action to further the client’s interests, or if the lawyer has any reason to think that the client would find the alternative desirable.⁵

Fast Facts:

Pre-litigation disputants have not yet become hardened adversaries.

Pre-litigation mediation works for all sides and presents opportunities which become more difficult to achieve once litigation begins.

Pre-litigation mediation saves money and relationships.

In Michigan, more than 98 percent of all litigated matters settle without a trial. Therefore, it is reasonable to suggest that almost all disputants should try to get to resolution as soon as possible to avoid the damage, costs, delays, and stress resulting from protracted litigation. In a recent article, experienced mediators Hon. John C. Foster, Richard L. Hurford, and Douglas L. Toering suggest, “In any event, drafters of business contracts should seriously consider a progressive dispute resolution process. This requires, among other steps, mediation before a party sues or demands arbitration.”⁶

It is interesting to note that Quebec’s Code of Civil Procedure mandates the consideration of alternative dispute resolution processes before instituting litigation. Similarly, pre-litigation ADR initiatives are mandated in many Australian commercial matters. Australian mediator Greg Rooney writes: “Some novel approaches developed including setting matters down for hearing in a priority list if the parties had attempted mediation and in a non-priority list if they had not.”⁷

While there is much discussion about mediation approaches, I have found that many different approaches can be successful. Maybe it is just about getting people together.

Rooney continues:

I have come to view that what is at the core of mediation and why it works so well is the simple fact that it is a venue. A venue where the parties are required to set aside time to spend with their lawyer, the other party and that party’s lawyer in the company of a mediator. The venue like the door of the court requires lawyers to look at their file in a holistic manner rather than piece by piece auctioning over a long period of time. It is where parties are presented with the tantalizing option that the matter could resolve that day if they so choose.⁸

For almost all business cases, it makes sense to get together and consider resolution as soon as possible. Mediator Christopher Webb, former vice president and general counsel for the

Often, it is easier to make “business sense”—for example, thinking about relationships, costs, collateral impacts, discovery exposure, disruptions, adverse publicity, customer losses, and the missed opportunity for creative resolutions—before the conflict is allowed to escalate.

Jervis B. Webb Company, writes: “For business transactions, keep in mind that making business sense will be more important than making perfect legal sense in the long run.”⁹

Often, it is easier to make “business sense”—for example, thinking about relationships, costs, collateral impacts, discovery exposure, disruptions, adverse publicity, customer losses, and the missed opportunity for creative resolutions—before the conflict is allowed to escalate. After reading a draft of this article, David Rosenthal, a retired owner of a construction business, reminded me that while conflict is inevitable, litigation is not part of a good business plan. He wrote:

...for business disputes, time is of the essence... anything which takes a company off course is a distraction and has an impact way beyond the eventual settlement costs to resolve the original dispute... Rapid and equitable resolution (in that order) of disputes is the most powerful tool that businesses have which can ensure their compliance to their business plan.¹⁰

Former litigator John R. Van Winkle addresses how easy it is to get lost on a “litigation train” and lose client focus. He refers to a case that he won but his client refers to as the “worst time of my life.”¹¹

Minimize the adversarial escalation by getting together as early as possible. Pre-litigation mediation works for all sides and presents opportunities which become more difficult to achieve once litigation begins. I began with an example of more than 90 percent of a large group of customer personal-injury claims that settled before litigation. My experience—and the experience of many others—supports pre-litigation mediation for a growing number of business, government, tort, malpractice, and employment disputes.¹² Why wait for escalation and entrenchment? Hold the lawsuit and at least try pre-litigation mediation. ■



Martin I. Reisig is a full-time mediator and arbitrator with American Settlement Centers, Inc. He was named Best Lawyers Detroit Area 2015 Mediation Lawyer of the Year and 2013 Arbitration Lawyer of the Year. Early in his career, he was an appellate defender, federal defender, and chief of the Economic Crime Unit of the U.S. Attorney's Office for the Eastern District of Michigan. Learn more at www.reisigmediation.com.

ENDNOTES

1. Mallick, *U.S. Corporations Should Implement In-House Mediation Programs into Their Business Plans to Resolve Disputes*, Harvard Negotiation L Rev (March 18, 2009) <<http://www.hnlr.org/2009/03>>; Miguel Olivella <<http://www.adrprocess.com/programresults.html>>. Olivella makes a strong case that after implementation of mediation programs, total expenditures for litigation expenses combined with verdicts and settlements go way down, citing Toro going from total expenses per claim pre-1991 of \$115,620 to \$42,839 after implementation of the mediation program. All websites cited in this article were accessed November 7, 2016.
2. Gannon, *Mediation helps hospitals steer clear of courtrooms* (March 7, 2007) <<http://www.post-gazette.com/business/businessnews/2007/03/07/Mediation-helps-hospitals-steer-clear-of-courtrooms/stories/200703070183>>.
3. Boothman & Hoyler, *The University of Michigan's Early Disclosure and Offer Program* (March 2, 2013) <<http://bulletin.facs.org/2013/03/michigans-early-disclosure/>>.
4. Richard C. Boothman, chief risk officer, University of Michigan Health System, testimony before the United States Senate Committee on Health, Education, Labor and Pensions (June 22, 2006) <<http://www.help.senate.gov/imo/media/doc/boothman.pdf>>.
5. Syllabus, Michigan Ethics Committee Opinion RI-262 (May 7, 1996).
6. Foster, Hurford & Toering, *Business Courts, Arbitration, and Pre-Suit Mediation: A Modest Proposal for the Strategic Resolution of Business Disputes*, 35 Mich Bus LJ 21 (Fall 2015).
7. Rooney, *The Australian Experience of Legislated Pre-Action ADR Requirements: Specificities, Acceptation, and Keys to Success*, 6th symposium of the Institut de Mediation et d'Arbitrage du Quebec, Montreal (November 4, 2015), p 6.
8. *Id.* at 13.
9. Christopher J. Webb, *Practical Considerations Regarding the Art of Negotiations*, presentation at the University of Detroit Mercy School of Law (2008).
10. David Rosenthal, after retiring from the construction business, is a past president and 20-year volunteer mediator at the Oakland Mediation Center in Oakland County.
11. Van Winkle, *Mediation: A Path Back for the Lost Lawyer* (Chicago: ABA Publishing, 2d ed, 2003), p 10.
12. My special thanks to fellow American Settlement Center mediator Timothy Patterson, who successfully served as the mediator for several of the retail chain store pre-litigation mediations and added his valuable insights for this article. Tim is the senior shareholder of Booth Patterson, PC, where, in addition to his skilled work as a mediator, he has been an active trial attorney, trying hundreds of cases ranging from simple municipal ordinance violations to complex zoning, condemnation, contract, personal injury, and contract cases.