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When Early Mediation Makes Sense

Eight key factors that make early mediation a valuable tool in civil cases

By Hon. Michael Wilner (Ret.)

Most lawyers know the sequence of a typical complex civil case in federal or state court. The plaintiff files a complaint, the defense moves to dismiss the action and the parties then engage in extensive discovery. If the lawsuit survives summary judgment practice, many federal and state courts require that the parties have some sort of settlement proceeding before the case can be set for trial. That could be one to three years from the commencement of the case.

Does it make sense to require the parties to sit down for settlement talks earlier in the action? Not always, based on my experience on the federal bench. But if certain significant factors are present, an attorney can provide a great service by advising their client to sit down for a meaningful mediation early in a lawsuit. When these factors align, early mediation can save time, reduce costs and potentially lead to a favorable resolution. Here are several circumstances where early mediation may be particularly advantageous:

1. You know what the key witneses have to say. Did the employee give a statement to her employer before they were discharged? Was a corporate executive deposed in a parallel lawsuit? Did the board or outside counsel conduct an investigation into the underlying dispute? Is there a police report laying out contemporary statements? If so, you may already have a good idea about what the trial testimony of a central witness will be long before depositions start. These folks may be locked into a version of events — substantively, and for impeachment purposes (FRE 801, 803, 804) — that can accelerate your evaluation of the case.

2.You already have the key documents. Good lawyers will have the main evidence (the infringing recording in a copyright case, the employee's file in a discrimination case, etc.) in hand when a lawsuit is filed. And numerous open sources — social media posts, PTO searches for prior art, emails forwarded to personal accounts, recorded quarterly investor conference calls, etc. — can provide counsel with a good idea about what the "hot docs" in the case may show. Additional written discovery will surely be necessary for trial. But if you can assess your client's exposure based on this preliminary work, you may be prepared enough for an early sit-down.

3. You can cooperate with the other side to get what you need. If you have a good, professional relationship with opposing counsel, you may be able to voluntarily exchange key materials early in the case that you don't already have in hand. Would you agree to turn over your client's sales data in exchange for your adversary's numbers? Can both sides agree to swap an employee's personal medical records for their annual employment performance evaluations? An early, informal production can build trust between the parties and expedite a resolution.

4. The law in the area is settled and clear. Motion practice is appropriate when a party's theories of recovery or defense are convoluted, overreaching or in flux. The trial court may need to weigh in and pare down the case at the Rule 12 or 56 stage. Yet, if the complaint is tightly written — or there are obvious "he said/she said" issues that will

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prevent summary judgment — then waiting for resolution of motions may be a non-event. More pointedly, money that would be spent on motion practice can be saved and used for settlement earlier in the litigation.

5. The insurance company wants to settle (even if the client doesn't). Your insurer may have a lot of experience with the plaintiff, the plaintiff's lawyer or claims that businesses similarly situated to your client previously tendered. In those circumstances, the insurer likely has an expected value that it'll use to settle your case — and that it believes the other side will accept. The insurance company may want an early settlement conference to get that offer on the table and save ongoing legal costs.

6. Plaintiff wants to build a "war chest." An early mediation can peel off parties from a multi-defendant action and help finance the rest of the case. Let's say a company launches a patent infringement action against several manufacturers of knockoff products. You suspect that some of the defendants are likely to litigate heavily and others will not. The plaintiff may choose to settle quickly with those infringers who want to get out of the case relatively cheaply. That can give the manufacturer a "free roll" — and funds to use for lawyers, experts and other costs — for the remaining litigation.

7. The parties want to learn something in a controlled environment. A successful early mediation doesn't necessarily mean that the lawsuit resolves that day. Instead, the parties may gain valuable information from the process. The lawyers can informally "eyeball" an individual plaintiff or corporate executive long before depositions begin. The exchange of settlement offers will need to be conveyed to a company's management or board of directors, which can help them plan for a potentially serious case. Additionally, a mediator can get the lawyers to discuss important issues in the litigation at a preliminary stage. Which claims or defenses are central to the case? Will the parties need to engage in expensive discovery overseas or retain costly experts? An early mediation can often turn into a helpful case management tool when the parties openly discuss how the litigation will likely proceed.

8. The principals can talk about business instead of litigation. If there's a potential for a business-related solution to the parties' dispute — a patent license, the sale of a franchise, a renegotiation of a contract — an early mediation can provide a forum for those discussions. Decision-makers from both sides will be present, and may be motivated to find a transactional alternative to litigation. In a commercial lawsuit, an early settlement conference can provide an opportunity for the parties to concentrate on their future prospects together rather than their past grievances.

An early mediation can undoubtedly cause the parties to incur significant costs. However, in the right circumstances, the potential benefits of such a meeting — whether or not the case settles — may mean that this is money well spent.

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