**The Curse of the Multiple Mediations:**
**Settling Cases Post Pandemic**

**St. Petersburg, FL**
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## Introduction

It is an understatement to say that the world of defense litigation has changed a great deal since the COVID-19 pandemic. Work from home for lawyers and their clients; the use of virtual communication platforms for meetings, depositions, court appearances and mediations; and fewer jury trials may be here for good.

There are widely held perceptions that juror attitudes have changed as a result of the proliferation of conspiracy theories and false information in some media and on the internet. The polarization of politics has continued to erode public confidence in judges, lawyers, and our judicial system. The perception that higher verdicts and nuclear verdicts are upping the value of cases has increased the desire of the business world and the insurance industry to attempt to evaluate cases early and get them to early mediations. That perception has also resulted in more contracts that have arbitration and pre-suit mediation clauses.

This paper (and the accompanying panel discussion) will address subjects such as:

- the proliferation of mediation and arbitration provisions as a pre-suit condition in contracts.
- the pros and cons of early mediation;
- the challenge of being ready for early pre-suit mediation;
- the challenges of convincing parties to take a pre-suit mediation seriously by getting ready for it;
- the pros and cons of Zoom mediations versus in-person mediations; and,
- the question of whether we are seeing more cases that require multiple mediations.

**Mediation and Arbitration as a Pre-Suit Condition in Contracts**

Pre-suit mediation and binding arbitration have long been included in an array of commercial contracts. Lately, however, defense attorneys have noted that pre-suit mediation and/or binding arbitration have begun to appear with greater frequency.

Such conditions have long been a part of construction contracts. However, we are now seeing them in leases, services agreements, joint venture agreements, employment agreements, and other commercial ventures in which the possibility of conflict is predictable.

There is no common understanding as to why there has been a proliferation of these types of conditions in contracts, but the likely reasons are the perceived out-of-control costs associated with litigation and the uncertainty of outcomes in front of a judge or jury. The biggest practical problem for practitioners is the lack of uniformity and clarity in how pre-suit mediation and/or binding arbitration is to be conducted, and who is responsible for paying for it.

Among the questions that practitioners are often left to negotiate include:

- How soon will mediation have to occur?
- Where will a mediation occur?
- How will a mediator be selected?
- Will the parties be obligated to appear in person, or can they participate virtually?
- Who will be responsible for paying a mediator's fees?

- How will an arbitration be conducted?
- Who will be responsible for paying for an arbitrator(s)?

In the realm of mediation, the parties are usually left to negotiate the terms and timing of mediation unless the contract specifies a certain forum for selection of mediators and mediation rules. With respect to arbitration provisions, most states adhere to some form of the Uniform Arbitration Act and have local statutes to which they can refer for guidance on how to select an arbitrator. Certainly, in many commercial contracts, arbitration is specified to occur according to the American Arbitration Association rules for commercial matters.

As we will address below, the overriding concern of many lawyers is whether parties will take the pre-mediation seriously and the questions of whether arbitration of a dispute will actually save the parties any money or aggravation.

**The Pros and Cons of Early Mediation**

The number one benefit of early mediation is that if it is used properly, the parties can save substantial attorney fees, expenses, and loss of executive time by bringing a conflict to the table early. Furthermore, the options available to settle a case

in the early stages of a dispute are far better than they may be when the parties have already expended a great deal of time and effort litigating the dispute.

For example, many commercial disputes can be resolved through business solutions and business concessions by the parties on either side. Often, commercial relationships can be maintained by early and open efforts to resolve disagreements before hard feelings and massive expenses have created barriers to the ability or willingness of parties to remain in a business relationship going into the future.

It is widely known by business attorneys that pre-suit mediation can be a complete waste of time if the parties are not prepared, or if the parties are not willing to seize the opportunity to resolve the case by taking the process seriously and preparing for it. The failure of many parties to prepare adequately for early mediation and to take it seriously has resulted in what many observers view as a proliferation of multiple mediations that may be needed to settle a business dispute. This will be discussed in greater detail below.

**The Challenge of Being Ready for Early Pre-Suit Mediation**

In the framework of litigation, counsel for the parties have the ability to ask the court to impose dates and deadlines for the parties to exchange information and be ready for mediation. Litigation also affords parties the opportunity to serve Interrogatories, Requests for Production, Non-Party Subpoenas, and take witness depositions. Quite often in litigation, one or both of the parties have to be compelled by the court to share the information that may be needed for each party to assess the risk of taking the case to trial.

In pre-suit mediation, the parties and their attorneys are left to their own devices to exchange information. It can be very had during a business conflict where there may have been a breach of trust or other behavior that has disrupted the parties' relationship, and that can result in unwillingness of either party to put cards on the table and share information with the other side. However, it is well known that no dispute can be settled until each party has enough information about its liability risks and its damages to fully evaluate the risk of not settling. Therefore, it is incumbent upon counsel for the parties in getting ready for early and pre-suit mediation to encourage their clients to be forthcoming with information, and it is the duty of each attorney to not only get their own client ready for mediation, but to also do what is

needed to get the other party ready. It is only through a heightened level of readiness that parties can be successful in pre-suit mediation.

**The Challenges of Convincing Parties to Take Pre-Suit Mediation Seriously**

As noted above, erosion of trust, disruption of the business relationship, and anger and frustration can very easily cause parties to throw their hands in the air and to be pessimistic about the likelihood of settlement. So, this can be the greatest challenge to successful early mediation.

Getting the parties ready for pre-suit mediation requires a lot of preparation. Some or all of the following techniques may be necessary to convince a party to take pre-suit mediation seriously:

- Lawyers should prepare a detailed budget for their client of the attorney fees, expert witness fees, costs, and time that will need to be spent by the client if the case cannot be settled.
- Lawyers also must provide the client with examples of the array of outcomes that may be available through a negotiated settlement as opposed to a judgment after a trial. The client must be aware that there may be great benefit to a negotiated settlement that simply will not be possible at a later date after the parties'

relationship has been further damaged through the litigation process, a great deal of time and money has been spent and a court has to make an up or down decision.

- If the parties are able to select a mediator, it is wise for the attorneys to suggest to the mediator that the mediator have *immediate* pre-mediation meetings by telephone or Zoom with each attorney and decision-maker to assess how seriously each party is or will be preparing for mediation. Quite often, it can be the mediator who finds a way to instill confidence and optimism for the parties that a negotiated resolution is possible and that a negotiated resolution may be preferable to years of litigation. The mediator may also be able to tell each party what information the other party will need in order to be ready.

In summary, lawyers need to stress to their clients that the opportunity for pre-suit mediation should not be squandered and that it should be taken seriously.

**The Pros and Cons of Virtual Mediations versus In-Person Mediations**

The answer as to which form of mediation is better, in person or virtual, varies from jurisdiction to jurisdiction, from mediator to mediator, and from lawyer to lawyer. Post-COVID, virtual mediations have become the norm in many locations. There are

many lawyers and mediators in those jurisdictions who will swear that virtual mediation is just as successful as in-person mediation.

There is no question that virtual mediation can make it easier for the parties to quickly schedule a mediation session. Virtual mediation can also make it possible for higher level decision-makers to participate when they would not have the time to travel and sit through an in-person mediation.

In order for virtual mediation to be as successful as in-person mediations, it is incumbent upon the mediator to spend time with each party at the beginning of the mediation session building a relationship so that trust can be established, and the mediator can obtain buy-in from the parties to be patient and to work hard to try to resolve the dispute.

It is also necessary for the parties and the mediator to have some understanding as to how they can have "back channel" communications with the mediator in a virtual setting. During in-person mediations, attorneys and parties will often run into the mediator in the hallway, in the restroom, or during a lunch break. That, of course, cannot happen in virtual mediation. So, it is beneficial for the mediator and the parties

to swap cellphone numbers so that if side bar discussions need to be held during the mediation, there is a means to communicate.

There is a fairly widely held belief that in-person mediations may be most beneficial when the matter involves a dispute of great complexity or a dispute where the decision-makers need to be able to sit across from one another in a room to have an open conversation to restore a relationship or to restore trust. Most mediators like in-person mediations, and they prefer to have in-person mediations when they realize that getting the decision-makers into the same room will be beneficial.

Going forward, it is likely that mediation will be a combination of virtual and in-person. Certainly, in the tort and insurance context it can be expected that insurance decision-makers are more often going to participate virtually even if their attorneys and other parties may be present in person. So, hybrid mediations have become the norm in many places.

Mediation has now become part of the fabric of our legal system, and attorneys and their clients have to be willing to engage in mediation regardless of whether it is virtual, in-person, or hybrid.

**Are We Seeing More Cases That Require Multiple Mediation Sessions?**

The short answer to his question is probably yes. As parties have become resistant to the amount of expense and lost time caused by litigation, they are wanting to get to the table earlier. As a result, they are often coming to the table inadequately prepared to settle. Indeed, some come to the table with no intention of settling the case but are simply there to see what they can learn.

Lawyers and parties have to understand that it is never a waste of time to get people together to try to resolve a dispute. Even if the matter doesn't settle the first time it is presented to mediation, the process of mediation still allows for the mediator and the parties to map out a plan for the next steps that may be needed to resolve the dispute. Early mediation can also help awaken a party to the risks and the expenses of going forward so that they will then be willing to come back and give mediation a try after they are better prepared.

The biggest strategy to avoid multiple mediations is for the mediator to have pre-mediation meetings with each of the parties. During those pre-mediation meetings, the mediator can discuss the ground rules, assess the readiness of the parties to participate in mediation, and can make recommendations to the parties of things that they can do

to prepare themselves or to prepare their opponent. So, with the help of mediators in advance of the actual mediation, it may be possible to cut down on the number of cases that result in multiple mediations.

Setting expectations of the parties is also important. Many parties believe that if they go to mediation and don't settle the case that the situation is hopeless. However, when a case is particularly complex or particularly high exposure, it is sometimes challenging to understand in advance how high the decision-making may need to go within a company for a resolution of the dispute to be attained. So, parties who have participated in a round of mediation that has failed should not view it as a failure, Instead, they should go away willing and committed to come back to the mediation table once other boxes have been checked and information has been exchanged.

## Conclusion

Given the extreme cost of litigation, the loss of executive time and productivity caused by litigation, and the uncertainty of jury and judicial verdicts, pre-suit mediation can be a very good thing. It is important for lawyers and mediators to do everything within their power to have the parties ready to mediate as early in the dispute as possible. And, for the lawyers who are writing the pre-suit mediation and arbitration

conditions in contracts, it is also important for them to spell out as much about the process for the mediation or arbitration as possible. If everyone pays attention to the importance of getting disputes resolved quickly and economically, everyone will benefit from pre-suit or early mediation.