

# Pre-Litigation and Early Dispute Resolution

By Joe Epstein, Esq. with Susan Epstein, Esq.

## Introduction

With criminal, juvenile, and domestic relation cases overwhelming court dockets, it is increasingly more difficult and more expensive to bring civil cases to trial. This article is designed to provide parties with appropriate alternatives to trial. In certain instances, the use of pre-litigation or early dispute mediation can provide a less costly, a less stressful, and a more effective means of conflict resolution. These methods have the advantage of greatly reducing the time to reach closure and can greatly reduce the transactional costs generally associated with litigation.

## Pre-Litigation Mediation and Early Dispute Mediation

Recently, we handled a case where a delivery truck crushed someone against the wall of a building while the driver was being directed where to park. The accident victim, who almost lost his leg, made an excellent recovery but was permanently impaired and disfigured. Interestingly, the parties came to us for a pre-litigation mediation. The case settled and it did so in just four moves.

Why were the parties able to have an effective pre-litigation mediation?

- First, both parties had excellent attorneys.
- Second, at the end of the day, both the adjuster and the plaintiff (the decision makers) were realistic.
- Third, liability was clear and of an aggravated nature.
- Fourth, the damages were severe and there were no causation issues.
- Fifth, the accident victim was an “A” plaintiff, in that he was nice looking, hard working, honest, articulate, and candid.
- Sixth, there was a target defendant.
- Seventh, the four step process led to good faith, respectful negotiations.
- Eighth, both parties used some of their projected transactional cost savings in order to reach a compromise settlement.
- Ninth, the necessary decision-makers came to the mediation table.
- Tenth, there was voluntary production of a reasonable amount of discovery.
- Eleventh, counsel and I have an excellent rapport and share mutual respect. Pre-mediation contact,

between the mediator and counsel, was utilized to some degree here to set the stage for our mediation.

Parties should consider pre-litigation mediation and early dispute mediation when most of the above or similar factors exist. Pre-litigation mediation and early dispute mediation make sense in a wide variety of cases ranging from personal injury to products liability, from probate cases to family firm disputes, from commercial cases to construction cases. We have also utilized both pre-litigation mediation and early dispute mediation with employment cases. Early intervention generally finds the parties more flexible and less entrenched. Additionally, attorney fees and litigation costs are not yet so substantial that money that would have gone to these costs can go towards a settlement.

With either pre-litigation mediation or early dispute mediation cases, care must be taken to plan the mediation process. The parties and the mediator should do the following:

Have a pre-mediation conference, where counsel and the mediator are present by telephone or in person, in order to design the mediation process. It is our experience that in these cases the

defense team will generally want to meet with the plaintiff at the mediation.

- Agree on the pre-mediation discovery requirements.
- Agree to bring the key decision-makers to the table.
- Agree on whether the plaintiff will make a pre-mediation demand. The greater the demand the further in advance of the mediation it will need to be made so that the “audience” at home can react to it before the mediation.

## Empathic Mediation

Not too very long ago, we were asked to mediate a wrongful death case stemming from a collision involving a tractor-trailer and a passenger car. Prior to litigation, the trucking company made an advance payment on the eventual settlement to the widow. The trucking company did this for two reasons. First, the company felt it was the right and moral thing to do. Second, the company’s early stage financial assistance to a family in shock and in need, helped build a bridge of trust between the parties.

The parties came to early dispute mediation soon after the filing of a complaint but before either side had incurred substantial costs on accident reconstruction and other experts. The case ultimately settled post mediation following persistent follow-up by the mediator and both parties. In this instance it took awhile to complete building a bridge of trust from one party to another.

Empathic mediation is not merely or necessarily advance pay compensation. Empathic mediation, as we use the term, is mediation that accords an opponent dignity and respect. It is mediation that utilizes acknowledgment and apology. It is mediation that attends to both the rational aspects of the conflict and its emotional aspects. It is a form of mediation where parties are encouraged to see the best in others and to build a

bridge of appreciation and understanding. It is a form of mediation that allows for forgiveness, reconciliation, and restitution. Clearly, the empathic approach to mediation is not limited to trucking companies. We have seen it utilized effectively by medical malpractice carriers, by self-insured’s, and others involved in catastrophic injury cases, by employers in employment cases, and by businesses in commercial cases. In a commercial setting empathic mediation may simply be the willingness to step back, to dismiss partisan perception, and to look at the facts and legal issues with the lens of the other side. Simply put, empathic mediation is the willingness to forge a connection with an opponent.

As a mediator, I look at cases intellectually and rationally and look for a connection between the parties. I seek to understand the legal issues and try to apply a thoughtful risk analysis. On the other hand, I embrace the emotional, intrapersonal, and interpersonal aspects of each case. Fear and anxiety exist in cases across the board. Grief, loss, and resentment can apply in probate cases and business cases just as they do in catastrophic injury cases. The same is true for safety and security concerns. In some settings these issues are readily apparent while in other instances these core emotional concerns are below the surface. A skilled mediator with some courage and empathy looks for and attends to these issues whenever necessary. I have found that the key building block to successful conflict resolution is trust and that trust often requires an empathic connection. Parties are more likely to accept the tough love of an intellectually honest but harsh reality check only after the foundation of trust has been established. Indeed, studies show that parties are more comfortable with the end result if they “feel” that the negotiation process has been fair and this feeling is more likely with an empathic approach.

## The Three-Step Negotiation

In a number of cases we have effectively utilized a three-move mediation process. This negotiating approach is particularly appropriate in high value pre-litigation and early dispute mediation cases as it adopts the tone of empathic mediation rather than the tone of “used car” mediation. The three-step process walks the talk of apology and respect requires that each party move only three times to get to their “best” number. When we get each party to put their best number on the table on the third move, there are several scenarios that may unfold. First, the plaintiff may accept the defendant’s third number. Second, we can use what is referred to as a mediator’s number that is somewhere between the brackets set by the parties in their “third” move. Third, we can convert the mediation process to a variation of baseball arbitration. With this alternative we write down a secret mediator’s number and then have the parties give us a number that is shared only with us. The number that is closest to the mediator’s secret number becomes the final number and the case is over. We find that this abbreviated process helps the parties to walk the talk of respect, acknowledgment, reconciliation, restitution, forgiveness and resolution. This is accomplished by avoiding the often frustrating processes of multiple moves, the ploy of “I have to call my supervisor or home office”, the trashing of the plaintiff, and the raising of false issues. This three step process works in these cases because the nature of the damages and the clarity of liability require a different tone if mediation is to be a financial and emotional success.

## Conclusion

Thus, with a bit of pre-planning and cooperation, the right cases, which contain the eleven elements discussed earlier, can be resolved by pre-litigation and early dispute resolution. In such cases, the mediator can serve as a for-

mal or informal discovery master. The goal in such cases is to set the stage for all parties to save the direct and indirect transactional costs. Clearly, stress and tension can be reduced and addressed early on. Early reconciliation and restitution can save, and even enhance, an on-going relationship. For plaintiffs, and in some instances defendants, the closure that comes with pre-litigation and early dispute mediation is calming and relieving. It allows them to close a painful chapter, at a time of enhanced vulnerability.

Empathic mediation can be utilized with pre-litigation and early dispute mediation or even late stage mediation. However, the power of empathic mediation is at its zenith with either pre-litigation or early dispute mediation when healing, good faith, respect and connection is most effective. Finally, it is during pre-litigation and early dispute mediation that the use of empathic mediation has its greatest opportunity to build a bridge of early and peaceful resolution.

Thus, we urge parties to look for the cases that are ripe for pre-litigation and early dispute mediation combined with empathic mediation. We find the results

of such mediations to be startlingly satisfying and successful.

A mediator's role in such cases is not simply to show up on the day of mediation and assist by passively trading numbers or by aggressively sitting as an arbitrator in all but name. Mediators should bring a proactive and creative approach to pre-litigation and early dispute mediation reflects a determination to work with parties in a meaningful way. The process starts with the case setting when there is an opportunity to design a mediation process that is appropriate for the nature and the dynamics of each unique case. We find that working with the parties, as opposed to staying on the sidelines; we can set up goals for either informal or formal pre-mediation discovery and help establish agreements about the presence of key decision makers. We see the mediator's role as bringing added value to the mediation process by our willingness to study the case beforehand and to engage in focused and active listening during the mediation. A proactive mediation style fosters bringing our creative energy and willingness to mediate dangerously. Mediators should use their insight, instinct, and experi-

ence in a manner of respectful leadership. This leadership may well require the tough love of a harsh reality check. On the other hand, leadership usually calls for not only a mediator's hard work and intellect but also a willingness to forge an empathic connection with the parties in conflict.

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