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## Fewer Clouds in the Sunshine State

What if Florida were to lead the country in disputes resolved before litigation? What kind of brand equity would that bring to the Chambers of Commerce in Florida or local business development agencies seeking to attract new business in Florida? If a state had less litigation and faster dispute resolution times, that should create a competitive advantage.

How would early dispute resolution become a norm? By fostering the understanding that cost of unresolved disputes transcends economics. Litigants may not always "hear" the warnings related to protracted disputes, including loss of business opportunities and income, strain on interpersonal relationships, reputational harm and the loss of customers—to name a few of the collateral consequences of litigation. But before a cultural shift can occur, the behaviors that govern dispute resolution have to change.

Many contracts have presuit mediation requirements. In Florida, we have a presuit mediation process for homeowner association-related disputes with residents. We have presuit screening for medical malpractice claims. These presuit requirements exist, in part, because we know talking about the problems and focusing our attention on the issues before litigation might lead to early resolution. Why not have presuit mediation for a vast array of cases, save a few that do not lend themselves to early resolution? We have many private contractual mediation provisions in commercial contracts—why not a social contract policed by the judiciary? Why do we limit presuit mediation to those situations where it was contractually agreed?

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Personal injury attorneys and insurance carriers frequently engage in presuit negotiations. Why don't we ask other would-be litigants to communicate through mediation or early neutral evaluation before filing suit? Even if the settlement rate is modest, some settlements are better than none. A mediation or facilitated negotiation might narrow the issues or identify the disputed facts. An impasse is not a failed mediation. The benefits of early settlement would percolate throughout the business community, judiciary and bar. Just the messaging alone—negotiate and communicate before suit—is helpful. We can make the presuit mediation costs taxable in later litigation as well.

What we gain is a broader meme, that litigation should be Plan B. We want to reinforce that a lawyer's primary function is not to manufacture disputes but to end them. American style litigation is sometimes necessary but is something akin to surgery. You don't aggressively rip out a tumor with an expensive and risky procedure. You and your doctor first carefully evaluate other conservative remedies. The same for litigation. Tolling agreements or tolling rules would obviate concern over limitation periods while conservative measures are considered. The legislature can mandate presuit mediation, or the court can order early mediation. We can save taxpayer dollars by mandating early mediation of many disputes. It is hard to understand why the legislature or courts would oppose that.

It will cost us litigators some business to be sure. But isn't this a predictable evolutionary path? Aren't we going to get there someday when the courts are too slow, the cost too high and the stakes too great for most businesses? Are we there yet? The Complex Case Division aka "Business Court" in Orange County just closed, not for lack of cases, but lack of funding. How is the current scheme going to improve without changes in behavior and attitudes? Fewer cases heading into the court system and shorter litigation periods helps everyone.

State-mandated presuit negotiation or mediation in all but a few excepted cases would be a good thing for all involved.

Discussing settlement in advance of suit is a modest prerequisite to filing. The only real currency exchanged in mediation is communication between the parties. Let's exchange that currency in advance of suit and see what happens. Early resolution by trained neutrals should benefit individuals and be a huge boon to private and public litigants, including the business community. After all, you cannot live in a Sunshine State under the cloud of pervasive litigation.

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