Mediate First – Let's Try to Avoid Legal Fees

"*I'm willing to fight. It's the principle of the matter.*" Ah, music to an attorney's ears. But you're not in business to teach people lessons. You're in business to make money. And there are few bigger drains on business than protracted litigation.

So how can you avoid this scenario? The answer can be a Mandatory-Mediation provision in your contracts.

(By the way, I am writing this article at the risk of really angering my litigator-brethren. As a matter of background, I am an attorney. I've spent lots of time in courtrooms. I've also participated in arbitrations, representing both plaintiffs and defendants. I've even been an arbitrator for the NASD. I still litigate. But now I mostly work to keep my clients out of court in the first place.)

Mediation is basically an informal settlement meeting. In it, both sides to a dispute sit down with an unbiased third-party – the mediator – to ***try*** to settle a dispute. Mediation should not be confused with arbitration. In mediation, the mediator has no authority to impose any resolution upon you; instead, he/she is there to facilitate a settlement agreement (probably one where both sides are a little unhappy – I'll get back to that shortly). It's relatively informal. And it does not require expensive "pre-trial" efforts, like depositions, etc. On the other hand, arbitration is basically a private lawsuit. In arbitration, both sides will prepare in the same way as if they were going to trial. (And THAT is expensive.) Then both sides present their case to the arbitrator – a private judge – who will then unilaterally issue a final ruling (which is quite often un-appealable).

Mediation is especially well-designed for business disputes. It's been my experience that the parties in a business dispute are usually intelligent, rational people. They are business owners or decision-makers. They may be frustrated or angry. But they are receptive to hearing risk analysis. And they are willing to make calculated business decisions.

That's why mediation – before a lawsuit is filed – often makes sense. It gives decision-makers the opportunity to obtain information (i.e. hear the other side's position), analyze the risk (including the COST of proceeding with litigation), and then make a rational decision about settling the dispute … so that they can move forward with business.

Why not just wait until the lawsuit is filed, and then mediate? Well, here's a dynamic you may not appreciate. As soon as a lawsuit is filed, the lawyers on both sides often stop communicating about resolution. Instead, they go into "adversary" or "fight" mode. They stop willingly sharing information. The corollary is that they cease short-term efforts at resolution. It's GO TIME.

There are a couple of legitimate strategic reasons for this behavior. For example, (i) if another lawyer tells me what's good about his case or what's bad about my case, then he may fear he is just helping me prepare for those arguments at trial. Or (ii) if I raise the idea of settlement, then the other side may view my overture as weakness. Unfortunately, there can also be some less altruistic reasons to stop discussing settlement – i.e. litigators get paid to fight, so if the fight goes away, they stop getting paid.

Here's the real kicker – even if the parties pursue litigation (i.e. a lawsuit is filed), they will probably be forced to attend mediation eventually. In the weeks prior to trial, most judges will issue an order requiring the parties go to mediation. So would you rather try mediation

before or ***after*** the parties have spent tens or hundreds of thousands of dollars on attorneys' fees getting ready for trial?

Now remember when I said that a good mediated settlement usually leaves both sides feeling a ***little*** unhappy? That means that neither side got everything they wanted. One side paid a little more, and the other side received a little less. But that settlement also eliminated the risk that the one side had to pay much more or the other side received much less. As to the *timing* of mediation – i.e. ***before*** litigation, as opposed to ***after*** months of litigation – I think it makes more business and financial sense to use a ***portion*** of the money both sides will otherwise pay to the lawyers toward the settlement pot. This is a strategy that will ultimately save money for both sides … although the lawyers won't make as much. (Sorry my brethren.)

All that being said; if the other side is wildly unreasonable, you don't HAVE to settle at the mediation. You can always stop negotiations and leave. The mediator cannot make you stay, or force you to settle, or even disclose any of the events to anyone. (Believe it or not, the legal system wants to encourage resolution, instead of trials. So, mediations are considered confidential.)

So if mediation is completely voluntary, how can you make it mandatory? That is an interesting conundrum, with an easy answer. I strongly recommend that my business clients include a provision in their contracts which REQUIRE the parties to participate in mediation BEFORE any lawsuit is filed. These provisions are legal and routinely enforced by courts. I tell my clients to include them in virtually all their contracts -- Vendor Contracts, Employment Contracts, Contractor Agreements, License Agreements, Franchise Agreements, Leases, etc.

It's worth a little "lawyering" now to avoid the cost of a lot of "lawyering" later. ♦

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