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Why should you compromise? A mediator's take.

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Litigation is like going to Las Vegas and rolling the dice at the craps table; it is an uncertain, emotional rollercoaster. Litigation devours time, money, energy, and adds considerable stress to everyone's life. Nonetheless, litigation is integral to our system of law and an individual is more likely to be involved in a legal dispute during his or her lifetime now more than ever before. Even an expedited process like arbitration, which is more expeditious and cost efficient than litigation, has its limitations. Therefore, when a mediator says "you need to compromise," you should pay attention.

When disputes arise, particularly those with significant emotional issues, parties may want to be vindicated and teach the other side a lesson. During mediations, litigants have even turned to me and said, "I don't care what it takes to prove my point." As a result, parties and counsel often ask, "Why compromise?" Whether parties should settle or see the case all the way through trial or arbitration, it often boils down to a cost/benefit analysis.

While the televised courtroom dramas make it appear that the trial takes place soon after the filing of a complaint, the reality is that it takes much longer to schedule a trial date. Moreover, a case goes through various stages and incurs substantial costs before even reaching the trial stage, let alone the appeals process. Arbitration moves more quickly, but may still have challenges.

Between the filing of a complaint and trial or arbitration, counsel engage in discovery, take depositions of witnesses and experts, and may draft and respond to various motions. Depending on the complexity of the issues and the number of parties and counsel involved, counsel may spend hundreds of hours on a case from start to finish. In addition, there are all the costs associated with these activities beyond counsels' hours, such as court filing fees, service costs, expert fees, document preparation and transcript fees, investigation services, among others. These costs add up fast, and can continue to increase depending on the length of time it takes to resolve the dispute. With arbitration, while the discovery and motion practice may be more streamlined, there are still fees for the arbitration itself. Even more draining than the monetary costs, however, is the personal and emotional stress that litigation or arbitration exerts on individuals and on key figures in businesses.

No matter the particular issues of a dispute, stress is inherent. This stress is compounded by the simple fact that litigation may be a long and involved process that pull parties away from their families, their work and other commitments. Moreover, if one is called upon to be not just a litigant, but, also, a witness, he or she will need to be prepared for deposition. For some, reliving the event that prompted the litigation can be quite challenging. Furthermore, for those new to the litigation process, statutory and procedural rules, and the lack of certainty with regard to the overall outcome, will be a profound source of stress. In some cases, litigants have reported that these stresses exhibit themselves physically through loss of sleep, physical ailments and sometimes even depression.

Litigation is a long process. Each side may do whatever possible to gain a tactical advantage. Motions will be filed and the judge will make decisions, which may or may not be favorable. Even in arbitration, while expedited, there is strategy and arbitrators makes decisions along the path to finally hearing the dispute. Nothing is certain in litigation, or for that matter, in arbitration. Even when the trial or arbitration come to a close and when it appears that the dispute has ended, the court decision might not in fact be acceptable to one or both sides and an appeal may follow, and in turn incur more costs. In an arbitration, there may be a battle over the entry of an award in court or counsel may move to vacate the award in a court proceeding. Thus, a substantial amount of emotional energy and time goes into a litigation or arbitration in addition to the costs of all types.

There are certain issues with respect to litigation and arbitration that are unique to each side. First, the defense side might be judgment proof, meaning he, she, or it lacks the financial resources or insurance to satisfy a judgment/award. So if a Defendant has no assets or insurance, there may be "no there, there." Even if one obtains a favorable judgment/award and damages are awarded accordingly, the judgment/ award may be virtually meaningless if it cannot be fulfilled. Conversely, a Defendant who decides to see the case all the way through to trial takes the additional risk that the Plaintiff will make adverse law in the relevant jurisdiction. For example, a dispute creating new law in the area of wage and hour issues can be expensive for a company and other similarly situated entities to conform to. There may be substantial costs incurred as the company decides what must be done to comply with the new case law and implement new policies accordingly. Furthermore, such a decision may take place at an appellate court, state Supreme Court, or even at the U.S. Supreme Court level, which means that the parties will have litigated for years and the legal costs have continued to mount all the while.

So, as you consider "Why compromise?" in a mediation, think about these issues. When the financial cost of litigation or arbitration, plus the costs of emotional turmoil are added up, it is not difficult to see why some parties choose to shake hands outside of court or arbitration rather than see a case through to "the bitter end" which may not even be "the end" at all.

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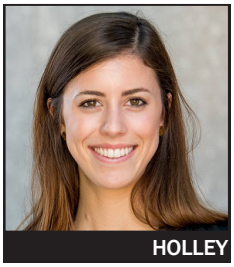
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