Getting Back to Business
Perspectives on Mediation of a Business Dispute

The lawyer charged with resolving a business dispute faces difficult choices. Some lawyers might think of the two doors as the plaintiff’s choice between two doors — one marked “litigation” and the other is marked “mediation.” Typically, the lawyer evaluates whether to mediate or litigate a business dispute by calculating the costs and benefits of each option. In principle, a cost-benefit analysis makes sense. A business is a profit-making enterprise. The lawyer might quickly perform this calculation and choose the indicated door.

Let’s consider the calculation of a hasty lawyer. Suppose the attorney represents a business suing a deep-pocketed defendant for liquidated damages of $2 million where the loser pays all costs of litigation. Let’s also stipulate to the fantasy that the value of money over time is entirely constant — such that a bird in the hand secured in mediation today is of the same value as a bird in the bush awarded years later in litigation. The attorney concludes the client will prevail 80 percent of the time and that the settlement value is $1.6 million. Should the lawyer choose litigation upon realizing that mediation will never yield an amount close to $1.6 million?

Now consider the attorney’s analysis thus far. People naturally perceive the world from their own perspectives. Indeed, this is the very meaning of “perspective.” A person in a distant valley perceives a mountain differently from a person observing the mountain from a nearby hill. We need always consider from what stance the subject is observing the object. Here then may be a shortcoming in the attorney’s calculation. The attorney evaluated the choice the client must make only from the attorney’s perspective, rather than the client’s. But the cause of action is the property of the client, not the attorney. The lawsuit seeks vindication of the client’s interests, and the client will principally bear its consequences. The decision whether to mediate or arbitrate a dispute should always be made from the client’s perspective.

Here the attorney aptly calculated the chance of success in securing recompense for the client but gave no consideration whether this calculation omitted certain costs or benefits from the client’s perspective. To offer one simple twist to the hypothesized facts: What if the attorney knew the client had an immediate need for cash that could be promptly secured in mediation? That benefit alone might dictate choosing mediation rather than litigation. But the more common shortcoming in these calculations of costs and benefits is the omission of certain costs the client will bear in continued litigation.

Costs the client must bear additional costs in litigation, such as attorneys’ fees and associated expenses. Here, this consideration is eliminated because the loser will pay these costs. But the client may bear other additional costs that the attorney overlooked.

To begin, the attorney here gave no consideration to the business relationship between the client and the defendant. Is the defendant a customer, a creditor, a vendor, or a competitor? Beyond legal fees and expenses, what other costs might a business bear in continued litigation? Does the litigation deter them from fulfilling their mission? Does it hurt their reputation? How does it affect their customers? Does it impact the time and energy of the company’s leaders? Does litigation cause the business to forgo future business opportunities? The attorney must try to consider all possible costs and benefits to the business despite the complexity of the task.

The solution to this conundrum is maintaining constant and effective communication between the attorney and the business client, with both maintaining a singular focus on the client’s interests and perspective.

The plaintiff desires mediation but the defendant balks; the plaintiff must litigate until the defendant expresses a willingness to mediate. This point reveals an additional difficulty with the attorney’s initial vision of a single binary choice between the two doors of mediation and litigation. The choice whether to mediate or litigate must be revisited in an ongoing dispute. The parties rarely face an irrevocable choice to either litigate or mediate. Even when parties have chosen to go the litigation route, they can almost always change course and select mediation. But whichever course the parties travel, the attorney should offer guidance after carefully assessing all costs and benefits experienced by the client, including the impact of litigation on an ongoing business enterprise.

Lawrence E. Mooney is a JAMS neutral based in St. Louis. Before joining JAMS, he served for more than 21 years as a judge on the Missouri Court of Appeals Eastern District, including a term as chief judge. He retired from the court in September.

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