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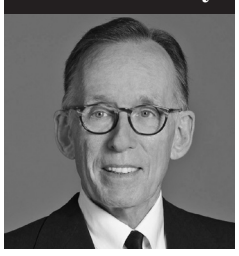
Getting Back to Business

Perspectives on Mediation of a Business Dispute

The lawyer charged with resolving a business dispute faces difficult choices. Some lawyers might envision a choice between two doors — one is 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.

Commentary



By Lawrence E. Mooney

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.

Of course, clients generally 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 his 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 other business relationships? Does it consume the time and energy of the company's leaders? Does litigation cause the business to forego 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 lawyer should question the client in detail about the prospect of litigation. The attorney and client should consider the effect continued litigation might have on an ongoing business enterprise and, to the extent possible, assess the potential costs. This information can be garnered only by a close working relationship with the client. Absent this, the attorney may fail to appreciate the full costs the business might bear in litigation.

Further, these decisions may be reached differently by those involved in law and business. Lawyers — particularly trial lawyers — are fighters. Our legal system is adversarial. Opposing lawyers offer competing narratives of the facts and analyses of the law. The judge awards the contest to the victorious attorney. This is our system, and it is largely a wise one. But we all have met lawyers whose adversariness might be listed first on their business cards. And this characteristic — an eagerness to fight —often is absent or sublimated in the businessperson. However, businesses are collaborative enterprises, sometimes remarkably so. A good business seeks to harness the best efforts of its employees to keep its customers satisfied. A business, ideally, is an ongoing enterprise, and is thus interested in establishing and maintaining its good name over the course of time. An attorney eager to litigate may represent a client not so inclined, and the interests of the client should always prevail.

None of this is to say that the plaintiff's attorney should always choose mediation over litigation. This decision requires not only the plaintiff's positive assessment of the costs and benefits of mediation, but also the defendant's. If 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.

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