Positively Neutral

Arbitration and Mediation for Attorneys and Their Business Clients

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Welcome to the Third Quarter, 2022 edition of my newsletter, in which I discuss hopefully relevant and interesting content pertaining to the arbitration and mediation of business disputes. This quarter, I would like to share my thoughts about the merits of an early mediation, especially in emotionally charged commercial fights, such as business divorces and disputes surrounding the separation of senior executives from their companies.

Client dynamics in these matters typically are challenging, as the disputants face loss of business control and/or employment, and there are often accompanying family pressures and antipathy toward former partners and colleagues. These collateral factors invite consideration of a more expeditious off ramp than litigation provides.

Conventional wisdom, however, suggests that early mediation in these matters is a high risk undertaking that is unlikely to succeed. According to this conventional argument, settlement remains a long shot until meaningful discovery is obtained, passions have cooled and the parties have knocked each other around enough to understand the downside and expense of litigation. Only then will the parties say "enough" and negotiate a resolution. Meanwhile, the underlying business may suffer and the reputations of the principals can be damaged as they embark on prolonged litigation.

I don't buy into the view that early mediation is pointless. A mediator can cool the temperature and facilitate the exchange of information in ways far more efficient than a court.

Before waving the white flag on an early mediation, attorneys and their clients may wish to consider the following:

—Lightning may strike. Contentious disputes do sometimes settle even before discovery and amidst substantial rancor between the parties.

—Nowhere is it written that mediation necessarily is a one day event; it can be a process. I recently served as a mediator in a business divorce that, after a collective day, left the parties rattling sabers. Two months later, with ongoing back and forth discussions at modest cost (approximately 11 hours of mediator time), the parties reached a resolution without formal litigation having commenced.

—A mediator can assume the role of case manager. Instead of the parties being subjected to a court's formal discovery rules, a mediator can facilitate the exchange of information that the parties need in order to make rational decisions regarding settlement. By bringing a mediation environment to discovery, information often is exchanged more expeditiously and without the contention

and rigidity of a judicial process where requests are made, objections are asserted, and courts make rulings.

—The dispute remains confidential. By embarking on an early mediation process, the parties are able to address their dispute without public disclosure that can damage the business and reputations. If the parties conclude that settlement is not likely, they may determine to address their dispute through arbitration, preserving the privacy they may jointly desire.

Experienced attorneys recognize that a mediator's involvement can provide value even if the dispute does not settle on the day designated for the mediation. A mediator can also serve as an informal case manager, facilitating the exchange of information and the establishment of a dialogue that enables the attorneys and their clients to pierce the emotional resistance that often accompanies business divorces and other highly charged disputes. Embarking on this path sooner rather than later can provide meaningful value to the parties.

--Rob Harris