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In This Issue:

"One Size Does Not Fit All"

In this quarter's newsletter—the first of a two-part series—Elan E. Weinreb, Esq., Managing Member of The Weinreb Law Firm, PLLC, explores ten reasons why in certain cases, commercial litigators should consider commercial mediation as a first option for resolving disputes.

To Litigate or Mediate?

Like all human beings, commercial litigators are not static, cookie-cutter lifeforms. There are probably as many personalities among them as there are frequencies on the electromagnetic spectrum. However, based upon over a decade of personal experience in the field of commercial litigation, one common denominator emerges: they love to litigate. Fondness for the art of advocacy, competitive instinct, case strategy, pre-trial and trial tactics, personal satisfaction, and—of course—the prospect of financial reward all fuel their pugilistic desire.

In some cases, this is fine and even commendable. Many federal and state landmark cases would never have been decided had the fire of litigation desire been absent from the hearts of their respective attorney advocates. Can one imagine history without *Marbury v. Madison*, 5 U.S. 137 (1803), *Roe v. Wade*, 410 U.S. 113 (1973), *Palsgraf v. Long Island Railroad Co.*, 248 N.Y. 339 (1928), and other "great hits" on the books?

Nevertheless, in other cases, the desire to litigate can lead to needlessly protracted, drawn-out proceedings akin to that of *Jarndyce v. Jarndyce*, the legal slugfest found in Charles Dickens' Bleak House. The negative consequences of such trench warfare include, but are not limited to inefficiency, waste, reputational damage, and public distrust of litigators. It thus comes as no surprise that as of May 2015, the *Jarndyce* litigation "has been referenced six times by New Jersey state and federal court judges, nine times by the U.S. Supreme Court, and more than 333 times by other state and federal courts outside of New Jersey."

Note: Citations to the various sources referenced in this article are available upon request by calling (516) 620-9716 or sending an e-mail to office@weinreblaw.com.

"To Litigate or Mediate?" — *cont. from Page 1*

There are just some situations where litigation is not an appropriate form of dispute resolution (and exactly what those situations are is a topic well beyond the scope of this article). In such circumstances, mediation—"an informal and confidential process wherein the parties meet with a mutually selected impartial and neutral person who assists them in the negotiation of their differences"—presents itself as an optimal (at least initially) dispute resolution method.

At first glance, the "gold standard" of mediation—a negotiated agreement that permanently resolves party differences and prevents future conflict from arising between the parties—is antithetical to the ingrained "legal combat" mindset and training of the commercial litigator. Furthermore, such an agreement often yields less personal satisfaction for the commercial litigator than the announcement of a favorable verdict or decision. There are no accolades in recognition of his or her brilliant opening statement, formidable demeanor in confronting witnesses, and intellectual ferocity in delivering an eloquent closing argument. Finally, there's almost certainly less billable time or tasks to be charged than if a full-fledged litigation were to be taken to its ultimate conclusion. In short, for the commercial litigator, commercial mediation seems to be a raw deal.

Ten Reasons to Consider Mediation as a First Option for Dispute Resolution

However, there are ten advantages of commercial mediation over commercial litigation that should cause commercial litigators to at least consider mediation before ascending the courthouse steps. Presented in the style of David Letterman's renowned "Top Ten" lists, the first six follow below. (Stay tuned for the next edition of TWLF News & Views (Winter 2016) for a discussion of the remaining four reasons).

Reason No. 10: Scheduling Flexibility

In any commercial litigation in which judicial intervention has occurred, the parties and their attorneys are at the mercy of one or more judicial schedules. While it is often the case that judges at both trial and appellate levels are patient and accommodating, there is no law requiring them to act in this manner. Moreover, where commercial litigators cannot agree on scheduling such that judicially-imposed deadlines become necessary, chances are more likely than not that once-accommodating judges will be anything but pleasant in imposing such deadlines.

"Ten Reasons to Consider . . ." — *cont. from Page 2*

In contrast to commercial litigation, the parties and their attorneys remain in control of their respective schedules in commercial mediation. As Jim Melamed, Mediate.com's CEO, has observed:

I am rather stunned by mediation's flexibility and adaptability. One of the reasons for this is that mediation is "scalable." For example, [mediators] can provide 20 or 2 hours of mediation or offer some portion of it online, whereas you just don't have that kind of flexibility with administrative and court due process hearings. Mediation's flexibility, organically based on emerging opportunities and our ever-hungry readiness, is leading to mediation becoming the expected way we resolve disputes.

As such, if parties, their attorneys, and essential witnesses (including experts) are elderly, have pressing family commitments, live in remote locations such that they can only appear via telephone or video-conference only at their convenience, cannot take time off from business during normal business hours without suffering financial loss, or otherwise have special scheduling considerations, the scheduling flexibility of commercial mediation can easily render it more attractive than commercial litigation as a dispute resolution option.

Reason No. 9: Recognition for Problem Solving

According to Scott Edward Walker, founder and CEO of Walker Corporate Law Group, PLLC, a firm which specializes in the representation of entrepreneurs, the top reason why entrepreneurs generally hate to deal with lawyers is the perception that they cause problems instead of solving them.

*Lawyers are often viewed as deal-killers because of their failure to set a positive tone and their annoying habit of raising all sorts of reasons why a particular deal won't close or why a particular idea won't work. One of the better lawyers I worked with at a firm often said: "**Good lawyers are able to identify significant potential legal problems; great lawyers provide solutions to those problems**."*

Commercial mediation defies this stereotype by its essence as an alternative dispute resolution modality controlled by the disputants, not their attorneys. As such, commercial litigators who support commercial mediation stand in support of "doing something"—problem solving—and not just "saying something"—problem identification. They stand out as Mr. Walker's "great lawyers," and potential clients will prefer them over the "good lawyers."

"Ten Reasons to Consider . . ." — *cont. from Page 3*

Reason No. 8: Judicial Support

Judges abhor (at least) two administrative nightmares: (a) an out-of-control docket; and (b) reversal or significant modification of their decisions. Successfully mediated cases that result in settlement prevent these nightmares from becoming reality in the first place. Therefore, it comes as no surprise that judges throughout the world ardently support mediation, and commercial litigators who ignore this strong level of support—especially in a case where one side is in favor of mediation and the other is not—do so at their peril.

Reason No. 7: Speed

Mediation can be faster even than the lightning "rocket dockets" of specialized courts. As commercial arbitrator and mediator David J. Abeshouse has observed, business mediations "usually take between one and four months from start to finish, and many are completed with just one in-person session. Shorter duration = fewer billable hours expended (= fractional cost relative to adversarial proceedings)."

In the absence of a strategic reason for delay, any rational client will prefer a faster dispute resolution process over a slower one, provided that the faster process yields equal or better results. It follows that in such "equal or better" cases, commercial litigators who offer representation in mediation will have a competitive and promotional advantage over colleagues who do not make representation in mediation part of their legal services repertoire.

Reason No. 6: Increased Law Practice Efficiency

The odds of a civil case ultimately proceeding to trial are not exactly high. "According to the National Center for State Courts, only about 7.6 percent of civil cases go to trial in the United States, and only 0.6 percent receives a jury trial." In contrast, the odds of resolving a business dispute through commercial mediation are practically mirror-opposite in nature. "[M]ore than 85% of mediated business cases result[] in settlement agreements."

Like many other professionals, commercial litigators have jam-packed schedules and must utilize their time, personnel, and other practice resources judiciously and efficiently. Taking into account the odds of a case settling at some point prior to trial being 92.4% and those of a business dispute settling through mediation being only slightly less, allocating resources to mediation initiatives in appropriate cases is certainly worthwhile and stands to significantly increase law practice efficiency.

"Ten Reasons to Consider . . ." — *cont. from Page 4*

Reason No. 5: Confidentiality

In the Information Age, it is not only high-profile cases which go to trial that end up being tried twice: once in the courthouse and once in the court of public opinion. Blasting a 160-character text or tweet of trial testimony to cyberspace that "goes viral" can easily cost any client—regardless of mainstream media presence—thousands of dollars in reputational damage in less than 160 seconds. Such damage can even occur when a client prevails.

However, unlike the public spectacle of a trial, with some narrow exceptions, commercial mediation is "entirely confidential." While this designation of confidentiality (or any other confidentiality designation, for that matter) is no guarantee against the disclosure of private, sensitive, or otherwise confidential information, it is certainly better than no protection at all. Furthermore, concerned clients can take some solace in the fact that while the remedies for breach of mediation confidentiality are not particularly punitive, courts will not take such breaches lightly.

To be continued in the next edition of TWLF News & Views