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WAYS TO REDUCE OR ELIMINATE HIGH COSTS OF MEDIATION, ARBITRATION, AND LITIGATION

by Charles G. Miller

There are inexpensive ways to head off expensive litigation, mediation and arbitration. Nobody likes to be a party to litigation, but it is unavoidable when you are the defendant. However, if you have the choice whether to bring a legal proceeding or have advance knowledge one may be coming, consider ways you may be able to head it off by taking innovative action before the dispute ripens into full-fledged litigation. This could be accomplished by utilizing a professional problem solver—an ombudsman—that has the respect of all parties. This person can work with the parties to arrive at a mutual solution *before* substantial expenses are incurred in litigation, arbitration, or mediation.

Litigation in any form—arbitration, mediation, court—is expensive. It has a life of its own. It is a myth to say that arbitration is less expensive. Arbitrators have the ability to determine motions for summary judgment or dismissal and discovery is generally permitted in arbitration, sometimes even without the limitations that are now imposed by court rules as to number and types of requests. It is also becoming common to even find motions *in limine* in arbitration. Plus arbitrators do not come cheap. They charge the same rate as lawyers do and bill for "study time" in addition to all the hearing dates. And it is almost impossible to effectively appeal an arbitration award.

Mediation is obviously less expensive because the only thing the parties need to do is prepare effective mediation statements and attend the mediation. However, lots of work goes into the preparation of a mediation statement, which often requires serious legal research and drafting, much like an appellate brief. Plus, mediation often comes at a time after the parties have already expended substantial sums in litigating the case. How often have you heard your lawyer say that it is too early to mediate until some discovery is undertaken or until certain motions have been decided or filed?

Clients often spend thousands of dollars in court or before the arbitration provider litigating whether the matter should even go to arbitration. A common issue where the parties are of unequal bargaining positions is whether the arbitration provision is unconscionable. In federal court, a party challenging arbitrability is even entitled to a jury trial on that issue. And generally if the court refuses to order arbitration, the losing party can appeal. So it is not uncommon for parties to spend thousands (if not hundreds of thousands) of dollars litigating issues before they even get to arbitration. I have experienced this both from the standpoint of an arbitrator and lawyer for parties in arbitration. What can be done to avoid incurring these enormous costs?

Arbitration clauses can be drafted to possibly avoid unconscionability issues, but that only cuts off one aspect of the expense. The arbitration will still be expensive. And it is not so easy to draft around unconscionability to avoid the expense since it will look like one side is cutting off the rights of the other and there would still be an unconscionability argument.

By the time the matter gets to mediation, while sooner than arbitration, the parties will be in an adversarial position. Granted, that's why a good mediator is important. But the expense of getting there without any assurance the matter will be resolved must still be factored in.

What is needed is a way to resolve disputes before they even get to the mediation/arbitration stage. Some agreements anticipate this and require parties to negotiate first. Common sense dictates parties should attempt to work out their differences before taking further action, so such a clause is not necessary. If that does not work, what's next?

The parties should think long and hard about whether to retain a professional problem-solver, an ombudsman, who should have the following minimum capabilities:

- The trust and respect of all the parties
- A background in resolving disputes
- Familiarity with the issues in the particular industry
- Creative solutions
- A personality that operates to work easily with the parties

Here's how it could work: The professional can be contacted by one of the parties even before the dispute becomes known to the other party. The professional can obtain the necessary information, find out how the complaining party would like the problem resolved, propose alternatives, come up with a plan and then contact the other party. By doing so and making it clear from the start that the complaining party wants to resolve the dispute, the focus will be on resolution, not posturing or saber-rattling. Or the professional is contacted by all of the parties as soon as the dispute surfaces.

The problem solver will need to learn the nature of the dispute, if there have been similar disputes and how they were resolved. He or she will need to learn what information can be conveyed to the other party and whether there are restrictions on information that can be disclosed. Another advantage to this early approach is that confidentiality can be imposed and there is no need for any public disclosure, which sometimes is required when a dispute is formalized by a filing. One of the most important attributes of third party involvement in the process is that it avoids the acrimony that can have a serious impact on the parties' continuing relationship. The goal of the professional is to convince the parties that they are working *together* to mutually resolve a problem and that the solution will benefit all parties.

In the franchise industry, the parties begin their relationship on the foundation that they share a mutual goal—promoting an identifiable brand to their mutual economic advantage. The relationship often breaks down—like a marriage. Rather than seek a divorce, the parties should retain the services of a problem solver to get back to where they started. No problem is unsolvable. It is possible that a dissolution will result, but with the help of a professional, it can be accomplished to the mutual benefit of the parties.

Another solution to the time and expense of standard arbitration is Early Dispute Resolution (EDR). Its goal is to exchange key information and evaluate the case within a limited time period. Procedures can include key client interviews and involvement of experts. Its premise is that most cases do not change after much expense and time is spent uncovering every detail. While it is possible a missing smoking gun is out there, it is unlikely and the savings in cost and expense is worth this risk. If EDR is used, it is possible that the process could take less than two months as opposed to years of litigation.

I have litigated, mediated, and arbitrated many disputes as a lawyer. Later in my career I have been called upon to mediate or arbitrate various disputes. During my many years of practice, I have come up with unique solutions to end the controversy. My latest venture has been in EDR, the wave of the future.