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Mediation Matters

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The Price of Principle

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As mediators, we encounter a lot of reasons why people choose not to settle a matter. One that we hear from time to time is that it is the principle of the matter that is the impediment to negotiation. A party cannot or will not settle the matter on the principle that it is somehow just "not right" to give any credibility to their opponent's position by entering into settlement discussions. There is a common belief ingrained in American culture that people who have "done nothing wrong" do not end up in civil litigation, and if they do, they are duty- and honor-bound to see it through to the end in order for justice to prevail, damned the expense.

According to George Washington, "the best and only safe road to honor, glory, and true dignity is justice."[1] While the pursuit of what one perceives to be justice is a fair and honorable principle and one worth fighting for in certain instances, the road to "justice" is not always a straight nor satisfying path. This is what we refer to as the "price of principle." It is important to understand how ingrained this belief is, because it impacts, often adversely, the ability of the parties, and in turn, the mediator, to facilitate settlement a negotiated resolution.

We are sure that this concept touches a chord in most of you, as almost every litigator with a degree of experience has encountered a client or an opposing party who are hell-bent on litigating to the end. The sort of litigant who will not be cowed or blackmailed into sacrificing their own principles and dignity by settling for anything less than complete and total vindication. In those cases, the party has determined that they will pursue their principle until the bitter end, despite the cost — be it economic, emotional or business stability. In doing so the litigant may be misguided in the mistaken belief that the American system of justice is here to ensure that no person or entity is unfairly subjected to the rigors and expense of civil litigation without being justified by the decision of a judge or jury, right? However, as lawyers, we know that this concept is not necessarily true.

The American Rule

A common refrain of parties who believe that they are the wrongful target of unfair litigation is that they do not care how much they spend on their legal fees. They choose instead to pursue defense of their principles, believing that they will eventually get their legal fees and expenses back when they win in court. In many countries it is common for the prevailing party to receive their fees. Indeed, many American contracts include a prevailing-party-fee provision. However, any experienced American lawyer knows that the award of attorneys' fees is exceedingly rare. In the authors' combined 50 years of legal experience, neither of us has ever seen a court award the prevailing party fees, outside of a contractual obligation and absent sanctionable conduct.

The default standard that each party bears its own legal costs and litigation expenses is what is known as the "American Rule"; it is so called because of its diversion from the English common law from which much American jurisprudence is derived. The American Rule is a fee-shifting doctrine and represents a departure from typical English and much of European practice, which permits (or even requires) the losing party to pay the legal expenses and costs of the winning party.

The American Rule dates back to *Arcambel v. Wiseman*.[2] In this case, the U.S. Supreme Court distinguished the practice of the U.S. as not allowing for winner payments, absent some statutory bases for an award of fees and costs.[3] The *Arcambel* Court,

1 Stephen Lucas, *The Quotable George Washington: The Wisdom of an American Patriot*, p. 52 (Rowman & Littlefield 1999).

2 3 U.S. 306 (1796).
3 *Id.*

on considering an appeal from the U.S. District Court of Rhode Island granting $1,600 in attorneys' fees to the prevailing party, ruled as follows: "We do not think that this charge ought to be allowed. The general practice of the [U.S.] is in opposition to it; and even if that practice were not strictly correct in principle, it is entitled to the respect of the court, till it is changed, or modified, by statute."[4]

Following this precedent, for more than 225 years American jurisprudence has recognized that absent extraordinary circumstances or a controlling legislative enactment, each party pays their own fees and costs in litigation, no matter the court. Nevertheless, most parties to a litigation, regardless of their level of business sophistication, continue to *expect* that when they prevail, the Court on principle will make them whole to rectify the injustice of being subjected litigation to prove their position.

The Logic of Litigants

Despite the longstanding deep foundations in American jurisprudence that parties are encouraged to use the third branch of the government to seek redress, actual parties to a litigation inevitably believe that litigation simply comes down to right and wrong. From the typical citizen's perspective, Americans just do not get sued unless they have done something wrong.

Equally important, if a person or entity has been sued but has not "done" anything wrong,[5] then the reaction is typically vociferously defiant — if not violent. The litigant almost immediately internalizes their role of plaintiff or defendant, and the other side becomes the enemy who must be defeated for justice to prevail. In the worst case, a litigant can become so identified with their role as a plaintiff who has been wronged, or a defendant who has been wrongly accused of malfeasance, that they become something close to obsessed with their pursuit of justice. The longer the litigation persists, the more entrenched the litigant becomes in their belief/search for vindication.

Experienced litigators recognize the need to manage their clients' expectations from the start, regardless of which side of the "v" they are on in the litigation. Part of client management is an assessment of the risk of winning and losing, and the litigation cost and legal fees associated with determining that outcome. We have yet to come across many cases that come with guaranteed outcomes; we have all lost cases we should have won, and won cases we should have lost. Therefore, part of the management discussions necessarily includes (or should include) the cost of litigation and the fact that the cost will not be abated, except in the rarest of circumstances, regardless of the outcome. Nevertheless, litigants, regardless of education or sophistication, cling to the idea that right will prevail and that they will be made whole by the outcome.

A Neutral Opinion

As has been previously explored,[6] experienced litigators will build into their litigation plan an opportunity for using mediation to resolve a dispute, so that it becomes as much a part of the process as a discovery cutoff or deadline for dispositive motions. No matter how many times your client reviews your litigation budget or hears your warning that the expenses associated with litigation may not justify the potential outcome, at heart they still cannot bring themselves to bring a strict business judgment to considering whether litigation ought to be pursued.

As one might know, courts, juries and even arbitration panels will render a determination on liability and, if any exists, whether or not damages flow from that liability. Absent a fee-shifting agreement or statute, the court, jury or panel will only in extraordinary instances consider whether to award attorneys' fees and costs to the prevailing party. So why do so many litigants still insist on having "their day in court?" Because they sincerely believe that someone is going to tell them that they are "right." Again, this is the price of principle, which is so deeply ingrained that most people are entirely unaware of the internal limitations, preventing them from becoming dispassionate about what really should come down to a business-judgment decision.

Bring in the neutral: the mediator. Many times, the reason that mediation is successful, regardless of the underlying legal theories involved in the litigation, is that the litigants have an opportunity to tell their story to a third party. They get a chance to espouse and give air to their grievances and advance their principles. They get to have the mediator perhaps even recognize and acknowledge their concerns and frustrations and respond to them. Mediators often recognize that the real discussions about a resolution cannot happen until one or both parties have had an opportunity to truly vent their self-righteous anger at the injustice of the situation in which they find themselves. Every litigant wants their day in court, or at least their opportunity to vent and be heard. This need often goes beyond speaking with the mediator, and at times, resolution is hard to reach until both sides have had an opportunity to tell each other their grievances. Again, the confidentiality and the mechanisms of mediation

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4 *Id.* (quoting *entire* handwritten decision) (emphasis added).

5 For those who practice in the "clawback" litigation space, how often we hear from a defendant that he/she did not do anything wrong. Defendants in these actions will point out that all they did was get paid money that the company owed them. Alternatively, they will state that they had no basis upon which to know that the entity that paid them was not the same as the entity to which they rendered services and thus they did not intentionally receive a fraudulent conveyance. For these cases and these defendants, it often (but not always) comes down to trying to explain that they did not do anything wrong, *per se*, but that the Bankruptcy Code (or governing case law) gives rise to the claims in question.

6 *See* Leslie A. Berkoff & Connor Bifferato, "Mediation: How Litigators Can Maximize a Unique Opportunity," XL *ABI Journal* 10, 24, 54-55, October 2021, *available at* abi.org/abi-journal.

afford the unique opportunity for parties to safely express their positions to one another without significant consequences, even if the dispute proceeds beyond mediation. It is critical to keep in mind that the ability for a client and the opposing party to have an opportunity test their perspectives with a neutral mediator before proceeding to trial is part of diligent representation in civil litigation.

So, whether the mediation is done in person or by Zoom, it is important to find a way within the remote platform to provide this opportunity. If the mediation is done remotely, even though video lacks the benefit of true face-to-face interaction, it is paramount to a successful negotiation to ensure that a party has this full and unfettered opportunity to vent to the other side. This often gets overlooked because of the remote nature and a proclivity to skip joint sessions and just speak in private caucus. It is in this context that perhaps a litigant gets to share outrage at the injustice of the claims brought against them, however they have been raised (offensively or defensively).

Moreover, an important part of the process is for the party to obtain a neutral party's guidance on whether, at the end of the day, pursuit of their principles will truly get the litigant "justice." As mediators, we often spend a great deal of time listening to the party complain about the injustice of it all.[7] Once a party can get past expressing their frustration at the process, and/or the injustice, we can hopefully help them to focus on the costs that go into perpetuating the litigation. Therefore, turning back to the price of principle: It is important that during the process, the mediator (and the parties) explore not just the legal theories at issue, but consider the cost of the litigation itself to focus them on yet another reason to consider settlement. This should include not just the legal fees that will be generated during the process, but the business cost of engaging in the litigation itself.

Parties often look at a lawyer's fees and expenses but totally miss the other more intangible costs, which can include the following: (1) the cost of business disruption; (2) a delay such as the time taken away from focusing on a business and irretrievably lost to the lawsuit; (3) the work of employees attending to document demands or depositions versus building or selling whatever widget the company makes; and (4) the emotional toll of the whole process. These are at least as important as the legal fees associated with protracted litigation. Have you ever heard a party to commercial litigation say, "I would rather pay my lawyer twice what they are seeking than compromise what I know is right"? Although that rationale will never survive the scrutiny required by the business-judgment rule, it is a common expression of frustration even among sophisticated litigants. Keeping business judgment at the forefront of commercial litigation is one of the best antidotes to the irrational reactions that businesspeople may have to becoming a party to a civil litigation.

The mediation process, with the help of a good mediator, can perhaps shine a light on the fact that your client's principles are indeed important and we can validate those concerns. However, emotional responses tied up in or mistaken for a principled approach to civil litigation never justify the cost of an irrational expectation of vindication through litigation. Ask your client the following question: Do their litigation decisions make good business sense? Is it worth having the price of principle derail a settlement that would otherwise promote the company's interests? A good mediator can help the parties see that the question of injustice may not be part of the court's analysis, regardless of feelings of fundamental fairness. Bankruptcy practitioners are well-versed in the various clawback actions and the multiple layers that offend the sensibilities of the average businessperson. So, when defendants raise all of the common refrains of, "I didn't know" or, "I am owed so much more money," they are all valid and understandable points and concerns. The question still comes back to the risk and cost of trying to get a victory on the principle that they have done nothing to deserve being put in this position. Further, where there are good, solid defenses to claims, or counterclaims with merit, even then is the pursuit of litigation in the best interests of the business?

What we hope is that litigants use mediation as a way to express their emotional reactions and their outrage at the offense to their principles. We do not undervalue or underestimate the importance in refocusing a party's perspective from litigation-oriented to resolution-driven. However, our hope is that at some point, through the mediation process (and the assistance of a good mediator),[8] both sides see reason — that in the end, the cost of the litigation process (and inherent risk to both sides) renders the choice to continue litigating the least-preferable outcome. We all know that commercial litigation is rarely personal, but when it comes to principles, which are always personal, understanding the price of principles is the challenge for, and the reason we have, mediators. abi

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7 *See supra* n.5.

8 Leslie A. Berkoff, "The Importance of the Right Mediator," XXXVI *ABI Journal* 4, 38, 102-03, April 2017, *available at* abi.org/abi-journal.