THE CASE FOR MEDIATION OF BUSINESS DISPUTES: CONSIDERING THE ODDS

By Michael A. Levy[1]

It is not uncommon for most business people about to undertake or defend a legal challenge to turn to their attorney and ask, "What are my odds of winning this lawsuit?" When you think about it, that's a perfectly fair and reasonable question. In fact, it's precisely the kind of question one might expect from a successful business person. After all, most significant business decisions involve an analysis which ends with the question, "What is our likelihood of success?" So then, why should the inquiry be any different in the context of a litigation that may have a significant impact on the business? The answer is it shouldn't. In this framework, the role of the lawyer is critical to the client's business judgment. Before deciding how, whether and when to proceed with litigation, the client needs some idea of its chances of success.

If your lawyer enthusiastically predicts that you will have a one hundred percent likelihood of success in winning a lawsuit, you would probably be well served to look not only for a second opinion, but for a second lawyer. Of the few, true one hundred percent cases, nearly all do not wind up in litigation because even the most intransigent of adversaries is capable of recognizing the futility in pursuing a bogus legal action, particularly where there exists a likelihood of sanctions for engaging in such frivolous conduct. Rule 11 of the Federal Rules of Civil Procedure under which courts can, and often do, impose significant financial penalties to both client and lawyer, as well as corresponding state court rules, generally act as an effective impediment to engaging in unjustifiable civil litigation. There are, of course, exceptions, and those are frequently the ones you read about on the front page of a law journal where a party or its lawyer has been smacked with a substantial monetary penalty. So how, then, is one to make a determination on whether to attempt to resolve a legal claim with the "Stand and Fight" or the "Sit and Negotiate" strategy?

As a matter of practice, I have found it to be a useful exercise at the beginning of the first session of a mediation to talk about the realistic "odds" of victory at the end of the litigation process should the parties choose not to resolve their differences in mediation. The optimal time for having this discussion is before a summons and complaint have been filed. In most cases, however, that has already happened, so the next most advantageous time to have the conversation

is as soon as possible after the lawsuit is underway and before significant time and money have been invested in that process.

The question might be posed this way: "As we sit here today, what are the odds of your ultimate success in this case if it goes through a trial and then an appeal?" That question might be followed with: "How long do you estimate this will take until you get to the end of the litigation and how much do you think it will cost?"

The first question – likelihood of ultimate success – is easier to answer than the next two – time and expense. When a lawyer starts a case, he or she has no idea as to what the extent and scope of the defense might be. There can be little discovery or there can be vast amounts of it. There can be a few depositions or many. There can be motions of one sort or another, from motions to dismiss to motions for summary judgment, with all sorts of discovery motions in between, all of which can cost tens of thousands of dollars or more, and all of which eat up time while the dispute remains unresolved. An absence of resolution often leads to uncertainty in the business, and uncertainly frequently spells a financial loss to the enterprise because it interferes with what business people do best – conduct business.

In more than four decades of law practice, I have never encountered a case with a legitimate legal basis in which the lawyer on either side could predict that the client has more than an 80% likelihood of success at trial. To be perfectly honest, even an 80% case is rare. I don't recall that I've ever advised a client that he or she had those kinds of odds in their favor. If for no other reason, history has shown that both judges and juries are remarkably unpredictable. Still, I use the 80% figure to illustrate the kind of exercise that one should go through in choosing "SAN" or "SAF" – whether to Stand and Fight or Sit and Negotiate.

At the broadest level, "ultimate" success rests on the results of two largely independent events. That is, first winning your case in court, and then winning the likely appeal that follows. In sheer math terms, this is known as a conditional probability – in other words, the likelihood of winning on appeal even after you had to first win the case. The table below simplifies the math in the column "End of the Day" as to your chances of being ultimately successful under a range of circumstances.

Available data appear to indicate that less than a third of cases which are appealed and decided on the merits are reversed or modified.[1] For purposes of this analysis and ease of computation, we can reasonably assume the likelihood that the average case won at trial has a 70% likelihood of being upheld by an

[1] This estimate assumes a "blend" of bench and jury trials.

appellate court, and conversely, the case lost at trial has a 30% likelihood of being reversed on appeal.

As the table indicates, at the very inception of the dispute, the party with a "best case" estimate of success has in reality a slightly greater than 50% chance of ultimate success if the case is appealed after it has been won at trial. A litigant with a 50/50 chance of winning at trial is only 35% likely to ultimately prevail if the case is appealed. The converse, of course, demonstrates and even more compelling reason to consider early settlement though mediation. If a litigant with a 50/50 chance of success at trial loses in the first round, the likelihood of a reversal is only 30%. Therefore, at the outset of the dispute, the ultimate likelihood of success if that litigant turns out to be unsuccessful at trial is 50% times 30%, or 15%. Looking at it from those odds, the benefit of early mediation is undeniable.

The Odds of Winning After Appeal				**Time and Cost**	
Charactization (a)	**Estimated Odds of Success at Trial (b)**	**Estimated Odds of Success on Appeal (c)**	**End of the Day (b) x (c)**	**Estimated Time (in years)[2]**	**Estimated Dollar Cost[3]**
"Best Case"	80%	70%	56%	1	$
"Best Case"	80%	70%	56%	2	$$
"Best Case"	80%	70%	56%	3	$$$
"High Odds"	70%	70%	49%	1	$$$$
"High Odds"	70%	70%	49%	2	$$$$$
"High Odds"	70%	70%	49%	3	$$$$$$
"Fair Odds"	60%	70%	42%	1	$$$$$$$
"Fair Odds"	60%	70%	42%	2	$$$$$$$$
"Fair Odds"	60%	70%	42%	3	$$$$$$$$$
"Even Odds"	50%	70%	35%	1	$$$$$$$$$$
"Even Odds"	50%	70%	35%	2	$$$$$$$$$$$
"Even Odds"	50%	70%	35%	3	$$$$$$$$$$$$

[2] For discussion purposes only, the number of years inserted in the "Estimated Time" column demonstrates the cost pyramid which shows that the longer a case takes to resolve, the greater its cost, with the lowest costs being associated with the high probability of success cases.

[3] Since every case is both law and fact specific, it is difficult if not impossible to make any universal prediction of the costs associated with litigations generally. With that in mind, it may not be unreasonable to make a generalized prediction that as the odds of victory diminish, the likely costs of litigation will grow. Thus, the "best case" is likely to be less costly than the case with "even odds" because the best case, in most instances, will involve less discovery, fewer experts, and correspondingly a smaller total of legal fees. Thus, the "Estimated Dollar Cost" column merely reflects the increasing costs of litigation associated with the decreasing odds of ultimate success.

CONCLUSION

Mediation of business disputes at the earliest possible stage is a concept whose time has clearly arrived. For many years, it has been the stepchild of alternative dispute resolution, having sat on the sidelines as the more commonly recognized mediation of matrimonial disputes led the way. It is perhaps a natural evolution that mediation of divorce cases would precede its application to other conflicts. Now, just as the costs of litigating matrimonial cases have rendered traditional court contests unconscionably expensive, an increasingly strained and overworked legal system has effectively put most business litigation beyond the reach of all but the most well financed of disputants. The case for mediation of business disputes is no longer difficult to articulate. Even for those with adequate financial resources, the time involved in a long, drawn out lawsuit is simply too expensive to the needs of most businesses which seek prompt resolution of their legal disputes. Indeed, it may very well be that the corner has now been turned and the rationale for "going to court" to resolve commercial claims is on the cusp of turning the traditional lawsuit into a jurisprudential relic of the past.

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