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WHEN WINNING IS LOSING

FOCUS COLUMN
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Formulating a strategy for conducting a litigated case is the litigator's forte. Your client has rights, and has been damaged. The defendants are going to have to pay, and the litigator's job is to make certain they do. Why mediate first? A demand for mediation could be construed as a sign of weakness. First, get the case into a posture that maximizes your client's position and makes the other side aware of just how much risk they face if they resist. Conduct some discovery, and wait for the court to suggest mediation before agreeing to participate in that process. Does that sound familiar? If so, you might want to consider the benefits of early mediation, especially of contract disputes, and, perhaps even more importantly, what your client might lose if you file an action or demand arbitration before demanding mediation.

A contract may or may not contain a clause providing for the recovery of attorney fees by the prevailing party. The presence or absence of such a clause (or a statute providing for the recovery of attorney fees) will alter the dynamics of a mediation, especially the assessment of risk. It is one thing for a party to be exposed to the expense of his or her own fees. It is quite another to be at risk for fees being incurred by one's opponent. It is yet another for a party to believe that he or she will be entitled to fees should he prevail at trial, only to find out that such a belief is incorrect, even when the contract at issue contains an attorney fee provision.

In a mediated contract dispute, as the parties assess risk, consideration is given to the extent to which attorney fees being expended are recoverable from the other side. Conversely, an assessment is also made of the extent to which a party is at risk for the other side's attorney fee expenditures. When a contract contains an attorney fee provision, the risk of moving forward through litigation will typically up the ante for both sides. To that extent, depending upon a party's conclusion as to the likelihood of prevailing in the litigation, he or she will reach a conclusion based, at least to some degree, on both the amount of investment to be made in the litigation by way of attorney fees, and the exposure to the other side's fees. If a contract does not contain an attorney fee provision, both sides must recognize that any net recovery under the contract will be reduced by the amount expended in attorney fees, and that any amount expended in defending the action will not be recoverable under any circumstances.

This leads to the question of how the dynamic changes if only one side can recover attorney fees from the other. The effect on mediation is to put the other party at a considerable negotiating disadvantage. Even with the best of cases, lack of ability to recoup attorney fees from the other side means that the party is at risk by having the potential of paying both sides' attorney fees, while at the same time seeing any potential net recovery diminished by the amount of his own attorney fee expenditure, even if he or she prevails at trial. Under these circumstances, for a plaintiff whose potential attorney fee expenditure might approach the maximum potential recovery from the opposing party, the incentive to settle at the earliest possible moment is tremendous. If that party's opponent recognizes this, a great opportunity exists to leverage a very advantageous settlement. If you think this is unlikely, consider the situation in which one party, by failing to demand mediation prior to filing an arbitration or court case, waives its rights to attorney fees.

In some contexts, typically those involving contracts with mediation requirements, failure to comply with those requirements could cost your client dearly. For example, paragraph 17A of the

standard California residential property purchase agreement contains a provision precluding the recovery of attorney fees, if a party "commences an action without first attempting to resolve the matter through mediation, or refuses to mediate after a request has been made." Other contracts have similar provisions. There is no doubt that the courts will enforce such a provision.

In Lange v. Schilling, 2008 DJDAR 8949, filed on May 28, the 3rd Appellate District held that where the plaintiff filed an action before demanding mediation, he forfeited the right to recover attorney fees.

In mediating litigated cases in which no pre-litigation mediation demand had been made, counsel will sometimes argue that his or her client had "substantially complied" with the requirements of paragraph 17A by offering to stay the litigation in order to mediate the matter, and that if the matter were to go to trial, his client would certainly recover attorney fees. The Lange court addressed this argument in the context of the trial court having ruled that there was substantial compliance by offering a stay of litigation. The trial court stated, "Plaintiff offers reasonable justification for failing to offer mediation prior to filing suit: He could not locate the [sellers]. He knew they moved from their last known residence. ... and were traveling in California and Nevada in an RV. A pre-litigation attempt to locate an address by an Internet search was unsuccessful. After suit was filed, plaintiff hired an investigator to locate the [sellers] in order to achieve service of process. The skip-tracer found their address within 16 days."

The trial court found that since the defendant seller had not responded to a post filing offer to mediate, there was no prejudice suffered by reason of the tardy offer, since no responsive pleading had been filed at that time. The trial court awarded the plaintiff more than $80,000 in attorney fees (out of more than $113,000 claimed), reflecting the amount incurred after the plaintiff's offer to mediate.

The appellate court, addressing this issue, found that the doctrine of substantial compliance was not applicable, since 17A sets forth a "clear and unambiguous condition precedent that must be met in order for attorney fees to be awarded: the party must attempt mediation before commencing litigation. By filing his complaint before attempting mediation, plaintiff lost any right to attorney fees."

Significantly, the court discussed the purpose of that paragraph: "Paragraph 17A is designed to encourage mediation at the earliest possible time. This provision would become meaningless if a party were allowed to recover attorney fees by making a request for mediation after litigation has begun and then claiming substantial compliance."

The appellate court restated the policy previously expressed in Frei v. Davey, 124 Cal.App.4th 1506 (2004); Leamon v. Krajkiewcz, 107 Cal.App.4th 424 (2003), and other cases: "The public policy of promoting mediation as a preferable alternative to judicial proceedings is served by requiring the party commencing litigation to seek mediation as a condition precedent to the recovery of attorney fees. ... Had the parties resorted to mediation, their dispute may have been resolved in a much less expensive and time consuming manner."

Prior to commencing litigation or demanding arbitration, in contexts other than a residential property purchase, good practice would dictate a review of applicable agreements to determine whether a pre-litigation or pre-arbitration mediation requirement is involved. Because mediation often results in considerable cost savings for parties over the alternatives of litigation or arbitration, more and more attorneys are including mediation requirements in the drafting of virtually any type of agreement.

It is also suggested that statutes be reviewed as well. See, for example California Civil Code Section 1375, setting forth dispute resolution procedures in the context of certain construction defect litigation.

There are circumstances in which an attorney might find that it is not possible to demand mediation prior to filing.

For example, if a client appears in your office for an initial meeting the day before a statute of limitations will run on a breach of contract claim, or the basis for an action is not discovered until that time, and you have no knowledge of the other party's whereabouts and no means of discovering that information, filing an action to protect your client's rights would certainly be the prudent action to take, even if attorney fees would not be recoverable as a result of that filing.

In Lange, the plaintiff spent more than $113,000 in attorney fees to recover a $13,000 judgment. Citing Leamon, the Lange court stated, "The economic inefficiency of this result may have been avoided if, prior to judicial proceedings, a disinterested mediator had explained to [the parties] the costs of litigating the dispute through to a judgment or a final resolution by an appellate court."

The plaintiff, Mr. Lange was the "victor" at trial, as the damage award remained intact, but he ultimately lost a net $100,000. It would not appear that most would consider that to be a "win." While there is never a guarantee that the matter would have resolved at mediation, Mr. Lange will never know. He does know that had the demand to mediate been made prior to litigation, he would not have lost quite so much.

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