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Win the battle, win the war: Cost-effective dispute resolution for small and midsize companies

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For small and midsize companies, resolving disputes through the court system is often not cost-effective and can even be cost prohibitive. This is especially true if the amount in controversy is relatively modest.

Parties are often left with a Hobson's choice — not pursuing a legitimate claim, settling a dubious one — which may feel more like a shakedown than a negotiation — or investing time and money that exceed the value of the claim to prevail in litigation. These are not great options.

As many lawyers have advised their clients, our justice system is often ill-equipped to resolve these disputes in a way that makes economic sense for the parties.

Alternative dispute resolution,[1] and particularly mediation, has emerged as a way for parties to resolve disputes, no matter their size or complexities, in a manner that is far less costly and more expeditious than litigation. However, even mediation can be time-consuming and costly for small and midsize companies, particularly when it comes to relatively small claims.

Accordingly, let me suggest another approach to evaluate claims and implement dispute resolution techniques — a "step" approach, including direct negotiation and mediation — to resolve business disputes in a cost-effective way. This approach, while helpful to companies of all sizes, is particularly beneficial for smaller companies that have fewer resources to devote to litigation.

DESIGNING A DISPUTE RESOLUTION PROTOCOL

How to begin? First, the company creates a protocol to evaluate claims early. Second, it designs internal processes to resolve disputes, including through direct negotiation and mediation, that are user-friendly to both sides.[2]

Step 1: Early claim evaluation

Claim evaluation should begin as soon as the company learns of a claim or facts that may give rise to one.

In fact, the company should keep track of and identify common areas of disputes. Do the same types of disputes with customers or vendors occur again and again? Do employees raise complaints that have a common theme or cause?

Company executives, including very successful ones, have full plates and are often laser-focused on their own responsibilities and the tasks at hand. They often have neither the peripheral vision to see what is happening elsewhere nor the time to anticipate unexpected issues.

Smaller companies may not have the layers of management that would be helpful in seeing the bigger picture. By tracking and identifying common areas of dispute, companies can proactively help to avoid their reoccurrence. What better way is there to resolve a dispute than to avoid it in the first place?

An early evaluation approach takes the company beyond simply asking, "Will we win or will we lose, and how much?" In evaluating a potential claim, the company should investigate what happened and why.

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It is critical to speak with in-house employees with relevant knowledge, e.g., sales employees, human resources personnel, marketing and public relations people, and others, to learn basic facts and to evaluate the risks and rewards — and, perhaps, unrealized opportunities — inherent in the claim and its potential outcomes. Ask, "How did we get here, and how do we solve this?"

In undertaking this type of analysis, the company should be able to evaluate the strength of a claim, the company's best interests and acceptable potential resolutions.

After learning what happened, in order to properly evaluate the claim, the company must first identify its objective. Simply saying that it is seeking a "business solution" to a problem is not sufficient; it must define what that "business solution" is.

Too often, companies and their attorneys will initially evaluate claims from the standpoint of determining whether they stand to win or lose in court, the likelihood of each outcome, the financial exposure or potential benefit, and the cost. While those

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are important components of any claim evaluation, there may often be other considerations that are at least equally compelling.

For example, depending on the identity of the other party — such as a customer, supplier, business partner, employee or investor — the most beneficial outcome to the company may have little to do with whether it can win or lose at trial.

The cost of litigation, both in time and money, must be considered. However, public relations, customer/client satisfaction, ongoing business relationships, and even the potential adverse effects of a settlement, may be equally or even more important.[3]

Therefore, in evaluating a claim, the company should first identify its needs, interests and ultimate goals in resolving it. These should be consistent with what makes the most long-term business sense for the company.

In so doing, rather than concentrating simply on winning or losing, companies must understand that the dispute may be resolved early and without intervention from outside lawyers or a court. Indeed, application of this analysis can lead to the identification of a creative resolution that may advance other,

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or related, business interests — possibly even with the other party — that may not have been apparent otherwise.

The evaluation, of course, will vary depending upon the type of claim involved. For example, customer service employees should be trained to perform "triage" so they can easily identify anticipated customer complaints, and, depending on their nature and complexity, either resolve them or refer them to superiors.

More complex customer claims, as well as disputes with vendors, other third parties and investors — including claims that the company may want to pursue — should be bumped up to in-house counsel or to executives whose responsibilities include claim analysis and resolution.

Depending on the type of claim, the in-house counsel or company executives may then want to consult with outside counsel for help evaluating the claim — consistent with the company's objectives as described above — and to help choose and implement a resolution strategy.

After learning the facts and evaluating the claim, the company should determine how to engage in the necessary give-and-take of settlement/resolution discussions. This will depend on the type of issue, the identity of the party making the complaint, and whether the other party is represented by counsel.

It may be something that can be handled internally, such as when a trained customer service or compliance employee speaks with a disgruntled customer or employee. However, it may require in-house or outside counsel to enter into more formal direct negotiations, and it may ultimately lead to mediation.

Step 2: Dispute resolution alternatives

Assume you have learned the facts and evaluated the claim, and the dispute was not resolved by your customer service employee. What should you do next?

Dispute resolution procedures short of arbitration and litigation can take the form of direct negotiation and mediation. The company should take care in deciding how to present and implement these alternatives. After all, there are relationships that you would like to preserve and customers and employees you want to keep.

First, you can negotiate. Direct negotiation, of course, can be initiated by the company or the other party.

From the company's standpoint, all that is necessary is to have procedures in place through which the right person — an individual with knowledge of the subject matter and authority — can engage in settlement discussions with the other party or its attorney. The company can initiate direct negotiation even if it does not have a written agreement with the other party.

If you cannot resolve the dispute through direct negotiation, you can mediate. Parties to a dispute may proceed to mediation only upon their mutual consent, except when they are directed to mediation by a court after litigation has commenced.

How do you get the other side's consent to mediation? A provision requiring the parties to engage in a good-faith mediation effort to settle the dispute prior to either party embarking on the course of arbitration or litigation can be included in a written agreement. These provisions are especially appropriate in agreements with third parties and employees.

Think of talking and negotiating as "step one" — "step" provisions may also require the parties to engage in a good-faith negotiation effort prior to the initiation of mediation — and mediating as "step two."

Mediation "step" provisions are becoming common in commercial agreements, and companies should not hesitate to request, or even insist upon, their inclusion.[4] Such provisions are just common sense and good business.

If the other party is a customer or potential customer, the company may not have an appropriate vehicle to provide for the automatic referral of a dispute to mediation. In those

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instances, the company can suggest proceeding to mediation using an agreement provision similar to the one suggested for mediation step provisions.

If the other party agrees to mediation, I strongly suggest that the company provide the other party with a simple, written description of what mediation is and a written mediation agreement, which should be drafted by the company's attorney and written in a user-friendly manner.[5]

Minimally, a written mediation agreement should:

- Contain a clear and concise description of the dispute that is being submitted to mediation as well as how the mediator will be selected and paid.
- Advise that the party (or, if a company, a person with knowledge and decision-making authority) will attend the mediation.
- Advise that the party has a right to have personal counsel appear with it at the mediation.
- Advise that the party should consult with an attorney prior to signing the agreement to mediate and conclude with an acknowledgment that the party has read and understands the agreement and has had the opportunity to and/or has spoken with an attorney prior to signing the agreement to mediate.
- Underscore that the mediation is confidential and that anything said there cannot be used in future litigation between the parties.

Two topics that must be addressed at the outset in any mediation agreement are the process by which the mediator will be selected and the cost.

Depending on the nature of the dispute, the company may provide for mediation by a third-party mediation service, such as the American Arbitration Association, private alternative dispute resolution provider JAMS, or other providers. It may also provide for the selection of a mediator from a list of mediators provided by the company.

With respect to a third-party mediation service, the filing fees, mediator compensation and other costs will be set by the third-party mediation provider's rules. With respect to a private mediation, the cost, which may consist entirely of the mediator's compensation, will be established in the written agreement between the private mediator and the parties.[6]

In many instances, the parties evenly split mediation costs. However, to make mediation more desirable, and especially when there is a significant disparity between the resources of the company and those of the other party, such as an employee or customer, the company may want to offer to pay more of the cost of mediation or even pay for it entirely.

Your approach should be based on the type of dispute and identity of the other party. Be creative; offering to pick up more than half of the cost of mediation may be money well spent if it will gain the other party's consent to mediate and lead to resolution of the dispute.

THE ROLE OF COUNSEL

In-house and outside counsel should play roles in designing and implementing the dispute resolution protocol. You want a professional set of eyes reviewing your protocol and procedures, and drafting your documents. You also want someone who can anticipate worst-case scenarios and protect the company.

In-house counsel (or, if the company does not have in-house counsel, key executives) play a central role in identifying the business objectives with respect to particular categories of disputes, key employees who would participate, and in developing the triage to be employed when a dispute arises. In-house counsel should work with outside counsel in designing an effective early claim evaluation procedure.

One issue to consider is whether the early claim evaluation procedure is conducted by the counsel who would represent the company if the claim eventually goes to mediation, arbitration or litigation. Indeed, the company should seek to ensure an objective early claim evaluation and must feel comfortable that the attorney will not argue the company's case when providing it.

Further, counsel with particular expertise in dispute resolution should prepare the information concerning mediation, the dispute resolution procedures to be employed, the agreement between the parties to mediate, and the template for the mediator biographies.

The company's outside counsel may not have that expertise. For the most part, however, these should be one-time costs, as they may need to be refined and revised only from time to time.

If the company wants to employ private mediators, it should approve the proposed agreements between the mediators and the parties in advance. By doing so, the company will have a better idea of the approximate cost of the mediation from the outset. This is important to all parties, and especially to small and midsize companies.

If the claim is not settled through direct negotiation, the company should consider whether its regular outside counsel, who may also represent it in arbitration or litigation if the dispute is not settled, should represent it in a mediation.

Representing a client in mediation is different than representing it in arbitration or litigation. Some litigators are very effective in mediation, and others are not.

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CONCLUSION

The time and cost of litigation, and the distraction from business operations that can result from an ongoing dispute, effectively mandate that companies consider designing and implementing a dispute resolution process that can quickly address issues that might otherwise fester or end up in litigation.

By considering the types of issues that may arise and the varying objectives in resolving disputes, and with the help of counsel, a company can better position itself to resolve disputes in a timely and cost-effective manner, while allowing its executives to devote their time to doing what they do best and what interests them the most: developing and growing the business.

By designing and implementing an effective dispute resolution process, companies can win both the battle and the war.

NOTES

[1] ADR may include early neutral evaluation, mediation and arbitration. Arbitration still involves many of the hallmarks of litigation: document discovery, depositions, presentation of evidence, and the rendering of a decision by a tribunal or individual arbitrator. Mediation, on the other hand, is a less formal, fully confidential, non-binding proceeding whereby the mediator facilitates the parties' negotiation in an effort to arrive at a settlement.

[2] The company should also consider whether there are certain categories of disputes that it would not want to mediate or be obligated to mediate. For example, a company may not want to be obligated to proceed to any type of alternative dispute resolution, including mediation, prior to seeking a temporary restraining order or preliminary injunction to protect its trade secrets or intellectual property. (Mediation may be an effective tool to ultimately resolve these types of disputes, and others, after the immediate harm is addressed.)

[3] While many settlement agreements provide for confidentiality and no admission of liability, it is good business practice to assume that the substantive terms of the settlement may "leak" out and that the mere fact of settlement may lead some to conclude that the company was at fault.

[4] If a company is concerned about being too heavy-handed with the other party, it could present the issue by saying, in substance, "Our relationship with you is important to us and, for this reason, we think it would be helpful to each of us to provide for a quick and efficient way to resolve any dispute that may arise between us."

[5] *See, e.g.,* the description provided in the New York State Unified Court System's website at www.nycourts.gov.

[6] If the company wishes to include private mediation without relying on third-party providers, I suggest the company interview a number of mediators and develop a list of mediators from which the other party may choose. In so doing, the company should provide a template to be completed by the proposed mediators setting forth the mediator's background, experience and compensation rate, and whether the mediator will charge for preparatory time. Mediator disclosures should also include their retainer, which should thereafter be set forth in the agreement between the parties and the mediator. The mediator should be required to submit an invoice setting forth the time expended in preparation and in the mediation sessions.

ABOUT THE AUTHOR

Bart J. Eagle, a private practice attorney in New York, has over 30 years of experience in commercial law and litigation. Eagle is also a mediator and is listed on the American Arbitration Association's Roster of Mediators, the roster of neutrals for the New York County Supreme Court Commercial Division, and the panel of mediators of the New York City Bar Association's Co-op and Condo Mediation Project. Prior to entering private practice, he spent six years with the Queens County, New York, district attorney's office as a trial attorney on homicides and other major crimes.

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