What To Do When You've Been Sued: *Part III: How to Help Your Lawyer Help You*

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"To fight and conquer in all your battles is not supreme excellence. Supreme excellence consists of prevailing without fighting."
– Sun Tzu, The Art of War

So you're finally ready for trial. All the witnesses have been questioned and the exhibits have been prepared. You believe you have a smoking gun that will bring the other side to its knees. But the other side also thinks the same. What will happen? Will it be the thrill of victory or the agony of defeat? Will you settle for half a loaf or risk it all? This article will discuss the final phase of lawsuits that includes trials, arbitrations, settlements and/or mediation.

Everyone wants to win. Unfortunately, in a trial, someone wins and someone else loses. Most parties want to feel that they got a fair hearing, had their day in court and an opportunity to tell their side of the story to an impartial decision maker. If they feel they got a fair trial, they can usually live with the decision, even an adverse one. Most cases settle because the parties would rather have certainty than risk an uncertain outcome.

Settlements occur because business persons want to minimize risk, hold down expenses, and control their own fates, rather than ceding control to a judge, jury or arbitrator. Some disputes, however, cannot be settled. Some cases must be tried to a verdict because parties are unreasonable, one side has mis-evaluated the case, or there is a principle involved.

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Among several different methods, a trial is the traditional way to get to a final resolution of a lawsuit. Before trial, the court will usually require the parties to participate in a settlement conference. Alternative dispute resolution mechanisms can also bring finality. Mediation uses a trained "neutral" to assist the parties in trying to settle. Arbitration is usually a binding procedure, where one or more arbitrators hear the case and make a final decision, which usually cannot be appealed.

Trials

Since most cases begin with a lawsuit that is filed in court, the traditional trial is the default mode. Typically, a case will take two or three years to get to trial, because of the large number of disputes crowding the court schedule. A trial can be held either before a judge or a jury. Most claims that are brought in court allow the parties to assert a right to trial by jury. The jury system exists to ensure that the voice of the community can be heard on issues of justice and fairness, and that cases are decided by a group, rather than a single judge. When a jury is impaneled, the attorneys can question the jurors and can strike or dismiss a few the lawyers feel have biases that may be adverse to their case.

When a trial begins, each side presents opening statements that preview their case. The judge or jury then hears the witnesses and sees the evidence. The judge acts as a gatekeeper to prevent the introduction of improper evidence, pursuant to legal rules. Experts may testify about specialized areas of knowledge, such as medicine or engineering. During the trial, a written record is kept of all testimony and exhibits. At the end of the trial, each side makes a closing argument. After the verdict is rendered, either side can appeal if it thinks the court made a mistake.

There are pros and cons to the trial process. A solid case and a good attorney can lead to a favorable result. A judge may make legal rulings in your favor or against you. Trials are like passion plays, with each side vying to be the good guys in the white hats. Juries are good if you have a common sense, simple story to tell, where you have acted reasonably and the other side has overreached or acted badly. Juries can be bad if you have a complex, technical or esoteric story that cannot be easily explained.

Jury trials, however, carry risks. Chosen at random from the community, jurors can be unpredictable and do not always have a high educational level. Some attorneys think this favors a "common sense" case, while others decry the perception that they have to "dumb down" their cases. The social dynamics of the jury group or a strong willed personality can also influence outcomes. Business people may fear that a jury will not understand the viewpoint and concerns of business. The costs of the trial process can be very expensive, as it takes great effort to marshall the attorneys, legal research, expert witnesses, exhibits and preparation necessary to put on a trial.

Settlement Conferences

Courts usually require a mandatory settlement conference prior to trial, with the judge engaging in shuttle diplomacy, going back and forth between the parties to see if common ground can be reached. Judges who have experience in evaluating cases and credibility with the lawyers can help facilitate a settlement. Others may not have the experience or the understanding of the factors that enable a case to be settled. These conferences can be beneficial when the judge indicates how he or she might rule on a critical legal point, which may cause either side to re-evaluate their case. Some judges may employ creative techniques to give the parties a reality check on what a jury might do, such as impaneling a group of jurors to hear brief presentations by the lawyers and then rendering a non-binding verdict.

Mediation

Mediation is a voluntary, non-binding process that uses a neutral mediator to try and bring the parties together. Mediators are generally selected by the attorneys from panels of trained facilitators. Having specialized knowledge in particular types of cases, mediators tend to get to the key issues quickly.

Mediation is based on the idea that settlements are more likely to occur if everyone is treated with respect and given a full opportunity to air their concerns. Consequently, most mediators start by exploring each party's position to try to see if each side will acknowledge both their strengths and weaknesses and come to a realistic evaluation. Unlike judges, mediators do not have judges' formal coercion powers and cannot rule on issues.

If the parties mediate but are still at impasse, some mediators will provide a case evaluation and make a proposal for a particular settlement amount. This can be successful if the parties and attorneys trust the mediator. However, if the mediator's opinion is rejected and his or her proposal not accepted, the mediator's effectiveness may be compromised. For this reason, most mediators hesitate to provide an evaluation too early in the process.

Mediation can be successful where parties are concerned about crowded court dockets, time delays and large costs of litigation. From a business perspective, using monies for settlement instead of spending it on litigation can sometimes be a better option. Some mediators argue that litigants are better off controlling their own destiny through a negotiated settlement, rather than surrendering control to the unpredictable decision of a group of random jurors.

Arbitration

Arbitration uses of one or more arbitrators, rather than a judge or jury, to render a binding (the more commonly used) or non-binding award. Most importantly, there is usually no appeal from the arbitration award, except in very limited circumstances, such as fraud. The parties trade the right to a full appellate review for a speedier, less expensive and private process.

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Available arbitration services, such as Dispute Prevention & Resolution or the American Arbitration Association, have specific rules governing the conduct of the arbitration. Arbitrators are usually selected by the parties, either by agreement or by picking from a panel. For cases with three arbitrators, each party will usually

pick one arbitrator, and the two will pick the third. Arbitrators must disclose any conflicts of interest they have with any of the parties.

Arbitrations are usually handled like a trial, but more informally and without any significant rules to exclude evidence. Since many arbitrators are attorneys, they generally allow most types of evidence to be admitted on the theory that they will not be unduly influenced by legally inadmissible evidence. "High-low" arbitrations are creative ways to provide an arbitrator with floor and ceiling amounts to guarantee a minimum result to the plaintiff and a maximum liability to a defendant. "Baseball" arbitrations, another creative approach, make an arbitrator pick between the last best offers of the parties to encourage the parties to give a reasonable number.

Providing a quick, cost-effective and efficient means for resolving time-consuming, complex and costly litigation can be the benefit of arbitration. Arbitrators tend to have specialized training and knowledge to provide assurance to the parties that they understand the complexities of a particular case. When the stakes are large, the preparation and conduct of arbitration, however, can be as expensive as a trial. Since there is generally no appeal, the parties take a significant risk that there will be no recourse, even if the arbitrators make a clearly erroneous mistake in the law to be applied or the facts of the case. Moreover, some attorneys feel that arbitrators tend to render compromise awards, rather than giving one side a clear victory.

Conclusion

Whether you choose to go to trial, arbitration, mediation or to settle your case with the judge, always seek to know the pros and cons of all alternatives so that you and your attorney can make the best decision possible to get the optimum result.

This article is intended to address issues of general interest, is not intended to be construed as legal advice, and does not take the place of consultation with qualified legal counsel.