

TROUBLE AHEAD, TROUBLE BEHIND (A Suggestion to the Entertainment Industry: Mediate)

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If the thunder don't get you, then the lightning will:

When faced with a dispute that threatens your livelihood, work, rights, or reputation, the remedy most often sought by Americans is litigation. The second most sought after remedy is Shakespeare's oft quoted "Kill the Lawyers." If the dispute threatens thunder, then litigation certainly is as unpredictable as lightning. Preparing a lawsuit is expensive and waiting to go to trial is time consuming. In San Francisco Superior Courts, the waiting period for a court date is several years, and a date with a lawyer is serious business.

So What are Your Options?

Your options depend on your position and the pertinent law. An objective assessment of your legal position is the most immediate priority. An artist facing a dispute needs to learn whether a legal remedy exists and whether a claim can be pursued. Despite jokes to the contrary, affordable attorneys are available to consult on this important and predominate determination. With your lawyer and by your own self-study, you can dissect the circumstances of the dispute and decide on realistic alternatives.

If you have an inclination toward mediation and/or if there is a contract that provides for some manner of alternative dispute resolution, you still want to maintain the right to pursue your claim. The option of filing a lawsuit need not be forfeited in the hopes of pursuing a negotiated settlement. Whether your dispute is of recent origin or if you have already filed suit, you have time on your hands. Neither mediation nor arbitration have to be remedies of last resort. Do not let a lawyer convince you that all of the discovery portion of the case must be undertaken prior to an initiation of settlement discussion. Ignore the antiquated notion that approaching settlement discussion prior to trying to kill your opponent in court shows sign of weakness.

Here are the kinds of cases more easily resolved by alternative dispute resolution (particularly mediation as described below): payment or credit for work performed, ownership of copyright or artistic work, collaboration issues, fee collection, personal issues, and public relations/reputation in the community issues.

Mediation

Mediation is negotiation carried out with the assistance of a third party. In contrast to a judge or arbitrator, a mediator does not give an opinion or impose an outcome on the disputing parties. Still, the involvement of a mediator changes the dynamics of a dispute. A mediator may attempt to:

Help negotiators realistically assess alternatives; Encourage flexibility; Shift the focus from the past to the future; Stimulate the parties to suggest creative settlements; Invent unheard of solutions that meet the fundamental interests of all parties.

These examples show the mediator's role is one of assistance, although this can be aggressively and persuasively exercised. To this end, the mediator meets in separate confidential sessions with

individuals and/or parties, learns and listens to the position of the parties, and then takes an agreed upon (ie., non-confidential) position to the other party(s), after first listening and learning the other party(s)'s position.

Mediators typically enter disputes with little authority, so their ability to bring about constructive movement or settlement depends, in part, on the willingness of the parties to accept the mediator. Where the mediator is not chosen by the parties, it is important to bear in mind that a respected or esteemed mediator who has no expertise in a given area may be more successful than a technically sophisticated mediator who does not maintain the parties' respect.

Arbitration

Arbitration is the referral of a dispute to a third party neutral who is empowered by the parties to make a decision on the issues presented to her. Arbitration contains the essential elements of court adjudication: proofs and arguments are submitted to a neutral who has the power to issue a decision that is binding on the parties. The arbitrator essentially acts like a judge, but unlike a judge holds only the authority granted to her by the arbitration clause in the contract. The arbitrator's decision can be binding or advisory and can resolve the entire case (liability and damages) or only a small (but important) issue.

The key issues in arbitration are how many arbitrators will decide the issue; who the arbitrator is; which issues will be resolved; whether the decision will come with a reasoned legal opinion or only a short award statement; what rules apply; whether there will be discovery, and how much; and most importantly, whether the arbitrator's decision will bind the parties. These questions are often partially resolved before the dispute arises in boilerplate contractual language agreed to by the parties, and/or in union or guild contracts. Such contract language frequently enlists the services of organizations such as the American Arbitration Association, J.A.M.S./Endispute, Inc., Arts Arbitration and Mediation Services (part of the California Lawyers for the Arts).

Choosing Between Mediation and Arbitration?

For several reasons, arbitration is the less favored alternative of the two. First, arbitration is more formal than mediation. Any arbitration, and especially one convened pursuant to a union contract, includes specific steps to be followed, which while less onerous than a civil courts' discovery process, nonetheless require measured and detailed compliance. Second, compliance with these measures increases the duration of the process and there is a commensurate rise in expense. The assistance of an attorney is strongly suggested in arbitration. Moreover, if the dispute regards a union contract, the arbitrator's award may not exceed awards prescribed by the rules of the union. Finally, arbitration may not ease the tension between disputants, since as in litigation, there is a combative element to the resolution. In the entertainment field that requires genuine participation to accomplish a product, arbitration does not mend fences.

Mediation in contrast is less formal, less time consuming, and less expensive. It is more about talking through the dispute and figuring out a creating solution, more concerned with future relations and with satisfying the underlying issues of the dispute. Frequently, mediators report that personal issues underpin the heart of a conflict. Where a personal issue exists, a party to a mediation can privately confer with the mediator in an attempt to flush out the latent conflict. Lawyers need not be involved at the mediation session.

A mediation clause can be included in a contract or agreement. The inclusion of a clause sets up a mechanism for conflict resolution that begins early in the process, thereby increasing the likelihood of preventing a scrape from turning into a wound. Second, including a clause in the written contract at the onset of relations ensures that the parties have a positive sequence of events (such as a telephone call or private meeting with a respected mediator) to avert them from taking an adversarial tact.

A clause suggested by the Arts Arbitration and Mediation Services (a program of the California Lawyers for the Arts) suggests that a writer, artist, performer, or manager can request the inclusion of the following sample language:

All Disputes arising out of this agreement shall be submitted to mediation in accordance with the rules as set out in this mediation clause and/or the rules of _____(insert Mediation Service, Union, Guild, or Mediator's rules). If mediation is not successful in resolving the entire dispute, any outstanding issues shall be submitted to _____(insert arbitration or litigation) for _____(either binding or non-binding) resolution.;

Parties must begin the mediation process as soon as negotiations appear futile and in no event later than two weeks from the inception of the dispute. If one party obstructs the mediation process, the other party may (1) choose alternative means of dispute resolution including litigation, or (2) void the contract and all its terms.

The parties agree to adhere to all the mediation rules established by (insert Mediation Service, Union, Guild, or Mediator's rules) unless they mutually agree, in writing, otherwise.

The location of the mediation will be in _____(insert city and state).

This sample language offers several options and presumes that the parties to a contract discuss further conflict resolution and agreed ahead of time to certain parameters. Obviously, if the contract is not written, but made orally, these suggestions carry less weight.

Finally, mediation is particularly applicable to the entertainment industry, with its unusual designs and requests. Mediation is flexible enough to accommodate any industry or practice, assuming the parties themselves have chosen a mediator up to the task.

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