

LEVERAGING ATTORNEY'S FEES TO AVOID LITIGATION

By Bob Halagan, Halagan Law Firm, Ltd.

A little known secret outside of law offices is that very few lawyers actually try lawsuits in front of a judge or jury anymore. While criminal defense lawyers still actually try cases, most lawyers representing businesses who call themselves litigators are very rarely, if ever, in court for a trial. Why is that? Because it simply costs too much for their clients. That understanding can be critical for your business to ensure that you have the superior bargaining power to avoid lawsuits and to win negotiations when a business conflict does arise.

It is not unusual for businesses to spend \$30,000 - \$50,000 in attorney's fees on smaller lawsuits and hundreds of thousands of dollars on larger ones, only to get towards the end of the process and find themselves in a mediation or settlement conference that results in a negotiated settlement. The emotions that are involved in a legal claim often overwhelm a rational business decision that recognizes that the only thing a lawsuit does is cause money to change hands. A lawsuit is just another type of business transaction, one in which you are paying a steep hourly fee to either try to get the other party to pay you or to avoid having to pay them.

So how do you leverage the often frustrating legal system to increase your bargaining power? The first step is to review all of the contracting documents you are a party to for language relative to attorney's fees. Under our system of justice, normally each side pays for its own lawyers. However, it is permissible for parties to contract with each other and agree that one side will be entitled to its attorney's fees if it prevails. Every contract you sign, every purchase order you issue or receive and every other agreement for work to which you are a party, should be reviewed and considered with the following issues in mind.

1. One-sided fees. The best language if it is in your favor, and the worst if it isn't, is language that gives only one party the right to attorney's fees. If you have the superior bargaining power, you want the other side to be in a position to have to pay your fees if you prevail but to always have to pay its own fees even if it wins. Conversely, you should never sign a contract that puts you in that position if it can be avoided.

2. Winner takes all. More common language is a provision that says the prevailing party gets its attorney's fees. This means whoever wins, on top of the judgment also gets their attorney fees paid. While on its face this seem like a neutral provision, in fact it heavily favors the party that can most afford attorney's fees. If one side can barely afford to pay for legal counsel and the other side can hire the most expensive firm in town, the downside for one side is much greater than the other. If this type of clause is in your contracting documents, carefully consider who you are contracting with and whether that puts you at an advantage or disadvantage.

3. Hometown Court. Another critical provision is called the jurisdictional provision. This language requires any lawsuit to be filed in a particular state and even a particular county. There is a substantial convenience factor and a definite cost savings to having all litigation at a Court within easy access. Obviously having a case heard in Minnesota as opposed to Delaware or California is a significant advantage. Even having a case heard in Minneapolis as opposed to Rochester or Duluth can save significant costs. The possibility your attorney knows the judge and can assess how he or she might respond to a matter is also potentially very valuable.

4. Arbitration/Mediation. A cost effective alternative to litigation is a required arbitration or mediation process. Arbitration is a less structured form of litigation where both parties pay for a neutral third party, usually a judge or someone with experience in a particular area, to hear the case and make a decision that is binding on both parties. Appeal rights are very limited and the arbitrator's decision has the same effect as a court judgment. Arbitration will save some legal fees and costs and is quicker and more convenient than using the courts. Mediation is a different method of dispute resolution where the parties pay for a third person to help them negotiate a settlement. The difference between arbitration and mediation is that mediation does not involve a binding decision by a third person. It is an alternative means of negotiating that is usually more effective than the parties trying to settle things face to face.