

# Newsletter

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## LETTER FROM ERIC...

We've all been there, in the midst of a dispute, wondering how it happened. As some of you know, I have two rules of thumb to avoid disputes. First, make clearly understood agreements. And second, avoid doing business with difficult people.

When disputes do arise, I almost invariably counsel my clients to settle them rather than file lawsuits. There are two exceptions: when someone has intentionally harmed a client (the case if you've been defrauded or someone has stolen from you) or when the dispute involves real property rights or boundaries that cannot be resolved outside of a court's judgment.

Since disputes are not 100% avoidable, this issue of the Newsletter addresses how to handle disputes as they arise, what to do if you do get served, and what you can gain from different forms of alternative dispute resolution.

I hope you're enjoying a bright business outlook. Please stay in touch and let me know how things are going.

Sincerely,

*Eric D. Morton*

## HANDLING DISPUTES WHEN THEY ARISE

If the inevitable occurs and you find yourself sliding into a dispute, here are some strategies to help you resolve the matter before it escalates.

Most disputes are about money. Maybe a company has cash flow problems. You might have a customer who's stopped paying their invoices, or stopped paying them on time. If that is the case, do not wait and hope that things will get better. Act sooner than later. Call the other party and express your concerns. If the other party can't give you a realistic timetable for getting caught up or if the other party breaks that agreement, stop doing business with them. If your company finds itself in arrears, talk to your creditors sooner rather than later, agreeing to payment arrangements you can make. If you can't get caught up, then stop ordering. The solution for both sides of this problem may seem harsh but it is my experience that continuing a bad course of action merely leads to greater problems.

If you have a genuine disagreement over a contract's terms or its performance, the first thing to do is meet and discuss the matter with the other party. Have the express intention of finding a solution to the disagreement. Take the position of seeking a solution to the disagreement rather than proving that you're right, and you will often be

amazed at the results. If you do come to a solution, then get it in writing, preferably at the same time. Continue to communicate often since further disputes may arise. Finally, evaluate whether or not to continue to do business with the other company.

It's surprising how often personalities come into conflict during the performance of a contract, where the parties take a dislike to one another or simply don't know how to communicate with each other. Successful business relationships often involve overlooking the quirks or personality traits of other people who just don't resonate well with your own. Look out for warning signs, such as an employee who is continually frustrated in dealing with another company. Or you find yourself bristling each time you take a phone call on a particular project. One curt reply or off-hand remark can lead to a breakdown in the business relationship. I have handled several lawsuits that originated as a personality conflict and grew ever stronger from the ego investments of the parties involved.

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If you detect warning signs, the first thing to do is be honest with yourself. Simply admitting that you just don't like someone is the best way to head off a dispute. You can also talk to an employee for the same purpose. Finally, don't take things personally and watch what you say.

No matter what type of dispute you encounter, there are a few universal points you should remember.

**Don't ignore the problem.** A dispute you ignore always gets worse, never better. Investigate what is happening. Don't jump to conclusions. Honestly find out what has happened and evaluate the situation.

**Communicate early and often.** Unless you actively state your position, you tacitly agree with the other party. If you disagree with someone's actions or interpretation, state your position clearly. Simply state the facts. Communicate with someone at the appropriate level of the other company. The owner may not know what is happening until things have gone too far. Be conciliatory. Always make clear that you desire to seek a solution to the problem. Listen to the other side and read what they write.

**Don't get angry.** This may be impossible but do not act, speak, or write out of anger. This is when to talk to a mentor or friend. Not your attorney. Wait until you have vented your anger before you talk to a lawyer. I waste a lot of time and my clients' time listening to them vent. Take adjectives out of your language when you speak or talk. No matter what, do not add unnecessary insults when you communicate with the other party.

If you reach an impasse, talk to an attorney who can help you evaluate the situation objectively.

If you do speak with an attorney, leaving your anger out of the conversation will enable the attorney to more clearly understand the substantive issues you face. Your anger clouds how you

present the facts and convey the situation. I've had clients so angry that they were almost incoherent about the dispute. It's not that their anger wasn't justified, it's just that it didn't add anything. Before you talk to an attorney, outline what happened and include all the facts, even those that may be unfavorable to you. Bring all the relevant documents when you meet with an attorney and explain the situation from the start. Be prepared to answer many questions.

**Make a business decision.** Sometimes, you may not reach an equitable resolution. In that case, don't think in terms of proving you are right or making an example. Instead, make a business decision as to whether to continue with the dispute. The cost of litigation is enormous. You might have to continue if the dispute concerns something core to your business but it's sometimes in your best interest to give the other party what they want and walk away. The best revenge may be in declining to do business again with a difficult or unresponsive company.

## ALTERNATIVE DISPUTE RESOLUTION

It's always my hope that clients can resolve disputes quickly before the costs of time and money, not to mention bad feelings, escalate. Unfortunately, some disputes simply won't go away no matter how hard you work toward resolution. You may want to throw up your hands and dig in your heels for what looks like an inevitable conflict. With a lawsuit looming, why continue to negotiate? But the truth is, that with an imminent lawsuit on the horizon, the need to keep seeking an alternative resolution is even stronger. Here's why.

Over the last 20 years, the legal profession—and judges in particular—have come to recognize the extraordinary costs of civil litigation and the frequently unsatisfactory outcomes for parties in a civil case. Attorneys and

judges have also recognized that most parties to civil lawsuits are best served by an early resolution.

So the courts now go to great lengths to encourage parties to civil suits to settle. There is some irony in the fact that companies often sue one another after failing to resolve a dispute, only to find the court leaning on them to settle the case. So let's look at some of the ways to resolve a dispute short of trial.

These means are generally referred to as "Alternative Dispute Resolution" or ADR. They include settlement conferences, mediation, and arbitration.

A **settlement conference** is a meeting between the parties and their attorneys, usually held at the courthouse with a judge presiding. The judge meets with the parties and their attorneys privately in chambers to urge them to settle. In San Diego County, the courts also appoint two experienced attorneys to conduct settlement conferences. Settlement conferences are normally concluded within an hour or two. If a settlement is reached, no one is found at fault and each side bears its attorneys fees and costs. There are no fees or costs paid to the court. Settlement conferences generally work unless the parties are too invested in their case to settle quickly. In such cases, mediation will be more effective.

**Mediation** is a proceeding typically held at the office of an attorney in private practice or a retired judge. A mediation may span 3-4 hours, or even an entire day. A mediator reads briefs prepared by the parties' attorneys in advance of the proceeding, taking time to learn about the case. During the mediation, the parties and their attorneys meet with the mediator to go over the ground rules, including the rule of confidentiality. In California, all settlement negotiations are confidential so that the parties and attorneys can speak candidly.

Each person present at mediation has an opportunity to say something about

the case and their position. This allows the parties to “have their say” and effectively facilitates settlement in itself.

After meeting jointly with all the parties, the mediator meets with the parties privately or may meet with the attorneys alone to give a frank assessment of the prospects for settlement. A skilled mediator listens to the parties and works steadily towards a settlement that each side can live with. As with settlement conferences, the whole point of the mediation is to settle the case. No one is found at fault and no one wins.

The good news is, *mediation works*. In almost every mediation where I’ve participated, the parties reached a settlement.

While settlement does not necessarily result in reconciliation—anger or resentment often persist—the parties have nevertheless settled the case and can move on. There is an old saying that a bad settlement is better than a good judgment. And every client I’ve represented that came to a settlement has fared better than they would have if the case had proceeded to a trial.

A mediator’s fees are paid by the parties. Although this can be a significant cost, especially for a retired judge, the benefits outweigh the expense.

While settlement conferences and mediation make no conclusions about the facts of the case and result in no decisions about who was right or wrong, **arbitration** does make such decisions.

Arbitration is the private determination of civil disputes outside court and can be **binding** or **non-binding**. *Binding* arbitration is frequently stipulated as the means of dispute resolution when parties enter into a contract. *Non-binding* arbitration is usually a more informal settlement technique encouraged by the courts after parties have filed a lawsuit.

The courts provide lists of attorneys who will act as arbitrators when the parties agree to this means of resolution. Organizations such as the American Arbitration Association (AAA) also offer arbitration services. The AAA refers cases to arbitrators with different areas of expertise and has rules of conduct for an arbitration. Other entities, such as the Contractors State License Board, offer arbitration services to their members. Those arbitrations are conducted by the Offices of Administrative Hearings.

Simply put, arbitration is a trial held by a private arbitrator. The arbitrator is usually an attorney or retired judge. The arbitrator may hold a hearing and take testimony from witnesses, either in writing or verbally. Often, arbitrations are very informal and the rules of evidence are very relaxed. Other times, arbitrations are conducted very formally, using court reporters and strict adherence to rules of evidence.

After hearing evidence and reviewing documents and briefs, the arbitrator gives an award. If the arbitration is binding, the winning party can take the award to court and ask that it be recorded as a judgment. If the arbitration is non-binding, then either party can request a trial, although the arbitration will often result in a settlement. There are several advantages to binding arbitration. First, it can be fast. Written testimony can be offered into evidence during arbitration (instead of live testimony), making the process less expensive and time-consuming than a trial. The award is final. There is no appeal from an arbitration award, so the parties know they will reach a resolution of the case. Arbitrators are usually chosen for their expertise in a particular field, so that the trier of the case is knowledgeable.

However, there’s a flip side to these advantages. A binding arbitration award cannot be appealed except for extraordinary reasons. Even if the arbitrator is completely wrong on the law or the facts of the case, the courts will not disturb the award. There are few pro-

cedural or evidentiary safeguards in arbitrations. Furthermore, arbitration can be expensive and put those with fewer financial resources at a disadvantage.

My clients over the years seem to prefer arbitration. They like the speed and finality. They prefer the informality of the arbitration hearing and the decreased complexity and burden on testimony and evidence.

ADR clauses are more and more popular in written contracts. Usually, an ADR clause will call for any dispute between the parties to be arbitrated. In recent years, some ADR clauses will also call for the parties to mediate a dispute before they file suit or demand arbitration. My clients, particularly business owners who have been through lawsuits, greatly prefer such ADR clauses in their agreements.

Creative dispute resolution means going for results. Whether you informally resolve a dispute before a lawsuit is filed, or you find yourself in a more formal venue for ADR, you are usually served best by realistically looking at the alternatives.

## WHAT NOW? I’VE BEEN SUED!

My clients all know that I like to *avoid* lawsuits. But since we’re talking about disputes in this issue, here are some practical tips about what to do if you *are* sued.

The first indication that you or your company is being sued is when someone serves you with a summons and complaint. This sounds very straightforward and obvious, right? Yet it’s not uncommon for people to be served and not realize they’re being sued. First of all, process servers dress very informally. When they hand you a summons and complaint, they don’t announce the nature of the lawsuit, who hired them, or even that the specific nature of the documents they

hand to you. They may say something like, "I'm serving you with these papers" as they place them in *your* hands and walk away. They might even serve someone else in substitution of you.

I'm no longer surprised when clients tell me they were served with a lawsuit but didn't understand what it was. **The key is to read what you have been served.** Look for a paper with the word "Summons" at the top. It is written in sixth grade English (and Spanish) and tells you in plain language that you are being sued, and who is suing you.

**Beware of substitute service.** If you are not at your usual place of business, a process server can serve someone else in substitution of you. The law says that substitute service may be made on the person who appears to be in charge of the business, but in practice this usually means the receptionist. **Make clear to the people in your place of business if anyone hands them legal papers then they must give you those papers as soon as possible.**

**Don't ignore the matter.** Don't be tempted to lapse into denial after being served with a lawsuit. If you don't read the papers immediately, you're courting disaster. Don't kid yourself and say "it's all legalese." Talk to an attorney right away. Defendants in State courts have only 30 days to respond. And in Federal court, you must file a response within 20 days.

The bottom line is this: Any time you are served with a document, read the papers and make an appointment to discuss the matter with an attorney. Don't call the attorney for the party who filed the lawsuit, as he or she can't give you any advice and is not apt to negotiate with you at that point.

Before you meet with your attorney, outline a chronology of the events that led up to the case and gather all documents related to the matter. In this way, you will be prepared when you talk to your attorney.

By all means, don't panic. But it's worse to do nothing at all.



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#### **ABOUT THE NEWSLETTER...**

The *NEWSLETTER* is published in Carlsbad, California. We welcome your suggestions for future issues. If you would like to be removed or added to our mailing list, please let us know.

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