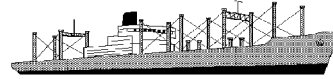




Rollin' On [®]



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MEDIATION: HEDGING BETS AND SHUTTLE DIPLOMACY

Here's the deal. You have either filed a lawsuit, or you are defending against a lawsuit. On the outside, you posture well, sending signals, through your attorney or otherwise, that your case is bulletproof. You show no desire or need to try to settle. Let the other side go first with a settlement offer, since you have the strong hand.

The reality is that in most lawsuits, neither side's position is a slam dunk, which means that there is a possibility, or even probability, that any given party might lose. After all, what is the other party thinking? Frequently, both sides have the same belief in their respective cases, which means that one is wrong (for now we will put aside the compromised verdict or order).

There is also the fact that even if you are right, and even if you win, the cost of victory could be high. Attorney's fees are only awarded where there is a written contract which provides for an award of attorney's fees to the winning side, or when there is an applicable statute, which is not very frequent, that does the same thing. So it may make sense to try to avoid the victory dance, assuming there is one, in court and just get the thing done and move on.

Just in case you need more encouragement to entertain the idea of settling, there is also the chance that if you go into Courtroom A, you might win but if you go into Courtroom B, you might lose. That is not to suggest the law is arbitrary, or that the judges are flakes, but just the reality that different juries or judges might see things differently. As for transportation law, most judges don't know Carmack from

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tarmac, or worse yet, they think they do, which means that there is some unlearning (like undelete on a computer; before Bill Gates, who ever used that word?) to do.

So you decide to give mediation a shot, although this alternative is likewise not bullet-proof. Mediators get paid, a cost that is usually shared equally by both sides. Also, during the process you might give away, and in fact will presumably give away, some information that you would use in your case. So if you elect that alternative and don't settle, then you've added to the expense, plus you may have weakened your position, not an enviable outcome. During the process, you wonder if the other side is acting in good faith, but the other side may have the same thoughts about you.

OK, let's say that you've decided to go forward with mediation, which is frequently scheduled for one-half day or full day sessions. Prior to the big day, each attorney prepares a confidential brief, letter or document that is furnished to the mediator in advance. This is a departure from normal procedure, where everything that is given to a judge or arbitrator must be furnished to the other side. On the big day, each side shows up with their attorneys. The mediator may bring everyone into one room for a general hello-how-ya-doin' thing, or instead each side may be shown to separate rooms. Either way, at a point early on, the parties are separated, and then shuttle diplomacy begins.

The mediator spends a lot of time with one side, trying to absorb and

learn that side's deal, then walks down the hallway and does the same thing with the other side. These sessions can be lengthy, so it's not like a path is being worn between the two rooms. Instead, the process is more deliberative. On the one hand, you are allowed, in fact encouraged, to put your best foot forward and show just how good your case is. On the other hand, you are forced to confront certain realities that could be your undoing. Of course, the other side is enduring the same process, thoughts and emotions.

During the process, the number drill is on-going. Each side has a starting point, and those starting points could be miles apart. As time goes on, and the mediator returns with the other side's response to a given position, you reflect on your stance, as well as the viewpoint of the other side, and depending on the strengths and weaknesses that you see on both sides, you frequently back off somewhat from your starting point. In fact, for the process to work, both sides usually need to backpedal. Even if you are confident in your position, you may need to relent a little just to allow the other side to save face. But usually both sides need to take a deep breath and retreat. And so it goes.

In federal court, you may be able to get a judge to mediate, at no cost, which is a pretty good deal. From the court's point of view, a few hours of mediation could save a lot of court time. A litigant should be comforted in knowing that a federal court judge has been around the block. Our local federal courthouse is very impressive, so you can see your tax \$\$ at work.

That's it for now. Until next time, keep the cargo *rollin' on!*

The Obligatory Disclaimer

This newsletter is for informational purposes, does not provide legal advice and does not create an attorney-client relationship.

Short Bio

Admitted to the state bars of Oregon, Alaska, Florida and Massachusetts. Practicing law for over 25 years and emphasizing transportation law, business law and related litigation.