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# THE LEGAL PAD

Practice of Excellence

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## A Newsletter of Current Business and Legal Matters

In This Issue:



## *What Are Your Risks with Employees Bringing Their Own Electronic Devices for Work*

*By James R. Vann*

You may have heard of the idea of "Bring Your Own Device to Work" (BYOD) and wondered what it means, or, you may have not thought too much about it. As is always the case as it seems, almost any activity which employees engage, could have an impact on the employer. Thus, employers need to be aware of this idea and decide how to address. The question is does it matter if employees bring in their own electronic devices to use in work? The answer is yes!

As you well know, most employees can now be effective in their work almost from anywhere as a result of improved electronics. The electronics used today are becoming easier to access and easier to be used by people in the work environment.

Corporate data and information can now be available on personal devices very easily (cell phones, tablets, laptops, etc.). Employers need to consider how corporate data/information is to be stored, secured, used, accessed, protected and ultimately destroyed. Employers should consider how to determine if there is a security breach of corporate data/information and how then to give notification of the breach.

As you have already considered, the question or security and control of the data/information is paramount! How can your business secure corporate data/information on devices which it does not own or manage? What happens to the information on the device if it is lost or stolen and the employer does not know? What is the impact of employees using the employer's network at work for internet access on their personal device? One other concern is the discoverability of the data/information on the personal devices in case of litigation.

There are many factors to consider regarding BYOD. Employers want to offer an easy way for employees to get work accomplished while also protecting important corporate data/information. The solutions in handling electronic information and data access are numerous. The decision of how information is accessed by employees should be studied and policies written. Obviously, information technology staff should be in on the conversation. Others to include in the conversation are the human resources staff, financial team members and your legal counsel. Be sure to have a policy that protects the business and the data/information entrusted to the business.

There are cases which are starting to pop up across the nation concerning these issues. Staying informed as this process develops is important. If you have questions, please feel free to let us know.

# *Seven Tips for Negotiating In Business Today*

*By James R. Vann*

It is such an honor to work with and help our clients in their business as they negotiate through numerous transactions and relationships. It is always interesting to help clients as they communicate with the opposing parties as the parties try to obtain a resolution to their needs. The following seven tips are based upon my experience in witnessing hundreds of transactions recently.

1. **List the accomplishments you want to achieve**. Many times, writing out and listing the objectives you hope to achieve will help in prioritizing the things you really want to accomplish. Even though this process seems simple, it generally helps in determining the real needs and wants in negotiating.

2. **Ask for the things you want**. Successful negotiators generally are clear and decisive as to what they want. Many are assertive and direct. This can be accomplished while still being kind and professional. I am amazed at how many times when people are clear about what they want or need to accomplish, stating it with decisiveness and directness, almost makes it seem like a foregone conclusion that it must occur. Many negotiations include the dance of people asking for the things they really need and not backing off. Making sure that your needs are met while maintaining professionalism and respect for the other side's point of view is key.

3. **Don't rush the negotiation**. More times than not, the best negotiations have resulted in our clients not being in a hurry to get it over. This has been evident recently more than ever. Not rushing the negotiating, conversation and expectations result in a much better outcome most of the time. Be patient.

4. **A great time to listen and learn**. Listen to the other side. Very few people are willing to come right out and say why they cannot or will not take a certain action to get to resolution of a transaction. However, if you listen close enough, often times you will gain an understanding of why they cannot or will not do so. Then, the power shifts back to you for you to determine a workaround the barrier to accomplish your goals. When negotiating with clients in mediation or in contracts for clients, when we listen close enough, we hear the real issues coming to light. Allow those barriers to become opportunities.

5. **Keep your numbers close to your chest**. When the negotiations turn to the numbers, often dollars, keep your bottom line close to your chest. Keep your aim high if you are asking for money and be willing to move slowly. Once the number comes down, it is almost impossible to get it to go back up. Thus, be willing to move but move slowly and optimistically. Showing a forecast of how you plan to move in your numbers can be a benefit in helping the other side getting closer to your number. Also, being willing to say "no" to an offer can be beneficial in negotiations.

6. **Keep the negotiations professional, not personal**. Keeping negotiations on a professional level and about the issues helps protect the negotiations from becoming personal. Focus on determining what the issue is and how to solve the issue. Avoid focusing on how unprofessional the other side might seem. Try to understand their actions and/or words and use that to your advantage.

7. **What are the pressure points for the other side**? Knowing as much as possible about the other side usually provides value in negotiations. Does the other side have a deadline to meet? Are there internal or external pressures to solve the issue? What does the other side need to resolve the issue? What happens if a resolution is not reached? What is the worse and best case scenario for the other side? These are a few questions which can help determine the need for the deal for the other side.

I hope these ideas and suggestions are helpful to you in your negotiations. If you have questions about negotiations, please feel free to contact us.

# *Prove It*

*By James A. Beck*

In legal matters, most of us believe whatever is right, fair and just should prevail. In the real world of business litigation, that is not always the case. The question for a court to decide is not "what is fair"; the question is "what did you prove?" Having this understanding and mindset early on when a dispute arises can save frustration and money. In fact, the sooner a potential plaintiff or defendant can begin to think on those terms, the better.

When it becomes apparent that a dispute is brewing, it is time to begin assessing what can be proven that will allow a positive outcome if the dispute ends up in litigation. Remember, the opposing party probably has a lawyer that is almost as good as yours, and will be looking for every possible hole in your case.

Generally, our clients do an amazing job of providing documentation for their claims and defenses. Most are able to produce contracts, invoices and relevant correspondence as evidence. Of course, no case is perfect and it is to be expected that there will be deficiencies in a given case. Some of the common areas where opposing parties can find a weakness include missing documents and correspondence and misidentification of a party. The best way to plan for potential litigation is to take control of these matters early on, even before a dispute arises. The goal is to build and maintain a strong trail of evidence supporting your claim.

Since we cannot rely on what is right, fair and just, here are some areas to focus on now that the only relevant consideration to make is what can be proven:

**Documents**: Perhaps the most useful set of evidence in a business dispute are the documents establishing and governing the relationship and illustrating the communications between the parties. Important documents include emails, letters, contracts, invoices, copies of payments made and text messages, among others. It is imperative that you retain all documents related in any way to a case (or potential case).

**Identities**: Although it is often overlooked, correctly identifying all parties involved is vital to the outcome of a case. Key issues include the correct name of the individual or entity with whom you dealt, who signed the contract and other relevant documents, whether the signor had the capacity and authority to sign, the identity of the person who accepted delivery. Again, documentation is your weapon. In addition, always research and confirm the name of the individual or corporate entity prior to entering into a transaction.

**Witnesses**: The witnesses will provide testimony regarding the case. One way to plan ahead with "prove it" in mind would be to keep a record of the names of the people who may have knowledge of the dispute, which could be anyone involved in ordering your goods and services, the delivery or acceptance of the goods or services, and anyone who was present when the contract was signed.

**Law**: While a non-lawyer is not likely to have substantial knowledge about all of the law affecting a dispute, knowing the basics of the subject matter is useful. For example, a supplier who understands basic lien law has a better chance of succeeding on a lien claim because he or she knows what is required at various stages of a project as far as notice and documentation. Similarly, a person who executes contracts on behalf of a company should have a basic knowledge of what constitutes an offer and acceptance, consideration and even authority to sign documents.

Litigation can be a drawn-out, costly and frustrating process with results that are sometimes unfair. Approaching day-to-day business with a mindset geared toward being able to prove your side of the story is one way to reduce that angst and improve the bottom line.

# *Court of Appeals Clarifies When Owner is Responsible for Tenants' Dogs*

***By Joseph A. Davies***

Many landlords choose not to allow dogs on their properties for fear of being held liable if the dog injures someone and the tenant lacks the means or the insurance to pay for the damage. In February, the North Carolina Court of Appeals clarified the law in North Carolina regarding when an owner of property is liable for injuries caused by their tenants' pets. In Stephens v. Covington, the landlord knowingly rented a home to a family that owned a Rottweiler. Because of the close proximity of the houses in the neighborhood, the landlord and tenant sought the advice of Animal Control regarding how to keep such a dog safely. Following the advice of Animal Control, the owner and tenant installed a fence as well as signs warning of the dog. Despite these precautions, the plaintiff in the case, an eight-year old boy, was injured when he was visiting his friend, the tenant's son. The issue in the case was whether the owner was liable to the plaintiff, given that the owner knew that the tenant had a dog and that the dog was a Rottweiler. The court decided that mere knowledge of the dog and the breed did not make the owner liable for the injury, and distinguished this case from previous cases where the landlord both knew of aggressive or vicious tendencies of an animal and had sufficient control over the premises to cause its removal. All of the evidence in the case indicated that the owner had no knowledge of any previous aggressiveness on the part of the dog. Therefore, the Court of Appeals determined that the landlord could not be held liable for the plaintiff's injuries.

# *Accepting a Cashier's Check Is This Immediately Good Funds?*

*By James R. Vann*

When a customer wants/offers to pay for goods or services with a cashier's check, can you count on the check clearing the bank without any potential problems? Many times, we get questions regarding whether a client should request a cashier's check to ensure payment for goods or services provided.

A recent case decided by the North Carolina Court of Appeals provided additional guidelines on how a cashier's check should be handled. The case is *Lawyers Mutual Liability Insurance Company of North Carolina v. Mako.*

The North Carolina General Statutes provide that a cashier's check is to be treated in the same way as a traditional check. Thus, "a cashier's check must undergo a provisional settlement period before it can be deemed irrevocably credited by the payor bank". In business terms, this means that a cashier's check should be treated like any other check due to the fact that the check could fail to be credited to the payee's account due to a several factors.

Pursuant to North Carolina law, a traditional check cannot be considered or treated as fully credited to the payee until the bank has either paid the check or the period of time for the bank to reject the check has passsed. The same provision is true for cashier's checks.

If a customer is offering to pay for goods or services with a cashier's check for immediate credit of the check, take caution. There could be issues with the cashier's check properly clearing the bank. This could in turn cause a loss for your business, especially in light of recent fraudulent activity having to do with purchases and/or transactions over the internet or electronic transactions. These types of occurances seem to happen more often.

If you have questions or concerns about these types of transactions, call your bank or legal counsel to get further assistance.

# *Do You Really Want to Arbitrate?*

***By Joseph A. Davies***

Arbitration clauses in contracts can be extremely beneficial, so long as you are sure you want to arbitrate. The Court of Appeals recently reinforced the judicial system's strong presumption that agreements to arbitrate are enforceable in nearly every context. Many of you may have arbitration provisions in your contracts without having stopped to consider what that might actually mean. In many cases, arbitration can be a less costly and a faster alternative to filing a lawsuit, particularly in larger disputes. However, the upfront costs of arbitration can be much higher than filing a lawsuit, meaning that in a case where you would much rather file a small claims action, the debtor could force you to file an arbitration action instead. Arbitration clauses can be a double-edge sword; while most people consider the benefit of being able to choose to arbitrate instead of litigate, many forget about the possible drawback of being forced to arbitrate. Of course, if you file a lawsuit and the defendant does not raise the arbitration provision as a defense, then you will remain in the court system. (The opposite is also true – the right to arbitrate is waived if not raised early in litigation.) In some cases, however, the defendant may recognize that moving a dispute to arbitration could mean the difference between you pursuing the claim and deciding it's just not worth the expense. The bottom line is that if you have any provision in your agreements that state that any dispute will be arbitrated, you must be prepared to have that provision used against you.



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