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Practical Tips on Commercial Mediation

Mediation in commercial litigation presents unique and different challenges than the typical personal injury cases with which many litigators are familiar. Commercial litigation cases often involve multiple parties, subtle but critical conflicts, and can involve much more than just money. The paramount interests of the parties may center on goodwill, market share, pressures from competition, or a host of other economic influences. Pain and suffering doesn't apply, and reputation may be everything. The practical dynamics of this area of alternative dispute resolution are explored below. In next month's ADR Committee article we will focus on the nuances of commercial litigation.

Convening the Parties

Effectively presenting issues in cases with commercial litigators depends on more than a general understanding of a client's business and may mean the difference between success and failure in resolving cases through mediation. In most commercial cases, parties are ordered to mediation or are otherwise obligated by contract to mediate before arbitrating or litigating. The mediator's first task is getting the proper parties to the table.

By and large, commercial litigation has moved outside the courthouse. Client reminders of the advantages of mediating commercial disputes include factors such confidentiality, resolution at reduced expense, removal of uncertainty as to outcome, and less business disruption. Likewise, the need to preserve ongoing business relationships or concern about establishing an adverse industry precedent may be considered. Speedy resolution resulting in avoiding protracted litigation and appeals prove attractive to parties as well.

Should They Need Convincing

Decision makers in business who have encountered lawsuits usually understand the expense and aggravation of litigation. They have companies to run and far better ways to use financial and human resources than at the courthouse. Through mediation they are able to explore privately the opposition's interests, concerns, motivations, and goals. Commercial mediators, much like those in other types of cases, are adept at finding common ground to identify possible resolutions.

Along the way, lawyers will participate in evaluating the case, assessing legal positions, and gauging potential litigation outcomes – all of which may be challenged or tested by a commercial mediator. As counsel and the parties gain confidence in the selection of a mediator with commercial experience, they may be in more of a mindset to resolve the dispute on their interests rather than positions.

Appearance Planning

Rule 1.720 of the Florida Rules of Civil Procedure requires physical presence of a party at mediation unless otherwise stipulated in writing or excused by court order. A representative of an insurance carrier for any insured party who is not such carrier's outside counsel is deemed to appear if that person has full authority to settle in an amount up to the amount of the plaintiff's last demand or policy limits, whichever is less, without further consultation.

Additionally, 10 days prior to appearing at a mediation conference, a notice shall be filed with the court and served, identifying the person or persons who will be attending the mediation conference as a party representative or as an insurance carrier representative. Though mediators are not empowered to police this rule, and compliance has been slow to develop since the rule change in 2012, given the last-minute nature of the way things transpire in litigation today, it has been a rude awakening for some lawyers and litigants.

Regardless, it is crucial to have everyone with a say on the final settlement decision present at the mediation to hear the points made and experience the process. If a business partner, officer, spouse, or family member (sometimes all of the above) is going to help make the decision, he or she needs to attend. A deal struck after a full day of bargaining may evaporate if the need to confer with a missing decision maker suddenly arises in the eleventh hour. This must be balanced with attendees that are simply yes-men to the litigant or lawyer, which can lead to an inability to perceive valid points about the weaknesses of a particular claim.

Preparation

Success in commercial mediation is dependent upon adequate preparation of counsel and client. The best trial lawyers are prepared to try every case, even though statistics tell us most cases settle short of trial. A lawyer should know the important facts of the case – both good and bad. Counsel should be educated in the law applicable both to the claims and defenses, including the latest case law. Mediators, though equipped to do so at

the outset, expect the lawyers to have prepared the clients by describing the mediation process and discussing patterns of negotiation. Honest assessment of the strengths and weaknesses of the parties' positions, the likely result of litigation, and the potential expense will allow proper evaluation of whether a settlement makes sense.

Mediators often assess the ability of advocates using the quality of mediation submissions as evidence of readiness for trial and skill of the lawyer. By failing to submit a requested summary in confidence, or merely sending a stack of documents, the lawyer misses an opportunity to frame the issues and inform the mediator of the nuances in advance of the conference. Candid submissions are better than shared ones that repeat advocacy already apparent in the court file. Of course key pleadings, evidence, admissions, deposition excerpts, photos, and videos, are appropriate. Determining the presence and status of any commercial insurance coverage (and reservations of rights) is helpful to know as well.

Finally, whether the parties have or plan to engage in E-Discovery, the costs of specific types of electronically stored information subject to production in the dispute may overshadow the amount in controversy.

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