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Nuances in Commercial Mediation

In "Practice Tips on Commercial Mediation," published in July's issue of *The Briefs*, I shared some practical tips on commercial mediation. This article – a continuation of last month's topic – will explore the subtle distinctions in mediating business disputes as opposed to other types of litigation.

Relationships

Most business disputes result from the breakdown of a relationship. Commercial mediators with persistence are often able to ascertain the root of that breakdown. Just as in family law cases, there are typically underlying relationship issues. While it is conventional wisdom to try and separate the personal from the business issues, it is often the interpersonal that needs to be overcome to get to a satisfactory resolution.

Demeanor is also important to the process, and greeting adversaries without hostility goes a long way toward getting the ball rolling. Although parties through their counsel do present positions persuasively, it is best to avoid emotionally charged language or theatrics. For commercial litigation, the atmosphere at mediation should be more like negotiating a complex business deal than making closing arguments. Competitors may even end up becoming partners at the end.

Businesspeople typically view the financial aspects of a case in dollars and cents. However, commercial mediators often succeed by exploring creative, global, nonmonetary resolutions in cases that may seem to pursue only monetary claims. Communication can bring business relationships back to life. Parties might even agree to continue doing business on new, mutually acceptable terms. It is common for parties in intellectual property cases to enter into win-win licenses or royalties, or agreements not to challenge the validity of such rights in the future.

Strategy

Determining opening postures based on the result a business client seeks for a joint session can be dangerous. While probably the first opportunity in the mediation to convey to the opponent he or she faces a formidable adversary capable of litigating the case to conclusion, there are benefits to both parties acting sensibly at the outset of a commercial mediation. Whether clients say anything during the joint session should really be decided in advance. A sophisticated and well-prepared party may appear reasonable, convincing, and even speak better about a particular point than counsel. A sharp mediator will encourage the parties to save nothing for trial. It is also important to acknowledge weaknesses where they exist and explain why anticipated weaknesses might not really exist. Reasonableness and willingness to listen must prevail if a mutually acceptable outcome is to be had from the process.

The goal is to create movement, albeit sometimes through subtle changes in position, toward a settlement. Tracking the progress of the negotiations in terms of time and money can be useful, but there is an overemphasis on midpoints that often sabotages what otherwise might be a good deal, despite where it appears the settlement is heading. Skilled mediators make regular pulse checks and remind clients that negotiation takes time. They are always working in one room or the other, continuing the process and getting decision makers to consider the next move. As the mediation progresses, creative solutions can arise as information and documents are authorized for sharing with the other side. Additionally, in some commercial cases, there may be a point in the mediation where the lawyers acquiesce to the two principals meeting by themselves, reaching a deal without counsel being present.

Multi-party Cases

Commercial cases can have many participants, and not visiting those participants frequently can lead to frustration and aggravation directed to the process and even the neutral. Crucial to maintaining the trust of the parties during negotiations is the feeling that the parties are having their position heard and transmitted to the others involved in negotiations. Though some litigants may have deeper pockets or are alleged to be more at fault, the smaller players deserve attention as well. After all, they are in a lawsuit and have appeared to help extricate themselves from it, just like the rest of the parties seeking finality.

Impasse

Of course, there are many effective strategies to break an impasse, but they have become overused and gimmicky. The bracket, the mediator's proposal or silver bullet, have all been seen. Creativity is case-specific, and recognizing that a good settlement is probably one with which neither party is delighted, but that both parties can accept (even for very different reasons), is still a good rule of thumb. Value in a case can be affected by many factors beyond the merits, such as the expense and disruption of litigating all the way to trial, insurance coverage, personal exposure of a party's representative, reputation concerns, publicity, reported

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settlement of similar cases, and attorney experience. Adjournment may be appropriate, depending on momentum, and leaves some hope that another day spent resolving the remaining issues will lead to a successful conclusion.

Mediated Settlement Agreement

Because it is essential to get the settlement terms in writing before the mediation session is over – unless authorized representatives sign before everyone leaves – each party is potentially subject to buyer's remorse regarding the negotiated terms of the agreement. To avoid this, it is suggested counsel draft desired settlement agreement language before mediation that can be tweaked to reflect the deal that is ultimately reached. This could save hours of back and forth, as well as the expense of massaging what is usually non-essential language in the days that follow the conference. Commercial agreements do tend to be more lengthy and complex. Self-determined material terms essential to the settlement are usually not that different from the average civil case and are, of course, governed by contract law. Though many settlements are handwritten, counsel having a flexible framework available from which to adapt an agreement is good practice.

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