WHOSE MEDIATION IS IT ANYWAY?

by B. Christopher Lee, Esquire

The last decade has brought significant growth and acceptance of mediation as an alternative dispute resolution process. This is largely attributable to the increase in litigation costs and the desire by businesses to resolve their disputes quickly and economically. However, as more and more disputes are resolved through mediation, many attorneys have begun to view mediation as another opportunity to engage in adversarial tactics. Of course, this "litigation mentality" of counsel unfamiliar with the mediation process often causes the same expense and acrimony which mediation is intended to prevent.

Despite the popularity of mediation, many lawyers do not understand the process and fail to recognize the differences between mediation and litigation. Many are uncomfortable with the fluid nature of mediation, as they are comfortable with the structures imposed by rules of procedure and evidence. Many gravitate towards the goal of "winning" the mediation, even though a successful mediation should not leave either party thinking in those terms. On the other hand, some lawyers incorrectly assume that the non-binding nature of mediation means that they need not prepare and that there is no downside to an unsuccessful mediation. Quite to the contrary, opportunities for resolution can be lost forever if client objectives are not fleshed out and adequately presented to the mediator. Regrettably, some lawyers do not communicate weaknesses to their clients and create unrealistic expectations about the merits of the case, making mediation extremely difficult.

What does this mean to businesses with disputes? First, make sure that you have counsel familiar with the mediation process. Second, make sure that you stay personally involved in the process. In fact, small disputes with ongoing customers may be best resolved without active participation of counsel at the mediation session. The process can be quick, economical and can preserve the business relationship. For larger disputes headed towards litigation or already in litigation, you should involve counsel early. Preparation for the mediation should be thorough and involve the gathering of adequate information to make an educated settlement evaluation without duplicating the cost of the entire litigation discovery process.

In the end, it is important to remember that the dispute is yours. It evolved out of your relationship with another business, and you have the ultimate decision-making power. Even though legal analysis may suggest that your side will win in litigation, a favorable litigation result years in the future may not compare favorably with an immediate satisfactory business resolution.

As a client, you have the responsibility to approach mediation with an open mind and assist counsel in determining the negotiation strategy. You can enhance the process by realistically assessing the following:

1. Determine your wants and needs objectively to evaluate the case.

2. Identify what is really at stake in terms of possible results, costs and delay.

3. Determine whether there are any settlement options which will create a mutual gain for both parties.

4. Make sure that your representative attending the mediation has adequate authority to settle the dispute.

If both you and your counsel adequately prepare for mediation recognizing your respective roles and objectives, mediation can be a very satisfying experience. You will maintain the control of the resolution of your dispute, usually with great savings of time and money.

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