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Mediation is Not Enough

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In this article the author discusses why mediation should not be the only strategy for settling business disputes and suggests a greater emphasis on direct negotiation and other options for in house counsel.

The success of mediation as a method of resolving commercial disputes has come at a cost to a more fundamental, and often more effective, form of dispute resolution: direct negotiation.

The weakening of direct negotiation as a possible method of resolving the dispute begins with the decision to involve counsel. Whereas one possible reason to involve counsel is to introduce more objective professionals who can contribute greater expertise to the resolution of the dispute and hasten its conclusion, the opposite result is often achieved.

Counsel who have an ongoing relationship with the client, especially, those who have already been involved in the transaction which gave rise to the dispute, may have the same lack of objectivity and the same sensitivity to internal client politics, as the client itself. On the other hand, counsel who are selected on a case by case basis, particularly after a competitive process, are likely to focus on promising to outperform opposing counsel by deploying decisive arguments and employing aggressive tactics. It is only fair to expect that counsel who are chosen on this basis, usually on both sides of the dispute, will perform accordingly. The result is that the original dispute between the parties will very quickly be supplemented by new disputes between counsel which may escalate into abrasive conduct, if not out and out incivility.

Particularly in large and complex cases, this situation may seem inevitable. The introduction of mediation into the process may seem like a panacea, but it is not.

Now that mediation has become the norm at some point in virtually every commercial case, it has in many cases become an excuse for the complete abdication by counsel of any role in promoting the resolution of the dispute before the mediation or independently of it.

It is not uncommon for counsel to arrive at a commercial mediation never having previously discussed settlement of the dispute or exchanged any offers to settle. Where such “settlement” discussions have taken place they have often inflamed the dispute. Or they have involved the exchange of derisory offers not intended to bring the matter closer to resolution but to intimidate the other side with cost consequences if immediate capitulation is not forthcoming. As this dynamic has escalated, it has been easy for counsel on both sides to point to the behaviour of opposing counsel as justifying the infliction of maximum pain on the other side (thereby incurring the maximum cost) before the inevitable mediation, in order to “soften them up”. One frequent consequence of this approach is that the costs that have been incurred by both sides prior to the mediation represent a significant additional obstacle to the settlement of the case. In many cases, the costs overwhelm the original dispute.

Over 95% of all court cases settle. Therefore, the crucial issue with respect to any settlement method, including mediation, is not its success rate in resolving disputes. The crucial issue is how much time and money is spent before the method is used. The question is: does the ultimate outcome provide an additional benefit to either or both sides that exceeds the cost of the dispute resolution process? In many if not most cases the answer is no.

Corporate counsel have a number of alternatives to avoid this result. Here are some of them.

1) If the case is a routine business dispute, choose counsel with a track record of delivering resolutions on reasonable terms, in a reasonable time and at a reasonable cost. Ask for this information in the selection process.

2) Do not involve counsel, including in house counsel, who may be defensive about their prior involvement in the transaction or the dispute.

3) If the case is material to the company, retain control of the negotiation process and deal directly with corporate counsel on the other side.

4) Alternatively, in very substantial or important cases, retain different counsel to deal with the settlement process as opposed to the litigation or arbitration process.

5) Always ask counsel for a negotiation plan and strategy, not just a litigation plan and strategy. Do this up front, and revisit and revise the plan as needed throughout the dispute.

6) If the dispute involves a party with which your company has an ongoing relationship or which has a reasonable reputation, consider agreeing at the outset of the formal dispute resolution process to a cap on the legal fees that will be recoverable by either side from the other at the end of the case. Inform both sets of outside counsel of the cap and ask them to design a dispute resolution process accordingly.

7) Ask to be copied on all communications between counsel and ensure that written communications are civil and do not impair the possibility of settling the case whenever the moment is right.

8) Recognize that "bully" tactics – even when you have the greater financial resources and even when they succeed – will almost never produce a cost effective or timely resolution and may produce a permanent adversary in business that will do you harm on another occasion.

9) Remember that an effective form of adjudication will always provide leverage in negotiations to the side with the better case. For this reason arbitration, used effectively and not just as a mirror image of litigation, can be conducive to the more principled settlement of commercial disputes.

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