EFFECTIVE ADVOCACY IN MEDIATION

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Most commercial litigators pride themselves on their trial advocacy skills. To be sure, an effective commercial litigator must be an effective trial advocate. But to be truly effective as a commercial litigator, a lawyer must have more than trial advocacy skills. The simple fact of the matter is that most cases are resolved short of trial. According to a recent report in the New York Times (December 13, 2003), less than two percent of federal civil cases are resolved by trial. A substantial majority of cases are resolved through settlement.

These statistics are somewhat distressing for those of us who truly enjoy trial work, but they also serve to highlight the need for an effective commercial litigator to develop skills beyond trial advocacy. To be truly successful, a litigator must be able to achieve effective settlements. That is, settlements that advance the clients’ interests in the most cost effective manner. Mediation is one of the best ways to do that.

Types of Mediators

The point of mediation is not merely to split the baby or bridge the gap between the parties’ mutual settlement positions. The point is to obtain the best settlement possible. Perhaps the first key to effective advocacy in mediation is selecting the right mediator. Most mediators fall into the category of “facilitators” or “evaluators.” Some folks would add a category of “arm-twisters,” but usually the arm-twisters can more fairly be categorized as either facilitators or evaluators, and their arm-twisting tactics are simply that: a tactic.

A facilitator is a mediator who encourages the parties to find common ground. A facilitator’s primary focus is in urging the parties to communicate with each other in an effort to achieve a settlement that is truly a product of the parties’ efforts. Facilitators typically do not pass judgment on the parties’ positions. While it is an over simplification to suggest that facilitators merely shuttle back and forth between the parties, carrying messages, they are often perceived in that way by the parties. In the appropriate circumstances, a facilitator can be quite effective. This is particularly true where the parties obviously recognize the benefits of settlement and perhaps need some help getting over the hump (perhaps there are personality issues, issues of saving face, or a fear of making the first move towards settlement).

By contrast, evaluators do more than simply encourage communication among the parties. To be sure, an effective evaluator will encourage communication among the
parties, but an evaluator goes beyond that to explore the parties’ positions, raise questions regarding the positions and expose potential weaknesses (preferably in a non-threatening way), and candidly acknowledge strengths. A good evaluator will not attempt to force his or her opinions down any party’s throat, but should give honest feedback about strengths and weaknesses.

An arm-twister is more likely to attempt to coerce a settlement. If the arm-twister is a facilitator, they will do this through harping on concerns of the cost of litigation and the risk of going forward. If the arm-twister is an evaluator, they tend to focus undue attention to the weaknesses of a given party’s case, and the strengths of the opposing party’s case. Arm-twisters can be effective, although a mediation brokered by an arm-twister is likely to leave a bad taste in the mouth of one or both parties.

**Preparing the Client for Mediation**

Critical to the success of any mediation is properly preparing your client. Clients need to know how the mediation process works, although more sophisticated clients should be familiar with the process. More importantly, clients need to understand your approach to mediation. What do you hope to accomplish in the mediation? How do you propose getting there? Who will take the lead role, and how, if at all, will that change as the mediation progresses? Part and parcel of this process is understanding exactly where your client hopes to go with the mediation. It is, after all, the client’s case and the client’s money that is at issue. You will not be effective as an advocate in mediation if you do not have a thorough grasp of your client’s goals and desires. To the greatest extent possible, you must work to be on the same page.

It is important to outline for the client, as part of the lead up to the mediation, the critical issues in the case. Spend time highlighting the strengths and weaknesses of your case and the strengths and weaknesses of the opposing party’s case. Anticipate, to the greatest extent possible, the arguments that the other side is likely to make. Why is this so important for a mediation? First, a fully informed client can make more rational decisions about settlement. Second, the client is likely to hear many of the same points from the mediator during the mediation. A client that can convince the mediator that it has considered all important facets of the case is more likely to convince a mediator that its position is serious and reasoned, as opposed to mere posturing. Often this gets translated back to the opposing party through the mediator.

**Preparing Effective Mediation Materials**

As a general rule, a good mediator will give the parties some idea of what kind of mediation statement and materials they would like. At a minimum, the mediator should be given copies of key pleadings that frame the issues in the case, such as the Complaint, Answer, TRO or preliminary injunction pleadings, dispositive motions, and similar pleadings that detail the facts and issues. The mediator also should be given key pieces of evidence that either support your position or undermine the opposing party’s position. The goal is to provide the mediator with sufficient information that he or she can objectively understand your client’s position.
This does not mean that more is necessarily better. Just as is true of trial advocacy, effective mediation advocacy requires the attorney to sort the wheat from the chaff and focus on the information that truly matters. The mediation will not go far if you or the mediator are lost in a sea of facts. It is far better to give the mediator too little information, with the possibility of supplementing at the mediation itself, than to inundate the mediator with more information than they are likely able to handle without an inordinate investment of time.

Of course, you should provide a mediator with a statement outlining your client’s take on the dispute, including a reasonable outline of the critical facts. The presentation should be an advocacy piece, but it should have as much objectivity within that advocacy as is possible. To the greatest extent possible, you should anticipate what the opposing party believes its key supporting facts are and explain why those facts are either not supported by the evidence or are of less consequence than the opposing party contends. Your discussion should not be such an advocacy piece that it cannot acknowledge strengths in the opposing party’s position. To be effective in mediation you must be able to grapple with the risk that the opposing party has points that may be made effectively if the matter goes to trial.

It is important to give the mediator some perspective on settlement history. Have the parties discussed settlement at all? If so, give the mediator some of the history and explain why, at least from your client’s perspective, the settlement discussions have not been fruitful. Many mediators request – some even beg for – a realistic figure for settlement. In general, I have not found that to be particularly productive. Some mediators are too quick to use numbers provided by the parties as brackets within which they attempt to bridge the gap. Again, the point of mediation is not simply to work numbers. Rather, the point should be to come up with a settlement that makes sense. I believe this is better accomplished by not worrying about getting to the numbers too quickly. (Having said that, it is critically important that the attorney understand where the client wants to go with the mediation. But revealing that to the mediator will not necessarily result in an effective mediation and may even be counter-productive.)

In preparing a mediation statement, do not ignore issues of personality or emotion. Usually parties are able to conduct themselves civilly and engage in a productive dialog. When they cannot, or when you perceive a substantial risk that they cannot, the mediator must know that so that he or she can tailor his or her approach appropriately. Additionally, even when the parties can engage in productive dialog, if you are aware of or perceive possible obstacles to settlement that may not be apparent at the surface, let the mediator know. The mediator can then investigate the issue and surface it so that it can be dealt with.

Find out from your mediator if he or she is willing to speak with you prior to the mediation. Occasionally mediators will not do so, fearing that this is some sort of improper ex parte communication. I reject that notion, as the essence of mediation is ex parte communication. Talking with the mediator before the mediation can be extremely productive. If you are able to speak with the mediator in advance, encourage him or her
to demonstrate that they are listening to and hearing both parties’ positions. Nothing can kill a mediation faster than a mediator who gives the appearance of having reached a judgment too quickly. It destroys the credibility of the mediator for at least one party to the mediation, and that may be sufficient by itself to doom the mediation.

Advocacy During the Mediation Session

One of the great benefits of talking with the mediator before the mediation session is that it gives you an opportunity to learn how the mediator will conduct the mediation. Most mediators begin with a joint session in which they discuss the mediation process itself and request the parties to explain their positions. Some mediators prefer a very brief presentation, while others prefer a long joint session. Of course, some mediators do not conduct joint sessions at all. Knowing how the mediator will conduct the mediation allows you to properly prepare for the presentation.

Of course, you should plan your remarks ahead of time. Decide whether you or the client representative will take the lead, and whether that will change depending upon the circumstances. Remarks in a joint session should not be inflammatory or belligerent. Firmness is fine, but most important of all is a clear explanation of your client’s perspective on the dispute. Demonstrate a willingness to listen – it is often important for the opposing party to feel that it has been heard.

Generally, the discussion becomes more freewheeling when the mediation breaks into private caucuses. Decide in advance whether to play your hand close to the vest or lay your cards on the table. As a general rule, if you desire settlement and believe that settlement can be achieved, lay your cards on the table. In doing so, the most you give up is a bit of free discovery. On the other hand, if you can persuade the opposing party to agree to acceptable settlement you will avoid the unnecessary expense of going through discovery. In any event, the opposing party likely will discover the same information in discovery. Without giving such information, including legal arguments, you are far less likely to achieve a settlement.

Closing the Deal

If you reach a settlement during mediation, do not leave the mediation without signing at least a rudimentary agreement reflecting the basic terms of the settlement. Getting the settlement in writing will help protect against buyer’s remorse. Even though many courts have very liberal policies towards enforcing settlements, a settlement reached during mediation but not reduced to writing may not be enforceable due to the confidentiality rules that apply to mediations. See, e.g., National Union Fire Ins. Co. v. Price, 78 P.3d 1138 (Colo. App. 2003).