Inside Counsel as Sophisticated Users of the Mediation Process

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Answer quickly: What does a mediator do? What does a private lawyer representing a company do in mediation? Probably you are doing fine so far. Now answer: What does counsel inside a company do in mediation? Perhaps that last question was not so easy. Inside counsel’s role and potential strong contributions to a mediation proceeding are not well defined in the minds of many, so the goal here is to explore some potential role-driven strengths, sometimes overlooked, that inside counsel can bring.

Mediation practice, now in its early maturity, finds its participants settled into comfortable roles I would challenge by asking this question: What are the unique strengths available to each participant—business client, inside counsel, outside counsel, mediator and possibly ADR institution (such as CPR, JAMS or the like)—that are underused? Specifically, by virtue of position in this matrix of problem solvers, what avenues, pressure points and actions can inside counsel (“IC”) activate better than all others, to make resolution more likely and acceptable to all parties?

This account necessarily is nothing more than the personal views of an in-house commercial litigator on how to leverage the peculiar strengths of the inside lawyer’s position to enhance mediation process. While the methods and attitudes described grow from experience in commercial disputes, they should be transferable to other species of conflict.

LITIGATION IS UNBUSINESSLIKE

After a slow start, the increasing rate of acceptance and use of mediation by corporations is not surprising, given that the basic modus operandi of business is to reach agreement on a contract and then act cooperatively. In normal commerce one does not begin a deal by collecting up grievances, highlighting opposing interests, and then proceeding to fight over them zealously, as paradoxically is the norm in litigation. Once labeled “adversaries” by the legal system, people too easily morph into antagonists. Litigation is
unbusinesslike. It is more natural for businesses to seek agreement through mediation tools than to engage in direct conflict.

Give people the tools to fight, and they will; show them how to move toward agreement, and they just might get there. The special strengths IC can bring to mediation all stem from being business-oriented lawyers knowledgeable of and close to the business, with established trust from the client. Our first purpose is to use that special connection to enhance the success of our firm, which may or may not mean “winning” a case—but always means resolving it. In an adversarial proceeding, outside counsel’s job ultimately will be to “win” the dispute, which may not really be a win for the business. Attuned to business goals, IC is best positioned as interlocutor among business interests, legal realities and proposed solutions to seek something closest to a “win-win” solution.

It is common that a business client will never have been through mediation, and will need education. Every IC mediation expert has heard this groaner of a naïve question from a savvy executive: “But will this be a binding mediation?” As accepted as mediation has become, there is still fairly widespread ignorance of how it actually works, and IC is best positioned to educate the client into a more potent participant in crafting resolution. If salesmanship is needed to bring one’s client to the mediation table, you can pitch it according to principles of Early Case Assessment. In commercial cases, even defendants do not necessarily want delay. There is a cost to merely keeping a file open; and consumption of business resources toward mounting a defense, as well as relationship damage with the adversary,

1 Throughout this piece I assume the parties share a will to resolve a case voluntarily. Sometimes an unwilling party who is set on an all-out, earth-scorching war of attrition gets ordered to mediate by a court. That is the rare instance where mediation is nearly worthless.

2 Backgrounding the client on the process can save a lot of legal fees, and help you find much-appreciated “quality time” with your client. While it is not always possible or even economical for IC to be the primary “go-to” during a heated lawsuit, IC always can do the time-consuming initial legwork on a case and to provide basic client education in how lawsuits and ADR work. For one of many possible examples, business people often believe that everything said to an opponent in furtherance of settlement is protected. Actually, this is not true. Any limited privilege such as exists under FRE 408 and its state cousins, without more (such as a mediation agreement) leaves such statements generally admissible, with limited exceptions. Under laws of other nations, there may be no protection at all for such statements. I keep a group of form memos ready to explain most such things to clients, customizing them to the case. Paying OC to educate the client on the basics is a waste of money and also squanders an opportunity to grow a closer client relationship.