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A Peek Inside a Primer for Lawyers: Picker's *Mediation Practice Guide*

BY BENNETT G. PICKER

Special to the Legal. PLW

Bennett G. Picker, of Philadelphia's Stradley Ronon Stevens & Young, is the author of the 1998 book, "Mediation Practice Guide: A Handbook for Resolving Business Disputes." The book was a project of the American Bar Association Section of Dispute Resolution.

The author has chosen selections from the book for this publication, including his popular "25 Practice Tips for Effective Mediation Advocacy." In addition, Picker has put together some additional thoughts on the distinction between mediation to achieve business-driven solutions, and what he calls the "win-lose environment" of litigation.

BENNETT G. PICKER *is a partner in the law firm of Stradley Ronon Stevens & Young LLP and chairs the firm's ADR practice group. He is a former chancellor of the Philadelphia Bar Association.*

AUTHOR'S INTRODUCTION

In recent years, I have come to see mediation as a powerful tool to resolve business disputes early, cost-effectively and fairly. Of course, mediation should not be thought of as a substitute for litigation. Indeed, there is no substitute for strong trial skills and good case preparation. When there is a need to protect a strategic ownership interest, to establish a precedent or to defend a frivolous lawsuit, litigation may still be the best choice.

In the appropriate case, however, mediation can create a more direct, less risky and less costly path toward a favorable resolution. A skilled mediator can work with parties to a dispute to facilitate communication and to explore the potential for business-driven solutions. Many of these solutions are simply unavailable in the "win-lose" environment of litigation.

While the adversarial system remains the model for establishing truth and rights in criminal cases, civil rights cases and many other classes of cases, our perspectives are shifting when it comes to business disputes.

In most business disputes, parties to a dispute are seeking models that focus more upon the underlying interests rather than upon truth or rights. Speed and cost are of paramount concern. As a consequence, many of today's designs for dispute resolution are founded as much in business school models as they are in law school models.

Today, there is a panoply of ADR options available to permit parries to resolve their business disputes in ways that are often faster, better and cheaper than litigation. It is mediation, however, that has captured the most attention. Mediation should be considered as a potential road to resolution in virtually every business dispute which is amenable to a negotiated resolution.

Mediation is a powerful tool only in part because it provides an alternative to litigation that is less risky and less costly. The process also permits the parties to examine their underlying interests and develop creative, business-driven solutions.

In addition, a skilled mediator can overcome many of the barriers to negotiation which prevent the parties from accomplishing a negotiated resolution on their own. In particular, a skilled mediator can overcome party problems (such as anger and communication failures); differing perceptions (of facts, law, potential recoveries, risks or stakes); extrinsic pressures (such as linkage to other disputes or fear that constituents may criticize a settlement); and issue problems (such as whether the factual development is incomplete or whether delay may favor a party).

I have found that many lawyers and business executives are unprepared to seize upon the opportunities presented by mediation in a business dispute. In writing a book on mediation, it was my purpose to overcome this problem.

Below I have selected several of the introductory portions of my book which offer an explanation of the reason most mediations succeed and the significant opportunities afforded by the process. I have also selected a section entitled "25 Practice Tips For Effective Mediation Advocacy."

MEDIATION DEFINED

Mediation is a process that employs a neutral person - the mediator, - to facilitate negotiations between parties to a dispute in an effort to reach a mutually acceptable resolution. Mediations are:

- Voluntary.
- Flexible.
- Confidential.

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- Informal.
- Non-binding.

Unlike an arbitrator or a judge, a mediator does not impose a solution on the parties to a dispute. Instead, a mediator works with the parties to assist them in defining their objectives and achieving a resolution of their differences. Although mediation is a non-binding process, the result of this process in the vast majority of cases is an agreement that is both binding and enforceable.

Mediation often redefines the way in which parties view a dispute by looking beyond positional bargaining over issues such as "who breached" and the extent of a party's "damages." The process creates an opportunity to explore underlying business interests and to examine the relationships between parties to a dispute.

A skilled mediator, therefore, can help the parties overcome hostilities and legal posturing and can often develop creative, business-driven solutions.

For example, claims for breaches of distributorship agreements have been settled by redefining territorial limits. Claims for breaches of agreements between vendor and vendee have been settled by agreements on future price discounts. In disputes between partners or shareholders who are also members of the same family, apologies have served as the linchpin of settlements. As these examples demonstrate, mediation offers the potential for a "win-win" solution in contrast to arbitration and litigation where there is a winner and a loser.

Even in a pure dollars dispute, a mediator can facilitate communications, assist the parties in making a realistic assessment of their case and help structure creative means of monetary exchange.

MEDIATION AS FACILITATED NEGOTIATION

Parties often experience frustration and difficulty in settlement negotiations. In addition to the inherent problems arising from the fact that the parties in a negotiation have opposing views and conflicting goals, other issues, such as personal antagonisms, make the process of communication difficult. Involving a mediator usually changes the dynamics of a negotiation.

A skilled mediator can enhance the process of communication and negotiation by working with the parties to:

- Provide focus.
- Clarify misunderstandings.
- Frame issues.
- Explore new areas of discussion.
- Encourage the patties to make realistic assessments.
- Set reasonable parameters for negotiation.
- Set the pace of negotiations.
- Coach the parties on moves in negotiations.
- Make suggestions for mutually acceptable solutions.
- Manage the agenda.
- Ensure fairness in the process.

A mediator typically accomplishes these objectives by meeting with all parties and their counsel, in joint meetings and in separate caucuses, as may be appropriate.

In contrast to direct negotiations between the parties or even litigation settlement conferences, a mediator usually will insist upon the presence of those representatives of the parties with ultimate decision-making authority. The mediator will involve these representatives directly in the process of communication and negotiation.

SUITABILITY OF A CASE FOR MEDIATION

In every dispute, counsel should consider whether a client's objectives can best be achieved through negotiation, litigation, mediation or some other form of alternative dispute resolution. While mediation is not "one size fits all," the benefits and disadvantages of mediation should be discussed with the client in virtually every business dispute.

Not every case is appropriate for mediation. In some cases, mediation is not necessary to achieve a negotiated resolution. Parties often overlook the possibility of resolving a dispute through direct and unassisted negotiations - an option that should be examined in every case.

In other cases, litigation may be the best dispute resolution alternative. For example, in a product liability case in which a plaintiff seeks to develop a new theory of liability, a defendant may decide that the need to establish a precedent dictates that litigation is the best alternative. As a consequence, and notwithstanding the trend to resolve disputes through alternative means, there remains no substitute for strong trial skills and good case preparation.

Most cases that are suitable for a negotiated resolution are also suitable for mediation. This is particularly true if client participation is needed to resolve the dispute. Moreover, a dispute may be ripe for mediation notwithstanding the fact that there have been failed negotiations in the past or the fact that the controversy is the subject of a pending lawsuit.

FACTORS FAVORING MEDIATION

Some disputes are particularly suitable for mediation. Factors favoring m [sic] mediation include:

- Desire to avoid adverse precedent.
- No need to establish a precedent.
- Need to avoid publicity

[sic] eed for confidentiality or privacy.

- Desire for speedy resolution [sic] eed to avoid delay.
- Need to preserve continuing relationship.
- Recognition that emotions or hostilities may bar a settlement.
- Desire to minimize risk of an imposed outcome.
- Need to reduce high costs of litigation.
- No adequate remedy at law.
- Existence of collateral issues that may enhance resolution in a mediation forum.

FACTORS WEIGHING AGAINST MEDIATION

The nature of some disputes suggests litigation as the most appropriate dispute resolution alternative. Factors weighing against mediation include:

- Need to establish a legal precedent.
- Absence of a bona fide dispute - other side's case is frivolous.
- Entire case can be decided on motion to dismiss or motion for summary judgment.
- Need for time to elapse before settlement possibilities can be evaluated.
- Other parties are not yet aware of dispute or have not yet been identified and need to be included for proper resolution of the dispute.
- Authorized decision maker is not available.
- Current budget limitations prevent serious settlement negotiations.
- Settlement was reached in the past, but a party breached the settlement agreement.
- Parties do not want a settlement (i.e., there exists the potential for a large jury award).
- Need for immediate equitable relief.

In deciding whether to mediate, parties should also consider the factors which may suggest binding arbitration as the best dispute resolution alternative.

These include, among others, the need for prompt resolution, the desire for privacy, the

need to minimize litigation costs, the existence of bad faith in prior negotiations, the high probability that a negotiated settlement is unlikely even in a mediation setting and the absence of any compelling reason to seek relief in a court of law.

PROPOSING MEDIATION TO THE ADVERSE PARTY

Once the client has opted for mediation, counsel should develop a specific proposal for mediation to present to opposing parties. Besides presenting the generic benefits of mediation, such as speed, cost savings, time savings and privacy, counsel should outline specific benefits geared to the opposing party's particular needs.

In preparing the proposal, counsel should attempt to analyze the opposing side's interests in a mediated settlement. Assessing the interests of opposing parties will held counsel determine whether the opposing party has an incentive to litigate or mediate.

For example, the opposing party may desire a public forum, an interest that will not be served through mediation. Once counsel has assessed the other side's interests, counsel can present a customized proposal that demonstrates to the other side the benefits offered by mediation.

Some lawyers are reluctant to propose mediation because of a concern that the suggestion will be interpreted as a sign of weakness. While the concern should be far less than when making settlement overtures, a proposal to mediate can be made in such a manner as to convey a sign of strength. For example, counsel can suggest that the merits of the client's positions are so strong that any skilled mediator would no doubt validate this opinion.

If it is significantly in the client's interest to mediate, counsel should consider including specific incentives for the opposing side if they are reluctant about the process. For example, the party proposing mediation might offer to pay for the initial mediation session. Counsel may also want to consider accepting as the mediator a candidate proposed by the other side so long as the mediator is competent and no conflict exists.

Counsel should also think about all aspects of the corporate culture of the opposing party. If a party to a dispute has adopted a corporate policy favoring ADR, counsel may remind the party of this commitment made prior to the dispute.

More specifically, counsel should inquire whether an opposing party is a signator to the CPR Corporate Policy Statement on Alternatives to Litigation. Over 4,000 companies have committed to this pledge which obliges subscribing companies to seriously explore negotiation, mediation or other ADR processes in conflicts arising with other signatories before pursuing full-scale litigation. Additionally, may companies have entered into industry-wide "treaties" favoring alternative approaches in disputes between signatory companies.

Some private organizations provide services that will assist in proposing mediation to opposing parties. A neutral person or organization may be in a better position to educate a reluctant party about the benefits of mediation. These organizations are also in a position to provide a range of related services including the submission of mediator candidates and the structuring of the entire mediation process.

25 PRACTICE TIPS FOR EFFECTIVE MEDIATION ADVOCACY

The following practice tips are offered to assist counsel with their preparation for a mediation:

1. Before selecting a mediator, carefully examine the mediator's reputation, expertise, personality, style and experience.

2. Use pre-mediation services to help plan for the mediation process.

3. Interview candidates to assess experience, style and qualifications to serve as mediator.

4. Participate in the design of the mediation process.

5. Be certain that all necessary parties and decision makers will be present during the mediation.

6. Make sure that representatives of adverse parties have comparable settlement authority.

7. Set aside sufficient time for the process.

8. Before the mediation, perform a cost-benefit and litigation risk analysis.

9. Review with your client its interests, goals, objectives and business needs. Prioritize the needs of your client and the opposing party.

10. Develop your client's "BATNA" (best alternative to a negotiated settlement) and "WATNA" (worst alternative to a negotiated settlement).

11. Educate your client about the mediation process, and explain the roles of the mediator, the advocate and the client.

12. Prepare for persuasive negotiations, not litigation.

13. Assess your client's ability to be articulate and determine, in advance, the most effective level of client participation.

14. Prepare client representatives for the likelihood that a mediator will ask questions such as "How do you feel about the dispute?" and "What is most important to you?"

15. Develop a specific negotiating strategy for the mediation. Continually reassess your strategy and revise it, as appropriate.

16. Present a concise opening statement that includes a factual summary and outline of the relevant issues and the strengths of your client's legal positions.

17. Direct your opening statements and argument to the opposing parties, not to counsel or the mediator.

18. Avoid the use of emotionally-charged language. Where appropriate, express empathy for the other parties' concerns.

19. Listen carefully. Parties are more open in a mediation session than in unassisted negotiations. Be on the lookout for signals from opposing parties throughout the mediation process.

20. Prepare, in advance, a few good reasons why the other party should move toward your settlement proposal.

21. Develop creative proposals that take into account underlying business interests and relationships between the parties.

22. Ask the mediator, where appropriate, to present settlement options as his or her own idea in order to avoid reactive devaluation.

23. Decide, in advance, what steps you and your client will take if mediation fails to achieve a negotiated settlement.

24. Anticipate the measures likely to be taken by adverse parties if the dispute is not resolved.

25. Remember that a "failed' mediation may be the catalyst for a subsequent negotiated resolution of the dispute.

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