Mediation Advocacy: Taking Aim at Settlement

This is the 10th article in this series on mediation advocacy. This article discusses the kind of groundwork counsel should perform to be ready for signing a terms sheet or a settlement agreement at the end of the mediation session.

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This is the 10th article in this series on mediation advocacy. The ninth article, published October 5, provided tips on effective advocacy during caucuses. The article continued a scenario in which the parties, Widgetronics and DesignMetrics, entered into a contract containing a dispute resolution clause and became embroiled in a dispute over Widgetronics' alleged wrongful termination of the contract. Counsel for Widgetronics and DesignMetrics have prepared their clients for what to expect during the mediation process and have discussed their negotiation strategy. Another pre-mediation task is preparing for settlement. This article discusses the kind of groundwork counsel should perform to be ready for signing a terms sheet or a settlement agreement at the end of the mediation session.

Preparing for settlement is as important as preparing for the negotiations and it can save valuable time and possibly avoid future disputes. All too often counsel do not think about, or come to the mediation with, documents that the parties can use to help them memorialize their settlement. The optimal time to begin drafting enforceable settlement documents is not after many hours of stressful negotiations. Absent a written settlement agreement or terms sheet signed by the parties or, in some jurisdictions, a settlement on the record transcribed by a court reporter, an oral settlement reached in mediation may not be enforceable. Even if the parties manage to prepare some form of a settlement document at the end of the mediation session, if they do not draft it carefully, or if they fail to include all the material terms, a court could refuse to enforce it.

Investigate the Issues in Dispute

While parties typically will want to resolve through mediation all of the issues that ignited the dispute, sometimes only some of the issues will be discussed. Parties involved in a mediation may also try to resolve issues that are ancillary to the main dispute (e.g., other pending actions, other disputes that affect an ongoing relationship). Thus, a threshold step in preparing for settlement is for counsel to investigate whether the parties want to mediate all of the issues that ignited the dispute and any ancillary issues. Sources for identifying the potential pool of issues could include any pleadings (if the case is pending in court), or correspondence, conversations or negotiations between the parties. Counsel should also consider calling opposing counsel to find out what issues the opposing party wants to address at the mediation (including whether the opposing party wants to resolve any ancillary issues).

In the Widgetronics dispute, for instance, a review of the correspondence revealed Widgetronics' interest in a new product DesignMetrics had developed and patented, that Widgetronics could distribute within its marketing channels. The parties had not pursued this interest in light of the current dispute, but perhaps that could be explored further in the mediation.

The eve of the mediation is too late for initiating due diligence on the issues the parties will or want to mediate. Your client may need time to consult with senior management, investors or the board of directors regarding whether issues outside the main dispute should be discussed (and on what terms), for example, or whether other issues should be dropped or narrowed. Having that information early in the preparations will improve the quality of the pre-mediation submissions, client preparation and the mediator's preparation, and it will permit the mediator to work with the parties to prioritize the issues for

the allotted time. If the due diligence uncovers a disagreement regarding the issues to mediate, the parties should factor this disagreement into the time allotted for the mediation session or handle it in advance of the planned session.

Capturing the Material Terms of a Settlement

After identifying the issues to address at the mediation, the next step is to begin to identify the material terms that would resolve those issues. At the same time counsel review prior correspondence, conversations and negotiations between the parties to identify the issues to mediate, they can explore whether the parties have begun to discuss material terms. In our example, correspondence between the parties not only mentioned the new product DesignMetrics had developed and patented, but also illuminated possible material terms related to this issue, including a license from DesignMetrics to Widgetronics to make, use and sell the patented product, royalty payments from Widgetronics to DesignMetrics, and a consulting agreement for DesignMetrics to provide assistance to Widgetronics for commercializing the product.

Providing the parties' views of the material terms of any settlement in pre-mediation submissions will also help the mediator. This permits the mediator to spot any agreement between the parties, any complementary terms, and any differences that will need attention. A good approach, if the parties haven't given the mediator a list of material terms before the mediation, is to provide the mediator a copy of the terms to review at the first caucus and to discuss each item with the mediator.

Counsel should prepare and bring on a laptop computer a draft terms sheet and/or a draft settlement agreement (with blanks) incorporating the material terms (as well as boilerplate terms) so that the parties can easily make any changes that are necessary to create a document they are willing to sign at the end of the mediation session. Preparing these drafts provides a logical framework for the settlement terms and increases the likelihood that the parties will address the terms they deem material to settling their dispute. Drafting these documents well in advance of the mediation also forces counsel to think about any additional information or documents they may need to prepare or bring (e.g., wire transfer instructions (if that is the agreed form of payment), a stipulated dismissal, or a license agreement).

Drafting a settlement document or a terms sheet requires the parties to consider what "standard" terms and conditions and novel terms to include. The "standard" terms and conditions will vary depending upon the nature and particulars of the dispute. Although a license is often a standard (and material) term in settling intellectual property disputes, for example, it may not be applicable in settlements in which a party agrees to stop making the accused product. The standard terms and conditions to include also might depend upon the specific requirements of the jurisdiction in which enforcement of the mediated settlement might be sought. If counsel is unfamiliar with the laws in that jurisdiction, they should discuss with local counsel whether any terms must be included for the document to be enforceable. Thinking ahead about settlement terms also provides counsel the opportunity to research preferred language for expressing those terms. Again, waiting until the eve of the mediation to compile the list of terms and effectuating language, or to draft a settlement agreement, may result in omitting material terms (and potentially an unenforceable agreement) and future disagreement as to the interpretation and meaning of the agreement.

The decision whether or when to share the draft settlement agreement or terms list with opposing counsel is a strategy decision that counsel must evaluate carefully. If sufficient progress is made during the mediation, counsel may want to share some of the standard non-controversial provisions to gain some momentum and save time. Opposing counsel's response to a request for inclusion of those terms also may be a good indicator of how that party views the progress that has been made or how contentious the bargaining might be. If there is a special term or condition of settlement, for example, that your client believes might be controversial, consider when you want to disclose this term to the other side. Springing this situation on your opponent or the mediator at the last minute is not advisable. Inform the mediator of any special terms or conditions of settlement fairly early in the mediation. Similarly, if your client requires a standard settlement agreement, make sure that you afford your opponent (and the mediator) an ample opportunity to review and approve the use of this document before introducing it during mediation.

Memorializing the Terms and Conditions for Settlement

All too often mediations end with only an oral agreement and a promise by the parties to prepare the necessary papers. Enforcing an oral agreement presents significantly more challenges than enforcing a written agreement, so memorializing the agreement in some written form, as late as it might be when the parties settle the case, can go far to avoid any possible remorse or any disagreement concerning the terms of the settlement. Regardless of whether the parties decide to memorialize their agreement in a terms sheet or a settlement agreement, they should endeavor to: (1) articulate all of the material terms; (2) use clear and definite language regarding what is required or agreed to; and (3) sign the agreement or terms sheet (the parties or their authorized representatives). When the parties use a terms sheet, they should also: (1) state that the parties intend the terms sheet to be binding and enforceable or that the settlement is effective only upon the execution of the subsequent documents (whichever the parties have agreed); and (2) describe carefully any subsequent settlement documents the parties will need to execute.

If applicable — and while the mediator is present — the parties should identify action items and next steps: who is responsible for doing what, when, and perhaps also what happens if the parties do not agree on the terms of the settlement documents. Keeping the mediator involved as the parties finalize the settlement represents a small incremental cost compared to the benefit should any disputes arise.

The mediation is coming up soon. Although you hope no impediments to settling exist, what happens if the mediation ends in an impasse? Can that be avoided? What part can the parties play in avoiding or overcoming an impasse? This will be covered in the next article. •

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