After the Mediation Session: Where Do You Go From There?

This is the 12th and final article in this series on mediation advocacy. The 11th article, "Mediation Advocacy: Preparing to Avoid an Impasse," published December 21, 2012, provided tips on how to avoid and address an impasse.

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This is the 12th and final article in this series on mediation advocacy. The 11th article, “Mediation Advocacy: Preparing to Avoid an Impasse,” published December 21, 2012, provided tips on how to avoid and address an impasse. 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 recently completed a mediation session. Regardless of how the mediation session ended (e.g., signed terms sheet, plan for further negotiations, need for information), counsel need to take appropriate action to follow through, to continue the momentum started in the mediation and preserve the benefit gained during the mediation. This article discusses the types of actions counsel should consider pursuing following a mediation session.

Following Through When Parties Reach Agreement

When the parties’ hard work in a mediation session results in an executed terms sheet or a verbal agreement, they must then follow through on whatever paperwork and actions are required to formalize their agreement, which typically includes preparing and executing formal settlement documents. Settlement-related documents will vary, depending upon the nature of the dispute and the agreed-upon settlement terms. In some cases, the formal documents may simply include a settlement agreement and a motion to dismiss (if a case is pending). In other cases, they might also include a business agreement, a side letter, a press release, a letter of recommendation, a title transfer, or even a certificate of destruction. Once counsel determine what settlement documents to prepare, they should decide who will prepare them, and set clear and practical deadlines for the drafts and final documents. Setting and keeping a schedule for preparing and finalizing the necessary documents is an important post-mediation task. Often the momentum of the mediation is enough, but sometimes counsel can become distracted with other responsibilities or they may encounter clients having second thoughts.

Enlisting the mediator to monitor the preparation, exchange and negotiation of drafts can be helpful – and the potential need to do so should be kept in mind when choosing a mediator; that is, interviews with mediator candidates should explore whether they are committed to remaining engaged after the mediation session to see the settlement finalized.

In addition to preparing settlement-related documents, the parties’ verbal agreement or terms sheet may also require certain actions within a specified time period before or after the settlement documents are signed and the case is dismissed, including, for example, payment of money, destruction of infringing materials, employee status change, transfer of property, and dismissal of other actions. The parties should set clear and practical deadlines for

accomplishing these kinds of tasks and may want to specify consequences if the actions are not timely performed.

Following Through When Parties Do Not Reach Resolution

If the parties have not resolved their dispute in the mediation, they may pursue various paths to resolution, each with its appropriate follow-up. These include:

• **Further negotiations with or without the mediator.** If counsel and their clients persevere, they can often settle a dispute within a short period after a mediation session. One way to enhance the chances of that happening is to enlist the mediator's assistance. The mediator can help the parties in various ways. For example, the parties might simply have the mediator monitor the ongoing negotiations, perhaps copying the mediator on settlement-related correspondence (e.g., terms sheets) that the parties exchange. If the mediator senses any delays or issues, the mediator might send an email or make a call to find out if a problem exists. The email or call alone may be enough to prompt counsel's focus. The parties might also request that the mediator take a more active role.

For example, even if the parties did not sign a terms sheet at the end of their mediation session, they may have agreed to an overall framework for the settlement or at least on certain material terms. Using that progress as a springboard, the mediator may work by phone and through email with counsel (and the parties' representatives) separately, jointly, or in combination, to continue the negotiations to the point of the parties signing a terms sheet or meeting again in person to continue their discussions. Counsel should confer and decide whether to involve the mediator, and to what extent. If they decide to involve the mediator, counsel should work out a method and timeframe with the mediator to keep the discussions flowing, preferably before leaving the mediation session or shortly thereafter.

• **Obtaining additional information.** Sometimes the parties realize they require information that they had not anticipated needing in advance of the mediation in order to further a settlement, such as more facts, documents or expert consultation. When this situation arises, counsel should try to obtain the information as expeditiously as possible, to leverage the momentum from the mediation, and then to get the negotiations (mediated or otherwise) rescheduled. For example, in our scenario, if, during the mediation, Widgetronics proposed purchasing DesignMetrics, then both parties might want to consult third parties (e.g., financial and corporate advisers) and conduct due diligence to determine the viability of that option. The mediation could adjourn until the consultations and due diligence are complete and then the parties could reconvene with the mediator or continue discussions on their own.

• **Proceed to litigation/arbitration.** Sometimes one or both parties have unrealistic expectations regarding their case, or they take an intransigent position on a particular issue. They may be basing the strength of those expectations and positions on uninformed assumptions or incomplete facts. In either situation, the parties might benefit from proceeding with litigation or arbitration to obtain an expedited answer on one or more key disputed issues. Although local practices and the judge/arbitrator will determine the parties' ability to do so, counsel should consider a proactive strategy, including early summary judgment or early claim interpretation determination in a patent case, that might reignite settlement discussions. Likewise, the parties might benefit from focused, expedited discovery related to a few issues that could fracture incorrect assumptions that support strongly held views. Cooperating counsel could save the parties considerable time and money if obtaining important information would stimulate the parties to resume settlement discussions.

Revisiting the Status Quo to Contribute Value to Clients

The first article in this series raised the issue of an inadequate mediation clause in the contract between Widgetronics and Designmetrics. So it is appropriate to end the series with the suggestion that if a mediation clause in use has caused problems instituting or carrying out the described mediation process, consider modifying it to avert similar problems in the future. And, because mediation provisions are often negotiated like other contract provisions, parties (in-house counsel and business persons alike) might benefit from understanding not only why the mediation provision did not work well, but the do's and don'ts for these clauses. Likewise, if the mediation clause is part of a more expansive ADR provision, counsel should consider revisiting the provision to ensure that the ADR processes, including mediation, embodied by the provision remain viable for the kinds of disputes that typically arise. Sometimes businesses try a particular ADR process (e.g., mediation) or escalation of processes (e.g., negotiation, then mediation, then arbitration) that turn out not to be optimal for particular kinds of cases. A business need not maintain the status quo if it's not working. Experienced ADR counsel might use a recent "bad" experience with ADR simply to improve what exists (e.g., better selection of a neutral, better arbitration strategy) or to change what exists to better fit the business needs.

Counsel should also be proactive and work with the client to minimize the risk of disputes similar to the mediated dispute from occurring. This could involve, for example, encouraging the client to investigate its internal processes and

procedures for weaknesses, or to provide training in handling conflict, or to implement a robust conflict management program to address issues early, before they escalate into major disputes. Addressing these issues when they are fresh may provide smoother sailing in the future.

Not all mediations result in a full or immediate settlement of a dispute and yet even those that don't may be considered successful. The dispute might be resolved sometime shortly thereafter, or the mediation might have provided information that the parties would never have obtained in expensive, time-consuming discovery that helps them settle the case at a later time. Or, the parties might resolve a portion of the dispute, narrowing the issues for litigation or arbitration. Many variables affect why cases will or will not settle, but one sure factor that enhances the likelihood of a successful outcome is the quality of counsel in representing clients in mediation. We have provided in this series of articles insight into counsel's role in each of the various stages of mediation with the objective of improving mediation advocacy skills to achieve more successful results. Here is a recap of the prior 11 articles we wrote in this series:

1. "Evaluating the Dispute Resolution Clause in Mediation": Reviewed the key elements of good mediation clauses and steps to take if the clause is deficient.

2. "Is Mediation the Right Choice for Your Dispute?": Examined how to evaluate whether mediation is the best approach for the client and what to do in the absence of a mediation requirement.

3. "Ten Ways to Introduce Mediation to Opposing Counsel": Provided various strategies to employ to get the other side to come to the mediation table.

4. "What You Need to Know About Selecting a Mediator": Discussed sources to find a mediator and criteria to use to select a suitable mediator.

5. "The Mediation's Framework: How to Approach a Preliminary Meeting": Outlined the various issues that are typically addressed at the preliminary meeting and how to prepare for it.

6. "Mediation Preparation: Don't Let the Informality Fool You": Covered the steps to take to prepare properly for a mediation.

7. "The Strategic Use of Pre-Mediation Submissions": Discussed ex parte and exchanged submissions, outlined the issues generally addressed in pre-mediation submissions and provided tips on writing them.

8. "The Mediation: Strategy for the Initial Joint Session": Discussed considerations for determining what to cover in the initial joint session including whether to have opening statements and how to prepare for them.

9. "The Mediation Session: Tips on Strategy for Caucuses": Covered what is addressed in caucus and how to prepare for caucuses.

10. "Mediation Advocacy: Taking Aim at Settlement": Discussed the groundwork to perform to be ready for signing a terms sheet or settlement agreement in the mediation.

11. "Mediation Advocacy: Preparing to Avoid an Impasse": Discussed the causes of impasse and provided tools and strategies for minimizing the risk of impasse.

We would appreciate hearing as to whether this information has been helpful. We can be reached at hsamaras@ablr.biz or jweintraub@ablr.biz. •

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