Alternatives
TO THE HIGH COST OF LITIGATION

The Newsletter of the International Institute for Conflict Prevention and Resolution

VOL. 28 NO. 2 FEBRUARY 2010

ADR Advocacy

Preparation: The Key To Mediation Success

BY BENNETT G. PICKER

Most mediation advocates in commercial disputes understand that the process offers an opportunity for clients to save time and money, preserve relationships, and achieve creative or business-driven solutions not available in either litigation or arbitration.

CPR

The flexible mediation process permits the parties to go well beyond the litigation positions, and delve into the underlying interests and needs of the participants.

Unfortunately, some mediation advocates, who would spend many hours preparing for a single deposition, spend insufficient time preparing for mediation. Perhaps it is a lack of familiarity with the process or the feeling that there is little likelihood of success.

For some, there is a sense that because mediation is not binding, there is no downside. Of course, there is a downside to lax preparation: It is an enormous loss of an opportunity for outcomes that can enhance the client's business objectives.

This article offers a list of key issues and concerns to address, in advance of mediation, in order to enhance the likelihood of successful outcomes.

1. Exercise Due Diligence in Selecting the Mediator. Critical to the success of a mediation is the employment of a highly skilled and experienced mediator. Especially in a substantial controversy, a mediation advocate should engage in due diligence to assess the skill, experience, and style of a particular mediator candidate.

In addition to collecting the kind of data available on the Internet, a mediation advocate should speak with other persons who have employed a potential mediator.

It also is entirely appropriate to call a neutral to discuss his or her mediation style and approach. This conversation can include issues such as preparation, written submissions, use of joint versus caucus sessions, use of evaluative techniques and ways in which a mediator would approach an apparent impasse.

2. Identify and Involve Client Representatives. It is crucial to encourage the participation of a decision maker with full authority to make resolution decisions, even if this person does not have personal knowledge of the underlying facts at issue.

Including the decision maker enables the client to monitor and shape the impact that any outcome may have on the client's business goals and objectives. Mediation advocates often assemble a presentation team that includes party representatives, but limits the representatives' participation. If a party representative is articulate and persuasive, his or her statement directly to the other side can be far more powerful than any summation or advocacy statement by counsel.

(continued on page 28)

The author is senior counsel in Philadelphia's Stradley Ronon Stevens & Young LLP. He is a full-time mediator and arbitrator in international and domestic commercial disputes. He is author of "Mediation Practice Guide: A Handbook for Resolving Business Disputes," published by the American Bar Association's Section of Dispute Resolution.

Worldly Perspectives *continued*

(continued from previous page)

Until Turkey's promulgation of the International Arbitration Law, no other legal tool had dealt with international arbitration; the only source for its regulation was the CCP's domestic arbitration provisions. As a result, the IAL's enactment filled an important gap in Turkish law and commercial practice.

Apart from sources of municipal law related to domestic and international arbitration, Turkey also has been party to major arbitration conventions, i.e., the New York Convention, the Geneva Convention, and the International Center for Settlement of Investment Disputes Convention, better known as Icsid.

RISING ADR INTEREST

Historically, the use of ADR techniques other than arbitration has been limited to a few areas. Labor law requires the representatives of employers and workers to apply to a mediator or arbitrator to resolve collective bargaining deadlocks.

There also are public entities that employ mediation, such as the Energy Market Financial Conciliation Center. Furthermore, attorneys may invite an opponent to mediation with the approval of their clients and only for individual—as opposed to public—claims.

The Ankara Bar Association's Alternative Dispute Resolution Center is the only ADR provider in Turkey. The Chamber of Commerce and other similar institutions have focused solely on arbitration. Founded in 2005, the Ankara Center provides ADR service and training, and creates awareness about the field in Turkey, especially within the legal and commercial communities.

In the training area, the situation is similar to the providers' landscape. There is only one specific training program in Turkey that is concerned with ADR, the Masters in Conflict Analysis and Resolution offered by the Sabanci University Faculty of Arts and Social Sciences. (See www.sabanciuniv.edu.tr/ssbf/conf/eng/.) This program offers several ADR courses, including Advanced Conflict Resolution Practice and Third Party Roles in Peace Processes.

The beginning of accession talks between Turkey and the European Union in October 2005 signaled a likely sea change in the use of ADR, and other areas in the Turkish legal landscape. Developments since that time are confirming that indication—for mediation in particular.

On May 21, 2008, the European Parliament and the Council of the European Union adopted the Directive on Certain Aspects of Mediation in Civil and Commercial Matters. It was intended to promote the use of mediation in member countries and to suggest a framework within which judicial proceedings and mediation could co-exist harmoniously.

In response, the Turkish Ministry of Justice put together a Draft Mediation Law and submitted it to the Turkish Parliament. The draft, currently under consideration, is intended to approximate the standards in the EU Directive. The drafters looked to the legislation of various EU countries for inspiration and followed the model of Austria's law in particular, but the Turkish draft varies from the models to some degree. For example, while the EU Directive makes the use of mediation essentially compulsory, its use is voluntary in the Turkish draft. Perhaps the most contentious of the Turkish draft provisions is that only lawyers can be mediators, which is not an EU rule.

The establishment of a legal framework for the use of mediation makes it likely that Turkey's historical limitations on the use of mediation and the availability of providers and training will be changing in the near future.

* * *

Next month: Israel.

DOI 10.1002/alt.20315

ADR Advocacy *continued*

(continued from the front page)

In some instances, the client's interests are best served by having the mediation advocate and client representative divide their presentation. Whatever the arrangement, it is important to decide in advance who will speak in a joint session and what subjects each presenter will address.

3. Determine Whether Information Exchanges Are Necessary. Gaps in information present one of the principal reasons that disputes fail to settle in mediation.

Especially in disputes' early stages, it is important that parties understand the essential basis of claims and defenses including, in particular, the basis of alleged damages. It is difficult for parties to change their assessments and settlement decisions on a real-time basis when this important information is conveyed for the first time in mediation.

Accordingly, a mediation advocate should use the neutral to promote an efficient exchange of such information. Any such request, however, should not be an excuse that substitutes for real discovery. All that is necessary is sufficient information to make an informed settlement decision.

4. Prepare Arguments Supporting Legal Positions and Settlement Positions. A mediation advocate should develop an overall theme and prepare arguments supporting the merits of claims or defenses with the same dedication as when preparing for trial.

In addition, the advocate should also develop reasons why the other side should be wiling to move to a "reasonable" settlement proposal. Here, the advocate's goal is to persuade the other side to consider his or her client's proposal. Counsel should recognize and be prepared to advance reasons why the other side's interests are being served by a specific settlement proposal.

5. Prepare a Confidential Written Statement to the Mediator in Advance of the Mediation Session. Regardless of whether the mediator asks for a confidential submission, a mediation advocate can obtain a significant advantage by submitting, in an informal letter, a confidential written statement summarizing the client's various litigation positions, including its rebuttal positions.

Pleadings and other litigation documents usually do not provide the summary of the critical arguments and counter-arguments a mediator needs to understand in order to help the parties reach a resolution.

More important, a confidential submission also offers an opportunity to address

the underlying issues, concerns and questions that often drive settlement decisions as much or even more than the litigation-risk analysis. Counsel should consider addressing issues such as timing; linkage to an unrelated issue or dispute; strategic issues; personal relationship issues; need for privacy; internal company issues and any impact upon the client's future; history of any negotiations that have taken place; suggestions concerning process; suggestions concerning substantive resolution; and any other factors which may favor or present a barrier to resolution.

A well-written submission, provided in a timely fashion, will enable the mediator to determine which paths are most likely to result in resolution.

6. Prepare a Concise "Opening Statement" for the Joint Session. Mediation advocates often say that there is no need for a joint session as the parties already understand each other's positions, or that excessive advocacy in a joint session will set the parties even further apart.

While there are some instances that call for dispensing with a joint session, joint sessions usually have a number of advantages. For the mediator, a joint session offers an opportunity to go over the ground rules, and to obtain from each party a commitment to listen respectfully and to engage in good-faith negotiations.

For the mediation advocate, a joint session offers an opportunity to have the other side's decision maker hear the client's arguments, often for the first time, in a manner unfiltered by the other side's own counsel.

Once in caucus sessions, the mediator can then develop the issues by reacting to what he or she heard in the joint session without risking the loss of trust that might arise if the mediator developed the issues for the first time in caucus sessions.

7. Make an Objective Litigation-Risk Assessment. Mediation advocates usually advance arguments based upon what the client needs or wants, what is fair, what is right and what is true.

While all of these issues are appropriate for discussion, a good mediation advocate owes a duty to his or her client to make a realistic assessment and a responsible decision.

In advance of the mediation, an advocate will serve the best interests of the client by discussing the only responsible benchmark for settlement decisions—comparing what might be achieved in settlement with the legal and business consequences of the litigation or arbitration alternative.

Meeting this counseling responsibility is not always an easy task for a mediation advocate, because most parties view their facts with a degree of selective perception and most advocates cannot avoid a certain amount of advocacy bias.

Recent studies at the Harvard University Program on Negotiation and elsewhere establish that it is almost impossible for a party with an interest in the outcome, or its advocate, to make a completely objective assessment of their own case.

Mediation advocates, therefore, should make every effort to recognize and discard their advocacy bias when meeting their counseling responsibilities. Moreover, in disputes involving substantial dollars or strategic business interests, mediation advocates should consider retaining an objective third-party to assist in making a litigation-risk assessment well in advance of mediation.

Advance Work

The issue: It's back to the basics: Are you ready for ADR?

The problem: Lack of mediation prep continues to show up at sessions.

The solution: It's time for you to fully understand what you need to do beforehand. Veteran practitioner Picker provides a list for your use.

8. Explore Potential for Creative Solutions. Many mediation advocates bring their litigation perspectives to mediation and focus almost entirely upon issues of fact and law. Many also engage solely in "distributive bargaining" where they exchange offers and demands in an effort to "divide the pie."

As a consequence, these mediation advocates and their clients fail to capture an opportunity to create value.

In contrast, an advocate should encourage his or her client to engage in "integrative bargaining" and take a more collaborative approach to mediation in an effort to create value in the negotiations. Advocates should encourage their clients to focus upon the client's underlying interests as well as their rights and to look for business-driven solutions, such as agreement restructuring, or the creation of new agreements. Even in pure monetary disputes, mediation advocates should explore the potential for creative means of monetary exchange such as, for example, a deferred payment obligation.

The search for creative solutions must begin well in advance of the mediation in order for the client representatives to have the time necessary to explore all of the possible business opportunities that may be available.

9. Develop a Negotiating Plan. Whether parties are engaged in a "pure dollars" dispute or a more layered, complex controversy, counsel and the client should prepare a negotiating plan in advance of the mediation. All too often, parties lose a significant advantage in mediation as the result of having thought about only their end goals.

Many mediations begin with the parties taking extreme positions, and expressing an unwillingness to bid against themselves. In these circumstances, counsel should consider the advantages of making the first credible move. Even a small move, if credible, may enable the mediator to meet with the other side and gain significant concessions.

Negotiation studies establish that the party making the first credible move can gain an advantage, referred to as "anchoring and adjustment," by setting a recognizable benchmark from which settlement options are developed.

In recognition of the fact that counsel and the client will be engaged in a "negotiation" with the mediator as well as adverse parties, counsel should plan the extent of voluntary candor with the mediator. The degree of voluntary candor may depend on a number of factors, including whether the mediator is more facilitative or evaluative; whether the communication involves legal arguments, underlying interests or settlement positions; and whether the mediation is in its early or late stages.

In the final analysis, this judgment call is likely to depend on the level of comfort with the mediator and may evolve in the fluid environment of the mediation sessions. While a specific negotiating plan is essential, counsel

(continued on page 30)

Published online in Wiley InterScience (www.interscience.wiley.com).
Alternatives DOI: 10.1002/alt

ADR Advocacy *continued*

(continued from page 29)

should recognize the need for flexibility in the mediation sessions and should be prepared to reevaluate in light of new information received and the mediator's suggestions.

10. Prepare a Draft Settlement Agreement. Mediators will insist, at the very least, that upon reaching a mutually acceptable resolution, the parties enter into a binding term sheet on all key issues.

This document is essential for avoiding a subsequent disagreement about the settlement terms, and to avoid the possibility of later remorse. Most neutrals ask mediation advocates to bring a settlement agreement draft covering the key economic and non-economic issues that need to be addressed in the event the dispute is settled in mediation.

Perhaps motivated by a feeling that the dispute is not likely to settle in a mediation session, many advocates don't follow this instruction. As a consequence, at considerable expense, advocates often spend hours drafting a term sheet after achieving an agreement in principle at the end of the day.

At this point, advocates and their clients often find themselves tired and unprepared, find that they are without important information or key documents, and overlook key non-economic issues. Drafting an agreement at the outset is valuable for preparing the final term sheet. It also is another vehicle through which client and counsel can articulate and review the client's direct and collateral goals and interests before entering the mediation.

* * *

Preparing for mediation requires an approach vastly different from the path an advocate takes when preparing for a deposition or trial. At the same time, mediation advocates can maximize the potential for successful outcomes by employing the same level of dedication and professionalism as when preparing for trial.

DOI 10.1002/alt.20314

ADR Skills

In Multi-Dimensional Mediation, Open Communications Take Many Paths, Through People and Technology

BY PAUL E. MASON

Q: What is multi-dimensional mediation?

A: Multi-dimensional mediation goes beyond the usual concept of multiparty mediation, although it can and often does include more than one party. As the term suggests, multi-dimensional mediation involves mediating beyond the normal two-party scenario where many other factors come into play.

These can include any of the following: more than one party; several entities participating in the mediation whether formal parties or not; attorneys acting as parties; a large number of mediation participants; employment of co-mediators, assistant mediators or experts consulting with the mediator; different media used to conduct the mediation; participants coming from different countries, cultural and negotiating traditions; use of more than one language for the mediation, and more than one organization involved in administrative aspects of the mediation.

Q: Is it really possible for a mediator to juggle all these balls at the same time?

A: Yes, although the mediator needs to keep his or her eye on all the balls, and not drop the most important one, which is getting the parties on the right track to settlement.

Q: How have these cases turned out?

A: This author has mediated at least four of them, and acted as counsel in another one. All turned out successfully. Although the total number of such mediations is not large, the cases were all complex and high value.

The first one was an environmental dispute for about $50 million between a state attorney general's office and eight multinational oil companies in a sharp conflict over responsibility for an underground gasoline plume that polluted groundwater in a residential area.

The second was an international commercial dispute over reinsurance coverage for a public bid bond on an Argentine government contract, worth about $5 million.

The third was an international dispute in the energy sector, where a Brazilian executive's performance bonuses were tied to renegotiating energy project financing for his

The author is a neutral on panels at the International Chamber of Commerce, the International Centre for Dispute Resolution, the World Intellectual Property Organization, and the CPR Institute, which publishes *Alternatives*. He focuses on mediating complex high-value international cases. He is a consultant at the Miami-based international law firm Diaz Reus, and Rio de Janeiro-based Bastos-Tigre, Coelho da Rocha e Lopes. He is former Latin American Legal Director, in-house, for Digital Equipment, Oracle, and 3Com/Palm. This article is expanded and updated from a version that was posted in the International Practice column at www.cpradr.org in November.

Published online in Wiley InterScience (www.interscience.wiley.com).
Alternatives DOI: 10.1002/alt