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Mediation as The First Step, Not the Fallback

▶ Paul Mastrocola and Shepard Davidson describe how their experience as litigators informs and measures their practice as mediators.

CCBJ: You are both long-time business litigators who have been involved in many mediations in your careers. Why did you decide to become certified civil mediators to serve as neutral mediators in disputes?

Shepard Davidson: Notwithstanding the fact that I make my living when people are litigating disputes, I enjoy helping people reach settlements, particularly creative settlements, where there is more to it than "I pay you X and you withdraw your claims." Second, acting as a mediator gives me a wholly different perspective on litigation, which helps me be a better advocate for my clients.

Paul Mastrocola: I have seen time and again the benefits of mediation to clients involved in business litigation. Litigation can be extraordinarily expensive and the outcome inherently speculative. Mediation is an opportunity for parties to mitigate the risk of business disputes by providing an efficient path to reach a fair and reasonable settlement and avoid protracted litigation.

How does your work as a litigator inform your mediation practice and vice versa?

Davidson: I am not one of those litigators who solely, or even mostly, represents either plaintiffs or defendants. Thus, I can empathize with both sides when it comes to mediation. Likewise, I can explain to both sides the risks in not settling and the potential flaws in their respective cases. Being a mediator increases my exposure to the tactics and strategies that other litigators use, which helps expand my own arsenal in those areas.

Mastrocola: I enjoy advocating for my client's position in court, but the objective is to reach the optimal resolution of the client's dispute in a cost-effective manner. I see mediation as the best mechanism to help all parties achieve those goals. Although being a good mediator involves a somewhat different skil set than that of a litigator, having the litigation and client service background is invaluable to understanding the goals, perspectives and concerns of all parties and their attorneys. This perspective helps me shape a mutually acceptable and practical settlement for the mediation participants.

What are the biggest benefits of mediation? Tell us why a company embroiled in complex business litigation should consider mediating its dispute.

Davidson: Mediation gives the parties a great opportunity to resolve a matter that otherwise might not settle, or might not settle as quickly, if the parties and their counsel try to cut a deal on their own. A secondary benefit is that the parties and their counsel can get an unvarnished opinion on the strengths and weaknesses of their case from a mediator, which can lead to a settlement. While all litigators try to evaluate a case objectively, the longer a case goes along, the harder it is for any litigator to maintain objectivity. A good mediator can help everyone have a more realistic view of the risks and/or rewards, and

the costs and/or benefits of settling versus fighting.

Mastrocola: Mediation is a relatively inexpensive process to conduct an accelerated settlement negotiation. The vast majority of mediations take place in a single day, which is one of the reasons it is so cost-effective. Mediation is non-binding, and if the parties do not reach a settlement agreement, the litigation continues. Mediation is also entirely confidential and none of the statements made or information shared during mediation can become evidence in the case if litigation continues. Of course, a company's decision to participate in mediation must be considered in the context of the particular facts, legal issues, circumstances, and strategy considerations of importance to the company. Mediation is an opportunity for a company to raise these key case issues before a neutral, focus on settlement and arrive at an immediate agreement that brings an end to the time, expense and uncertainty of litigation.

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Are there some types of disputes that don't lend themselves to mediation?

Davidson: While there are specific cases that are difficult or impossible to mediate or settle, you can't categorize them by the type of claim or industry. However, it typically is very difficult to mediate a case prior to having taken discovery because the parties usually do not know enough about each other's position. If the facts are straightforward, however, even those cases may lend themselves to mediation.

Mastrocola: I believe that any type of dispute can be successfully mediated. While it is inevitable that some cases have to go to trial if the involved parties are intractable in settlement negotiations, an effective mediator has the ability to find openings, encourage flexibility and get the parties on track to advance settlement. There is no one-size-fits-all solution. Even where the parties and attorneys may see no hope for a settlement, mediation can result in a good resolution for all.

Walk us through a typical mediation. Why is a neutral mediator so important to the negotiation?

Davidson: The first step usually involves the submissions of briefs, laying out the parties' positions and their offers/demands. Usually, these go to the opposing party, although sometimes certain information is sent confidentially just to the mediator. The actual mediation typically begins with each attorney making an "opening statement," saying why it will prevail and why the other should capitulate. At this point, it is critical that the mediator make sure the parties do not become polarized since this is often the first time the decision makers who are not lawyers hear what and how the other side will pursue the matter. Thereafter, the parties go into separate rooms, and the mediator goes back and forth between them to have private conversations, provide feedback and communicate proposals. At this stage, the mediator's skill is put to the test as he or she must use empathy and tough love in tandem to help the parties make an informed decision on whether and/or what terms to settle.

Are there universal mistakes companies frequently make in mediation? If so, how can they be avoided?

Davidson: People often focus too much on getting a mediator who will be favorable to their position. I once went to a mediation with a mediator I knew fairly well, and it became clear to the other side that this mediator liked me. After that, it became

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very difficult to settle, because the other side felt like the mediator was my advocate and not a neutral.

Mastrocola: One mistake is treating the mediation like a trial. While the facts and legal issues are relevant to potential settlement terms, companies that approach the mediation as an attempt to purely argue their case and have a mini-trial will not be sufficiently focused on resolutions to achieve settlement. Also, business disputes can be frustrating and prompt emotional reactions, even among seasoned business executives. It is important to maintain a rational, deliberative approach to the mediation. Companies are best served by keeping focused on the settlement objective without being distracted by minutiae of the case.

Can you share any recent mediation success stories with us?

Davidson: I recently resolved a case after three mediations. The first was before the lawsuit, which was a disaster because it was wholly unclear how the plaintiff could prevail on its case and be awarded the millions of dollars in damages that it was claiming. The second effort was well into the case and only went a little better because the opposing party simply believed in his story too much and underestimated the fact that juries are inherently unpredictable. Finally, at the third mediation, the mediator was able to break through to the opposing party and get him to see the real risks. At that point, my client upped its offer substantially, as we could see a settlement was within reach, and the mediator was able to help bridge the remaining gap.

Mastrocola: I recently facilitated a settlement between owners of a closely-held corporation who had been involved in almost two years of litigation relating to control of the company. The dispute between the owners essentially paralyzed the company, which had previously been tremendously profitable, to the point that the court was considering an order of involuntary dissolution – essentially the death penalty for the company – because the owners were at an impasse. We were able to craft a settlement by which one owner agreed to purchase the other's interest in the company, while the departing owner maintained the ability to get the benefit of a later sale of the company if the sale price exceeded a certain threshold. The company survived and returned to successful operation.

Do you see any mediation trends on the horizon?

Mastrocola: Pre-litigation mediation is becoming more common. Rather than commencing litigation in the first instance and considering settlement negotiations or mediation as litigation progresses, parties often look to mediation as a first step to resolve a dispute before runaway litigation begins. ■