ALTERNATIVE DISPUTE RESOLUTION: PART III
THE EFFECTIVE ADVOCATE: NOT A POTTED PLANT

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With the increased use of Alternative Dispute Resolution ("ADR") to resolve conflict, there has been an upsurge in the frequency with which attorneys are called upon to represent clients in mediation and arbitration. This article, the third in a three-part series, focuses on the role of attorneys in providing clients with effective advocacy in ADR.

EFFECTIVE ADVOCACY IN MEDIATION

In the traditional litigation context, the attorney has an easily defined role - advocate for the client and win. Attorneys who cling to this traditional model during mediation will fail their clients miserably. Mediation is a conciliatory process in which the parties control the outcome by trying to fashion their own resolution to a dispute. A mediated resolution typically involves compromise. How, then, can an attorney provide effective advocacy when the process may entail facilitating an erosion of the client's demands? Here are some suggestions for providing effective advocacy during mediation.

Familiarize Yourself with the Process

Knowledge is power. Before representing a client in mediation, become as familiar as possible with mediation. There are many books and treatises on mediation, a process that differs markedly from arbitration and litigation. You should thoroughly understand the process by knowing what is contained in a good Agreement to Mediate, where the mediation will take place, who will be present, whether attorneys will attend

sessions or coach from the sidelines, how long each session will last, how many sessions will be needed, what the style of the mediator is, how break-out sessions or caucuses will be used, what the purpose of the caucuses is, and what the cost will be.

You should also have a clear understanding of the confidentiality issues. In mediation confidentiality has many layers. Is the fact of the mediation itself to be kept confidential? Will the mediator keep ex parte communications confidential as to the other party unless expressly permitted otherwise? Is the mediated agreement to be confidential? If so, among whom? Should the confidentiality include each party's spouse? If so, do spouses have to enter into the agreement to mediate or the final settlement agreement? What are the laws governing the confidentiality of communications to the mediator? If the mediation does not end with settlement or if the Settlement Agreement is breached, can the mediator be subpoenaed by a party to testify concerning statements made during the mediation? May the mediator be subpoenaed by third parties?

To fashion a good Agreement to Mediate and to provide effective advocacy during the process, you must understand the laws governing mediation. In Massachusetts mediation is governed by M.G. L. c. 233. In addition to Massachusetts law, you will also want to know the rules of the dispute resolution provider. For example, the American Arbitration Association has specific rules for Family Mediation, Construction Industry Mediation, Commercial Mediation, Securities Mediation, Insurance Claims Mediation, and Employment Dispute Mediation. Effective advocacy begins with a thorough understanding of the laws and rules governing the mediation.

Educate Your Client About the Process

The attorney should make every effort to educate the client about the mediation process and involve the client in preliminary decisions. This serves two purposes. First, through involvement in the planning stages, the client will feel more committed to the

mediation and may work harder toward a successful outcome. Second, client education is an excellent way to avoid misunderstandings, client dissatisfaction, and malpractice suits.

Work Diligently to Select the Right Mediator

The issue of mediator selection is so important that the entire second part of this series of articles was devoted to that topic. That article set out methods for finding good mediators and suggested ways to select the right one for your case. Briefly, the article suggested finding out as much as you could about the mediator, including the opinions of colleagues and parties who had used that mediator, the mediator's background, mediation training, legal experience, style, subject matter expertise, types and number of disputes handled in the past, settlement rate, fees and availability.

Understand Your Role

The attorney's role in mediation varies from minimal involvement (such as merely reviewing the final Separation Agreement at the conclusion of a divorce mediation) to maximum (attending all mediation sessions). The attorney must understand his or her expected level of involvement. That said, regardless of the intensity of the attorney's involvement, the nature of the involvement must be non-controlling. Attorneys must allow the mediator to retain control of the process. After all, it's the reason you worked so hard to select the right mediator! If you try to take control, you will upset the developing relationship of the parties to each other and the relationship between the parties and the mediator. The development of these relationships is a cornerstone of mediation.

Promote a Spirit of Conciliation and Cooperation

Regardless of the mediator, the success or failure of the mediation ultimately relies on the goodwill of the parties. The parties must enter into mediation with the understanding that the resolution will involve compromise. To help your client, you should

understand the principles and art of successful negotiation: separating the issues from the personalities; focusing on the interests (not positions) of the parties; finding ways to increase the available pie; working together to create options for mutual gain; developing objective standards by which to measure the terms of agreement; understanding your best alternative to a negotiated agreement; understanding and using power, information and time; understanding and employing a variety of negotiating styles; recognizing and handling the negotiating style of others; and trying to foster a spirit of cooperation in the other side. If you understand the elements of negotiation, and help your client understand them, you will enhance the chances of a successful outcome.

Guard Your Client's Rights

Trying to foster a spirit of cooperation does not mean mediating away your client's rights. Successful advocacy depends on meticulous legal research, a solid understanding of your client's rights, and an educated assessment of the likely outcome in court. Even though in mediation mode, the advocate still retains responsibility for protecting the client's rights. While the client may choose to waive or compromise those rights in the interests of negotiating a settlement, it is nonetheless essential that you understand your client's rights, inform the client of those rights, and caution the client that he or she may be waiving those rights. You may be conciliatory, you may be willing to compromise, you may be open to negotiation, but, to paraphrase Brendan O'Sullivan, you're not a potted plant.

Be Available to the Mediator

The mediator may wish to consult with the parties' attorneys at various points throughout the mediation. Effective advocacy includes making yourself available to the mediator and remaining open to the mediator's suggestions for moving the mediation along. While it is impossible to predict precisely what will come up during a mediation, there are certain to be some stumbling blocks. You will assist in the elimination of

stumbling blocks by keeping the lines of communication open between you and the mediator.

Do Not Undermine the Process by Trying to Control It

Perhaps the toughest part of advocacy in mediation is resisting the attorney's natural inclination to control the process. By trying to wrest control of the process from the mediator and parties, the attorney can quickly undermine the mediation. It is not helpful to second-guess the mediator, question the mediator's judgment, or plant seeds of distrust with your client. If you are concerned about the content, tenor or results of a session, contact the mediator and explore the mediator's plan and thinking. Ex parte communications are permitted in mediation, so you can discuss the progress of the mediation with the mediator and request that the mediator not disclose the content of the conversation to the other side. By discussing your concerns with the mediator before bringing them to your client, you may discover that there is a greater good to be achieved through what appeared to be a troublesome session.

EFFECTIVE ADVOCACY IN ARBITRATION

Arbitration is an adversarial process and zealous representation is the order of the day. The advocate's role approximates the role played in litigation, so it feels more familiar to litigators. Here are some ways to provide your client with effective advocacy in arbitration.

Review Any Arbitration Clause and/or Draft an Agreement to Arbitrate

First off, make sure you know why you are in arbitration. If there was a prior contract under the terms of which your client is required to arbitrate the dispute, make sure that the arbitration clause is valid and that you understand its requirements. The clause may, for instance set forth where the matter is to be heard, before what

arbitration provider, the size of the panel, responsibility for fees and costs, and the scope of the arbitration.

If there is no prior contractual agreement, you should begin the process by drafting a written Agreement to Arbitrate. That document should set forth at least all of the elements enumerated above which might have been stipulated in an arbitration clause. In addition, you may also spend some time with opposing counsel trying to circumscribe the arbitration by defining and narrowing the issues.

Select the Right Arbitrator

As discussed in Part II of this series, the ability to select the arbitrator is a tremendous advantage of arbitration over litigation. Don't squander this opportunity. Learn everything you can about the prospective arbitrator - level of training, years of experience, number of cases arbitrated, number of cases arbitrated in your subject matter, decisions rendered, natural biases, fees and availability. Solicit the opinions of parties and attorneys who have appeared before the arbitrator. The right arbitrator can make all the difference in the smoothness, efficiency and outcome of the arbitration.

Familiarize Yourself with the Arbitration Process

Although arbitration is less formal than litigation, it still has rules. Familiarize yourself with the statutory requirements for commercial arbitration which in Massachusetts is governed by M.G.L. c. 251. In addition to statutory schemes, there may also be rules and procedures of the specific dispute resolution organization under whose auspices the arbitration is taking place. The American Arbitration Association, for example, has specific rules governing Construction Industry Arbitration, Labor Arbitration, Insurance Claims Arbitration, Employment Disputes Arbitration, and Commercial Arbitration. These are arbitration's equivalent of the Rules of Civil Procedure and the effective advocate must learn them.

Educate Your Client About the Process

Once you are familiar with the arbitration process, you will be able to bring your client into the loop and explain the process and how it differs from litigation. This will promote good client relations and encourage an active role for the client.

Prepare As Thoroughly As You Would for Litigation

Although the procedural rules are somewhat relaxed in arbitration, you should nonetheless prepare with the same exacting attention to detail as you would for trial. Many arbitrations permit discovery, motions in limine and preliminary hearings. Depending on the case and the available resources, you may find yourself engaged in a process not unlike full-blown litigation.

Meticulous preparation is essential. The more litigators arbitrate, the more they bring to arbitration the tools of litigation. You have to prepare your case as if for trial and, the relaxation of the rules notwithstanding, be prepared to argue evidentiary, as well as substantive, issues. Come armed with the statutes, case law and procedural rules needed to support your arguments.

Make the Arbitration Fit Your Skills and Your Case

Since the rules for arbitration are relaxed, there is some latitude in the configuration of the process. Use this to your advantage. So, for example, if the written word is not your strong suit, you may want to argue at a preliminary hearing that pre- or post-hearing briefs are unnecessary and should not be permitted. Or, if your client has limited means, you might want to limit the number of depositions, the number of witnesses, the scope of discovery, or the length of the hearing. You can try to do this by filing motions or by raising these issues in a preliminary scheduling conference with the arbitrator and opposing counsel. Try to use the relaxation of rules to mold the arbitration to your needs.

Be Courteous, Maintain Decorum, and Accord Deference to the Arbitrator

Even though arbitration is less formal than litigation, the Massachusetts Rules of Professional Conduct still apply. SJC Rule 3:07 sets forth the lawyer's responsibilities and

duties concerning professional conduct. Advocates must extend the same courtesies and maintain the same decorum during the proceedings as they would in court. Although the arbitrator does not wear a robe, you should remain mindful of the arbitrator's role as neutral and decision-maker, and accord appropriate deference. Similarly, although the arbitrator does not have chambers from which to appear and to which to disappear, the arbitrator is the adjudicator. Ex parte communications - including casual chatter in the hallways - is to be avoided.

Review the Arbitration with Your Client

Once the arbitration concludes, you should review the entire experience with your client and solicit feedback about the client's experience. Through specific inquiry about the process, your strategy, and your performance, you may gain valuable insights into ways to provide even better advocacy during the next arbitration.

CONCLUSION

Mediation is totally different from litigation and advocates must develop and utilize a specific set of skills to provide effective advocacy in mediation. Similarly, there are enough differences between arbitration and litigation, that even seasoned litigators need to learn new skills and focus on new areas in order to provide effective advocacy in arbitration. The good news is that effective advocacy in ADR mostly requires building on and honing skills good lawyers already have.

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