PositivelyNeutral

Arbitration and Mediation for Attorneys and Their Business Clients

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When mediation day arrives, the parties and their counsel presumably are aware of the contours driving settlement. The claims and defenses frame the dispute. Information, either known from the outset or obtained through discovery, is used by the parties to evaluate the strengths and weaknesses of their respective positions. Sometimes, facts and circumstances not directly related to the merits can have a substantial impact on settlement value.

For example, a plaintiff creditor may have a rock-solid claim against the debtor. Nonetheless, the debtor's financial distress may cause the creditor to conclude that settlement will require acceptance of a meaningfully reduced amount than the paper value of the claim. A debtor's claim of poverty—when backed up by precarious-looking financial statements—often leads a creditor to take what it can get before the bankruptcy petition is filed.

Here's another example. Knowing that the adversary party is hot-tempered to the point of acting irrationally may drive a party to make financial concessions so as to finally be rid of a pain-in-the-butt.

In the instances above, the settlement analysis is influenced by the party's knowledge of the relevant information, enabling the party to assess the reasonableness of a negotiated resolution.

But what if key information is not known? Sometimes, there are extraneous circumstances that can meaningfully impact settlement value. A business entity may have wider, strategic concerns that are not generally known, and sometimes not shared with its own counsel.

Here are a few illustrative examples:

- Company X, angry that a key employee jumped ship to join a competitor, has filed suit to enforce a non-compete provision in the faithless employee's contract. But what if Company X simultaneously is recruiting a senior executive who herself is bound by a non-compete with her current employer? Vigorously asserting through litigation the sanctity of contractual non-competition provisions against its former employee may undermine Company X's important

recruitment efforts. Under these circumstances, would Company X be better off extricating itself from the lawsuit with its former employee?

- A complicated transaction between Company X and another entity went awry, resulting in a multi-count complaint. To appropriately pursue the matter, Company X's attorneys will require details about the transaction and ongoing support from the key employees of Company X who "lived" the transaction. But what if those key employees no longer work at Company X, having departed the company for greener employment pastures? How will the company (and its outside counsel) litigate the claim when Company X's personnel are no longer there to help?

- Company X is a financially strong entity with many business units. One of its business units has a trade debt collection claim that ordinarily would be routine. However, Company X has been negotiating the sale of the business unit. The prospective purchaser will not be taking the claim, meaning Company X will be left to pursue it, no longer as part of its ordinary operations, but as a one-off orphan, and thus a distraction. Will Company X be well-served to discount its claim to bring it to an end?

These examples, and others like them, demonstrate how Company X's attorney will benefit from knowing how the company's larger strategic interests can impact the resolution of a single, discrete claim. Sometimes, the significance of the dispute for which the attorney was engaged will pale next to wider, practical ramifications facing Company X.

However, especially with larger companies, the relevance (or even knowledge of) strategic matters in the company's pipeline are not known to the company personnel involved with the dispute. Thus, Company X's outside counsel may be operating in the dark, unable to appropriately advise the client regarding settlement risks and opportunities.

Outside counsel should not assume the company representatives assisting with the dispute are knowledgeable about Company X's wider strategic initiatives and how they might impact the current dispute. Those assisting with the claim typically are operational personnel who were involved with the specific transaction; their job responsibilities do not ordinarily encompass company-wide initiatives that may have strategic implications for the dispute.

Outside counsel should inquire of Company X's ***inside*** counsel whether there is anything about the particular dispute that potentially will be problematic for the company's wider strategic interests. Inside counsel—who may not be particularly focused on the dispute that its outside counsel is handling—usually will appreciate an outside attorney's inquiry as to whether there is anything about the dispute that implicates Company X's wider objectives.

An attorney representing the adverse party will find it more challenging to uncover information about Company X's strategic initiatives that may be helpful in negotiating settlement. However, on occasion, sleuthing may prove productive:

- Sometimes, personnel from the two, now adverse companies maintain relationships that transcend the dispute. The client representative(s) can thus be a source of information or gossip about Company X that proves useful.

- Attorneys can conduct an online review to determine whether there is available information about Company X's current strategic initiatives. If Company X is publicly traded, its SEC filings may provide useful information. Company X's press releases can also provide insight that is valuable to an attorney representing an adverse party.

Whether and how an attorney should share strategic information with a mediator is important. Knowledge of that information will be helpful to an experienced mediator in assessing the potential contours and terms of settlement. However, there is a legitimate concern by counsel that the mediator not inappropriately divulge the strategic information to the other party. Even though mediation confidentiality enables counsel to fully and frankly discuss the information with the mediator, both counsel and the mediator should ensure they are on the same page regarding how much information, if any, the mediator can share with the other side.

In short, knowledge of a client's underlying business strategies and external circumstances can significantly influence the resolution process. Attorney diligence in uncovering these broader issues—and, where appropriate, discussing them with a mediator—enables them to achieve results that are aligned with the overarching goals of their clients.

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