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THE EVER-INCREASING INFLUENCE OF MEDIATION AS A MEANS OF RESOLVING COMPLEX COMMERCIAL DISPUTES

WHY CRENET/SPIDR PUBLICATIONS HAVE REPLACED THE RULES OF CIVIL PROCEDURE ON MY BOOKSHELF

*Howard C. Emmerman**

Mind you, I have not discarded the Federal Rules or the Illinois Code of Civil Procedure. Rather, I have begun to realize that the influences of the business community are relying more heavily on other means of resolving complex commercial disputes, not the least of which is mediation. These influences already have been felt in the legal community, to the extent that very soon it is likely that all attorneys whose practice is primarily in litigation will be required to have completed formal training in mediation techniques. These training programs are very much in existence today, as are a growing number of organizations that promote mediation and other means of alternative dispute resolution, or "ADR."¹ Moreover, mediation can no longer be considered a novel concept; initiatives are underway nationally, statewide, and locally to incorporate mediation into the resolution of litigated disputes. As a microcosmic example, an interim draft of the Uniform Mediation Act is under consideration by the National Conference of Commissioners on Uniform State Laws,² a mediation program to settle civil rights cases has been initiated by the United

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1. For example, formal dispute resolution education programs are now conducted by, DePaul University's Center for Dispute Resolution and the Center for Conflict Resolution (CCR). For a list of organizations which offer training and education programs *see, e.g.*, GOLDBERG, et al., DISPUTE RESOLUTION — NEGOTIATION, MEDIATION AND OTHER PROCESSES, app. G, at 673-78 (3d ed., 1999). Unfortunately, there appears to be little comity between these programs. A certification in one program does not always suffice for participation in others.

2. *See Uniform Mediation Act* (National Conference of Commissioners on Uniform State Laws, Interim Draft February 20, 2001) *available at* <http://www.law.upenn.edu/blil/ulc/mediat/med0220.htm>.

States District Court for the Northern District of Illinois,³ and the Law Division of the Circuit Court of Cook County has established a Voluntary Mediation Pilot Project.⁴

The pressure to resolve disputes through mediation emanates not only from the courts in which these disputes are litigated and the lawyers who litigate them. The business community has begun its own initiatives to adopt ADR techniques as alternatives to litigating disputes. An example of these initiatives is found in the efforts of the CPR Institute. CPR is an alliance of global corporations, law firms, legal academics, and selected public institutions. Approximately 4,000 operating companies have subscribed to the CPR Corporate Policy Statement on Alternatives to Litigation,⁵ which obligates them to explore the use of ADR in disputes with other signers. CPR's stated mission is the following:

[T]o install . . . ADR . . . into the mainstream of corporate law departments and law firm practice — to make the legal profession the preferred delivery system of ADR. To fulfill its mission, CPR is engaged in an integrated agenda of research and development, education, advocacy and dispute resolution. It is the leading proponent of ADR that is managed by the parties and a highly qualified neutral, or self-administered ADR.⁶

The import of these efforts for the career litigator is clear: Develop new skills and a new approach to dispute resolution!

That is easier said than done. In recent years, I have taken to answering that most often heard (and usually rhetorical) inquiry, "what type of law do you practice," with the purportedly droll response, "I administer the involuntary redistribution of corporate wealth." Sarcasm aside, there is a measure of truth to that statement. Indeed, the inclination to regard the litigation of corporate disputes as all-out warfare has, with increasing frequency, been assailed by our courts. "The adversary process in the judicial arena does not require attorneys to be clothed in a suit of armor and fight to the bitter end. The parties, the profession, and the public all lose when the attorneys fail to treat each other with common courtesy."⁷ Unlike those areas of the law such as family law disputes and civil rights litigation, where intervention by a mediator can have obvious socially redeeming aspects, commercial disputes are disputes over money or money-value equivalents.

3. See News Release - Mediation Backed for Civil Rights Cases (Nov. 14, 2000) available at <http://www.ilnd.uscourts.gov/PRESS/PR111400.htm>.

4. Rules of the Circuit Court of Cook County, Illinois Rule 20.1 *et. seq.*

5. CPR Institute for Dispute Resolution, available at www.cpradr.org.

6. About CPR, available at <http://www.cpradr.org/aboutcpr1.htm>.

7. Miller v. Bittner, 985 F.2d 935, 941 (8th Cir. 1993).

Thus, the impetus for the parties to adopt an attitude of compromise rather than confrontation, is not usually strong or compelling. Nonetheless, in every one of the three case studies detailed below, the mediation process enabled the parties to settle their disputes without expensive litigation, and the attorneys, who initially risked being likened to traitors for so much as even suggesting a conciliatory procedure, became heroes.

These case studies constitute my real-life initiation into the mediation process. It should be noted that in every one of the following cases, I opined that there was no chance whatsoever of a compromised settlement. My prediction record was totally consistent: it was wrong every time. In my participation in these cases, always as litigation counsel for one of the parties in a case which was in litigation or in which litigation was imminent, I learned that there is still skill, gamesmanship, and tactical considerations which the good mediation advocate must consider and utilize. Managing detente is no less challenging than is managing warfare.

CASE STUDY 1: THE SYSTEMS FIRM VS. THE FREIGHT TERMINAL

My client was a publicly held systems company. A new management regime had recently been installed, and the desire to achieve a dramatic and immediate success was strong. Under its previous management, the client had entered into a contract to automate an intermodal freight terminal, installing hardware and configuring software to accomplish the daunting task of tracking and physically moving substantial freight traffic as it approached, left, and moved within the terminal. Unfortunately, the system which was installed had not become operational and the outside performance dates had long passed, as a consequence of which the terminal's ownership had terminated the contract and withheld substantial payments from my client. The contract contained a compulsory mediation clause, by which the parties were required to schedule a mediation conference. Though our facts were not good, my analysis of the parties' acts and omissions pursuant to the contract had produced some legally palpable excuses for the system's failure, and I had advanced the theory that the terminal's ownership had repudiated its obligations under the contract and had frustrated my client's ability to perform. Ever the litigator, I prepared an extensive memorandum for the mediator with exhibits attached, in support of our theory of the case. Our opponent's submissions were meager in comparison.

At the initial mediation conference, we were clearly better prepared, our presentation outshone that of our opponents' counsel, and

my client was pleased. In our first caucus, the mediator cut to the quick. After complimenting our “clearly superior” presentation,⁸ he saw through our arguments and made it very clear that the non-performance of our system was likely to doom our lawsuit. Though I had advanced this very opinion to my client many times previously, the client’s representatives reacted as though they had been shot. Two days later, and after a number of my client’s senior and super-senior management operations executives had made their unscheduled appearance at the mediation table, my client accepted a substantial reduction in the amount claimed due, and the matter was resolved.

This experience reinforced a time-worn rule: No matter how many times one advises his or her client of a potentially adverse result in litigation, the client is more likely to heed that advice when the client hears it from a third party.

CASE STUDY 2: THE DOCTORS VS. THE MEDICAL EQUIPMENT MANUFACTURER

My client was a manufacturer of non-functional prosthetic devices used in certain minor cosmetic surgical procedures. The client had been sued by two physicians who had used the client’s devices on large numbers of patients and claimed that, after a period of time, the devices had failed with large numbers of their patients, requiring the plaintiffs to re-perform the procedures at their expense. None of the procedures involved a threat to the patients’ lives or well-being. A lawsuit had been filed by the physicians under state laws which permitted recovery of economic damages in a tort action notwithstanding the absence of personal injury or property damage. The plaintiffs sought substantial damages, both for the cost of the re-performed procedures, as well as damage to their reputations. We had subpoenaed the physician’s records and found that, while there was evidence of multiple failures of the devices, there was also a substantial possibility that we could prove the failures were caused by the physicians’ negligent failure to follow the instructions enclosed with the devices.

Clients and their attorneys were present at the one-day mediation session, which had been scheduled by agreement. Having learned from my first experience that a well-prepared litigation presentation was not necessarily likely to effect settlement and in fact could with equal probability polarize the parties’ positions, I directed my opening statement not to the mediator, not to plaintiffs’ counsel, but to the two plaintiffs themselves. In essence, I told them that we intended to de-

8. Thinking back on it, I have little doubt he said the same thing to the other side.

pose their patients with the hope of exposing the physicians' failure to follow the instructions for installation of the devices. As a direct result of our efforts, these physicians' patients would be sensitized to the possibility that their doctors might have committed malpractice. I told the plaintiffs that apart from the further damage to their reputations which could result from this realization, they were exposed to the real possibility of malpractice suits being filed against them as a result of our depositions, since the statute of limitations would not run for a long time. If our defense was successful in their suit against my clients or if our defense was unsuccessful but their damage recovery was not as substantial as they had hoped, they would be left with no one to blame and substantial liability to their patients.

As we were caucusing separately with the mediator, I learned that this approach had worked. The plaintiffs' demands were far less than their *ad damnum*, and the matter settled. From this experience I learned: Mediation gives counsel for one party the opportunity to address the opponents directly, and to thereby dispel or at least diminish, any possibly unrealistic expectations created either in their own minds, or by their counsel.

CASE STUDY 3: THE PARTNERSHIP BREAKUP

I represented one of two former partners who were engaged in a dispute over allocation of the proceeds of sale of a substantial tract of real estate, the only asset of their dissolving partnership. The dispute was peppered with mutual allegations of fraudulent concealment, appropriation of partnership business opportunities and self-dealing, all reflecting the absolute and total failure of their relationship after eleven years of attempting unsuccessfully to develop the property. The accounting issues were monstrous; indeed, the most pivotal testimony in the trial would come from multiple expert witnesses who would each opine as to the proper allocation of the capital accounts of the warring partners. Each side claimed entitlement to all the proceeds, and to additional recovery against the other. The parties were a chasm apart in their respective demands. I had evaluated the likelihood of our prevailing as fifty-fifty at best. After three years of litigation, and almost on the eve of what would surely be at least a four-week trial, the court suggested mediation and the parties agreed on a one-day session. The submissions to the able mediator were enormous, but his ability to digest them quickly was perhaps the most significant factor in the mediation process. This was my first mediation in which the parties refused to sit in the same room with each other; we went into separate caucus rooms immediately. Obviously, no di-

rect communication with the opponent would be possible here. The entire day was spent in long discussions with the mediator about the specifics of our version of the accounting. At the end of the day there had been some movement, most of it on the part of my client, but the parties were still far apart. After about eight hours, we all decided to terminate the mediation.

The next morning, I called my client to compliment his honest good-faith participation in the negotiations at the mediation session, and to repeat my advice to him at the end of the mediation, that he had made a reasonable compromise offer. His response was surprising: after spending substantial amounts of money on depositions, the retention of experts, motion practice, and the other countless and expensive necessities to the preparation of a complex case for trial, he told me to accept the last demand we had received from the other side at the mediation, and to put an end to the lawsuit. I was flabbergasted; how could this client give up the battle after spending so much for so long on an emotional, high-stakes dispute? He responded that he was just tired of the matter, that the mediator's inability to predict him as a likely winner was depressing to him, and that he wanted to move on. From this sobering experience I learned: A mediation session is a cheaper and more efficient way to test the client's stamina than is a full-blown trial.

I have since encountered many more mediation sessions in various capacities; each has reinforced the notion that mediation is beneficial for the client even when the process does not produce a settlement. More than anything, the use of mediation in the settlement of complex commercial disputes represents one of the most significant modifications effected in my thirty years of practice and will challenge commercial trial lawyers in the next fifty years to develop distinct skill-sets in this very different approach to dispute resolution.