51ST UIA CONGRESS

Paris, France
October 31-November 4, 2007

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Thursday, November 1, 2007

MEDIATION AND CONFLICT PREVENTION

DEAL MEDIATION: A NEW LOOK AT AN OLD FRIEND

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Introduction

Deal Mediation is a new application of an existing process. Attorneys whose practice is focused on transactions are beginning to discover the positive impact a neutral, skilled in mediation, can have. By employing a neutral to assist in the negotiation of complex deal, counsel can increase the likelihood of the success of the negotiation. Additionally, use of a third party neutral will save the client money because the process not only produces results but also is more efficient. Providing the client with the desired results efficiently and economically will result in greater client satisfaction. This, ultimately, benefits the business interests of counsel. This article explores this new trend of Deal Mediation.

Historical Context

The field of mediation has grown tremendously over the past thirty years since the Chief Justice of the United States Supreme Court, Warren Burger, challenged the entire legal community to find "a better way" to resolve disputes. [1] Since that time, the field of alternative dispute resolution ("ADR") has grown and evolved. Dockets throughout the United States have felt the impact as litigants resolve their disputes privately.[2]

Despite initial resistance from the Bar as well as from clients, ADR has proven enormously popular.[3] Retaining control over the resolution of the dispute produces greater satisfaction with that result.[4] Most importantly the process is more private, quicker and far less expensive than proceeding through the court system. [5] Attorneys have discovered, contrary to their initial concerns, that attorneys are not irrelevant in the mediation process. Rather with the appropriate skill set, lawyers can make an enormous difference in the process as well as the result. Serving as Counsel to a party in mediation or other ADR process does require a separate skill set. Mediation Advocacy is completely different from the advocacy practiced in the litigation context. An advocate in mediation knows how to select the appropriate mediator, when to mediate, how to give a compelling mediation opening statement and how to manage the negotiation. Not all litigators are trained in it or are skilled in mediation advocacy. In fact the latest development on the horizon is the establishment of a new area of specialization specifically designed to provide value to the mediation process, that of "Settlement Counsel." [6]

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[1] Burger, *Opening Remarks*, in American Law Institute, Remarks and Addresses at the 62nd Annual Meeting 1, 8-9 (1985).
[2] Thomas J. Stipanowich, *ADR and the Vanishing Trial*, 1 Journal of Empirical Legal Studies 3, 843-912, (2004).
[3] Jennifer Shack, *Mediation Can Bring Gains, But Under What Conditions?* 9 Dispute Resolution Magazine 2, (2003),
available at http://www.caadrs.org/downloads/DRMAarticle.doc.
[4] id
[5] id
[6] John Leo Wagner, *Aggressive ADR,* ABA Section of Business Law, Business Law Today, May/June 1999. available at http://www.abanet.org/buslaw/blt/8-5adr

Settlement Counsel assist their clients in mediation and working towards reaching a settlement of the dispute. On a parallel track, litigation counsel retain responsibility for all trial preparation. An obvious advantage to using settlement counsel is that they have the appropriate skill set. In addition Settlement Counsel have as their clear objective reaching agreement. When trial counsel also act as settlement counsel there is a subtle conflict if counsel prefers for whatever reason to litigate rather than settle. Their own confidence in their likelihood of prevailing at trial may impair their own objectivity in assessing settlement value. In addition, what transpires in the settlement conference that is the mediation will remain absolutely privileged and confidential even from litigation counsel.

Comparison Between Deal Mediation and Dispute Mediation

The success of mediation in the context of dispute resolution has led to the exploration of other uses for this process. An evolving area is that of "Deal Mediation." Although, informally practiced for decades, the concept of Deal Mediation has only been formalized within the past decade or so.[7] One of the major objections that has confronted ADR over the years and will no doubt arise in connection with this innovation is the fact that attorneys have historically conducted successful negotiations directly. This is true and a fair objection. However just as there are lawsuits that are more difficult to settle directly and which have benefited from the intervention of a skilled third party neutral, there are deals that are more difficult to close directly. It is in these instances that the third party neutral may prove invaluable.

The concept of third parties assisting clients with deal making is not new. Historically, parties have relied on intermediaries in connection with the negotiation of private agreements. These individuals are usually consultants, advisers, agents, or brokers.[8] Lawyers and investment bankers also routinely serve this function. These individuals represent and are compensated by a single side of the deal. Therefore, although they assist in facilitating the negotiation and closing the deal, they have implied or actual bias. They will not enjoy the trust of both sides, and regardless of whether there is any actual interest in the final terms, their implied objective will be in furthering the interests of their client.

Employing a neutral Deal Mediator shifts the dynamic somewhat and formalizes the objectives. The role of the Deal Mediator is to facilitate communication, and to manage the negotiation while serving as representative to both and to none. The Deal Mediator helps parties work through any conflicts that could result in impasse. The Deal Mediator gets the deal closed.

Deal Mediation and Dispute Mediation are more alike than different. The neutral utilizes the same basic skills and techniques to identify common ground and ultimately reach agreement. In fact, in resolving a lawsuit, the Dispute Mediator is facilitating the negotiation of a "deal." There are only a few differences. The most significant and obvious is the fact that Deal

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[7] L. Michael Hager and Robert Pritchard, *Deal Mediation: How ADR Techniques Can Help Achieve Durable Agreements in the Global Markets*, available at http://www.dundee.ac.uk/cepmlp/journal/html/vol6/article6-12.html.

[8] Jeswald W. Salacuse and Henry J. Braker, *Mediation in International Business,*available at http://fletcher.tufts.edu/fac*lt*/salacuse/pubs/mediation.html.

Mediation takes place as the relationship between the parties in interest is forming. Disputes only arise after the parties have been dealing with one another and the relationship has broken down. In dispute resolution, sometimes it is important to try to salvage the relationship between the parties, but often, especially in commercial dispute resolution, that is not a priority or even possible. In Deal Mediation, the relationship between the parties in interest is paramount. Without a working relationship involving mutual respect and trust, it is unlikely that the parties will consummate a deal between them. Because of his or her ability to assist the parties in preserving a good working relationship, the Deal Mediator can add value to any deal.

Deal Mediation in International Negotiations

Another circumstance in which the use of a third party neutral can be especially helpful is in the negotiation of deals involving parties from different countries and distinctly different cultures. When parties are from different cultures, ordinary issues of communication and trust are exacerbated. In any negotiation the focus of a neutral will include facilitating communication and understanding the dynamics. This is true when parties are from the same country and speak the same language. There still are often issues below the surface that are not communicated or are misunderstood. Even in purely domestic negotiations, a third party neutral, skilled in these techniques, can serve to keep the parties focused on the objective and to avoid misunderstandings.

The most obvious problems in international negotiations are language barriers. Translation is not a straightforward issue. Often nuance and context can be lost in translation. Ideally the third party neutral would have some facility with the languages spoken by all parties. However, even if the mediator is not fluent in all of the languages, he or she will nevertheless be sensitive to these issues and capable of avoiding misunderstandings arising from translation issues.

In all negotiations dealing with conflicting interests, demanding constituencies, and difficult personalities presents challenges. Clashing cultures adds an additional layer of complexity. Even the simplest gesture may give rise to confusion and mistrust. In the United States for example, it is customary to shake hands firmly and for a few seconds only. A limp longer handshake can indicate weakness and can be seen as inappropriate. In Africa, however, it is correct to shake hands limply and for as long as several minutes. [9]

Cultural differences can be obvious as in the differences in a handshake or acceptable business attire. Or these differences may be subtle. For example, there are low and high context cultures.[10] The low cultures tend to be more direct. People in these cultures speak their mind and get to the point. High context cultures tend to be more indirect. They rely on context and a shared basis of experience for their communication.[11] These sorts of cultural differences can easily derail an otherwise mutually beneficial business deal. One side may perceive the other side as disrespectful or rude when each side is merely adhering to accepted behaviors of their

[9] http://www.analytictech.com/mb021/cultural.htm
[10] id.
[11] id.

own culture. These sorts of cultural differences can be especially problematic in the business context.

A Deal Mediator skilled in negotiating international disputes will understand these differences and guide both sides through this cultural minefield. The mediator is an impartial third party with no interest in the outcome. This individual can enjoy the trust of both sides. The mediator shares the objective of both sides, that of consummating a deal. The mediator has no agenda with regard to specific terms or positions that benefit either one side or the other.

If the Deal Mediator is involved in the negotiation from the beginning of the negotiation, he or she can help to navigate the process and avoid the conflicts in a negotiation that can jeopardize the entire negotiation. Although preferable, it is not absolutely necessary that the mediator be present from the beginning of the negotiation. He or she can be brought in should the parties reach an impasse.

There are many reasons why in some circumstances direct negotiation may fail. Among them are the dynamics of the individuals. There may be misunderstandings as to positions and interests. The presence of complex terms and numerous parties can create impediments to reaching an agreement. These misunderstandings are even more likely in the international context where the presence of a facilitator can be extremely helpful.

Applicability of "Principled Negotiation" Theory to Deal Mediation

The role of the mediator in the negotiation is quite similar that of the mediator in dispute resolution. An appropriate approach to assisting in the negotiation is the method espoused by Roger Fisher and William Ury in their seminal book *Getting to Yes.*[12] The basic tenants of this highly effective approach include: 1) separating the people from the problem; 2) focusing on interests rather than positions; 3) "expanding the pie" and option generating; and 4) relying on objective criteria.[13]

Separating the people from the problem means that everyone in the negotiation should remain focused on problem solving and reaching and to avoid being distracted by personal dynamics or emotion. All negotiations, regardless of the complexity or dollar amount are personal transactions engaged in by individuals. The first step in separating people from the problem is identifying the interpersonal issues.

As much as the parties would like to think emotion and personalities are irrelevant, this is never the case. In fact, ignoring personal issues or denying their existence would be dangerous. Once the personal issues are identified, they can be addressed and diffused. The mediator will seek to understand who the principles are and to understand what they mean by what they say. Is someone merely posturing or is that person really likely to walk away? How much trust exists and how well are the parties communicating? How are the tactics of one side being perceived by

[12] Roger Fisher & William Ury, 18 - 94*Getting to Yes*, (2d ed., 1992)
[13] id at 15

the other? Parties will act contrary to their own best self interest to the extent they believe they are not being heard or are not being fairly treated.

In any negotiation, the first step is to understand who the parties are. The next step is to make sure who they are is not an impediment to what they want. A third party neutral can be quite helpful in separating out what one side means from what they say. It is not unusual for messages to be intended to be heard a certain way, but misperceived by the listener. Emotions can cloud the ability to send a message as well as receive it clearly. How common is it in a negotiation for one side to misperceive frustration as anger or the constraints imposed by various constituencies as unreasonableness or intransigence.
The Third Party Neutral can explain not only the terms but also the underlying rationale. He or she will diffuse the personal issues in order to maintain focus on the negotiation.

Interests and positions are sometimes the same thing, but more often they are entirely different. The mediator can assist both sides in identifying what they need as opposed to what they want. The story of the two sisters and the orange is often told to illustrate the difference between interests and positions. There was only one orange and two sisters both wanted it. So they split it in half. One sister threw away the peel and ate her half of the orange. The other used the peel for a spice cake and threw away the fruit. Their positions were that they both wanted the orange. Each had a different interest in the orange. The lesson from this story is to go beyond the stated position to understand the interests that are driving these positions.

Option generating presents an opportunity to be creative. Sometimes there are ways to change the dialogue and to find additional ways to bring value to both sides to the negotiation. The mediator can assist the parties with brainstorming options either privately or together. The phrase commonly used to describe option generating is "expanding the pie." It is not uncommon to identify areas where one party can give freely of that which is of nominal value although essential to the other side. These are shared and compatible interests.[14] And can be found if one is willing to look.

Finally, relying on objective criteria is a powerful alternative to positional bargaining. Positional bargainers believe that the most effective approach to negotiation is to start far from where you want to wind up and fight harder than anyone else. The measure of success for positional bargainers is who gets whom to move farthest. The use of objective criteria provides an alternative highly effective technique. This approach requires knowledge of the objective value of the deal. For example, if one were negotiating the purchase of a house, it would be customary to determine the condition of the house, the location, school district, and the price of comparable prices. These criteria are objective and provide an excellent alternative to screaming the loudest for the longest.

The Deal Mediator will employ these techniques and manage the negotiation. When deals are negotiated in the principled manner described above, not only is the negotiation has a better chance of being successful, and relationships are likely to remain strong. However, in the event that there are unanticipated problems at some point in the future, the agreement can contain a

[14] Getting to Yes p.42

provision for the future intervention of the Deal Mediator to help resolve any disputes and avoid litigation.

There are numerous advantages to the parties in using a Deal Mediator. As with a lawsuit, the presence of a neutral to keep the parties focused on the objective and to prevent the distraction of personal issues increases the likelihood that the deal will be consummated. The ability to identify interests and separate them from positions will result in more possibilities to engage in creative option generating and ways to satisfy the interests of both sides at minimal cost to both. The use of objective criteria is a principled way to negotiate that should be rational to both sides. This is an excellent style of negotiation especially in situations where a relationship is just beginning. It is in the interests of both parties to maintain a good relationship going forward.

Conclusion

It is always in the interest of counsel to provide their clients with the desired results as efficiently and economically as possible. Satisfied clients lead to more business and referrals. Deal Mediation allows transactional attorneys to provide their clients with advantages Dispute Resolution has afforded litigators. The result is in the popular negotiation terminology a "win/win" development.