Hawksmere Conference, London November 5, 2003

THE CASE FOR MEDIATION IN COMPLEX LITIGATION

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- **MEDIATION IS A RAPIDLY GROWING FORM OF ALTERNATIVE DISPUTE RESOLUTION:**
  - Good mediators have become more plentiful.
  - More defense lawyers realize how helpful mediation can be in resolving complex litigation and avoiding a lengthy, expensive trial, where there is a serious risk of a very high verdict.
  - Mediation is different from arbitration, which is still bound up in a formal style of presenting a case through examination of witnesses and can involve expensive discovery and protracted proceedings.
  - More important, it is different from arbitration where you do not have the ability to speak privately to the neutral(s) and make your case. Also in arbitration, the award is binding; in mediation nothing is binding if no resolution is reached.
  - With an intelligent, motivated mediator, you are given the opportunity to conduct private caucuses with the neutral and persuade him or her as to the weaknesses in plaintiff's case and the merits of your defense. This is invaluable, because you do not have that opportunity in a trial or arbitration where the judge, jury or arbitrators can only be persuaded through a formal presentation of witness testimony and documents.

- **AT WHAT POINT DO YOU DECIDE WHETHER YOU WANT A MEDIATION AS A DEFENDANT IN A COMPLEX COMMERCIAL OR TORT CASE?:**

  - First, it is necessary to complete all or almost all fact discovery so that you can master the facts of the allegations and defenses.
  - Through discovery and expert reports, it is important to come to a full understanding of the dynamics of the alleged damages.
  - Decide whether you want a mediation, <u>before</u> proceeding with expert depositions which are extraordinarily costly and of little value to a mediator.
  - After fact discovery, make a thorough assessment of the entire case in terms of strengths and weaknesses.
  - Make a dead honest analysis of whether the judge (if a bench trial) or jury will or will not understand some of the critical, complex issues just by hearing testimony and viewing documents. Make a hard judgment as to whether there are certain biases acting against you or in your favor.
    - For example, in a tort case where the accident and death were highly profiled in a locale, such as in an aviation case, there will be an almost insurmountable sympathy factor for plaintiffs. In a commercial case, where it becomes apparent that, because of the case's complexity, the judge or jury will never achieve a full understanding of your defenses, especially more subtle ones, there is a risk that there will be a much higher verdict than warranted. A judge may reveal his failure to fully grasp the issues during motion practice or conferences.

- If you conclude that your case is one of liability and it is probable that large damages will be awarded by a judge or a jury, primarily because of lack of understanding of the complexity of the case and your defenses, then it is wise to actively seek a mediation.

- **NO SURPRISES: YOUR OPININON LETTER TO YOUR CLIENT PRIOR TO REQUESTING A MEDIATION:**
  - Your client has to be completely informed in detail about the strengths and weaknesses on the critical issues of its case and what the likely outcome of a trial will be. The letter must give a direct, thorough and blunt assessment based on the record.
  - Your client must go into the mediation knowing what your opinion is as to the best and worst possible results and the dollar amounts associated with each. There should be a consensus between your litigation team and the client as to the probable verdict at trial. In this way, your client will understand the request for a mediation, will be a more constructive participant in the mediation and will have an appreciation for the numbers that are discussed during the mediation.

- **HOW TO GET A MEDIATION FROM A COURT:**
  - Some courts have the right to demand a mediation under the laws of the jurisdiction.
  - Some courts do not have the statutory right to demand a mediation, but almost all courts are amenable to "urge" the parties to mediate, if one or more of the parties requests it.

-- Your request for a mediation is more likely to be implemented if all fact and damage discovery has been completed, all dispositive motions have been made, and only the discovery of experts remains.

-- Most courts are not anxious to conduct a lengthy trial in a complex litigation and will press parties resisting a mediation to participate.

-- If resistance continues, most courts have the inherent power to order a non-binding mediation.

-- In all events, even if there is no resistance, you should request that the court issue an order for the mediation; this will be helpful later in giving the mediator more authority in pressing for a resolution.

- **SELECTING THE "RIGHT" MEDIATOR:**

  - In a complex case, it is essential to get a mediator who is well known for her intelligence, patience and fairness. He can be a former judge, an accomplished senior lawyer (with mediation experience) or a professional mediator from one of the numerous mediation entities.

  - It is equally essential that the mediator is motivated by ego and extra fees to obtain a resolution, and accordingly, is willing to regard himself as an arm of the court who can threaten to report non-cooperation of one of the parties (usually meaning its demands or offers are too off-line), run the mediation for consecutive ten hour days, or threaten to bring the parties' CEO to meet with him or her. This can be extraordinarily effective.

-- Negotiate an "alternative fee arrangement" with the mediator which allows for a discount of her normal hourly rate plus a 10% "kicker" of the settlement amount if the mediation results in a resolution.

-- Try to ensure that the mediator is willing to announce to the parties at the outset that he considers himself an arm of the court and that he feels an obligation to do whatever it takes to get the matter resolved. That is why it is so important to have a court order authorizing the mediation.

- **WHAT TO DO PRIOR TO THE MEDIATION:**

  - Submit a concise brief summarizing the background of the case, the critical issues that need to be understood and the damages your client is willing to pay at the outset. Emphasize your commitment to the mediation process.

    -- Be fair and reasonable, rather than argumentative and aggressive. You have to establish your credibility at the outset and continue it through the mediation.

  - Submit all prior dispositive motions made in the case along with the court opinions deciding the motions.

    -- Submit any appeal briefs that were filed in the case and all court opinions deciding the appeals.

  - Arrange to meet privately with the mediator prior to the mediation, but after the submission of the papers, to get some feel about his initial views on the issues and how he plans to conduct the mediation.

- **THE OPENING PRESENTATION:**
    - You should use this opportunity to put your strongest points forward.
        - -- Concede the claims you would plan to concede at a trial; this enhances your credibility.
    - It is important to be firm, but set a tone of conciliation.
    - Back up the strengths of your defenses and the showing of why certain claims are without factual foundation with documents and deposition testimony.
    - Most mediation facilities are equipped with computers at each seat so that your documents and excerpts from deposition testimony can be digitized into power point displays. You should highlight parts of documents and deposition testimony or enlarge them and juxtapose them. Use key videotaped deposition testimony.
    - Display the transcript as a subtitle under the video.
    - Use demonstrative exhibits to clarify and fortify your points.
    - Overall, your presentation should give the other side a taste of what will come in a trial and should put the best face on the key issues the mediator will have to resolve.

- **IMMEDIATELY FOLLOWING THE PRESENTATIONS:**
    - Typically, the mediator will want to meet alone with each side to ask questions.
    - Be prepared with hard copies of the exhibits used in the presentation.
    - Use this opportunity to drive home points that may remain unclear to the mediator.

- Assess where the mediator is having difficulty agreeing with your attack on the claims or with your defenses. Use this information to prepare for the first morning session the next day.

- **THE MEDIATION CAUCUSES:**
  - Each mediation caucus gives you the opportunity to speak privately with the mediator and your client about particular points or issues. It is a chance to go through the evidence on these points and issues slowly in a give and take dialogue. It is precisely what you cannot do in a trial setting.
  - After shuttling back and forth between the private caucuses, at some point during the first day, the mediator will give you his rough assessment of what the case is worth. It is likely to be much higher than you anticipated, so ask the mediator specifically how he came up with the number and identify issues on your side as to which he has doubt or does not agree.

- **OVER THE NEXT DAY OR TWO, DWELL ON DIFFICULT ISSUES AND CREATE DIFFERENT APPROACHES TO PURSUADE THE MEDIATOR OF YOUR POSITION ON THESE ISSUES:**
  - If you are successful in getting the mediator to lower his valuation of the case, which is closer to your own, then you can begin a typical negotiation.
  - The mediator will tell you where your adversary is, identifying a possible number and where the sticking points are.

- If he thinks any party is totally out of range and jeopardizes a resolution, urge the mediator to threaten that party with advising the court that they are not cooperating.
- If little movement continues on the part of your adversaries, the mediator usually will threaten to and actually proclaim a "mediator's number" to settle the case; if he does not, ask him to do so.
- He will then tell the parties jointly that if they cannot agree on the "mediator's number," he will, or you can suggest, that he order the CEO's of the parties to continue the negotiation in his office and advise the court of the necessity to do so because of lack of cooperation.
- Usually this threat is effective and the parties will agree to the mediator's number or a negotiated one within its range.

- **THIS HAS WORKED SUCCESSFULLY IN COMPLEX LITIGATION WHERE, FOR THE REASONS STATED ABOVE, WE ACTIVELY SOUGHT A MEDIATION:**
    - By getting an intelligent mediator to understand the issues in private give and take dialogues, the resolution number is usually closer to the best case scenario in a trial that you laid out to your client in your opinion letter.