THE AMERICAN LAWYER
An ALM Publication
americanlawyer.com
November 1, 2021

Using Nonconfidential Mediation Statements and Opening Presentations to Your Advantage

BY JOYCE KLEMMER

Success in a mediation may require persuading the other party to adjust its assessment of risk and consider creative resolutions. When I am mediating a business or intellectual property dispute, I tell the parties that my role in the mediation is to assist them in reaching a "business resolution." For the parties, any business resolution involves a risk/benefit analysis. The benefits of reaching a settlement are usually apparent to all: closure, cost savings and certainty of the outcome. It is the parties' assessment of risk that is the driver in the negotiations.

Assessing Risk

Risk involves not only the cost and possible outcomes if the case is litigated, but also the risk that the litigated outcome will not achieve the desired result or resolve all of the issues between the parties. To be in a good position to negotiate, you need to make the other side, specifically the decision-makers, question their assessment of those risks. But how do you do that without turning the mediation into just another forum for stating your party's legal position? How do you raise issues that cannot be resolved by the pending litigation but can be resolved by settlement? Two under-utilized mediation tools for addressing, and influencing, a party's assessment of risk and possible resolutions are mediation statements that are shared with the other party and making an opening presentation.

Address the Decision Makers Directly

Most mediators require the parties submit mediation statements addressing specified topics. Typically, mediation statements are confidential and are shared with the mediator only. But if you provide opposing counsel with a *nonconfidential* mediation statement, you will have the opportunity to present your view of the case directly to the other side's decision-makers in advance of the mediation session. The mediator can assist the parties in assessing risk, but it is the decision-makers' perspective of the risks that drives settlement. Counsel are in the best position to highlight the facts that can influence the other party's view of risk.

The party representatives may or may not be well-versed in the

merits of the dispute. Even if the party representatives are in-house counsel, this may be only one of many matters vying for their attention. The other party's client sees the case, and the risk, through their lawyer's eyes only, not the eyes of opposing counsel. The nonconfidential mediation statement gives you the unique opportunity to do what you cannot otherwise do ethically: speak directly to the opposing party's decision-makers, explain the merits from your point of view and perhaps move the needle of risk assessment in your favor.

Protecting Confidentiality

Before deciding to provide a nonconfidential mediation

statement, the parties should check the statutory or local rules governing the confidentiality of mediation communications and enter into a confidentiality agreement limiting disclosure. Private mediation providers usually have the parties to the mediation sign a mediation agreement providing for confidentiality. For example, the JAMS Mediation Agreement provides that statements made during the course of the mediation are privileged settlement discussions that "will not be disclosed to third parties except persons associated with the participants in the process." Depending upon the stage of the litigation and the facts that you want to present, you might further limit dissemination of the nonconfidential mediation statement to only those persons who will attend the mediation.

There will undoubtedly be information that you want to share only with the mediator. This can be done by submitting a confidential addendum. For example, a business event may be looming, such as a new product rollout, a refinancing of obligations or the sale of the business. A party may want only the mediator to know that information to avoid giving leverage to the other side in negotiations. Similarly, if a party thinks that its claim or a defense has weaknesses, it will not want to share those weaknesses with the other side. A confidential addendum addressed only to the mediator gives the mediator information that he or she can use to steer the course of negotiations, without compromising the confidential information.

Use the Opening Presentation to Suggest Possible Resolutions

The parties also often forgo the opportunity to make opening presentations. As with the nonconfidential mediation statement, this may be your only chance to speak directly to the business decision-makers on the other side. Something you say may cause them to question their assessment of the strengths and weaknesses of their case. The goal here is not to drive a wedge between the business decision-makers and counsel; rather, the purpose is to give the decision-makers the opportunity to see the case from the other side's perspective. To avoid posturing or polarizing positions, the ground rules must be clear in advance. The mediator should require that any opening remarks must be non-argumentative, non-accusatory and fact-based, with notice given in advance of the intent to make opening remarks.

A good opening presentation should, first and foremost, convey a party's willingness and desire to reach a business resolution. It may include a brief discussion of the facts, the current posture of the case, the damages or defenses that it intends to present at trial and a discussion of the possible outcomes if the cases is tried. Most importantly, an opening presentation should include a general outline of acceptable resolutions and the advantages to both parties if a resolution is reached. A non-argumentative, logical and reasonable presentation of the facts, claims and defenses that also suggests alternatives for resolutions may convey a genuine interest in resolving the case and open a dialogue about what it will take to settle the case.

Disclaimer: The content is intended for general informational purposes only and should not be construed as legal advice. If you require legal or professional advice, please contact an attorney.

Joyce B. Klemmer, *Esq., is a JAMS neutral with more than three decades of experience in intellectual property and related complex business litigation. She can be reached at jklemmer@jamsadr.com.*