HOW DOES BIGLAW RESOLVE COMMERCIAL LITIGATION CASES IN MEDIATION?

BY NIGEL WRIGHT

The short answer to this question is "by preparing their cases thoroughly." However, like most things in life, the true answer to resolving commercial litigation cases lies in the details.

The websites of most BigLaw firms emphasize the business requirements of their clients; the need for sophisticated counsel for complex matters; and the resources required to go to trial to achieve ultimate success. These websites further detail the industry background and pedigree of their attorneys while offering a seamless national platform enabling those firms to bring their resources to bear wherever the litigation may be venued. Obviously, the litigation needs of large commercial clients can arise anywhere and involve any subject. There are advantages to having an established relationship with a law firm through a single point of contact or client relationship manager who can address every contingency anytime, anywhere.

When the stakes for a commercial client are high, the company will often look to established national names where processes are known and from whom consistent results are expected. In civil litigation, the great majority of cases are settled, and most commercial clients expect their BigLaw counsel to pursue consistent favorable settlement outcomes. Being right about the law is not the only consideration. Indeed, being right doesn't matter if the client is unhappy because counsel did not provide value or, even worse, affected the client's business negatively.

In a national law firm, losing a large commercial client is significant, especially where that client retains counsel for numerous business lines. BigLaw rightly spends a lot of time on risk assessment, expectation management, and establishing the highest degree of certainty about the outcome. In the very least, large commercial clients want to understand with a high degree of certainty their financial risks and relative chances of losing in a litigated case. Companies generally don't like the risks of trial (absent a clear business objective) because of the uncertainty that trials generate.

Assuming the parties have a high degree of certainty with regard to the possible outcomes of litigation and have already established the risk/reward of proceeding to trial, how do they resolve their cases? A surprising number of cases are resolved between the lawyers without the involvement of a neutral mediator. Litigators relish the opportunity to settle cases with their adversaries directly because most attorneys believe they know their case well and are in the best position to bargain without a filter. However, in many cases, acrimony or lack of trust between the attorneys and the parties can impede the communication that is needed for dispute resolution. Or there may be so many parties to a dispute that a mediation manager is needed. In those types of cases, a neutral mediator is indispensable.

Sophisticated legal counsel should look for three main things when selecting a mediator: 1) reputation, 2) expertise in the subject matter, and 3) neutrality. Counsel should put a great deal of effort into selecting the mediator. When one considers that most cases sent to mediation resolve in settlement, it makes sense that counsel should work hard to select the right person who will have an outsized impact on the ultimate outcome of the case.

If done correctly, the lawyers in a mediation will prepare carefully as though going to trial. They should consult with their clients and draft key terms and provisions of any settlement agreement before the day of mediation

arrives. A large commercial client expects substantive pre-mediation work to be done so that its best foot is put forward while the arguments of the opposing side are countered. From the attorneys' perspective, extensive preparation for the mediation will have the added benefit of managing the expectations of the client with a thorough risk analysis.

The pre-mediation brief should be presented in a clear and compelling manner, with graphs, flow charts, and visual aids where appropriate. The briefs often concede weaknesses yet address those perceived weaknesses to ensure that their impact is minimized once the mediation begins. Be mindful of what should be disclosed to the other side and what should only be disclosed to the mediator.

During the mediation, the parties will often seek to persuade the mediator of the strength of their arguments, rather than allow the mediator to influence them. The perceived effectiveness of the mediator will be assessed on how close the parties are able to get to their preferred outcome. The parties typically emphasize technical positions over compromise, and sometimes ego can get in the way because attorneys and clients are working in front of their peers and adversaries. In addition, credibility is important to maintain for everyone in case there are future disputes to be resolved.

In conclusion, BigLaw commercial litigation mediations usually involve more interests than are apparent and consensus building is required before the mediation. In addition, the need to establish technical credibility is often greater where the parties and/or their lawyers may face each other at a future date. By preparing the case thoroughly, BigLaw builds that consensus and is often able to better predict possible scenarios, many of which are played out internally before the mediation commences.

As a mediator and arbitrator, Nigel Wright offers almost 30 years of litigation and dispute resolution experience. He is a practicing New York and Georgia attorney, as well as a solicitor of the Senior Courts of England and Wales. Nigel has been a senior partner at two AM 100 law firms on both sides of the Atlantic, and he has represented corporations and entities in Federal and State Court, in various international civil forums as well as in administrative and regulatory hearings and proceedings. Nigel`s experience encompasses extensive domestic and international meditations and arbitrations. He can be reached at nwright@milesmediation.com.