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Mediation Notes

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When Does Substantive Knowledge Matter in Selection of the Mediator?

One of the topics that lawyers and commentators like to debate is the importance of substantive practice area knowledge enjoyed by the mediator. Clearly, lawyers like having a mediator who speaks the language of the case and understands the substantive law as well as the business or industry. Mediators as a group tend to avoid the topic, often believing that a good mediator can mediate any case. There is also some concern that an "expert" mediator may hijack the mediation on some level.

Having read some of the commentary, my opinion on the subject boils down to a couple of key points. When the case involves something more than a cash payment and standard release, substantive legal or industry knowledge on the part of the mediator brings an added benefit. If the case is hard or complex, then substantive knowledge of the industry and law makes it easier for the mediator to spot the issues and smoke out the extreme positions. If the settlement agreement to be reached will not have much more than the payment of money, then substantive knowledge is of lesser importance. If the deal has non-monetary pieces, licenses, covenants and terms that might lead to a non-monetary breach, then understanding the business or relationship going forward and drafting experience is at a premium. Where the deal gets complicated, having a learned set of eyes is helpful.

I had occasion to speak at the meeting of the Intellectual Law Property Committee of the Florida Bar, part of the

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Business Law Section, on the topic of insurance for intellectual property claims. Having litigated copyright, trademark and patent claims, I am of the belief that intellectual property is one of those areas where some litigation experience is helpful—if only in tempering wild assertions on the boundaries of trademark law and in being able to identify low probability events. Having a mediator fluent in IP parlance makes it easier to get to a settlement because the mediator can do some vigorous reality testing and push back on strange demands that the judge would never provide and the experience necessary to suggest terms that are workable. If you are going to bridge a gap, sometimes you need an experienced engineer to help design the bridge.

Having some sense of case law, the scope of permissible injunctions, and experience in helping the parties draft, for example, consent decrees, and the like can be very helpful. Like intellectual property litigation, I find it is helpful to have some experience in HOA or condo litigation, insurance coverage and bad faith, employment law and other topics where the settlement hinges in part on an understanding of the boundaries of the law and the terms involve more than money.

Mind you, the mediator should not be the architect of the deal. Self-determination is the touchstone of a meaningful mediation. The part of the mediation I enjoy is where I can give some helpful suggestions on language and mutually agreeable terms that solve a roadblock or where I can offer another way of fitting what appears to be a round peg in a square hole. As a customer of mediation services, you should not hesitate to question your mediator on his or her experience. Has he or she actually litigated a complex construction defect case? A trademark dispute in federal court? A good mediator can learn the case, the law and the industry if he or she is motivated to do so, but the parties benefit from a learned mediator when the case becomes hard to settle, when the demands seem unreasonable in relation to the facts and law, and when you need someone working creatively to hammer out a deal. Do not be shy

about asking your mediator what he or she has done in the past. It is your mediation . . . optimize the process and give thought to your choice of mediator.

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