

CORPORATE COUNSEL

ALM

Creative Use of Dispute Resolution Can Save A Business Relationship

To settle disputes, parties should not overlook attorneys who may have conflicts of interest.

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ALL RESPONSIBLE COUNSEL, whether retained or employed, would agree that the best way to resolve a dispute between corporations is through negotiation. The next best method would be some form of ADR, or alternative dispute resolution, with litigation being, in most situations, the least preferable approach. There are, of course, matters that must be litigated. Elements of the more preferable dispute resolution methods can, however, and should be employed.

Werner & Pfleiderer Corp. recently took the ADR road in a somewhat surprising situation.

One party's first choice for retained counsel had a conflict. Rather than moving on to the next choice, the parties agreed to use conflicted counsel's knowledge of each party and the reciprocal respect existing between conflicted counsel and employed counsel for each party.

Counsel did not discuss specific "ground rules" in advance. The conflicted counsel agreed to play whatever role the parties asked of him

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consistent with obligations under the applicable rules of professional conduct.

This arrangement yielded a more advantageous result to each party than could have been expected from full litigation without this assistance. So it may be worthwhile for similarly situated parties to seek a "conflicted counsel."

Resolving the Dispute

The decision to use the conflicted counsel involved a case in which Werner & Pfleiderer, as plaintiff corporation, enjoyed a long-standing, mutually important business relationship with the defendant corporation notwithstanding previous disputes.

After repeated difficulties and long, acrimonious negotiations, the parties agreed not to litigate. They executed a settlement agreement, mutual releases and a cooperation agreement governing future business.

After several years of operating under the cooperation agreement, the plaintiff corporation received information indicating that the defendant corporation was in substantial breach of the agreement.

The plaintiff corporation became concerned that the previous negotiations had not produced a workable arrangement.

The plaintiff corporation became

further concerned that the defendant corporation — which took a hardball approach to business — viewed the plaintiff corporation's prior willingness to negotiate as weakness.

After analyzing all factors, the plaintiff corporation decided that the business relationship must continue for at least several years.

The defendant corporation shared the same perspective. The plaintiff corporation, however, concluded that for the relationship to be acceptable, the cooperation

agreement must be enforced strictly and that the defendant corporation must be forever disabused that the plaintiff corporation would not defend its rights.

The need to maintain the business relationship made ADR even more preferable than usual.

Only the most optimistic would consider ADR a likely process because of these factors.

Litigation Ensues

The management of the plaintiff corporation decided on equitable relief and sought an injunction to enjoin breaching the cooperation agreement and an order for specific performance governing future activities. Management further decided to forgo contacting the defendant corporation

The conflicted counsel agreed to play whatever role the parties asked consistent with professional conduct.

based on previous unsuccessful attempts to resolve the matter. To the plaintiff corporation, only a court confirmation of the cooperation agreement's enforceability and order that the defendant corporation specifically perform would yield the required results.

The plaintiff corporation's legal tactics frequently included using equitable relief to enforce its rights in various matters. It had learned that to secure a truly effective result in this litigation, counsel must be familiar intimately with the facts of the instant case, as well as the corporation's overall goals, strategy and culture.

The plaintiff corporation's general counsel had been involved heavily in preparing pleadings and often sat second chair, arguing motions as appropriate.

The plaintiff corporation decided that the circumstances of the case warranted that its general counsel should be the lead counsel with participation by retained counsel as required.¹

Conflict of Interest

While filing and serving the moving papers, general counsel for the plaintiff corporation contacted the defendant corporation's general counsel and learned that the in-house attorney who had negotiated the cooperation agreement had left the defendant corporation.

Next, the defendant general counsel informed the plaintiff's general counsel that he was not admitted in the jurisdiction in which the suit was being filed and therefore had retained outside counsel.

As soon as the plaintiff's general counsel learned where to send the papers, he knew that an obvious conflict of interest existed. Not only had the conflicted counsel's firm represented both the plaintiff and defendant corporations, he himself had

been the lead partner for both clients.

Nonetheless, the parties immediately agreed that the conflicted counsel would be sent the papers in the hope that he might be able to participate in some way to resolve the differences.

Several hours later, the conflicted counsel and defendant general counsel contacted the plaintiff's general counsel.

First, the conflicted counsel vouched for the judgment and integrity of each general counsel to the other.

The defendant general counsel indicated that the diversity of his practice and the fact that the plaintiff corporation actually was dealing with a

remotely located defendant corporation subsidiary, the operations of which were not particularly familiar to him, foreclosed him from even a preliminary discussion of the merits.

He indicated, however, that he had discussed the matter with the division president who reported full compliance with the letter of the agreement.

General counsel indicated that it was the plaintiff corporation's position that the defendant corporation violated the letter and spirit of the previously negotiated agreements and that the matter could be resolved only by court order.

The disputing parties, however, agreed to attempt to avoid a full litigation with moving and opposing motions on every issue. The conflicted counsel agreed to help if possible.

The defendant general counsel indicated that because his client believed that it was complying with the agreement, it would agree to a consent preliminary injunction restraining the defendant corporation from breaching the agreement.

The plaintiff general counsel agreed. In addition, he agreed that the conflicted counsel should also review

the proposed form of order before submitting it to the court.

Abusive Discovery Ameliorated

The plaintiff corporation was concerned about the value of the consent preliminary injunction because the parties disputed what conduct violated the agreement.

Litigation and ADR resumed simultaneously once the parties agreed that depositions would take place at the conflicted counsel's office and the defendant corporation had retained counsel.

Typically a matter in which each corporation is represented by employed, in addition to or instead of, retained counsel proceeds more smoothly than it would without in-house counsel.

In-house counsel, despite differences on the merits, each generally have similar approaches based on in-depth knowledge of each company and what is required from the legal process. In-house counsel generally also share a disinclination to prolong the matter.

In this case, the defendant general counsel was not particularly familiar with activities at the remote subsidiary or with equity practice in this jurisdiction. Additionally, the retained counsel had no familiarity with his client and therefore objected to virtually everything.

The conflicted counsel turned around what seemed destined to be a typical abusive, time-consuming, expensive and ultimately inefficient discovery process.

He was an experienced litigator and, at the parties' request, he ruled on various discovery disputes.

This process proved to be advantageous over actual litigation because the conflicted counsel participated by consent, not by force of law.

He therefore made rulings with which the parties could be comfortable.

Another major advantage included the possibility of ex parte discussions —

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of course with the knowledge and consent of the non-participating party.

This tactic was particularly valuable because the dispute became very heated, which made full candor with a respected third party useful and allowed the conflicted counsel to take into account the parties' ultimate interests. These interests frequently become obscured when couched in the language of contested motions.

The conflicted counsel was more useful than even the best mediator or arbitrator because he had the trust of both parties from the beginning, when so much of the tone is set for the remainder of the litigation.

An unknown mediator or arbitrator, however, must take time to develop that trust and credibility.

Depositions took several days. Without the conflicted counsel's assistance, they would have taken several weeks and involved a court. The parties thus avoided the risk of depleting valuable judicial goodwill that is better used on the merits.

Reaching Settlement

Although the parties had contemplated a joint presentation to the conflicted counsel upon completion of initial discovery, they agreed that matters were sufficiently contentious that it would be better for the conflicted counsel to hear each side uninterrupted.

After those hearings, the conflicted counsel called all parties together, businesspeople as well as attorneys. He announced that each side was firmly entrenched.

The plaintiff's general counsel basically had established the defendant corporation's conduct at the depositions. Because of compromises during discovery disputes, however, the plaintiff corporation was not entirely comfortable with its level of knowledge.

The plaintiff corporation continued to assert that to the extent that the conduct was known, it violated the agreement. The defendant

corporation continued to assert that it did not.

The conflicted counsel indicated his role did not entail ruling or even commenting on either party's position except to state that he did not see a clear winner in court.

During the next several hours, various meetings took place with combinations of attorneys — sometimes including the conflicted counsel — and businesspeople. No solution emerged from those meetings. The conflicted counsel suggested that this was a matter that would only be resolved by a court or settled after several interim rulings indicating the court's inclination on whether an order would be issued and what its scope might be.

To avoid that, the conflicted counsel suggested that the lead businesspeople meet alone. The defendant corporation could explain the motivations for its conduct and the plaintiff corporation could explain what was unacceptable about that conduct.

Such a meeting would not have been possible until after discovery and issue identification. The conflicted counsel's efforts allowed both to occur in a timely fashion. After an extended period of time, the businesspeople produced a modification in the relationship that addressed both parties' needs.

ADR's Value

Before this could be agreed upon, the parties solicited advice from attorneys in specialties beyond those who had participated to date.

This participation would, naturally, have been more time-consuming and expensive in fully contested litigation. After the specialists signed off, the parties again met at the conflicted counsel's office.

Although it turned out that his presence was not needed for this final meeting, his availability ensured that what continued to be a heated controversy could be addressed in a rational way. The parties reached a conceptual agreement.

Many weeks of exchanged drafts, accusatory faxes and heated phone calls remained before a consent final injunction could be presented to the court.

These weeks confirmed that the conflicted counsel's participation saved vast amounts of corporate and public money, namely court time.

Additionally, the final result probably derived from the meeting between the businesspeople. The settlement addressed the issues raised and allowed the companies to continue their relationship, better than either side could have expected after spending all that time and money in court.

Thus, an experienced and respected attorney whose judgment is trusted by both parties to a litigation should not necessarily remove himself or herself from the process when a conflict of interest arises.

If the parties are willing — and the conflicted counsel should feel free to volunteer — there are several unique and extremely valuable ADR roles that he or she could play, such as those already described.

Corporate and retained counsel can identify others in particular situations to preclude litigation if possible.

All attorneys involved would feel comfortable with the arrangements because nothing compels them to continue the conflicted counsel's activities. At any time, either party can resort to fully adversarial litigation, with all its advantages and disadvantages.

One should consider, however, using or even seeking a conflicted counsel to help use those advantages and minimize those disadvantages. ■■

¹ See Ogden, "Litigation by the Corporate Generalist — A Necessary Skill," ACCA Docket, 1994 Summer Edition.