UT LAW CLE THE UNIVERSITY OF TEXAS SCHOOL OF LAW

PRESENTED AT

2015 Non-Compete Camp

September 3, 2015
Dallas, Texas

Getting it Resolved

Note: This paper was converted from a scanned image. The conversion has been reviewed for accuracy; however, minor spelling or text-conversion errors may still be present.

Courtenay L. Bass
Gilber Mediation Group
CBS Tower
12001 N. Central Expwy, Suite 650
Dallas, Texas 75243
Ph: 214-303-4500

Will Pryor
Mediation & Arbitration
Two Lincoln Center
5420 LBJ Freeway, Suite 626
Dallas, Texas 75240
Ph: 469-374-0222

Amanda Reichek
The Reicheck Firm, PLLC
4514 Cole Avenue
Suite 600
Dallas, Texas 75205
Ph: 214-731-3110

William E. Hammel
Constangy, Brooks, Smith & Prophete, LLP
1201 Elm Street, Suite 2550
Dallas, Texas 75270
Ph: 214-646-3422

I. PLANNING & PREPARING FOR MEDIATION

You are preparing for mediation in your "new" non-compete case. Typically, at least one side has already sought injunctive relief, so both the prior employer and the departing employee (and potentially new employer) have felt the pain of invoices for legal fees. Both sides have a basic understanding of liability, counterclaims, and damages (including the ability/likelihood for any side to recover its fees). It should be easy, right?

Well, even the most "routine" non-compete fact patterns are complicated, and representing each side has its unique challenges. If you are representing the departing employee's prior employer, then, if you have done a good job so far, your damages may be limited going forward. The departing employee usually divests herself of any misappropriated trade secrets early just to limit damages going forward. Also, if you have already obtained a TRO and are mediating before the temporary injunction hearing, you know that "holding on" to injunctive relief is usually more difficult that obtaining it in the first place. The stakes may even be higher. Your client may expect a healthy return on its investment in litigation even though you have advised your client on the need to show actual damages as well as your legal and practical ability to recover attorneys' fees. You are likely concerned about counterclaims, too. No matter how much you explain to your client that you are playing against an opponent who also wants to win, they are convinced that the departing employee will not assert counterclaims. But, you know that more-than-a-few wage/hour collective actions began as counterclaims in non-compete actions. The stakes may even be higher for you professionally. Perhaps you drafted the restrictive covenant agreement at issue. If so, your client will not appreciate a court finding that the agreement you drafted is overly broad or is otherwise deficient.

If you represent the departing employee and/or the new employer, then you probably do not know all of the facts. Your client typically does not have a litigation "war chest," so your ability to litigate may be restricted by budgetary concerns. Plus, even if your client has the ability to fund litigation in the short term, then she will likely be "bled dry" after a few months. Conversely, if the new employer is paying you to represent the departing employee, then you are concerned about conflicts and privilege issues. As for liability, your client's story may have "evolved" over time. During that first interview, the client assures you that she did not take anything when she resigned and has not competed with her prior employer in the restricted territory. During an expedited deposition, though, you discover that she forwarded her entire sales team's client list and revenue information to her personal email account and has made a couple of sales calls in the restricted territory. You have done a good job exploring counterclaims, too, but you have not found one that provides for the recovery of attorneys' fees. Your client's options are limited, and, depending upon the results of the mediation, her new employer may let her go, even if just to insulate itself from liability. You also get the impression that the other side's attorney does not want the case to settle. You may even suspect the other side's attorney is "in it for the fees."

These are typical concerns leading up to most restrictive covenant/trade secret mediations. Regardless of which side you represent, an early mediation is usually in your client's best interest. But, up to this point, you have primarily been advocating for your client. Now, you have the difficult task of neutrally evaluating liability and damages and then preparing your client. Now, the hard part begins.

A. Choosing a Mediator

The decision on which mediator to use (if you have a choice) is critical. It is very important that your mediator have experience in mediating and litigating non-compete/trade secret litigation. If not, you will discount his/her credibility when giving opinions on how the judge or a local jury might see the facts and issues in dispute. If you have not mediated with this particular mediator before, do your homework. Reach out to your colleagues and ask their experiences. If you do not know anyone who has used a mediator before, consider contacting the mediator directly for references.

It is also extremely important that your mediator's personality is a "good fit" for your client. The mediator sets the tone and pace of the mediation, so your client must be comfortable with the mediator's personality and style. That being said, the

best mediators will adapt to the situation. Also, do not automatically rule out mediators proposed by the other side. Mediators have a reputation to uphold and defend, so they almost never "take sides." In fact, many lawyers take the position that the best mediator to use is one who is proposed by the other side because the mediation is more likely to succeed.

B. Scheduling the Mediation

The timing of the mediation is also important. Where are you in the litigation process? Has there been a TRO or a temporary injunction hearing? Has there been expedited discovery? If not, then you cannot use mediation as a discovery substitute because learning about your case during mediation can result in disaster. Regardless, unless your client is willing to make concessions to avoid the cost of discovery, then mediating "too early" will likely result in an impasse. Your client must be prepared to negotiate, and it is very difficult to negotiate without knowing the facts.

Also, you should plan on scheduling the mediation for a full day. Restrictive covenant/trade secret mediations are almost always emotional. Client are angry, scared, concerned about the risk of substantial lost revenue or an individual's ability to provide for his/her family, or all of the above. Half-day mediations do not provide sufficient time to remove emotional barriers and let the mediation process play out.

C. Preparing for Mediation

Every successful mediation requires extensive planning and preparation. The better prepared you and your client are, the "better" the results you will achieve. First, you must evaluate your client's case with the best evidence available. Do not wait until the day before mediation to prepare. Good preparation requires no less than an honest evaluation of liability, damages, and counterclaims.

You must also meet with your client in-person early. Discuss what your client wants and what you anticipate the other side will want. Also discuss potential mediation scenarios and outcomes. Collaborate with the client in choosing an appropriate client representative and find out the limits of authority. It is also helpful if you prepare your first few offers/demands and counters. Carefully consider the other side's probable reactions to your scripted offers/demands. Run through as many scenarios with your client as possible. A successful mediation is usually one where there are no surprises.

After meeting with your client, draft a formal mediation position statement. At a minimum, it should address the factual background, the legal and factual issues in dispute, your client's position on liability and damages, the opposing party's positions, and the history of settlement negotiations. Exhibits help the mediator immensely, too, so use them. Resist the urge to draft your position statement like a motion for summary judgment, though. This is not the time to advocate at all costs. Overall, a thorough mediation statement arms your mediator to advance your positions during mediation. It also is an excellent way to document your ethical obligations to fully prepare your client for mediation. Simply put, there is no excuse in not providing a mediation position statement.

II. ETHICAL CONSIDERATIONS

A. Texas Disciplinary Rules of Professional Conduct

1. Obligations to Client

Takeaways:

- Fully prepare your client for mediation - no surprises.
- Convey *all* settlement offers to your client... do not take any chances.
- ® Do not even consider any perceived future fees when advising your client. Even if the tactic works in the short-term, it will be exposed in the long run.

Rule 1.03: Communication

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

Title search: Getting It Resolved

First appeared as part of the conference materials for the
2015 Non-Compete Camp session
"Getting It Resolved"