

5 Keys to Mediating Non-Compete and Trade Secret Disputes

Insights

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Mediating a non-compete and trade secrets dispute is different than mediating general commercial disputes. This is particularly true early on in litigation. Non-compete cases are front loaded by nature and get expensive very quickly. The associated expenses are often beyond a party's control. Here are five things to keep in mind as you consider whether and when to mediate a non-compete and trade secrets case:

1. **Consider mediating early, and be prepared to do so rapidly.** The conventional wisdom when it comes to mediation is that the parties should not do so until they have had a chance to conduct discovery. More often than not, this advice is right on the money. But the nature of a non-compete case is different. These cases require rapid attention, and that is equally true in mediation.
2. **Be prepared and willing to disclose information.** This runs counter to a commonly utilized approach where parties are discouraged from using mediation as a substitute for discovery. In ordinary litigation, where costs are likely to be strewn out gradually over time, parties are understandably reluctant to disclose facts that won't be learned by their opponents for some time. But in non-compete disputes, discovery is likely to be swift in coming, and instantly expensive upon arrival.
3. **Choose a mediator well experienced in non-compete and trade secret litigation.** This can mean the difference between a successful and unsuccessful mediation. The fact that a party has successfully obtained a temporary restraining order does not necessarily mean it will obtain a preliminary injunction or damages. The opposite is also true. Denial of a temporary restraining order does not automatically mean recovery of damages is foreclosed. Using a mediator who has

litigated non-compete cases will translate into credibility for the mediator, which is essential. It will also ensure that the mediator can craft and propose enforceable and creative non-monetary solutions if necessary.

4. **Be open to creative solutions.** Courts have discretion to fashion equitable remedies. Parties should be equally creative in mediation. This can be particularly essential when a defendant lacks deep pockets.
5. **Bring persons with authority AND emotion.** It is obvious that a mediation will not succeed if the parties in attendance lack authority and are mere designees with pre-set bottom lines. But of equal importance, non-compete disputes are driven in large part by emotion. Parties feel betrayed by their opponents' misconduct, which is frequently fresh in their minds. Providing them with an opportunity to speak their mind (in a respectful way) can be cathartic and productive.

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