Early Mediation in Fiduciary Disputes

If and when you can prevent escalated litigation and costs by Denise Rahne and Eric Magnuson

March 2022

Publication

Denise Rahne, Eric Magnuson - The Robins Kaplan Spotlight

Frequent Spotlight contributor Denise Rahne sat down with former Minnesota Supreme Court Chief Justice Eric Magnuson, whose experience as a practitioner, judge, and mediator provides him with a unique perspective on early mediation efforts in fiduciary disputes.

Q: We appreciate your taking some time to share your expertise on this topic. Let's start out at a high level: What are some key differences between fiduciary disputes and more traditional business disputes as it relates to dispute resolution?

A: If the dispute is between parties that have no fiduciary relationship, there are no special rules. The dispute is guided by traditional contract terms or, perhaps, tort or statutory laws. But if the dispute is between the fiduciary and the beneficiaries whose interests the fiduciary is charged with protecting, then a whole different set of considerations come into play. The fiduciary has an obligation to the beneficiaries that it must balance against its decision to dispute the beneficiaries' claims.

Q: What about shareholders in closely held businesses — can that situation present unique dynamics?

A: Certainly. Often the parties don't fully understand the extent to which fiduciary duties exist until after a problem has arisen. Unlike a trust, with clearly defined responsibilities, the law imposes fiduciary obligations on shareholders in a closely held corporation. Frequently resolving disputes of this kind is the equivalent of trying to un-ring the bell. Disputes between the stakeholders of closely held corporations also often involve close friends or family members, which can add another level of complexity to an already complicated dynamic. Mediators can play a key role in bridging the treacherous divide that often exists in these scenarios.

Q: In your experience, are there key categories of information that a mediator and the parties should have—maybe through early informal discovery—that can position a dispute for early mediation?

A: When I'm a mediator, I try to get an honest assessment from each side about the issues and the prospects for resolution. I ask them to tell me not only the strengths of their position, but the weaknesses, and the strengths of the position of the other side. Getting that information in advance of the mediation session helps me guide the discussion. It's sometimes difficult to get an honest and

realistic assessment from each side, but if I start them thinking about it before the mediation, we make more progress once the mediation actually starts. Understanding each party's business objective can also help me assess whether there is the potential for a business resolution.

Q: Besides the obvious cost savings, are there other compelling reasons that parties in fiduciary disputes should explore early mediation?

A: A fiduciary relationship is often ongoing, even after a specific dispute is resolved. The longer the dispute goes on, the more entrenched the parties are in their position, and the more the assets that are the subject of the fiduciary structure are dissipated due to paying the litigation expense of both sides. That is a unique aspect of fiduciary litigation.

In addition, as mentioned above, fiduciary disputes often involve family members or relationships that are far from arms-length. An early mediation can sometimes (but by no means always) prevent a dispute from becoming so contentious that there is no hope of repairing the relationship.

Q: What are the most typical obstacles to the success of early mediation of fiduciary disputes?

A: Getting the parties to understand the unique obligations of a fiduciary is sometimes a challenge. Fiduciaries need to look out for the best interests of the beneficiaries. But sometimes that means not agreeing with them on a particular issue. Setting expectations and the rules of play are key. The emotions that can come with the close nature of the relationships can also hinder successful mediations.

Q: What are some missteps or missed opportunities you have seen with early mediations that could have been successful but were not?

A: In order for a mediation to be successful, the parties have to be willing to compromise. If the mediation takes place too early, the parties will have not had an opportunity for their positions to be tested either through discovery or preliminary adjudicative procedures. Untested ideas are some of the hardest to deal with.

Q: Any parting wisdom?

A: Strong advocates for the competing interests are critical to the process. And that strength must include more than the ability to represent the client's position to the mediator and the adversary. The advocate needs to be able to identify the weaknesses in their own case, and the strengths in the opposing case, and speak directly and realistically with the client. The mediator is a facilitator, and seldom acts as an advocate. The lawyers for the parties need to be part of the mediation team.

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