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3 ways a business can use mediation to avoid litigation

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Businesses are increasingly mediating complex business disputes before filing a lawsuit or going to arbitration. Sometimes this is required by a contract clause, but businesses can also choose to mediate without one.

Mediation before litigation can make tremendous business sense; the opportunity should be taken seriously, particularly in the life sciences, health care and other technical fields.

Business leaders desire to preserve current and potential business relationships; avoid public fights with collaborators, customers or regulators that can negatively affect their businesses; and focus on driving their business objectives rather than dealing with a multi-year, expensive public litigation.

Even the initiation of litigation – ostensibly to gain “leverage” in a dispute or “force” a party to the table – has a tendency to exacerbate conflict and harden positions, making it more difficult to focus on reaching a smart business solution. It may also inspire the other party to file a surprise retaliatory counterclaim.

Done right, pre-litigation mediation can serve as the confidential extension of business negotiations through the help of an experienced, business-oriented neutral who helps bring perspective and objectivity to the parties’ deliberations.

The following tips are helpful in all complex business mediations but are particularly important in a pre-litigation context.

1. Prepare for and conduct the mediation like you would a business negotiation

The mediation of a relatively simple litigated matter emphasizes an in-person session in which no one goes home until a settlement is reached. A pre-session confidential mediation memo for the mediator only and perhaps a short call are often part of the process, but are not the focal point.

For a pre-litigation complex business case, think of mediation as a six-phase, overlapping process involving the assistance of the mediator at each step:



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- Defining in writing the issues to be addressed, the parties’ respective positions, and any additional entities that ought to be at the table.
- Preparing for the discussions internally by interviewing key participants and in-house or external experts (I have participated in such sessions) and obtaining stakeholder buy-in from both executive and functional (such as tax, finance) personnel regarding acceptable outcomes and required approvals.
- Preparing for the discussions with the other party (ies) through exchanging information and perhaps even external expert opinions on disputed technical issues, substituting for the litigation discovery phase to the extent practical and necessary to ensure the sharing of facts materially affecting any business deal and case settlement value.
- Identifying and perhaps drafting key components of the multiple documents and side letters often required to implement any business solution.
- Meeting in person to discuss the disputed issues and define a detailed term sheet.
- Conducting email and telephone follow-up sessions (involving the mediator as an observer or sounding board as appropriate) to draft definitive agreements.

This deliberately expanded phasing is often more realistic and certainly more consistent with the look and feel of a business negotiation. Complex contracts simply are not and cannot be negotiated in one day. It also helps ameliorate some of the concerns about “not knowing enough” to achieve a settlement before litigation.

The internal and external preparation – supplemented by written and oral confidential mediator communications – during the preparation period helps the parties understand and critique their respective positions without taking time from the in-person sessions, and helps the lawyers learn the strengths and weaknesses of their potential court case.

2. Select the right mediator

Different mediators have different experiences and skill sets. For a complex business case that will involve, for example, a significant adjustment/renegotiation of a business arrangement or a multiple-part negotiated termination, a mediator with both litigation and hands-on transactional and business negotiation experience may well be preferred.

A two-track mediation analysis, consisting of an assessment of chances in court and a detailed, informed discussion of business terms and workarounds – two related but very different discussions – could be critical to achieving success. A mediator with hands-on business negotiation and even industry experience has many tools with which to assist the parties in considering their options and to run a mediation business negotiation session.

3. Business representatives, inside counsel and transactional attorneys should play major roles

To keep the mediation focused on business solutions, consider having business representatives (both executives and functional personnel), inside counsel and transactional lawyers play major roles.

In several of my matters, litigators have played important roles behind the scenes, but they elected not to attend the in-person sessions. Although not always appropriate, this can help set the tone to ensure that the business decision-makers and experts are guiding the business negotiations.

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