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Resolving Technology Disputes: Mediation Strategies for a Fast-Moving Digital World

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Not all mediations are the same. Technology-related disputes, in particular, often involve highly specialized issues that require both a well-prepared mediator and equally prepared litigants. To navigate these matters effectively, mediation must be approached with careful planning, technical experience and a clear framework. This article outlines four key areas—from early preparation through settlement—that provide a practical roadmap for resolving fast-moving technology disputes. Along the way, it highlights how mediation can deliver speed, confidentiality, flexibility and creative outcomes while helping preserve valuable business relationships.

1. Laying the Groundwork: Preparing for Mediation

Mediation agreement

Most technology-related disputes begin with some type of contract. Too often, corporate lawyers use a form mediation clause, or no mediation clause at all, at the time of contracting. This is done without consulting a litigator, without regard to mediator qualifications and without consideration of guidelines for mediation. Even in the absence of a mediation clause, parties should consider a pre-mediation agreement.

A good technology-related mediation agreement will require the parties to select a mediator with hands-on experience with the issue in dis-



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pute (e.g., technology licensing or intellectual property rights). One of the skills of a good mediator is the ability to challenge the parties with difficult questions they may encounter absent settlement. A properly qualified mediator will be better equipped for such task. A good mediation clause or agreement will also identify the documents to provide to the mediator. Technology-related disputes may have a request for information, business requirements, statements of work, status reports, etc., that will likely be at issue in the litigation. Sharing those documents with the mediator will result in a more efficient mediation.

If mediation is conducted pre-suit, consider tolling the statute of limitations to enable a successful mediation. Example: "The statute

of limitations is tolled from the date of a pre-suit mediation demand through 30 days after mediator declaration of an impasse.” Finally, consider agreeing in advance whether the mediation should be held in person or virtually. On the one hand, given what is likely a large volume of documentation, an in-person mediation will enable the mediator to more quickly work with the parties in highlighting key parts of the documents. On the other hand, a partially virtual session may better enable the attendance of persons with the most knowledge and direct settlement authority.

2. Setting the Stage: Pre-Mediation Tasks

Relevant documents

Because technology-related cases often involve several key technical documents, the parties should identify these documents in advance so the document exchange referenced can be efficiently conducted. Using merely the underlying contract and self-serving statements is generally insufficient.

Pre-mediation statements

Too often, parties do not exchange mediation statements. At the same time, there is a trend not to have opening statements. To be best prepared for mediation, it is important for all parties to understand each other’s positions in advance. Thus, the exchange of mediation statements at the same time they are sent to the mediator should be strongly considered. However, should a party want to communicate something privately to the mediator, then a mediator’s-eyes-only supplement should be allowed. A mediation statement should fully educate a technology-minded mediator, not provide high-level positions only.

Pre-mediation calls

Assuming the mediator is properly educated regarding the facts and issues, each party should

be prepared to participate in a private pre-mediation call with the mediator. This enables the mediator to ask questions in advance, which can increase the efficiency of the mediation. Such pre-mediation calls are generally *ex parte* with each party separately, which enables the mediator to ask questions without potentially educating one party regarding another party’s strategy. Normally, such calls are with counsel only, but consider inviting a party representative who will attend the mediation.

3. Driving Progress: The Mediation Session

Selecting the negotiation team

The composition of the mediation team is important. Although the party representative and in-house counsel play critical roles, consider also including team members with hands-on experience and knowledge, such as a technical lead or business lead. These team members have “skin in the game” and direct knowledge. They can assist in understanding the most important technical details and validate or challenge technical assertions made during negotiations, as well as eliminate lengthy delays by answering technical questions rather than contacting people who are not present. Although it is possible that these team members may have strong emotions because of their involvement, a skilled mediator should be able to manage any emotional dynamics while leveraging the team’s collective expertise and knowledge to reach a successful resolution.

Embracing creative solutions

When considering potential remedies, think creatively beyond purely monetary settlements. One of the benefits of mediation is that a settlement may involve elements that a court cannot order. Mediation participants should be open to alternative ways to resolve the dispute that preserve relationships, thus providing a win-win situation. Alternatives may involve

restructuring a relationship or modifying a payment structure.

4. Closing the Loop: Settlement and Session Conclusion

Maintaining control and momentum

One of the primary benefits of mediation is that the parties retain control of the outcome. The mediator can give guidance but cannot decide the specific terms of the settlement. In order to capitalize on settlement momentum, it is best to carefully consider the various aspects of the settlement in advance. For example, before the mediation begins, prepare a template agreement that includes provisions regarding confidentiality and nondisparagement. Having this framework ready prevents momentum loss when an agreement is reached. During documentation phases, be prepared to exchange drafts as they are prepared. Keep in mind that settlement momentum can be easily derailed when one side conducts multiple rounds of internal review, which can consume precious time during the mediation. For example, a mediation can easily get bogged down when a party requests various technology and IP teams to review a draft late in the day while the other party waits.

Managing impasse versus continuance

Not all mediations conclude with a signed agreement on the day of the mediation, but distinguishing between true impasse and the need for continuance is critical. In technology disputes, incomplete discovery often means parties lack crucial information to accurately evaluate the dispute. Rather than declaring impasse, consider scheduling follow-up sessions after specific discovery milestones.

Effective mediators in technology disputes typically maintain ongoing involvement even without formal sessions. They may periodically

check in as litigation progresses, particularly after key litigation developments that might shift party perspectives. Parties also should consider re-engaging the mediator when circumstances change or additional facts are established.

Technology disputes are increasing in frequency and complexity. Mediation of these disputes offers many advantages over traditional litigation, including faster resolutions that preserve business relationships, creative settlements that courts cannot provide and confidential proceedings that protect proprietary information. In order to maximize the chances of having a successful mediation, in-house counsel should consider specialized approaches, including selecting technically proficient mediators, enlisting mediation team members with technical knowledge and recognizing the value of non-monetary remedies.

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