

Outside Counsel

Expert Analysis

Is Contractually Required Mediation of Business Disputes a Waste of Time?

Businesses are increasingly mediating complex business disputes before filing lawsuits or going to arbitration. This is sometimes required as part of a “step” or “waterfall” clause providing for mediation as one condition precedent to litigation. Is requiring perhaps unwilling partners to dance a “check the box” exercise on the way to litigation? Is it simply too early?

I posit that requiring business parties on the brink of litigation to hit a controlled mediation pause button with the help of a business-oriented mediator and the right process and participants almost always makes sense. Using the techniques outlined here can make pre-litigation mediation successful in many more business disputes than lawyers might expect—to the likely delight of their business clients.

Do Not Underestimate the Near-Term Effects of Filing a Lawsuit.

Business leaders generally desire to preserve current and potential future business relationships, or at least to end them quickly and efficiently in a way that makes business sense;

avoid public fights with collaborators, customers or regulators that can negatively affect their businesses; and focus on driving their business objectives.

It is therefore critically important to focus business clients on the effects of the filing of litigation. It can be too easy to say that “we need to show that we are serious” or to use the commencement of litigation to “gain leverage.” While these may be legitimate strategies in certain circumstances, the following factors should be carefully considered:

(1) *Litigation expenses can be immediate and significant.* A litigation team will need to be assembled to conduct a reasonable investigation of the facts, document holds will need to be implemented, and an e-discovery vendor will need to be retained to deal with document discovery. Conscientious outside counsel do an excellent job

of controlling these and other costs, but they cannot be avoided entirely.

(2) *Unexpected and even retaliatory counterclaims may be asserted by the defendants.* I have mediated a number of cases where counterclaims became the main event. In at least one of these cases, the defendants told me without

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reservation that they would have not have asserted the claim without having been sued first.

(3) *Taking the step into litigation inevitably hardens the parties’ positions and increases conflict.* Rather than being intimidated into surrendering, business leaders can become infuriated. Potentially exacerbating this reaction is the change in personnel from the business to lawyers to litigators, which inevitably changes the perspective with which the business disputants—now combatants—

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view the situation. The focus will shift from what is fair, reasonable and practical from a business perspective going forward to a retrospective analysis of who was right and who was wrong.

(4) Unless parties agree quickly to settlement negotiations, the business loses control over the outcome of the case and the opportunity for flexible, business-focused remedies. Litigation, however, often takes on a life of its own; from both technical and momentum perspectives, it can be difficult to stop. Settlement off-ramps are pushed further into the future because of this dynamic.

(5) It is also important to remind clients of the expense, disruption and uncertainty of litigation, and the years it can take to get to trial—all for a very uncertain result. Someone in a corporate legal department may well be responsible for continuing to justify the decision to keep pursuing an expensive case during business budget reviews.

Steps to Pre-Litigation Mediation Success. Avoiding these issues and dynamics should help encourage upfront investment in a negotiated solution, but what are the chances of success? Getting parties involved in a process like what is described below may ameliorate some of the common objections to early mediation, keep a focus on a business solution and convert the skeptical, as the momentum created by a more objective negotiated process with the help of a knowledgeable neutral moves the parties forward.

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

(1) Set aside, for the moment, a litigation mindset. Any sophisticated business mediation requires a willingness to compromise, look forward and avoid focusing on winning, accountability or right and wrong. The best result might be a renegotiated agreement or a negotiated termination with multiple parts that entertains some form of continuing relationship. As described below, a willingness to share information in order to get to the bottom of things and value a case early are critical to success. A mediator may also recommend direct communications between business clients and—with the permission of counsel—direct communications between her and those clients in order to improve the chances of a successful business resolution.

All this is not necessarily the kind of process to which trial lawyers are accustomed. Viewing the negotiation as a problem-solving, forward-looking exercise and ceding some control over the flow of information and client contact can be difficult. As my colleague Yarko Sochynsky has noted, transitioning from a litigation advocate to the lead negotiator in a mediation does not come naturally to everyone.

Certainly, parties can and should expect litigators to advise them on their litigation chances and expect mediators to understand their arguments and push hard to get the parties to evaluate their risks realistically, but this should not overwhelm attention to commercial solutions. The best lawyers and business mediators are able to conduct the mediation on two separate tracks: (a) a business negotiation track, informed to an appropriate extent by (b) an assessment of litigation risk.

(2) Set time limits. The clause should set clear time limits on the process, subject to extension by the parties. Once a set period expires, for example, the parties should be able to pursue litigation (or perhaps, by contract or agreement, arbitration). Seeking injunctive relief could be an exception as well. The clause should also require some of the preparation steps outlined below.

(3) Give business representatives and business lawyers major roles. To keep the mediation focused on business solutions, have business representatives (both executives and functional personnel), inside counsel and transactional lawyers play major roles from the start. In several of my matters, litigators have played important roles behind the scenes, but they have

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elected not to attend the in-person sessions. This is not always appropriate, of course, but it can be one way of setting the tone to ensure that the business decision-makers and experts are guiding the business negotiations. And having transactional lawyers involved is critical to help with developing and documenting the parties' agreements.

(4) 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/multiple-part termination, a mediator with both litigation and hands-on transactional and business negotiation experience may well be preferred. As suggested above, two-

track mediation analysis, consisting of an assessment of the chances of prevailing in court and a detailed, informed discussion of business terms and workarounds, 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.

(5) *Think of mediation as a process involving preparation, in-person sessions and follow-up.* For a pre-litigation complex business case, the typical in-person mediation session should be viewed as only one part of a more nuanced mediation process emphasizing preparation and follow-up, much like a business negotiation. In addition, using the mediation process to prepare avoids the concern that it is simply too early to negotiate by filling information gaps and substituting to some extent for discovery. Consider the following steps, which can occur sequentially or overlap and should involve the mediator:

(a) Conduct an internal analysis (much like an early case assessment) by interviewing key participants and in-house or external experts and obtaining stakeholder buy-in from both executive and functional (such as tax and finance) personnel regarding acceptable outcomes and required approvals.

(b) Given the absence of a complaint and answer, the parties should then define and share in writing the issues to be addressed, the parties' respective positions and any additional entities that should be present at the table. I have often heard that "we know

what they think already; we have been arguing about this for a year" only to find that when the parties sit down to define their current understanding of the facts and law, additional issues arise. This work saves time in the mediation by obviating the need for legal opening statements and/or relying upon the mediator to pass basic positions back and forth when direct communication ahead of the sessions can be more efficient and effective.

(c) Exchange information, key documents and perhaps even external expert opinions on disputed technical issues, which will take the place of 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.

(d) Supplement what is shared with confidential memos for the mediator and ex parte calls to discuss the information that has been obtained and the range of possible solutions acceptable to the clients.

(e) Have the key participants—including adequate representation from various business functions—meet in person with the mediator in a flexibly structured session (or sessions) to discuss the disputed issues and exchange detailed term sheets memorializing possible resolutions. These term sheets should be drafted by the parties themselves to ensure buy-in and approval. The parties should permit the mediator to make suggestions about who should be present at the meeting and when to discuss certain issues.

(f) Conduct email and telephone follow-up sessions (involving the mediator as an observer or sounding board) to draft definitive agreements. What constitutes success in a business mediation should be carefully considered; it need not be a final settlement if a road map for future discussions is identified.

This expanded procedure is often more realistic and certainly more consistent with the look and feel of a business negotiation. Complex business arrangements are rarely negotiated in just one day.

Ultimately, making the most of the pre-litigation moment is worth the investment. It greatly increases the likelihood of settlement in the early stages. Furthermore, even if a settlement does not result at or within the months following in-person sessions, time has not been wasted, for the parties will be in a good position to litigate efficiently and well—and the issues to be litigated (or arbitrated if that is the next step in the agreement or the parties agree to do so) may well have been crystallized or narrowed as a result of the process.

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