

Mediating Complex Business Disputes Before Litigation: Making the Most of the Moment

by *Conna A. Weiner*¹

Increasingly, business partners are exploring the mediation of complex business disputes before filing a lawsuit or arbitration. Sometimes this is required by a multi-step, or “waterfall” clause (negotiation, mediation, litigation) in the underlying contract, be it a simple vendor contract or global, highly technical research and development agreement. Businesses also choose to mediate voluntarily without a contractual requirement. Given the need to preserve current or possible future business relationships, the desire to avoid public fights with industry participants or customers and the acknowledged cost and business distraction of a full-fledged, public litigation, pre-litigation mediation makes tremendous sense in these contexts. Simply put, litigation can exacerbate conflict, takes on a life of its own and makes it that much harder to get back to the table to come up with a customized, sensible business solution within the parties’ control – better to try mightily to settle early with the help of a knowledgeable neutral than miss the opportunity.

A pre-litigation business mediation requires special skills, tools, and participants. This article identifies practical steps based upon my business mediation experience (and prior inside counsel and litigation background) to increase the success of mediating before a litigation or arbitration is filed. Ultimately, the parties should focus on maximizing the benefits of not (yet) being in a litigation while using the mediation process to help make up for the absence of certain litigation tools that are in fact helpful in assessing one’s best way forward. Although many of the approaches discussed here can be important for a business mediation after a litigation is commenced, they are particularly important in a pre-litigation context.

1. Where are the Parties on the Future Business Relationship Continuum?

A critical issue to consider from the beginning is the extent to which an on-going business relationship will exist after the mediation or may exist in the future.² The parties often find that there is a continuum of possible answers and focusing on this question will help them generate creative business options. The dispute may concern a relatively small part of a valuable on-going relationship; a fundamental misalignment or series of misunderstandings in connection with the parties’ objectives requiring a rethinking of the structure and incentives of the business deal; or a negotiated termination where valuing the extent of “damages” owed by one party to another is really the point of the mediation. Even in the context of a negotiated termination, however, there may be ways to give value to the party who has already terminated or desires to terminate through the creation of

a new or different relationship that will require on-going contacts between or among the parties (such as the sale of goods at a discount and on-going maintenance obligations). Many other scenarios are possible. Generally, the more likely there will be an on-going business relationship of any kind, the more critical it is that business people take a lead role in the mediation process as discussed in point 2 below. The possibility of an on-going relationship increases the likelihood that the parties will be able to find a mutually acceptable business solution and identify “pie-expanding” options to settlement other than cash to do this – business leads and inside counsel are well-suited to drive this effort.

2. Putting Aside a Litigation Mindset – The Role of a Litigator in a Pre-Litigation Business Mediation

Any sophisticated business mediation requires a willingness to compromise, look forward and avoid focusing on winning, accountability or right and wrong. In a pre-litigation situation -- and regardless of where in the relationship continuum the parties find themselves -- to reap the benefits of the absence of litigation, it is particularly important to keep the discussion focused on a business solution and on the business participants. The process has not yet escalated to the clearly adversarial stance of litigation, where positions harden and issues of who is right and wrong predominate in a process managed by lawyers; this fact in and of itself can be helpful in maintaining the willingness to look for a solution that makes business sense given the alternatives. Maximizing the opportunity to avoid, if possible, turning control of a dispute over to the litigation process will benefit tremendously from a willingness to view the mediation process as a meaningful negotiation of a business deal with the help of a neutral, knowledgeable third party rather than only a chance to argue over the merits and settlement value of a litigated case – or a “check-the-box” exercise on the way to litigation.

This means that the participants involved should to some extent mirror the participants in a negotiated deal. Consider having inside counsel and transactional lawyers lead the effort and having the litigators in the wings, staying on top of the action and actively participating in analysis of the potential litigation from behind the scenes, but not driving the process. Having inside counsel with transactional experience involved will be an asset should the mediation lead to a restructured or new business arrangement.

In addition, and as discussed further below, pre-litigation participants should be willing to share information voluntarily. This ideally requires extensive cooperation with the entity that might in the future be an adversary in litigation. This willingness to share does not come naturally

to lawyers locked in a litigator mindset.³

Similarly, the relatively open-ended and improvisational nature of a robust mediation process can also make some litigators uncomfortable. Simply put, if you've seen one mediation, you've seen one mediation. The process is absolutely a collaborative one developed by the parties and the mediator, but lawyers should be prepared to take a step back from an urge to control the overall process.⁴ Most fundamentally, the litigator will not know the contents of the mediator's confidential communications with the other parties, and these can be extensive in the preparation steps recommended below. Today's attorneys understand this basic aspect of mediation processes – but it can be uncomfortable for ace trial lawyers who are accustomed to being (and feel it is their responsibility to be) on top of every detail. Sometimes this uneasiness leads to an unproductive focus on who is sharing more with themselves or the mediator and other perceived inequities in the process. As Yarko Sochynsky has noted, the lawyers and parties should keep in mind that the ultimate control over the process does, in fact, rest with them – no one is forcing them to sign an agreement. In the end they have much more control over their fate in a mediation than in an arbitration or litigation.⁵

As also discussed further below, particularly in the context of a complex business mediation, an experienced mediator will make recommendations regarding to whom they would like to speak, which participants should meet, etc. both in the preparation and in-person session phases and will ask the parties to make quick decisions about these issues. This may involve the mediator speaking to clients without the presence of their attorneys or having the business principles speak to each other without the presence of counsel, techniques that I have found can, in the right situation and at the right time, be very helpful in moving a business mediation process along – particularly pre-litigation. Overcoming a knee jerk reaction to maintain control of communications and, instead, facilitating mediator access to the right people at the right time can be important to the success of the effort to bring the parties closer together.

Finally, and stepping back from the details, the urge of a litigator is to persuade the mediator and, further, to win. That is healthy and appropriate at the right time and place. However, as Sochynsky has put it, litigators sometimes “view [a mediation] as a competition for the heart and mind of the mediator, thinking if they can persuade the mediator to their point of view through effective legal argument, the mediator will in turn prevail on the other side to throw in the towel.” He goes on to note:

...mediation is not a contest. It is a facilitated negotiation...the object is to get the other side to enter an agreement, not vanquish them. Changing roles from a litigation advocate to the lead negotiator in a mediation does not come naturally easily to everyone.⁶

There are, however, at least two critical roles for litigators (including in-house litigators) using their litigation lens in a

pre-litigation mediation setting. I discuss fact-gathering and case assessment below. Litigators are, of course, essential to this important aspect of the proceedings. Here, I note that it is critical for a litigator, be it outside counsel, inside counsel expert in litigation or both, to have a clear-eyed, brutally honest conversation with clients – and themselves – about the potentially negative general effect on business operations and the possibility of settlement once a litigation is filed. Parties often underestimate the effect of the very act of filing a litigation on the business and the attitudes of the parties. This sometimes leads them to question the value of putting the effort required into mediation preparation and sharing information because – in the case of an aggrieved potential plaintiff, for example – they believe that the other side “needs to see that we are serious” first by filing a lawsuit that will “give us leverage.” It is critical for the litigators to acknowledge to themselves and their clients that once litigation is commenced it may well be harder to settle any time soon because of the effect of taking the next step into a highly adversarial, “us vs. them” process focusing on right and wrong. Positions harden, clients are insulted – “OK, they want to play it that way? I'm all in!” – and litigations tend to take on a life of their own. Investing in settlement and resolution upfront rather than investing in litigation may be the best course.

In addition, litigators should carefully assess with their clients the actual value of any perceived leverage, and, importantly, the costs of getting it. Scratch out a realistic timeline and budget with the client. Litigation can be costly very quickly in many ways, well before the next settlement off ramp materializes. The first and immediate cost is a complaint and an answer (perhaps with a surprise counterclaim that the defendant would not have been motivated to raise as readily in the context of a pre-litigation business negotiation.)⁷ In addition, your dispute, as well as any attendant accusations and characterizations of business competence – is now public, and the publicity risk involved should not be underestimated. Even the fact that a business partner could not resolve its disputes in a business-like way (without litigation, in other words) may be perceived as problematic by future potential partners.

In addition, disruptive document hold obligations (sometimes requiring holding onto to documents that can be harmful in subsequent cases) and corresponding document production – including e-discovery and the retention of an e-discovery vendor – can start early and require significant upfront expenditures. Overlay your timeline with the business objectives of the company over the next several years and note the distraction from those objectives required by a litigation. If the client is the potential plaintiff, carefully search for and assess the possibility of any “surprise” counterclaims. Point out that the median time to trial in federal court is over 2 years, with potentially years of appeals still to go, and the corresponding need to explain to senior management every fiscal quarter what you are doing with their money.⁸

3. Hire a Proactive Mediator with a Strong Commercial, Transactional Background as well as the Ability to Help the Parties Evaluate a Potential Litigation

As discussed above, in a pre-litigation business mediation, business people should consider taking a leading role. Selecting a mediator appropriate for a pre-litigation mediation of a business dispute requires identification of the type of skill set that works best in a business negotiation context.

The mediation may require a challenging two track analysis that simultaneously looks to the future and the past – an evaluation of business terms or consideration of a negotiated termination that make sense to both parties now, regardless of the previous arrangement, and an evaluation of any dispute about those past arrangements in a litigation context. It is very helpful to select a mediator who has both extensive experience with the negotiation of transactions and deal terms that can help the parties work around difficulties and commercial litigation and evaluation experience. Such a mediator can help guide a proactive process on both fronts and understand both the litigator and business mindsets. A mediator without hands-on business negotiation experience may have fewer tools with which to assist the parties to consider their options and reach a resolution or actively assist in running a mediation business negotiation session. In addition, hands-on experience with transactional and collaboration implementation issues can help the mediator contribute to both business solutions and case evaluation.

4. The Importance of Extensive Pre-Mediation Session Preparation by Lawyers, Clients, and Mediators

While mediating in a pre-litigation context has tremendous advantages if approached in the spirit of a business negotiation, there are certain gaps that need to be filled to help the parties assess their business position and the settlement value of their potential case. The right mediator can and should help with this process – and, if possible, the parties should even go so far as contractually to agree in their mediation agreement to engage in a reasonable preparation process. Ultimately, and particularly pre-litigation, the participants should think of preparation as just as or even more important than the in-person mediation session – or sessions. Ultimately, a business “mediation” of any kind should be thought of as a creatively structured process involving pre-joint meeting steps to prepare for discussions with the other parties, in-person sessions (and sometimes more than one) and a document negotiation process memorializing deal terms.⁹

What are the parties’ basic positions?

In a litigation, and depending on where they are in the process, the parties have had to go to some lengths to define their respective claims and positions. There is a complaint, answer, possibly some discovery, and perhaps even motion practice that has whittled down some of the issues. Pre-

litigation, this basic claim definition has not necessarily taken place.

The parties should consider:

- Carefully assessing with the mediator what the parties have said in emails/letters about the dispute and in attempting to whittle down the issues.
- Preparing for the mediator a joint binder of the most relevant documents (the contract, email exchanges, etc.) so that the parties and the mediator readily can refer to the appropriate materials.
- Exchanging (and sharing with the mediator) mediation statements about what facts are disputed, business issues, positions and needs and the law, perhaps even with an opportunity for an informal reply. This “public” exchange can be very important to crystalize what to talk about in the mediation and save time there. If only confidential statements are shared with the mediator, the mediator may end up trying to outline the issues for the first time in private pre-mediation conversations or the lawyers or the mediator do this at the first in-person session. This can waste tremendous amounts of time and potentially derail the entire session. The timing of this public statement should be considered – it may be wise to wait until after some of the steps are taken in part (b) below.
- Supplementing the public statement with confidential statements to the mediator candidly discussing strengths and weaknesses, settlement value and the range of possible business solutions – as well as impediments to settlement such as unrelated business barriers, antipathy amongst the parties or other personality issues.

What do we need to know?

Many litigators are concerned about mediating too early because they lack the information necessary to assess their case.

The literature in the dispute resolution field is replete with useful resources outlining the value of a systematic, early cases assessment process internally, and the view that the process can be quick and efficient (applying, for example, the 80/20 rule, namely that knowing only 80 percent of the relevant facts can give enough information to a business to make a reasonable plan for resolving the dispute).¹⁰ Involving the mediator as a knowledgeable information exchange referee and participant can be helpful in getting the right information internally and from the other party in a business solution-driven way without litigating, and sophisticated business mediation participants regularly use mediators to help with information exchange. At a minimum, the goal should be to establish the basic undisputed facts so as not to argue in the mediation over topics that are relatively easy to resolve – such as how much money has already been paid to or by the parties. In such a case a bit of pre-mediation accounting work can help take

issues off the table and save time at the mediation session.

In this information-gathering process, consider having the mediator join internal interviews of key participants, internal “experts” in disputes about technology and otherwise participating in fact gathering – the litigators/clients will learn along with the mediator and, even more importantly, have an objective sounding board at the table. The mediator may also have expertise that can help spot problems or issues that may need to be resolved or taken into consideration.

The parties should also seriously consider retaining a joint expert to get a neutral view about critical, highly technical issues that need to be resolved or at least assessed before a resolution is possible (product defects, commercially reasonable efforts in connection with delivery schedules or marketing and sales efforts in complex technical markets, etc.). Such a joint neutral’s report would not be usable in the event of later litigation unless the parties agreed. Even the retention of party experts in connection with mediation of technical disputes can be helpful in conducting a reality check both about a possible business deal or chances in litigation.

Term sheet/Agreement/Settlement Document

Depending on the extent of preparation and where the parties are in the process, the lawyers for each side independently should attempt to prepare an outline of settlement terms and conditions in advance of the mediation session. Even sketching out and exchanging draft possible term sheets before the in-person session can be helpful. This last technique is quite common in all business negotiations. It should be noted that mediators will be extremely reluctant to provide draft templates because the significant drafting should be left to the parties and their counsel, but they can certainly make recommendations.

5. The Pre-Litigation Mediation Session(s)

If we stick with our business negotiation analogy, it is easy to understand how the actual mediation of a business dispute can and should look different from the more common “joint session – off to caucuses” model.

Careful consideration should be given to who should attend the mediation sessions and who should speak for the clients. As recommended in this article, certainly business representatives and inside counsel should have taken a significant role in mediation preparation and similarly should be the focus of the in-person mediation session in a pre-litigation situation. In addition to the traditional emphasis on attempting to have a “decision-maker”¹¹ in the room, at least two other business functions should be at the table in a complex case; clients with knowledge of the facts (those involved in the dispute) and, if possible, a likely more objective business client such as a finance leader. The mediator may ask the business clients to make an “opening statement” about their business goals, disappointments and how to address them going forward. He or she may ask the parties to address issues privately with the mediator

and then come back together in additional joint sessions to negotiate term sheets or particular issues face to face. This has the benefit of efficiency, keeping the parties talking – especially those familiar with the give and take of business negotiations -- and keeping the process in a business format. As discussed in point 2 above, litigators should be prepared to help facilitate a reasonably fluid communication process and rely on the mediator to develop a sense of how best to move the discussions forward based upon the mediator’s communications with both sides.

The resolution of a complex business dispute will likely involve many terms, both monetary and non-monetary, and moving parts. It can be difficult to compare apples to apples in connection with the changing offers. In order to facilitate offer-to-offer comparison, make sure that there is internal team agreement on the next offer to be made and clarity about the terms, it is critical that the parties exchange reasonably detailed typed term sheets rather than simply reading off the offer to the mediator from notes. These term sheets should be prepared by the parties, not the mediator, and reviewed by the mediator to ensure that he or she understands the offer and can make suggestions. Consideration should be given to having a business person in the room with the mediator to present the offer – this reinforces the practical, business negotiation aspect of the process and keeps the conversation going.

In addition, it is more likely than not that it will take longer than one session to negotiate the basic deal. Despite all the preparation, a complex new amendment to an existing agreement may not be drafted in one day. As discussed, the parties should certainly exchange written, concrete terms sheets agreed by each side as their pre-mediation session position or mediation offers during the session, and every effort should be made to make as much progress as possible during the first in-person session – and a persistent, patient mediator will help keep the process going. Nevertheless, success can be had if the parties, based upon their robust preparation process, are able to identify sufficient common ground and establish a sufficient road map – outlined at least in a signed term sheet or statement of principles -- to justify continuing the mediation process.

During the post-session drafting stage, the parties should consider keeping the mediator in the loop during any additional discussions or documents drafting. A knowledgeable mediator with a contract negotiation background can serve as a silent (or active) observer and help ensure behind the scenes that agreements made during the mediation flow through to the documents and that the documents papering the resolution do not themselves generate the potential for additional disputes – a highly ironic outcome that should be avoided.

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Pre-litigation mediation of business disputes involves different planning, participants, and preparation than mediation of a case already in litigation where issues have

been joined through complaint, answer, and counterclaim. It takes work, time, and the willingness of the parties, with the help and if necessary intervention of the mediator, to step away from an adversarial mindset and cooperate in achieving the best business results. It also provides a unique opportunity to resolve a dispute before time and resources have been invested to the point that resolution becomes more difficult as a result of the difficult momentum created by hardened positions and an increased sense of the value of the battle for the battle's sake.



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Endnotes:

¹The author would like to gratefully acknowledge her esteemed and valued colleagues Jack Esher and Yarko Sochynsky for their support, review and comments on this article and others referenced anonymously in these footnotes who shared their considerable wisdom.

²Even if a particular deal or arrangement cannot be salvaged, industry participants may often find the need to work with each other down the road. A supplier may need, in general, to preserve relationships with manufacturers or other customers; and customers may need help from suppliers in the future. These business considerations should be front and center in any assessment of acceptable mediation outcomes.

³The concept of a "settlement counsel" shadowing a trial team and leading settlement negotiations takes into account the understandable challenges that litigators can face in putting aside their litigation mindset.

⁴A sophisticated litigator – the chair of his firm's nationwide litigation practice – once somewhat ruefully remarked to me that in a pre-litigation business mediation situation his job was to "get out of the way" and let the business people do the talking. A federal district court magistrate judge who has run many, many mediations remarked flat out that lawyers tended to be "impediments"

to the mediation process. With the right attitude and approach, there is no reason that litigators cannot adapt and eliminate such impressions.

⁵Sochynsky, Y. "Effective Mediation", published in the New York Law Journal and the San Francisco Attorney, 1999. Similarly, a federal district court magistrate judge with whom I have worked has noted that if she gets the feeling that the litigators are out to "win" the mediation, the likelihood of a successful negotiation is greatly reduced.

⁶Id. Similarly, a federal district court magistrate judge with whom I have worked has noted that if she gets the feeling that the litigators are out to "win" the mediation, the likelihood of a successful negotiation is greatly reduced.

⁷I once mediated a complex, highly technical false advertising case in which the a defendant representative told me that he would have been highly unlikely to have pursued a counterclaim independently if they had not sued him first. That counterclaim ended up overwhelming many of the plaintiff's claims in terms of time and attention in discovery and significantly changed the legal risk calculation for the plaintiff.

⁸Please see an article I co-wrote with Steven Greenspan, the global litigation head at United Technologies, entitled "Reassessing Commercial Arbitration: Making It Work for Your Company, published in the Docket magazine of the American Corporate Counsel Corporation, March 2017, for some interesting statistics comparing litigation and arbitration time tables. These statistics are relevant in considering the costs of litigation generally. This article is available in the article and resources section of my website: www.connaweineradr.com

⁹Note that business decisions and negotiations take place over a series of meetings with different stakeholders. This should be considered in mediating a business dispute, especially one that is not yet in litigation.

¹⁰See the materials prepared by the American Bar Association's Planned Early Dispute Resolution Task Force https://www.americanbar.org/groups/dispute_resolution/resources/planned_early_dispute_resolution_pedr.html, and the early case assessment toolkit available from the International Institute for Conflict Prevention and Resolution, www.cpradr.org

¹¹It is beyond the scope of this paper to discuss whether it is always realistic in connection with a complex business mediation involving large corporate clients to expect that further approvals will not be needed outside the mediation session. As explained to me by an inside counsel with a financial services company, part of her preparation involves extensive communication with absent company stakeholders to gather their thoughts and approval; but even then follow up work may well be required to sell a deal to the right people internally. Awareness of this fact of life will help set expectations about what can be achieved at the mediation itself.