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Mediation in commercial disputes

Mediation is a useful alternative to the cost and effort of litigation. Is it right for your business case? These tips will help you decide—and help you use it to your client’s advantage.

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Trial lawyers know they must be prepared to try every case, even though the reality is that most cases settle before trial—many in mediation. But how do you propose mediation to your client and opposing counsel without appearing weak? How do you find the right mediator for your case? How do you decide your opening settlement position in the mediation? And how do you close what seems to be an unbridgeable gap between the parties’ positions?

Correctly addressing these and other mediation issues in business cases—and avoiding the most common mistakes commercial litigators make—can be the difference between success and failure in resolving cases through mediation.

The threshold question is whether your commercial case is a good candidate for mediation. In some circumstances, parties are obligated by contract to mediate before arbitrating or litigating, so find out if your client has signed such a contract.

If the client is a corporation, determine whether it is one of more than 4,000 companies that signed the International Institute for Conflict Prevention and Resolution’s “Corporate Policy Statement on Alternatives to Litigation.”¹ Signing that letter is a commitment to seriously explore mediation and other alternative dispute resolution methods before pursuing full-scale litigation.

Factors favoring mediation for your client include the need for confidentiality; the desire for resolution without the expense, uncertainty, and disruption of litigation; the need to preserve an ongoing business relationship; and a concern about establishing an adverse precedent. Factors weighing against mediation include a need to establish a legal precedent; the likelihood of success in a motion to dismiss or for summary judgment; a need for immediate equitable relief; and, of course, the unwillingness of your client to mediate.

Consider mediation only after you have a solid grasp of the facts supporting all claims and defenses and a thorough knowledge of applicable law. For example, you may want to complete key depositions or document discovery before you mediate.

On the other hand, you don’t want to wait too long. It is best to propose mediation well before trial. By the time of trial, both parties will have invested so much time, effort, and money that positions will likely have hardened, and clients may feel that it is too late for mediation.

Clients sometimes perceive the suggestion of mediation as a sign of weakness. It is important to explain the cost and time savings and the privacy benefits of mediation, while emphasizing that a proposal to mediate, made by one commercial litigator to another, is common. Explain that it signals not weakness but a willingness to resolve the case without putting both parties through litigation to the last appeal.

Stress that mediation is not binding; instead, it is guided negotiation. If appropriate, advise your client that the merits of the claims are so strong that a mediator is likely to validate your client’s position, encouraging the opposing party to resolve the dispute in the client’s favor.

Assure your client that, when you propose mediation to opposing counsel, you will emphasize that a successful mediation will benefit both parties and is therefore worth pursuing. After all, your client and the opposing party are in

the same boat: Neither wants to incur the expense and aggravation of litigation. Each has a business to run and better ways to use financial and other resources than to spend them on a lawsuit.

Choosing a mediator

Selecting the right mediator can make all the difference. Some mediators take a facilitative approach, exploring the parties' interests, concerns, motivations, and goals; finding common ground; and identifying possible resolutions. However, such a mediator—who need not be a lawyer—will typically be unable to evaluate the case, assess legal positions, or predict potential litigation outcomes.

Other mediators take an evaluative approach, offering opinions on the strengths and weaknesses of each party's position, challenging the parties' predictions on the litigation outcome, and initiating settlement proposals. Of course, many mediators combine both approaches.

You want an impartial mediator who has a strong track record for effective problem-solving, excellent negotiating skills, patience, trustworthiness, a keen business sense, and a good sense of humor. Depending on the case, you may need a mediator who has expertise in a particular area, such as construction or patents.

Discuss with opposing counsel which mediators you are considering and get assurance that your opponent agrees on the selection. Unless all counsel and all parties have confidence in the mediator, they won't have the necessary mindset to listen to what the mediator has to say or to come to a resolution. Keep in mind that if the mediator is viewed as likely to favor one side or the other, any recommendation he or she makes will be considered suspect.

Preparing to mediate

One of the biggest mistakes lawyers make in connection with mediation is failing to prepare. According to Beverly Hodgson, a mediator and arbitrator based in Connecticut:

The chance of success at a mediation plummets if counsel and client are not adequately prepared. A lawyer should know the important facts of the case, both helpful and adverse. He or she should also be well versed in the law that applies both to the claim and to the defense, including any recent cases. Counsel should prepare the client by describing the mediation process and having a discussion of bargaining strategy. Don't arrive without having decided on an initial demand, but don't wed the client to a hard-and-fast "take" figure before you've heard the mediator's thoughts.²

In deciding on your initial demand, ask your client to consider the best and worst alternatives to a negotiated agreement (BATNA and WATNA, respectively).³ This analysis requires a cold, hard look at the strengths and weaknesses of each party's position, the likely result of litigation, and the potential expense. It will allow you to evaluate whether a settlement proposal makes sense.

As a businessperson, your client views the financial aspects of the case globally—what the ultimate result will be in dollars. For example, if a client is pursuing a monetary claim, the question is: How much will the client likely recover after paying your fees and expenses? Make sure you get clear authority from your client concerning the initial demand, as you must for each settlement proposal during the course of mediation.

Keep in mind that sometimes mediations succeed because parties propose nonmonetary resolutions, even in cases that apparently present only monetary claims. For example, the client might agree to continue doing business with the defendant on new, mutually acceptable terms. In an intellectual property case, the parties might work out a license and royalty agreement, or an agreement not to challenge the validity of intellectual property in the future. Discuss such creative resolutions with your client before mediation.

Consider a principle both parties can agree on and around which they can build a settlement. For example, in a contract dispute, the operating principle might be: "We agree that Jones is entitled to all amounts properly due him under the contract." As you evaluate the application of this principle, focus on the motivations of *both* parties in seeking a resolution. As a useful exercise, when meeting with your client to prepare for the mediation, play the roles of opposing counsel and his or her client as they prepare.

Most commercial disputes result from the breakdown of a relationship. Ascertain the source of that breakdown, evaluate the relationship issues, and strategize accordingly. To the extent that you can, separate the personal from the substantive issues.

The mediator will likely request a premediation statement from each party. Failing to submit a statement, or providing one that is incomplete, is another big mistake lawyers make. As Hodgson puts it:

If the mediator invites position statements, failing to submit one, or submitting one that is merely a stack of documents, is the loss of an opportunity to frame the issues and persuade the mediator in advance of the session. Mediators assess the quality of advocacy and will use the quality of the position paper as evidence of the client's actual readiness to try the case if necessary and the likely skill of the trial lawyer, factors that bear on the value of the claim.⁴

Consider whether it is advantageous to exchange position papers with opposing counsel, or whether it makes more sense to submit confidential position statements only to the mediator. As an alternative, you might want to submit one statement that is exchanged and one that is not.

Also consider preparing demonstrative exhibits for the mediation, including smaller versions of them in your position statement. For example, a time line or an organization chart may graphically convey what is difficult to put in words. Also bring to the mediation all key pleadings, documents, admissions, deposition excerpts, photos, and videos, as appropriate.

Bringing the wrong team to the mediation is the third big mistake lawyers make. According to Hodgson:

It is crucial to have everyone with a vote on the final settlement decision present at the mediation to hear the points made and experience the bargaining process. If a spouse, business partner, or family confidant is going to help make the decision, make sure they attend. An offer made at the table after a hard day of bargaining may shrink or morph if a party has to wait and confer with a missing decision-maker. On the other hand, bringing a clutch of cheerleaders—associates, paralegals—may lead to an inability to hear valid points about the weaknesses of a claim.⁵

Discuss proper mediation demeanor with your client, including how to greet the adversary without hostility. Make sure your client realizes that, although you will present your position persuasively, this is not a time for emotionally charged language or theatrics. The atmosphere is more like negotiating a business deal than making a closing argument to a jury. Your client should be aware that opposing counsel and the mediator are sizing up you and your client based on what you say, how you say it, and what your body language conveys.

Work out an agreement for the terms of the mediation, including who the mediator will be, where the mediation will take place, how payment will be made for the mediator's services and the facilities, and how confidentiality will be preserved. Federal Rule of Evidence 408 and state analogs make privileged certain statements made during the course of settlement negotiations, but those rules do not protect statements of fact. Nor do they protect against the use of mediation-related statements and documents in depositions and arbitrations, in the press, or in public. Accordingly, agree in writing before the mediation that all statements made in connection with the mediation are privileged and cannot be disclosed to anyone.

On the other hand, the mere fact that someone uses a document in connection with a mediation does not make that document privileged. Furthermore, information you disclose at a mediation is known to the other side and may be the subject of discovery, deposition, and trial questions.

Selecting strategies

Once you have determined your opening position and the final result your client seeks, how do you achieve it? Typically, mediators give each attorney the opportunity to make an opening statement in a joint session. This is probably your only opportunity in the mediation to convey to your opponent that you are a formidable adversary prepared to litigate the case to conclusion, if necessary—but that you nevertheless recognize the benefits to both parties of resolving the case sensibly through this mediation.

Decide in advance whether your client will say anything during the joint session. If your client is sophisticated and well prepared—and if he or she will appear reasonable, convincing, and sympathetic—the client can speak at this point.

As the mediator engages in shuttle diplomacy, meeting with each side separately, expect that he or she will occasionally play devil's advocate, emphasizing the weaknesses in your position and your opponent's, in turn. Acknowledge weaknesses when they exist and explain why perceived weaknesses do not exist.

Make proposals to generate movement, understanding that if you consistently make changes in your position parallel to the opponent's, you will probably end up halfway between your opening positions. When you are getting close to the limit of your authority, signal this by reducing the incremental changes you make in your position. Track each change in both positions so you can monitor the progress of the negotiations and be aware of where you are heading if you stay on that course.

Above all, be patient. Typically, in a one-day mediation, the negotiation either comes to a resolution, or fails, in the mid- to late afternoon. While the mediator is meeting with the other side, remind your client that negotiation takes time, evaluate where you are in the process, and consider your next move. Even though you have predetermined your desired result, remain flexible; as the mediation progresses, you may need to alter your analysis of the strengths and weaknesses of the parties' positions.

Keep your mind open to creative resolutions, and ask the mediator to recommend substantive proposals, as appropriate. Listen carefully to the words that opposing counsel uses in making a proposal, as conveyed by the mediator. It is one thing to say: "My client will not settle for a penny less than \$750,000," but quite another to say, "My client is looking to settle in the range of \$750,000" or "My client may consider \$750,000 if you offer it." Likewise, be aware of the words you use in discussions with the mediator to convey your authority.

Be clear with the mediator what information and documents you are willing to share with the other side. For example, you may rely on a key document that is not yet the subject of any discovery to support your position. But you may prefer to keep it confidential in case the mediation fails, because you might benefit if you disclose it for the first time at a deposition or at trial. Do you authorize the mediator to show it to the other side? Make sure the mediator understands your expectations about the documents you provide.

It may be appropriate, at some point in the mediation, for the two principals to meet by themselves to smooth things over. Consider this option only if you have confidence in your client's good sense, ability to handle such a potentially stressful situation, and understanding about the extent to which his or her conversation is privileged.

Getting past impasse

If you have chosen an effective mediator, he or she will have strategies to break an impasse. You can use your own strategies, too. This is the time to be creative, recognizing that a good settlement is one that neither party is delighted with but that both parties can accept.

The value of a case depends on many factors beyond the merits, such as the expense and disruption of litigating all the way to trial, insurance coverage, personal exposure of a party's representative, settlement of comparable cases, and the attorneys' experience. Here are some impasse breakers:

- Once the opposing party digs in its heels, you have a good idea of its perceived BATNA. Through the mediator, challenge the assumptions implicit in it. For example, consider this hypothetical situation: Your client, P, manufactures widgets. Client P enters into a contract to sell 100,000 widgets to Company D for \$250,000, deliverable by an agreed date, but with no "time is of the essence" clause. Company D pays Client P a \$50,000 deposit. Client P delivers all 100,000 widgets to D—but two months after the agreed date. Company D refuses to pay the balance because of the late delivery.

Client P sues Company D for \$200,000, plus interest and attorney fees, as provided in the contract. Company D counterclaims for lost profits arising from the late delivery. You could argue: "Even if D could establish that P breached the contract because of late delivery, D won't be able to prevail on its lost profits claim because D will not be able to show that it could have sold 100,000 widgets during that two-month period, and the market for widgets during that period was down due to economic factors beyond P's control."

- Through the mediator, focus on the opponent's WATNA. For example, in the same hypothetical situation, assume from successively smaller increments in the amounts D offers at the mediation that D perceives its WATNA to be \$200,000. You could argue: "Even if Company D offered \$200,000, that amount would not

take into consideration D's contractual obligation to pay interest on late payments and attorney fees in the event of D's breach. Interest to date is \$35,000, and attorney fees to date are \$25,000. So D's worst-case scenario as of now is \$260,000, not \$200,000, and that amount increases every day."

- Suggest that the mediator create a new group dynamic by shifting the participants into different groups in multiparty mediations.
- Refocus on the importance of future relationships. Your client shouldn't burn bridges unnecessarily.
- Emphasize the mutual benefits of resolving the dispute in confidence, with no publicity.
- Review the analysis of risk and cost. If you believe that your client should give you more authority to achieve a resolution, so advise your client, emphasizing the logic of your analysis and all the benefits of certainty, finality, avoidance of additional litigation expense, and, if you represent a plaintiff, the additional benefit of a bird in the hand.
- Consider nonmonetary components of a settlement.
- Consider a "double-blind" proposal, by which the mediator confidentially presents a final number to each side for acceptance or rejection. Unless both accept, neither knows whether the other side has accepted the proposal.
- Take a recess or, if appropriate, adjourn until another day to resolve the remaining issues.

If you don't succeed in breaking the impasse, don't despair. Use the mediation as a basis for later negotiations.

In some cases, the solution might be to transform the process from mediation to arbitration. The person who served as the mediator can serve as the arbitrator for these types of resolutions or for straight arbitration, or you can select someone else to arbitrate. This decision depends on whether, during the course of mediation, you or your client revealed to the mediator something detrimental to your client's position that may not come out in arbitration. Make sure your client understands that, unlike mediation, arbitration is final and binding, subject to limited exceptions.

Arbitration can take different forms. Consider using so-called baseball arbitration, in which each party submits to an arbitrator a number that is acceptable, without disclosing the number to the other side. The arbitrator then picks one of those two numbers, and his or her decision is conclusive and binding on the parties. This process forces each party to be reasonable in submitting a final number. Also consider "bounded" or "high-low" arbitration. The parties agree that the defendant will pay, within an agreed range, an amount to be determined by the arbitrator.

If you are successful in the mediation, get the settlement terms in writing before the mediation session is over. Unless representatives of each party with binding authority sign on the dotted line before everyone leaves for the day, each party has the opportunity to reconsider the terms of the agreement.

Finality is key. Consider having a computer and printer accessible to draft the terms of the final agreement, so it can be printed and signed on the spot. You may even want to draft the boilerplate provisions of a settlement agreement on your own computer before you begin the mediation session and bring an electronic copy with you.

If you apply these strategies, you will enhance the likelihood that your mediation will succeed and that your client will be satisfied.⁶ The more cases you mediate, the better you will be at it, having learned from experience.

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Notes

1. To see the letter, go to www.cpradr.org/corppol.asp?M=11.5.
2. Interview with Beverly Hodgson, coauthor of Beverly J. Hodgson & Louis I. Parley, *Alternate Dispute Resolution in Connecticut's Courts* (A.L. Book Co. 1998), a compendium of Connecticut case law and procedure in alternative dispute resolutions (Dec. 20, 2006).
3. See Roger Fisher & William Ury, *Getting to Yes: Negotiating Agreement without Giving In* (2d ed., Arrow Bus. Books 1997); William Ury, *Getting Past No: Negotiating in Difficult Situations* (Bantam Books 1993).
4. Interview with Beverly Hodgson, *supra* n. 2.
5. *Id.*
6. For further reading, see X.M. Frascogna, Jr. & H. Lee Hetherington, *The Lawyer's Guide to Negotiation: A Strategic Approach to Better Contracts and Settlements* (ABA 2001); Bennett G. Picker, *Mediation Practice Guide: A Handbook for Resolving Business Disputes* (2d ed., ABA Sec. of Dispute Res. 2003).