INSIDE THE MINDS

Strategies for Successful Mediation

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Mediating Business Disputes in the Midst of Litigation: The Art of a Facilitated Settlement

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The Concept of Mediation in the Midst of Litigation

It is axiomatic that approximately 95 percent of civil lawsuits settle before trial. No matter how contentious a case is, no matter how simple or complex its issues may be, and no matter how confident either side may be about the correctness of its position, a trial represents extraordinary risks for both sides. There is always the possibility of a doomsday result. A defendant may be required to pay far more than it believes it should, or than it can afford. A plaintiff may recover far less than it expects or feels is right, or it may recover nothing at all. The cost of litigating through trial in any civil case, but especially in a complex business case, is extremely high. The prospect of incurring that cost and then suffering a doomsday result to boot is a powerful deterrent to trial, and an equally strong motivator for settlement. Moreover, a settlement brings finality. Even a good result at trial may prove to be only the first chapter in a continuing contested saga that includes expensive and protracted appeals.

For all these reasons and more, in most cases, at some point before trial, the parties reach a settlement. The ingredients that make settlement possible are many and varied. But in general, a party will be willing to settle when it believes that, taking account of the cost it is willing (or able) to invest in the case, it has used the litigation process to position itself in the strongest possible posture it will be able to present to the other side. In other words, in the world of litigation, war is an instrument of diplomacy.

A case in which both sides feel they have achieved their strongest bargaining position is ripe for settlement. But a case may also be ripe for settlement if one side feels that way and the other side is out of money to finance the battle. In between those two paradigms, there are an infinite number of possible permutations, but in general, cost and benefit are the variables that tell the story.

Many cases settle based on bilateral negotiations. But in complex business litigations, it is becoming more common for the parties to use a private mediator, who is paid a fee to provide the service of mediation, to facilitate the process. This kind of mediation is non-binding. If it does not work, the parties simply resume the litigation process. I am not aware of published statistics, but I believe a large number of private mediations of this kind

actually result in settlement. No doubt, the reasons for this have partly to do with some of the issues discussed in this chapter. But the fundamental driver is this: lawsuits are all about the parties' rights, and mediations are all about the parties' interests.

Mediations commonly take one or two days (sometimes more). The ground rules for the process are agreed upon, and typically set forth in writing, in a mediation contract prepared by the mediator and discussed with the parties, through counsel, in advance. The parties pay the mediator a fee, apportioned between the parties as required by the mediation contract, usually in advance. The mediation is attended by litigation counsel and a senior decision-maker or decision-makers for each side, and the mediator. Although the process can work any way the parties choose, in the typical model each side has an allotted time, usually an hour or less, in which counsel presents to the opposing counsel and client, and to the mediator, a summary of that side's case and why it believes it should win. The two sides then retire to separate, private conference rooms, and the mediator shuttles between them, conveying offers and counteroffers, along with the substantive arguments that are communicated with them. In this process, the mediator may be more or less proactive. He or she may push, prod, cajole, argue, or persuade, or he or she may choose to act as a less intrusive purveyor of information. In general, mediators do whatever they sense will be most inclined to keep the process alive. Sometimes the protagonists re-convene together with the mediator. Sometimes there are additional arguments presented before the assembled group. Sometimes the mediator will publicly take a substantive position on an issue—or on a possible settlement amount—and sometimes he or she will assiduously refuse to do so. The process continues until settlement is reached, until time runs out, until the parties agree to extend—or resume—the process for a specified additional number of hours or days, or until the parties, or one of them, give up and declare failure. It is not uncommon for mediations to conclude without resolution, but for the dialogue to continue between the parties afterwards, with a settlement achieved in the days, weeks, or months thereafter.

There are other kinds of mediation than that provided for a fee by a private mediator. In some courts, judges do not allow a case to go to trial until it has first been referred to another judge for judicial mediation. A mediating

judge may act in roughly the same manner as a private mediator, except that the process is usually more truncated, and the parties commonly have little or no say in the ground rules the judge chooses to follow. Most importantly, because a mediation process of this kind is mandatory, and because it costs the parties nothing financially, the parties are commonly less invested in it. It therefore carries a greater danger that one side or the other will just be going through the motions. The trial may be all but inevitable.

It is also possible for a mediation to take place because it is required by the parties' preexisting business contract, typically in a provision that provides for binding arbitration, but posits non-binding mediation as a pre-condition thereto. Although a mediation of this kind typically takes place before a private mediator, for a fee, it commonly presents the same special challenge, flowing from the fact that it is mandatory, discussed above.

The remainder of this chapter focuses on the particulars of that species of mediation engaged in voluntarily by both sides to a business lawsuit, before trial, before a private mediator, for a fee. More specifically, the focus will be on the elements that maximize the chances of such a mediation's success.

When to Mediate

As a general matter, in a complex business lawsuit, once the complaint is filed, the case may be thought of as having a preliminary motion phase (i.e., motions to dismiss), a fact discovery phase, an expert discovery phase, a dispositive motion phase (i.e., motions for summary judgment), and then trial. In addition, motions of all kinds may be, and typically are, made during each of those phases. Traditionally, most mediations take place somewhere toward the end of this process, roughly between the conclusion of expert discovery and trial.

The question of when to mediate is of paramount importance. On one hand, it may be prudent for a party to wait until fact and expert discovery is complete, or virtually complete, to leverage all the admissions and/or other information obtained in that process. If a party believes it may be able to whittle the case down by having certain issues resolved through summary judgment, it may also be prudent to wait until after summary judgment

motions are decided. On the other hand, the later the mediation, the greater the litigation cost invested in the case. Moreover, by waiting until later in the process to mediate, a party may weaken, rather than strengthen, its settlement position. In other words, it may turn out that the discovery record, and/or the rulings on summary judgment motions, are harmful to that party, and correspondingly strengthen the other side. An earlier mediation reduces those risks. It enables each side to argue that the other side should be fearful of possible or likely future adverse developments in the case, and should instead factor them into a compromise settlement calculus before they happen.

The challenges of timing posed by a summary judgment motion are a good case in point. Suppose the defendant has moved for summary judgment as to liability on most or all of the plaintiff's claims. Suppose the plaintiff has filed its opposing papers, and suppose the lawyers on each side are able to advise their clients that both sides' submissions are of high quality, the issues present a close call, and the decision could go either way. If the motion is granted, the case will be over or virtually over and the defendant has won. The case's settlement value will then become a negligible amount or zero. If the motion is denied, the defendant will know it must face a trial on all the issues, and the case's settlement value will go way up. Each side wants the benefit of a favorable ruling on the motion, but each fears the opposite result. While the motion is pending, but before it is decided, may be the optimal time to mediate. The arguments presented at such a mediation are likely to be all about what dollar amount each side is and/or should be willing to pay and/or accept to avoid the risk that the motion will be decided against it.

There is an important variable lurking in this example about the summary judgment motion. It is that each side believes the other side's motion papers are of high quality. Not until each set of lawyers has seen the other side's work will it be able to opine that, because the other side did a good job, the result is too close to call. Suppose instead that one set of lawyers advises its client that the other side's work was not so strong, and that the chances of succeeding on the motion are therefore higher. That party may be willing to risk the result of the ruling on the motion, and it may not want to mediate.

The jockeying for position that takes place during a lawsuit, especially in a complex business case, has much to do with exploiting weaknesses or vulnerabilities exposed by the other side. This involves, in part, weaknesses inherent in the other side's factual or legal position, but it also involves, in part, waiting for the other side to stumble. The kind of stumbling I have in mind includes, for example, the weaker-quality motion papers in the summary judgment example above. The point is no different from the self-evident proposition that an athlete will look for and try to exploit an opponent's weakness. A tennis player, for example, may serve to an opponent's backhand side, because the opponent's backhand is perceived to be weaker than the forehand. This phenomenon tends to cut against mediating early in the litigation process. Each side hopes that, at some point, the other side will stumble (to complete the metaphor, through either a forced or an unforced error), and each side consequently fears that, if it mediates too early, it will give up the possible advantage flowing from such an opportunity. Each side wants to maximize the chances that the other side will make a mistake. For this reason, parties have traditionally been reluctant to mediate at a relatively early stage of a complex business lawsuit.

I nonetheless suggest that a mediation relatively early in a case, even in a complex business case, is sometimes highly desirable. An early mediation is most likely to be successful in a case in which there are competent lawyers on both sides who have mutual respect for each other, such that each side feels it understands what the other side will be able to do with the available factual and legal ammunition. In such a case, each side will be able to say to itself, "I know what the weaknesses in my case are, and I know how the other side will be able to use them against me" and "I know what the strengths in my case are, and I know how far those strengths are likely to take me." In other words, in such a situation, there will be less incentive to wait to see if the other side stumbles, in a way that might fortuitously minimize the danger of the weaknesses in the party's case or amplify the benefit of its strengths.

I have said that, in such a situation, mediation can be desirable at a *relatively* early stage. It will likely be necessary in most complex business cases for the parties to complete enough fact discovery so each side has received and reviewed all the relevant documents, and each side has completed the depositions of all the key fact witnesses on the other side, as well as of any

important non-party witnesses. Without this basic foundational discovery, it will usually not be possible for an honest appraisal by each side of the strengths and weaknesses of its case to take place. But there need not be any reason for that honest appraisal to await the completion of *all* fact discovery, and there sometimes need not be any reason for it to await the completion of *any* expert discovery.

This last point may be seen as litigation heresy. Many litigators may believe that, in a complex case involving experts, it is folly not to complete expert discovery before mediating. After all, whether the experts are addressing damages or an element of liability, such as the practices and procedures in a particular industry and/or whether the standard of care has been breached, how can one evaluate one's strengths and weaknesses on the issues addressed by the experts until both sides' experts have completed their work? The answer is that the ground rules of the mediation may be drawn to allow for the exchange of written expert reports, as summaries or otherwise, and/or some other species of expert participation in the mediation, even though formal expert discovery has not yet taken place in the lawsuit. Whatever work the experts contribute to the mediation process will be without prejudice to formal, comprehensive expert discovery if the case should continue. In this manner, the parties are able to include in their mediation arguments the benefit of the experts' input, without having to complete what can frequently be the lengthy and expensive process of plenary expert discovery before mediating. For this notion of truncated, mediation-only expert input to work, each side has to have sufficient respect for the lawyers on the other side to believe those lawyers will be able to make competent and effective use of their expert ammunition. In other words, each side has to feel that it is able to achieve a sufficiently realistic view of what the expert landscape will be, for purposes of summary judgment and/or trial, that it is able to factor into its settlement calculus the strengths and weaknesses of each side's expert position.

Traditionally, parties have sometimes been reluctant to be the side that initially proposes mediation, for fear that doing so will be viewed as a sign of weakness. That seems to be changing. In my view, because mediation is now seen as something closer to an integral part of the litigation process, proposing a mediation, even if the proposal comes relatively early in the case, can actually be a sign of strength. The proposal means the side making

it believes it has come to understand not only its own case, but the other side's as well, and that it is willing to participate in a settlement process in which it feels confident its arguments will be sufficiently compelling to yield a result it sees as fair. Historically, the party receiving the mediation proposal may have felt encouraged, even smug, that the other side flinched first. Today, the party receiving the mediation proposal may bemoan the fact that the other side seized the momentum and beat it to the punch.

The Art of Mediating: Tips on Strategy and Tactics

Part of the genius of the mediation mechanism is that it gives each side the chance to feel it has had its day in court. The presentations by each side's lawyers have the feel of a trial. Each client may revel in the passion and eloquence of its lawyers' presentation, and such catharsis may be good for the settlement dynamic. But the notion of mediation as surrogate trial holds a profound danger for the advocate. Many lawyers actually prepare their mediation presentations as if they were talking to a judge. They may be passionate and eloquent, but they may be seduced into arguing the facts and the law as if they were trying to elicit a decision from a decision-maker empowered to make one. Such advocacy involves overcoming and defeating—that is, inevitably, demeaning and marginalizing—the arguments and positions of the other side.

All this is a fatal mistake. A presentation that plays as a full-bore, blustery appeal for total victory will serve only to crystallize and inflame the opposition, and it will guarantee equally inflammatory reciprocation. This is not the stuff of which deals are made. Moreover, the mediator is not the judge. He or she will not decide anything. Indeed, the mediator is not the right audience at all. The only audience that truly matters in mediation is the client on the other side. That is the person with whom a deal must be made. That is the only person the advocate should be addressing. And in doing so, the advocate should not be trying to persuade the opposing client that the advocate's side is right. That effort would be doomed to failure. The goal here is not to win a case, but to make a deal.

It is critically important for the advocate in a mediation to begin by addressing the opposing client in the right tone. That tone should be respectful with a personal touch. It should run something along these lines:

"Mr. or Ms. opposing client, we appreciate your taking the time to participate in this mediation. I am not here to try our case or even to persuade you that our side is right. If we do not settle, I will have plenty of time to do that in the courtroom. Instead, because our side believes the case should settle, I would like to share with you just a few of the key reasons we feel the case is worth [more] or [less] than you seem to believe. I want to help you understand, without asking you to agree, why *we* feel the way we do. If I succeed in doing that, I will succeed in explaining why we are not willing to [pay] or [accept] what you want us to. I ask you to keep an open mind. Our side will then listen to yours in the same spirit. We will then be happy to turn the process over to the mediator, so he or she can help us determine if there is a way we can reach agreement. Now, let me focus on two key issues of liability and one key issue of damages…"

In a presentation of this kind, I suggest addressing the opposing client, in a respectful way, by his or her last name. The presentation should have the feel of a conversation, but it should be frank about the particular key factual or legal issues around which it is built. As to those issues, the explanation should be powerful and include a treatment of why the other side's position is wrong and will fail. But it should acknowledge at least some weaknesses and risks in the position of the presenter. It should say the presenter's client is willing to compromise within certain parameters, because it will be fair to do so (herein fit the weaknesses), but it should say there are limits beyond which the presenter's client will not go, and it should say why. My suggestion is that the presentation should not include mention of any specific dollar amounts. That should be left to the subsequent shuttle diplomacy of the mediator. Instead, the boundary lines should be drawn only as concepts. For example, a mediation advocate might say something like this: "For the reasons I have explained, we are not willing to include in a settlement any amount representing revenue from the X line of business. We do not feel you have any right to that money, and we are confident you will not win it at trial. But we will negotiate with you in good faith about a settlement amount calculated based on the Y line of business, in the way our expert has analyzed it. If you reciprocate that good faith, and if you take account of the risk we think you face on the Z issue regarding liability, we think there may be a deal to be made." In general, every statement in this presentation about what the advocate's client will not do should be matched by an explanation, at least at the level of concept, about what it will do. I do

not deny that, at some level, the presenter's purpose is to persuade. But it should be a subtle, not overt, species of persuasion, and it should be one artfully combined with both the carrot of a final resolution immediately within reach and the stick of a highly competent and confident courtroom battle if settlement fails. And it must be respectful of the opposing client. That client, as a human being, may simply find it impossible to make a deal with someone he or she has been given cause to demonize.

For some lawyers, even if they may agree with the wisdom of the approach I suggest, it is more difficult to strike the desired respectful and deal-oriented tone when they represent plaintiffs than when they represent defendants. There seems to be something of a sense in the land that the plaintiff's advocate must assiduously avoid uttering a word of compromise. I disagree. The only reason either side is paying to participate in a private mediation is that it wants to compromise. Candidly admitting the obvious point, while putting conceptual boundaries around what such a compromise will have to entail, no more weakens the plaintiff's standing or ability to fight to the death in the courtroom if necessary than it weakens the defendant's standing or ability to do the same. Candor is not inconsistent or incompatible with strength. And remember that, in the difficult clinches of the mediation give and take, each side has something precious to dangle in front of the other: the defendant can dangle money, and the plaintiff can dangle peace. Each side's piece of that equation should be felt, and used, as a source of strength.

The World of Mediators

It is critical to have a good mediator. There are many available. Word-of-mouth referral from a trusted source is usually the best way to find one. Sometimes it is important to have a mediator with knowledge of a particular area of law or a particular industry or technology. This may be especially true in cases involving legally or factually esoteric subjects such as patents, intellectual property, antitrust, or securities law. And if the case in question involves a substantial dollar amount, it is obviously desirable to have a mediator with experience in large-dollar disputes. But in general, in a complex business case, the most important quality for a mediator to have is the willingness to prepare in advance. Preparation by the mediator can make all the difference.

The kind of preparation I have in mind is not limited to reviewing the written mediation statements or briefs the governing ground rules commonly require to be submitted to the mediator by each side in advance. It also includes the mediator taking the time to talk in depth to each set of opposing lawyers (and sometimes their clients) *ex parte*, and to ask probing questions not merely about the party's factual and legal positions, but also about the myriad human and business considerations that influence the party's settlement position. Does the party prefer a lump-sum payment or payment over time? Does the party wish to preserve, or perhaps to avoid at all cost, any future business dealings with the other side? Is someone's job or promotion at stake in the dispute and/or its resolution? Will the settlement have shareholder and/or lender ramifications for the party making the settlement payment? Will the manner in which the settlement payment is structured have tax implications for the party receiving the settlement payment? Is the timing or amount of a settlement influenced by a party's budgeting process, public reporting obligations, and/or other regulatory factors? Is there insurance involved in the settlement calculus? If so, should the insurers participate in the mediation, or are they better left in the background? Are there unresolved insurance coverage issues that may influence the settlement process? Are there non-monetary, hot-button issues that have to be resolved? Are there publicity issues? Are there confidentiality issues? Is either side concerned about how the resolution of this dispute may affect its position in other actual or possible cases? All these questions represent examples of the type of information a good mediator should work hard to elicit from each side, in private, before the mediation. It is therefore obviously important that the mediation contract permit such *ex parte* communication, and that each side fully understand that the mediator intends to conduct such a private dialogue with each side. It is also typically important that each side have sufficient trust in the mediator to believe the mediator will not divulge to the other side any information shared with the mediator in private, unless and until express permission is granted in the mediation process.

A good mediator understands that information is power. The kind of factual insight into each side's thought process suggested by the above questions can be used by a skillful mediator at the right time to great advantage in the mediation give and take. Perhaps a greater dollar amount can be traded for a longer payment period. Perhaps a future contract can be

traded for a smaller dollar amount. Perhaps a substantive provision in a settlement agreement can assuage a non-monetary concern. Exploiting possibilities such as these to their fullest potential, including but not limited to knowing when to suggest them, is much more likely if the mediator has taken the time to learn the kinds of information suggested above in advance.

There is not any one particular personality type that is needed for someone to be a good mediator, although pedantic, pompous, and condescending is probably not anyone's ideal. There is no need to worry, because the field does not seem to attract such types. A good sense of humor can be a huge advantage and, not surprisingly, good mediators tend to have this trait in common. A good mediator has the innate ability to put each side at ease, and to gain each side's confidence, especially in the private sessions of shuttle diplomacy when each side is called upon to make the difficult, sometimes soul-searching decisions that determine the result. A good mediator works hard to keep his or her own ego out of the process. When the job is done well, the mediator functions much like a waiter in a good restaurant: almost invisible, not intrusive, but absolutely essential to the delivery of the product. The parties are left to feel that they could have, or perhaps that somehow they actually did, settle the case on their own, despite their rational cognition to the contrary.

It is sometimes said in the world of litigation that there is no such thing as a bad settlement. This is so despite the fact that, typically, especially in a complex business case, a settlement leaves each side unhappy and disappointed, except, of course, as compared to the prospect of the risks and uncertainty of a trial. The lawyer who counsels a client through a mediated settlement in a complex business case is entitled to feel that he or she provided a valuable service. That lawyer may be certain that the settlement compromise would not have been possible if the other side did not feel it faced the risk of a worse result at that lawyer's hands in court.

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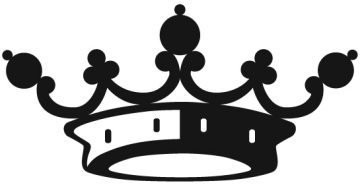

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