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Business disputes: Know when and how to mediate

Business disputes are costly, complex, and often ruin relationships, but when approached with early communication, strategic mediation, and the right people at the table, resolution can be faster, cheaper and even lead to renewed collaboration.

By Brian S. Currey

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Business disputes can be messy and costly. Partners might disagree about how their shares should be divided; contractors might challenge payments they got (or didn't get); investors might contend that their interests weren't protected; or companies might accuse each other of breach of contract or anticompetitive conduct. When you add in consumer and regulator claims, the list seemingly knows no bounds. Damages, valuations, and a host of other issues may require experts on both sides, and discovery usually is extensive, driving the price of litigation through the roof.

At trial, juries are expected to understand complex and esoteric information so they can render appropriate judgments. Not an easy assignment, even for those with business acumen. Any verdict issued is likely to be appealed, further dragging out both the length and costs of the dispute.

The only certainties of a business case are that a lot of money will be spent and that litigants will never do business together again. Might there be a better way to resolve business disputes? No stranger to business litigation, I spent more than thirty years litigating them on behalf of and/or against businesses, and then I presided over them as a Superior Court Judge and Court of Appeal Justice.

Now I mediate business disputes, and I've learned that how and when these cases are removed from the court system can make all the difference in the success of their resolution. I offer these lessons about resolving business cases through mediation.

Mediation is cheap, but talk is cheaper

Mediation is far cheaper than trial or arbitration, but it may not be the lowest-cost way to conclude a dispute. Resolving cases the old-fashioned way might be even cheaper and faster. What is the old-fashioned way?

Talking. Some disputes can be resolved simply by communicating with the other side. These are generally cases in which a simple – and usually obvious – solution is available if the two sides are willing to listen to each other and forgo adversarial posturing. Just as people can work through their differences by listening to one another and finding common ground, so too can businesses focus on finding solutions to straightforward issues.

For example, one of my clients owned a business that designed and manufactured electronic parts and computer accessories. The CEO called me with a serious problem. Another company had begun to market a small camera using a name that infringed on my client's intellectual property. What to do? After briefly discussing the issue, I suggested that my client simply call the other company's CEO to alert him to the issue. A few minutes later, my client called back to report that the other company's CEO had been unaware of the IP issue and would be happy to rename the camera. On top of this, they had even discussed the possibility of doing business together in the future. I did not bill for my time. Total cost to my client: nothing.

The general counsel of another client, with whom I had a longstanding relationship, called me one day with a different problem. His company, a large conglomerate, owned the only pipeline supplying jet fuel to the Las Vegas airport. Running from Southern California to Harry Reid International Airport, the pipeline had developed a leak in San Bernardino County. The pipeline's safety systems had worked as designed, shutting the pipeline down automatically. The leak had been reported as required to the appropriate authorities and had been repaired. Sand along the right of way had been contaminated, but the company had remediated the area.

Nevertheless, the San Bernardino District Attorney's office brought criminal charges against the company. With my client's assent, I called the Deputy DA assigned to the case and arranged to have lunch. During a pleasant meal, I explained the cause of the leak, the systems in place that mitigated the damage, and the resulting cleanup. We agreed that my client would pay a modest civil penalty, and the criminal charges would be dismissed. Cost to my client: my travel time, the lunch, and a small penalty. Lesson learned: In an appropriate case, explore settlement early, with or without mediation.

When to mediate

When a mediation takes place in a business dispute will depend on the case and the parties. An earlier mediation can certainly save litigation costs and might even preserve business relationships by avoiding protracted litigation, but a later mediation may have a better chance of resolution because it is based on a better grasp of the facts.

Even though early mediation can avoid litigation costs, if it is too early it will have little chance of success. For this reason, despite cost savings, many (if not most) business mediations tend to take place after some discovery has been conducted, or even closer to the eve of trial. Why? Lawyers are risk adverse, especially when dealing with complex issues that require deep factual analysis and expert guidance. By the time they have completed discovery in such cases and have prepared for trial, the cost of trial and likely outcomes are more predictable.

Like most trial judges, I used to – at lawyers' requests – mediate business cases assigned to me for trial. By that time, testimony had been locked down through depositions, all potential documentary evidence had been identified through exhibit designations, and trial theories had been clarified in the trial briefs. Experts had been deposed. Sure, there could be big surprises at trial, but those were rare.

With pretrial discovery concluded, the parties may disagree about their predictions on outcome or damages, but everyone should be working from the same known universe of theories and evidence. Despite the time and money already expended, mediation will now save both parties considerable additional cost. The process will be focused and streamlined, successful resolution more likely, and if successful, there will be no chance of further appeal.

Who should attend the mediation?

When negotiating business disputes, two types of client representatives should attend: those with decision-making authority and, in the appropriate case, those who can convincingly tell a particular side of the story. It serves no purpose to present a strong case if nobody has authority to settle. And it is easier to settle cases if the parties share a common understanding of key facts.

For a corporate defendant, the decision-makers might include the General Counsel or someone from that office, the CEO or a designee, the CFO or a designee, and possibly a department head, depending on the size and nature of the case and whose budget will fund the settlement.

If the case has survived summary judgment, some key facts likely remain disputed. In those cases, counsel may consider bringing client representatives to shed some light on those facts. The "storytellers" should have personal knowledge of the facts behind the dispute and should be prepared, in much the same way a witness is prepared for trial, to tell the client's side of the story.

This information can be communicated to the mediator in a private session or shared in a joint session. The goal of using "storytellers" is to convince the other side of key facts or to at least sow doubt about the facts in the other party's mind. Many lawyers understandably are reluctant to give the other side a preview of what a witness might say at trial, preferring to summarize the facts themselves, particularly in open sessions, even though statements made in a mediation should be inadmissible at trial. Counsel should carefully prepare any client who will attend to ensure he or she understands the purpose, the process, and how the facts relate to the claims. Clients should be made as comfortable as the circumstances permit.

Many years ago, I represented a California alternative energy company that had a dispute with its east coast customer. We agreed to mediate the dispute in New York City. The customer retained a well-known lawyer to represent it at the mediation. My client's General Counsel believed the customer and its lawyer misunderstood some key facts and that educating them on these facts could result in a favorable settlement.

In addition to preparing client representatives (who worked in separate locations) individually, the General Counsel arranged for us to fly together to New York on a company plane outfitted with a large conference table, where we worked with our "witnesses" on how to best present key facts. At the mediation, those storytellers were able to convince the customer and their lawyer that the customer's understanding of the facts was faulty, and that the customer should make additional payments.

With the advent of Zoom mediations, it is now easier to bring more voices into the mediation process, even when parties are geographically dispersed. In a recent mediation I conducted, one company was based in France, but the French employees were able to participate via Zoom.

Use the right mediator

Mediators have different styles and backgrounds, so it is important to find the right one for a specific case. When I litigated business disputes, I looked for a mediator experienced with business and business culture who had sufficient gravitas to convince recalcitrant executives to compromise.

Complicated business cases may not settle on the first attempt, so it behooves litigants to select a mediator who will be persistent and actively follow up. I recently mediated a case that was close to settling but was not resolved on the appointed mediation day. The attorneys and I kept at it via email and cell phone and sealed the deal a few days later.

File a thorough mediation brief

Mediation briefs should alert the mediator to the facts (distinguishing between those that are accepted and disputed) and legal issues. The mediator will not decide issues presented but may weigh in on the relative strengths and weaknesses of the parties' cases. Explaining what evidence may be used at trial and how it relates to key issues will help the mediator uderstand shortcomings in the other side's case. A brief can highlight opponents' trial risks, such as cost, distraction, damages, and potential reputational injury, while acknowledging obvious weaknesses in one's own case.

Conclusion

Although these pointers are helpful for all types of legal disputes, they are particularly salient when business issues are being litigated. Parties tend to be heavily invested in the outcome of these complicated matters and may initially resist compromise. But with due diligence behind them and the prospect of further costs looming, parties to business disputes should be far more open to listening to one another, examining alternative narratives, and reaching settlement. When skillfully guided by business-savvy mediators, they may even be willing to explore ongoing and future business opportunities

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