EIGHT TIPS FOR MEDIATING A BUSINESS CASE

by Jonathan B. Frank, Esq.

Having spent time on "all three sides of the table" in business mediation (plaintiff's counsel, defendant's counsel, mediator), I have observed what works and what doesn't. These are not random, unique occurrences. So, let's spend some time looking at what is systemic and recurring so that we can improve the process, the outcomes and, most importantly, client satisfaction.

1) Don't wait until the last minute/Do prepare for mediation

This seems so obvious. And yet, litigators and mediators will tell you that perhaps the single biggest cause of an unsuccessful mediation is the failure to prepare. Here, I want to focus not only on your preparation as counsel (understanding the facts and law), but also on your preparation as counselor (advising your client about the mediation process).

Business cases require a particularly intense level of preparation. Business clients are likely juggling multiple business issues, even multiple business problems, in the days leading up to mediation. The litigation itself may be such a negative experience that the client actually does not want to spend time on it. You'll need to find a way to command your client's attention.

As you work with your business client, keep in mind that your client is likely accustomed to evaluating problems with multiple dimensions, based on complete and accurate information. As litigation counsel, you are the sole source of that information. You need to be able to explain, in terms the client will understand, the current status of the litigation and the time/risk/aggravation/cost of continuing the litigation. Pay attention to the words you use – avoid even basic legalese (does your client really know what a "motion for summary disposition" is?). Armed with your advice, your client will be in a much better position to evaluate the pros and cons of settlement offers.

Because business clients likely negotiate about something nearly every day, and generally are not accustomed to having a third party involved in their negotiations, you must explain the role of the mediator. Make sure your client really understands the difference between mediation and arbitration

(most business owners don't). Explain that one of the most valuable functions of mediation is that the mediator can hear, and will keep confidential, the bottom-line position for each side. Most importantly, explain that the mediator is likely to focus on two things: 1) the weakness in your client's case, and 2) why and how your client should consider settling.

It is also important that your client understand the speed at which mediation can settle a case. Most likely, the dispute was lingering before you filed the case, and now some number of months have passed while the case was pending. In all this time, the dispute was not resolved. Your client likely believes that mediation will not resolve the case either – most business clients initially view mediation as just another expensive, court-ordered litigation event. Given the circumstances, it is critical for you to explain that in a mediation session (whether that is a half-day, a full day, or some other length of time), there will be rapid movement in the direction of settlement. If your client is not prepared for this, your client will have a difficult time realizing that a resolution is in sight. If you adequately prepare your client for the process, it is much more likely you will effectuate a settlement that you know is in your client's best interest – because your client will see that too.

Consider the value of a substantive premediation conversation with opposing counsel. Mediation works best when the process is efficient. There is nothing more frustrating than wasting time on issues that are either irrelevant or easily resolved. Counsel should try to identify those issues before the mediation in order to streamline the process. This conversation should focus specifically on each side's business goals – in other words, what each side sees as the outcome of the mediation or litigation process.

Sometimes attorneys are worried about showing their hand before mediation or displaying anything that could be interpreted as a sign of weakness. In reality, however, the entire mediation process is premised on the idea that there are issues, or possibly even the entire case, that can be the subject of a mutual agreement. It is therefore important that the attorneys have a candid conversation before mediation starts.

An example will highlight the importance of such a conversation. In a recent shareholder oppression case, the parties had not been clear about whether they preferred to stay in business with each other, find a way to buy or sell to the other, or sell the business to a third party. As a result, both sides were headed to mediation without a clear understanding of their respective goals. A 15-minute conversation between the attorneys before the mediation identified these important issues and set aside any misperceptions that existed. The mediation proceeded much more productively.

Finally, think about including someone with subject matter expertise. Sales or product information might be relevant. Technology issues might be involved. In such a situation, it is possible that there is some distance between the business owner and the employee with the most knowledge about the subject. It is also possible that there has been some disconnect between ownership and the employee about the company's performance. Another example: In a recent technology case, both sides brought an internal IT employee. As it turned out, there were software issues on both sides that the owners were not aware of until the mediation. Indeed, both owners had been told by their internal IT staff that the other side was completely at fault. If the IT employees had not been present at the mediation, it is unlikely that the substantive issues could have been resolved. But they were there, they provided valuable input, and the case settled.

Conclusion: Do your homework before the mediation, and you and your client will be prepared to do the work required during mediation to move the case toward settlement.

2) Don't forget to talk about losing/Do be realistic about the case

Studies show that most litigants are overly optimistic about their chances of success. This is certainly true for business clients. As litigators, we need to find a way to explain the risk of losing without jeopardizing our relationship with our clients. This is critical before and during the mediation process. The mediator will likely identify all of the flaws with your case. This should not be the first time that your client hears them.

Of course, clients may begin the process believing that they are absolutely not at fault. But even if their only fault is that they had unrealistically high expectations for the other side's performance, it is likely that both sides played a role in the origination and evolution of the dispute. For the mediation to be effective, both sides should recognize the role that they played, and be prepared to accept at least some responsibility.

You can use the opposing side's mediation summary to have a realistic conversation with your client about the possibility of losing. Although you can expect that your business client may disagree with the opposition, as well as with some of your negative evaluation of your own case, understand that this is a necessary part of the process. Explain that the other attorney should be having the same conversation with his/her client as well. Again, business clients may have difficulty appreciating this at first. All they have heard from the other side's attorney is the most aggressive presentation of the other side's case. But we know that if opposing counsel is doing her job, she will be having that same candid and frank conversation with her client that you are having with yours.

3) Don't over-advocate at the mediation/Do think collaboratively

This may be the hardest concept for a litigator to successfully implement. Your client hired you to aggressively advocate your case. Up to the point of mediation, the parties have been engaged in an adversarial process. It is likely that your client has watched you highlight every positive aspect of your position and reject or ignore the negative ones. Business clients likely believe that, because they have chosen litigation in the first place, shows of strength and aggression are the best way to reach a mediation result, and likely expect you to continue that posture during the mediation.

While there are ways to effectively do that, it is critical for you and your client to appreciate that finding a settlement through mediation is a collaborative process. To paraphrase Aaron Burr's line in "Hamilton," "talk less, listen more." Since there is no way to "win" the mediation, you will need to transition from being a single-minded advocate to being a reliable analyst of all settlement options. Based on feedback you hear from the mediator, you may need to help your client adjust his/her view of the strengths and weaknesses of the case.

Two recent failures highlight this point. In one case, counsel was aggressive, even patronizing, from the outset. In another, counsel repeated and relied on arguments about which the mediator (and the judge) had cast serious doubt. For whatever reason, neither counsel had effectively listened to the valuable insight from neutral third parties and accepted the possibility that their cases were not airtight. There was room to settle both cases, but they both went to trial, a frustrating result for both mediators and both judges, and likely both clients.

4) Don't think narrowly/Do brainstorm creative solutions

Business owners likely have a sense about their "entitlement" to a particular outcome of the case – often expressed as "they owe me every penny I am asking for" or "I don't owe a dime." Before and after mediation, it is important to help your client assess that hypothesis. Most business owners have little or no experience with the burdens of the litigation or mediation process. Outside of litigation, they are accustomed to making decisions about money that are unaffected by the costs/time/aggravation/risk of litigation. Once they are in the process, it still may be difficult for them to place monetary value on these nonmonetary considerations. But a business owner may be more persuaded to modify their sense of "entitlement" once he/she realizes that, in the months ahead, significant company resources must be dedicated to litigation. In a recent case, business owners who had spent nine months in the discovery process and were about to prepare for trial settled their case based on the common view that the resources required for trial, mostly the commitment of employee time, were more significant than the actual money at issue.

It is incumbent upon counsel to educate clients about the burdens of the litigation process because mediation is not the time for limiting the settlement options based on

your client's misperceptions. Remind your client that good business people are good problem solvers. Explain to your client in advance that an open mind will allow for creative solutions that can help them avoid costly litigation. You should not be afraid to propose "brainstorming" solutions with your client that may even sound ridiculous. Often the best way to find the "right" solution is to discard a series of "wrong" ones.

Mediators are trained and/or experienced in finding previously hidden solutions. At the mediation, you should therefore look for opportunities to suggest creative solutions to the mediator. If the mediator suggests such solutions, be prepared to evaluate them, even on short notice. Your first reaction, and your client's, might be: "We didn't think of it ... that can't be a good idea." Your advance preparation of your client (see above!) will help to overcome that reaction. My most successful mediations, both as an advocate and a mediator, have included some concept that neither the parties nor their attorneys had thought of before.

5) Don't waste time/Do respect the time commitment

Mediation of business cases should be an efficient process. Business clients are not accustomed to dedicating a full day, or even a half-day, to an intense problem-solving meeting. They do not want to waste time at the mediation. Therefore, it is best to lay out the disputed issues as quickly as possible so that the process of finding a solution can move quickly. Otherwise, clients tend to get impatient. With that impatience comes the sense that the mediation process will not succeed.

At the same time, rushing a mediation can result in failure. Successful mediations often involve the gradual recognition of a path to settlement. The case and the parties often need a chance to breathe, literally and figuratively. Factual and legal positions often need to be tested. Since the parties have already set aside some number of hours to dedicate to the cause, be prepared to counsel patience. Give the mediation process the best chance of success.

At some point, it may appear that the mediation is not going to succeed. A good mediator should be able to say relatively quickly if the process is not working. One or both parties may simply not be prepared to consider reasonable settlement options. There may be a pending motion that has not yet been resolved. A client may have appeared without true settlement authority. There are obviously other reasons. Consistent with the idea of respecting everyone's time, the parties and the mediator should be open to the possibility that the mediation should be terminated before the allotted time has expired.

6) Don't be a control freak/Do let the business people talk to each other

This is a radical idea, I know. As litigators, we have been trained to control every aspect of the process. We might even resist our client's own suggestion that he/she speak directly to the other side. This is a mistake. The "case" is a business dispute that apparently includes some legal aspects. But the dispute is, first and foremost, a business problem. In the end, business disputes, like personal ones, are easier to resolve once both parties have been allowed to vent.

Sometimes, of course, the dispute has become too heated. Maybe there are emotional underpinnings. Maybe there is a serious personality clash. But in many cases business people, armed with information about the time/risk/aggravation/cost of litigation, can translate those variables into a workable business solution.

It is even possible that business people can find common ground through the mediation process that they never thought existed. In one recent case, the business owners, during the introduction process, realized that they were both third-generation family members in their respective businesses. Effectively overriding the typical mediation process, they began to talk directly at the table about their common experiences. It turned out that both of their grandfathers suffered from some learning disability that caused them to become entrepreneurs in the first place. Before long, the business owners suggested that they go for a walk together. The mediator and attorneys stayed in the conference room and talked about the day's news, sports and the weather. A

half-hour later, the business owners returned, laughing and smiling. They had resolved their case.

I recognize that this is an extreme example. However, the underlying factors are probably present in every case. Be aware of this possibility and do not be afraid of it.

7) Don't walk out without a plan/Do find some building blocks for future discussions

Even an "unsuccessful" mediation should have some value. Maybe some legal or factual issues have been resolved, or at least narrowed. Maybe the scope of discovery has been limited. Maybe there is a basis for a partial settlement of some issues. Very few mediations are complete failures.

Your work is not done even when the mediator declares an impasse. Spend some time at the end of the mediation talking with the mediator, your client and even opposing counsel about what happens next. Try to find some basis for realistic optimism about the process. Your client will have invested in the process in a number of ways: money, time and energy, at a minimum. Since business owners don't like to see investment wasted, your client will be thankful that you are still considering finding a path to resolve the case, but also frustrated and pessimistic about the apparent failure (you may even hear an "I told you this wouldn't work"). Be ready to manage your client's conflicting reactions.

8) Don't be overly optimistic or pessimistic/Do be realistic

There is no way to predict whether a particular mediation will succeed or fail. To manage your business client's expectations, you will need to present a realistic prediction of the process in advance, realistic advice during the mediation, and a realistic assessment at the end. Whether you settle the case or not, your client will consider mediation to be time and money well-spent. ◆

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