PROGRAM MATERIALS
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September 14, 2020

Effective Mediation Part 4 – Ten Things Every Advocate Must Consider Before the Mediation Starts

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10 Things Every Advocate Must Consider Before Mediation

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&

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September 14, 2020

Overview

To ensure a successful mediation experience for your client, it is important to spend the time and effort to fully and adequately prepare in advance. Proper preparation includes spending time with your client reviewing the facts and legal issues, including your claims, defenses strengths and weaknesses, as well as those anticipated by the other side. Analyzing the motivations and impediments to a negotiated resolution, and, analyzing your risks through "BATNA" - Best Alternative to a Negotiated Agreement, will allow you and your client to properly evaluate and respond to offers made during the mediation. Further, ensuring that the right individuals will participate in the mediation, or be readily available for questions, is critical. Finally, to the extent that you need to consider tax implications of any settlement, this should be done in advance.

This program will explore the top ten items each advocate should consider and address prior to the mediation to best prepare and succeed.

1. Pick the Appropriate Mediator for the Case

- Interview
- Substantive Experience
- Mediation Experience
- Mediator's Style, Approach, View of Process
- Ask colleagues
- Ask for and check references

2. Determining Who The Right Participants/Attendees Are For The Mediation (And Who Needs To Be On the Phone or Available)

Consider the following:

- Who has knowledge?
- Who has the authority to settle?
- Who can present the best face for your case?
- Is it more than one individual?
- Do you need the ability to speak to others who may not have to be physically present?

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3. Understand The Facts Of Your Case (Both Good And Bad)

- It is important to know your facts
- Understand good and bad facts
- How would you prove or disprove facts in court?
- Review with client and other parties in interest
- Analyze from your perspective and the other side's

4. Understand The Strengths and Weaknesses

- Understand the operative law or statutes and how that impacts your case
- How do your facts work under the operative law?
- Would your claims survive motion practice?
- Consider motivations and impediments to settlement
- Analyze from your perspective and the other side's

5. Prepare A Risk Analysis

- What happens if you don't resolve?
- What are the risks if you don't settle?
- What is the cost of litigation- time, money, emotional toll and business distraction?
- Consider BATNA- *Best Alternative to a Negotiated Agreement*
- Consider WATNA- *Worst Alternative to a Negotiated Agreement*
- Consider LATNA- *Likely Alternative to a Negotiated Agreement*

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6. Are There Tax Consequences To Settlement?

- Review options with accountant
- Determine how any concerns can or should be mitigated so you can evaluate how to couch offers

7. What Should Go In The Pre-Mediation Statement ?

- Settlement Focused
- How do you address your strengths without sounding like you are arguing to a court?
- How do you address your weaknesses? Or should you?

8. Do You Want To Submit A Confidential Pre-Mediation Statement Outlining Your Weaknesses, Or Cluing In The Mediator?

- Are there things you need to tell the mediator?
- Key information so they can work the process properly
- Share triggers the mediator should be aware of
- Share prior settlement offers
- Motivations/Impediments
- Prior Negotiations / Procedural History / Value of the Case

9. Prepare The Client

- Explain the process — review confidentiality, breaks, joint session, caucus
- Will this be a remote/ virtual mediation?
- Engage in practice session to test the technology
- Be sure you have a line of communication separate from the virtual process to speak to client

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10. Virtual Mediation

- Review with mediator their protocols
- Discuss confidentiality
- Joint Session – pros/cons
- How are documents going to be shared during the process?
- Term Sheet/Settlement Agreement

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Drafting ADR Clauses for Financial, M&A, and Joint Venture Disputes

17 Min Read

By: Leslie Ann Berkoff (/author/leslie-berkoff/), Andrew Barton (/author/andrewbarton/), Serena K. Lee (/author/serenaklee/), Peter R. Day (/author/peterrday/), Susan Tomaine (/author/susantomaine/)

| Today

IN BRIEF

- The inclusion of an ADR clause in financial, M&A, and joint venture deals is increasingly favored because of its myriad benefits when compared to litigation.
- A savvy transactional attorney will understand the nuances of the ADR clause and how customizing an ADR clause can be greatly beneficial (or very detrimental if drafted poorly).
- What are some examples of sample problem clauses of which to be aware?

Many enterprises and lawyers that handle financial, M&A, and joint venture transactions are now turning to alternative dispute resolution (ADR) processes as an effective way to resolve disputes. ADR institutions have seen a significant increase in these types of disputes over the last few years. Unfortunately, contract drafters oftentimes fail to appreciate the nuances of ADR or the various options that should be considered at the front end for a possible dispute down the road. Business corporate lawyers should include the litigators in their firms in this drafting process because the litigators will be in charge of any form of ADR process, be it mediation or arbitration, once the deal is complete and should a dispute arise.

Furthermore, as one of the institutional ADR providers, JAMS (formerly Judicial Arbitration and Mediation Services) notes: "Planning is the key to avoiding the adverse effects of litigation. The optimal time for businesses to implement strategies for avoidance of those adverse effects is before any dispute arises." JAMS recommends "that whenever you negotiate or enter into a contract, you should carefully consider and decide on the procedures that will govern the resolution of any disputes that may arise in the course of the contractual relationship. By doing this before any dispute arises, you avoid the difficulties of attempting to negotiate dispute resolution procedures when you are already in the midst of a substantive dispute that may have engendered a lack of trust on both sides."

The American Arbitration Association (AAA) states: "Alternative dispute resolution (ADR) allows parties to customize their dispute resolution process. Parties can insert the standard arbitration or mediation clause in their contract and can further customize their clause with options that control for time and cost."

A well-written dispute resolution clause is the foundation of an effective dispute resolution process, and parties who draft these agreements most likely want an efficient, meaningful, and enforceable outcome. Flawed arbitration clauses may result in court intervention if disputes arise before the appointment of an arbitrator, during the arbitration, or afterward. So how do you decide what you will need within the provision? Is a simple, standard ADR

provision too little protection, and can you "over-draft" a provision? Or is there some sort of "Goldilocks" provision that delivers the "right answer" each and every time? The answers to these questions can be "yes," "no," "perhaps," "often," "occasionally," and many more. It truly just depends.

THE STANDARD CLAUSE

If a dispute arises from or relates to this contract or the breach thereof, and if the dispute cannot be settled through direct discussions, the parties agree to endeavor first to settle the dispute by mediation administered by the American Arbitration Association under its Commercial Mediation Procedures before resorting to arbitration. The parties further agree that any unresolved controversy or claim arising out of or relating to this contract, or breach thereof, shall be settled by arbitration administered by the American Arbitration Association in accordance with its Commercial Arbitration Rules, and judgment on the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof.

A standard arbitration clause is often chosen and is the best choice for ease in contract drafting and negotiation. By invoking a provider's rule set, the standard clause provides a complete set of rules and procedures and eliminates the need to spell out each contingency and procedural matter. When combined with the organization's case management services, the clause provides a simple, time-tested means of resolving disputes that has proven highly effective in hundreds of thousands of disputes.

By providing for mediation first, the parties have an opportunity to resolve their dispute early. Although sometimes a dispute might not be "ripe" for this facilitated step, many times it can serve to dispose of smaller, less complicated disputes almost immediately or serve to narrow the issues that might then proceed to the arbitration. It can therefore eliminate the need for arbitration and/or streamline the remaining unresolved issues, resulting in greater efficiency and cost savings. Anecdotally, it is said that mediation resolves around 80-

85 percent of all cases, which if true or even remotely true, could be reason enough to consider its inclusion in a dispute resolution clause.

Should mediation prove unsuccessful, arbitration is included to provide a mechanism to fully and finally resolve "*any unresolved controversy or claim.*" This provision allows the institution and the rule set to manage the proceedings, including (among other things) arbitrator selection and appointment, managing challenges, collecting and dispersing arbitrator compensation, and general assurance that the case will keep moving toward a speedy resolution. Once the arbitrator (or panel of three arbitrators) is in place, the standard arbitration provision provides the arbitrator(s), advocates, and the parties the most flexibility to address the specific needs of a particular dispute and then craft an appropriate process to follow through to an award.

THE CUSTOM CLAUSE

There are as many reasons to customize a clause as there are to not customize a clause. As explained above, the standard clause relies heavily on the advocates and a thoughtful, experienced arbitrator to collaboratively create a custom process in real time. This successfully occurs frequently. Sometimes, however, parameters cannot easily be agreed to while in the thick of the dispute, or agreeable counsel may settle on a process that mirrors the courtroom (both of which can be costly and time consuming), leaving clients with sour memories and raising serious questions about inserting an ADR provision into future contracts.

Thus, the crafting begins with well intentioned, battled-scarred mindsets like, "Don't ever let that happen again," "It can't take longer than 90 days," "We need three arbitrators next time," "Make them come to us," "What if . . . tried this," and "I heard from a friend that we want to include . . . ."

In most cases, customizing a clause can help streamline the dispute resolution process. However, there are times when a custom clause becomes confusing, overly burdensome, or is impossible to interpret and administer.

The courts and administrative agencies are regularly faced with arbitration clauses that are problematic in some respect. Resolving ambiguous filing requirements, vague conditions precedent, or unrealistic deadlines can add to costs and delays when parties in a dispute must work with a poorly worded dispute resolution clause. "*Caveat Emptor*" or "*What's Good for the Goose . . .*" are phrases to remember when discussing what should and/or should not be included in your next dispute resolution clause.

SO MANY CHOICES

There are many resources available to the reader when choosing options. The AAA has "developed a ClauseBuilder® online tool—a simple, self-guided process—to assist individuals and organizations in developing clear and effective arbitration and mediation agreements." Organizations such as JAMS offer drafting guides that help avoid ambiguity when contemplating the various choices in customizing an ADR clause.

Additionally, and specifically for M&A transactions, the Business Law Section of the American Bar Association offers the *Model Asset Purchase Agreement* and the *Model Stock Purchase Agreement with Commentary,* which are available as resources for attorneys negotiating and documenting a deal. These publications include model language, commentary, and explanations of related substantive laws regarding many issues. ADR clauses and purchase price dispute resolution clauses in M&A agreements are also covered.

Many parties use a standard clause as their "foundation" and then modify it to address unique circumstances, increase process predictability, or attempt to produce a desired outcome within the process. Items that can be included in the ADR clause are:

Domestic/International Rules

Number of Arbitrators

Method of Arbitrator Selection

Arbitrator(s) Qualifications

Locale Provisions

Governing Law

Discovery

E-Discovery

Documents-Only Hearing

Duration of Arbitration Proceedings

Remedies

Forum Fees and Attorney's Fees

Opinion Accompanying the Award

Confidentiality

Language

Nonpayment of Arbitration Expenses

Appellate Process

Although this list is long, and each item seems like a great idea to consider, the list does not include the myriad ways in which the language surrounding the concept can become lengthy and confusing to the advocates and arbitrator(s) who are bound by the ADR clause. Language can be misinterpreted, and disputes may not arise until years after the documents are signed. It is therefore important to be clear and concise where possible, but remain flexible enough to allow administrators, advocates, and arbitrators the ability to adapt quickly and adjudicate the case in an efficient manner. It is realistic to recognize that you cannot, more times than not, design the perfect ADR mousetrap. In addition, what might work (or has worked) for certain disputes in certain parts of the world may not work in others. The general goal to include an ADR clause in any contract is to create a process that is fair and effective in resolving disputes in a manner that provides all the benefits of ADR: confidentiality, efficiency,

some level of autonomy in selecting mutually agreeable mediators and arbitrators, and (hopefully) a reduction of legal costs in comparison to litigation.

INTERNATIONAL CONSIDERATIONS

Choice of the Seat. Although the selected arbitrators are probably the single most important factor in any arbitration, in an international arbitration, the "choice of the seat" of the arbitration may be a close second. The seat (as opposed to the location(s) of the hearings) is the jurisdiction of law that governs the arbitration. The courts of the seat, applying the procedural law of the arbitration (*lex arbitri*), supervise the arbitration for issues ranging from determining the validity of the arbitration agreement, compelling the parties to conform to the arbitration agreement, regulating the appointment of arbitrators, handling challenges should the parties or a chosen arbitration organization fail to do so, and deciding an action to set aside an award.

The procedural law, as applied by the courts of the seat, determines to what extent the courts can and cannot interfere in the arbitration. This is different from the substantive law applied to the transaction itself. In fact, there may be multiple substantive laws involved in an international transaction (e.g., contract law, real property law, labor law, etc.).

Although it is possible to choose a seat in one jurisdiction and the procedural law of the arbitration of a separate jurisdiction, it is almost always advisable for the courts of the seat to apply their own law. Thus, the arbitration clause should clearly identify both the seat and the procedural law. For instance, the Hong Kong International Arbitration Centre (HKIAC) model clause suggests the following:

"The law of this arbitration clause shall be . . . (Hong Kong law).

The seat of arbitration shall be ... (Hong Kong)."

For choosing the seat, the Chartered Institute of Arbitrators (CIArb) in London has developed a set of principles "to provide a balanced and independent basis for the assessment of existing seats and to encourage the development of new seats."

The CIArb London Centenary Principles (or London principles (https://www.ciarb.org/media/1263/london-centenary-principles.pdf)) comprise of 10 elements:

- an arbitration law providing a good framework for the process, limiting court intervention, and striking the right balance between confidentiality and transparency;
- an independent, competent, and efficient judiciary;
- an independent, competent legal profession with expertise in international arbitration;
- a sound legal education system; the right to choose one's legal representative, local or foreign;
- ready access to the country for witnesses and counsel and a safe environment for participants and their documents;
- good logistical support, including transcription, hearing rooms, document handling, and translation;
- professional norms embracing a diversity of legal and cultural traditions, and ethical principles governing arbitrators and counsel;
- well-functioning venues for hearings and other meetings;
- adherence to treaties for the recognition and enforcement of foreign awards and arbitration agreements; and
- immunity for arbitrators from civil liability for anything done or omitted to be done in good faith as an arbitrator.

Ad Hoc Versus Administered Arbitration. Unless the parties have experience in arbitration and can maintain a reasonable working relationship throughout the dispute, it is usually advisable to use an established arbitration organization to administer the arbitration. Not only does this free the arbitrators from the administrative tasks (such as collecting deposits and managing document flow), but it may also lend credibility to the award in the event it must be enforced in other jurisdictions,

particularly those with less experience in arbitration. Ad hoc or unadministered arbitration only works if the parties and their counsel are working collaboratively toward a resolution, *post-dispute*.

Discovery. In polite terms, it could be said that the rest of the world is less than enchanted with U.S.-style discovery. Any attempt to include extensive discovery provisions in an international arbitration agreement is likely to be strongly resisted. The International Bar Association (IBA) has issued "Rules on the Taking of Evidence in International Arbitration," which are a compromise between the common law and civil law approaches to the exchange of information. Although not binding rules, international arbitrators commonly refer to them for guidance even if not specified or agreed to by the parties.

Although the standard of these rules is much more restrictive than U.S. discovery (e.g., for a document to be produced, it must be "relevant to the case and material to its outcome"), note that civil law arbitrators are likely to give an even more restrictive interpretation of these rules than common law arbitrators.

Language. Finally, selecting the language of the proceedings is highly advisable. Likewise, it is advisable that all the arbitrators are fluent in that language and that relevant documents are available or produced in that language.

SAMPLE PROBLEM CLAUSES

"The parties first agree to negotiate in good faith. If unsuccessful, the parties then agree to mediation. Should mediation fail, either party may file for arbitration."— Although admirable, leaving the resolution of future disputes to "good faith" can lead to problems—namely, if there is no good faith between the parties or counsel, arguing about whether steps precedent to others have been satisfied could be problematic, and set the case up for a fight and undue delays at the very beginning. It is more advisable to include specific timeframes when providing a "step ADR clause" so that notice and impasse can be properly evidenced when proceeding to whatever the next phase is. An example of a better step clause:

If a dispute arises out of or relates to this contract, or the breach thereof, the parties agree first to try in good faith to settle the dispute by mediation administered by the American Arbitration Association (AAA) or JAMS under its Commercial Mediation Procedures. Within 30 days after a party requests to mediate, any party may opt out of mediation by commencing binding arbitration with the AAA or JAMS in accordance with its Commercial [or other] Arbitration Rules, and judgment on the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof.

"Disputes may be submitted to JAMS or the AAA . . ."—Sometimes drafters prefer one set of rules or ADR administrator over another, or a particular panel over another. Although providers' rules are similar, they are different, and the panels' qualifications of each are generally specific to the administrator. Be mindful of which providers have specialized panels that are relevant to the disputes that will likely arise from the contract, and how ADR providers' rules differ.

"Three Arbitrators shall be appointed."—To prevent the "lone ranger" or "rogue arbitrator," parties will sometimes include a mandatory appointment of three arbitrators to preside over their arbitration, believing that three heads are better than one. Unless this language specifically defines a threshold amount in controversy that requires the appointment of three arbitrators, however, a small, less complicated case could become very expensive very quickly, unless the parties agree to waive this requirement. If an established ADR provider is named in the clause, some will have thresholds for amounts in controversy to determine how many arbitrators will be appointed (e.g., for the AAA, controversies with over $1 million in dispute shall result in the appointment of three arbitrators unless the contract provides otherwise or the parties agree post-dispute to proceed with a single arbitrator).

"Arbitrator must be a lawyer with 15 years of experience in the technology industry and must have a Master's degree in electrical engineering, and has been an Arbitrator for at least 10 years."—This likely came about because, in the last arbitration, the arbitrator had no substantive knowledge in the subject matter, or the "deal"

was so specific that these qualifications seemed reasonable at the time. Good luck trying to find someone who has this combination and is also available! One benefit of an administered process is help with arbitrator selection, either through their own rosters, outside organizations, or a facilitated compromise to reach an acceptable exception to this overly narrow requirement.

"The parties agree to apply the Federal Rules of Civil Procedure . . ."—Overly broad discovery can easily take over an otherwise efficient process without skilled counsel and a strong arbitrator. Language included in the clause can prevent efficiency from the start. Language added such as "or at the arbitrator's discretion" can curtail and control the scope of discovery controversies. Most rules give the arbitrator broad discretion in allowing or limiting discovery and have a rule similar to AAA Rule 22(a), which instructs the panel to manage discovery "with a view to achieving an efficient and economical resolution of the dispute . . . ." JAMS's Comprehensive Arbitration Rule 17, governing the exchange of information, outlines the scope and deadline for parties to engage in the voluntary and informal exchange of documents, but allows the arbitrator to "modify these obligations at the Preliminary Conference."

"Either party may elect to appeal matters of . . ."—What may sound like a good idea to protect against a "bad decision" can drive up cost and time. Arbitration is inherently final and binding. Although some providers do offer rules for limited appeals (e.g., both AAA and JAMS offer an optional arbitration appeal procedure) in recognition that clients may hesitate to agree to arbitration due to its limited grounds for overturning an award, one of the hallmark benefits of arbitration is its finality; adding an appeals process should only be included if absolutely necessary. The cost and time associated with appealing the arbitration (within the confines of the optional arbitration appeals process offered by some ADR providers and not in the courts) makes sense in only a few "bet the farm" scenarios.

An example case of a good idea gone wrong is *Hall Street Associates v. Mattel Inc.* (2008), where an atypical clause in an arbitration agreement stipulated that the district

court could override the arbitrator's decision if "the arbitrator's conclusions of law are erroneous." Under the arbitration agreement in that case, both parties agreed to resolve matters according to Federal Arbitration Act (FAA) procedures; however, the FAA had a specific list of categories to which a court could override an arbitration award (e.g., "corruption," "fraud, "evident partiality," "misconduct"). Cost and time did indeed increase for this dispute: the initial arbitration in favor of Mattel was reviewed by the district court, the district court found legally erroneous conclusions, the arbitrator then ruled for Hall Street (the district court affirmed), the award was appealed to the U.S. Court of Appeals for the Ninth Circuit (in favor of Mattel), and finally the U.S. Supreme Court granted certiorari. The Supreme Court affirmed (6-3) the Ninth Circuit and held that the FAA's categories are exclusive and cannot be expanded through contractual agreement.

CONCLUSION

The inclusion of an ADR clause in financial, M&A, and joint venture deals is increasingly favored because it offers parties confidentiality, expediency, ability to control the selection of decision makers in future disputes, the choice to craft a dispute resolution process that makes sense for all parties who wish to avoid the vagaries and unpredictable delays of the courts in both domestic and international jurisdictions, among other myriad benefits when compared to litigation. A savvy transactional attorney who understands the nuances of when it makes sense to include a step clause (where mediation is either encouraged or required) and when to modify a clause to address a specific concern or desire of their clients has great control to mitigate exposure and possibly reduce the time and cost associated with litigation - but only if the ADR clause is drafted thoughtfully, carefully, and in consultation with an experienced litigator who shares the clients' interests and understands their concerns and goals. Recognizing that negotiating the dispute resolution clause can have a negative impact during the formation of a new venture or a merger, the hope is that the drafters take time to understand the process of mediation and arbitration (in contrast to litigation) and how customizing an ADR clause can be greatly beneficial (or very

detrimental if drafted poorly), and to consider all the resources available to craft a dispute resolution process that their clients will appreciate should the deal go south in the future.

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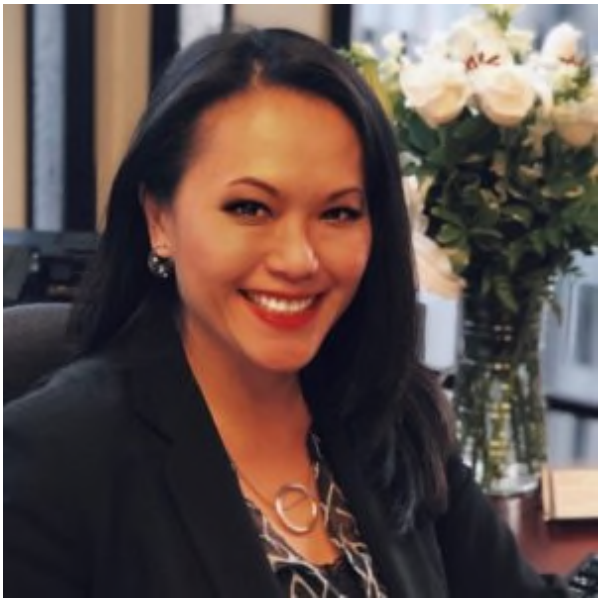

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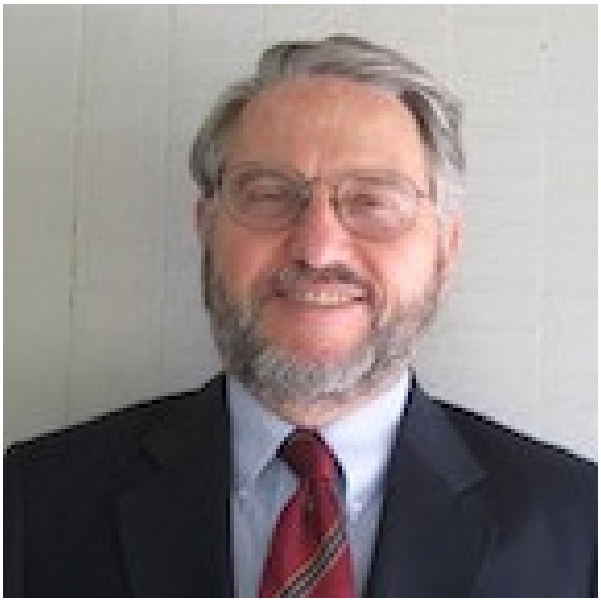

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Reflections on the 1-2-3's of the Mediation of a Merger & Acquisition Dispute

5 Min Read

By: Leslie Ann Berkoff (/author/leslie-berkoff/), John Levitske (/author/john-levitske/)

| July 15, 2017

On April 6 and 7, 2017, during the ABA Business Law Section Spring meeting in New Orleans, the Dispute Resolution Committee presented a dynamic three-part program entitled "The 1-2-3s of Mediation of a Merger & Acquisition Dispute" that reviewed the anatomy of a mediation from the earliest planning stages through settlement.

This article shares some thoughts from several of the participants concerning the value of preparing for, as well as fully participating in, a mediation to obtain the best results for your clients and your clients' companies.

Judge Elizabeth Stong, a U.S. Bankruptcy Court judge in the Eastern District of New York, served as the "mediator" during the program and shared her advice for advocates, clients, and mediators. First, she noted that advocates and

clients should be "focused on being prepared in every conceivable way—of course on the law and the facts," but that this is only the starting point in a successful mediation. She wisely pointed out that participants should not disregard the "business context, including any future opportunities or issues and also . . . the opportunity to agree to something that is outside the narrow scope of what a judge could decide." Thus, the parties should look both "backwards (to assess the parties' positions and rights) and forward (to see future opportunities)" in evaluating the range of ways to resolve the pending dispute. Further, she noted that it is important to examine "how the situation looks from every other seat at the table, including that of your adversary's counsel and their client, as well as any other affected party."

As for advice to the neutral conducting the mediation, Judge Stong remarked that the program reminded her how important it is for the neutral "to be prepared as well in all the same ways noted above for counsel and clients," and she commented that it is also important to remember that parties sometimes need a third-party neutral to create an opportunity to think outside the box—and to encourage them to work as hard at working things out as they have been working to fight and win the case."

Along these same lines, Michele Johnson, a partner in the litigation department at Latham & Watkins LLP in their Orange County, California, office, served as one of the advocates and highlighted all the various issues that "come into play in a mediation, outside of legal theories of plaintiff and defendant." She pointed to just a few examples, including "the timing of other unrelated business endeavors; the personalities of the parties and how they view the distractions of litigation; and how the decision-makers for the litigation can change with the signing or closing of a strategic transaction."

Maureen Beyers of Beyers Farrell PLLC in Phoenix, Arizona, served as the "settlement counsel" during this program and reminded all of us that "the clock should not dictate the success of a mediation." Setting an internal clock for how long a party may choose to buy into the mediation process not only can be a distraction, but also can serve to derail the process, if the parties believe that if the matter

does not resolve in a certain time frame, it never will. Ms. Beyers also reminded us that it was important for every party at the mediation, both mediator and participant, to "understand the various hats each party is wearing and roles each party is playing at the mediation and in the underlying transaction as well."

Since the mediation during the program focused on M&A transactions, Sophie Lamonde, a partner at Stikeman Elliott LLP and head of the firm's mergers and acquisition practice in Montreal, noted that when engaging in a transaction, if you feel a deal is going sideways, then "there is only upside in involving your litigators early on . . . , [as] the better off you may be." David Cellitti, a partner in the Chicago office of Quarles & Brady LLP and a member of the firm's Business Law Practice Group, pointed out that as part of a team, he tries to ascertain what his client's interests and goals are so that perhaps a deal can be "salvaged by . . . rebuilding trust that may have been lost during the course of the dispute by trying to be reasonable and by being practical as a deal-maker." He noted that his role as M&A counsel is often to help both "the client and co-counsel by sharing the history of the negotiations to aid them in building a record, making an assessment of the case, and prepare for the mediation; this way all of the facts have been developed."

Finally, both Ryan McLeod, a partner in the litigation department of the New York firm of Wachtell, Lipton, Rosen & Katz, and David Lorry, managing director and senior counsel of Versa Capital Management LLC in Philadelphia, focused on the potential flexibility and creativity in the mediation process.

Ryan highlighted that while "busted deals can be complicated and sensitive," the best part of mediation is that "parties can customize the mediation process so that it suits their needs—needs that will vary, based upon a multitude of factors." He contrasted this with litigation in which the court must make a more narrowly focused decision. David noted that "parties to a commercial transaction should consider alternative dispute resolution as an option to achieve an outcome, as opposed to investing in a process—litigation—with an uncertain outcome and the risk of an unfavorable decision by a

judge." He added that "parties tend to drink their own Kool-Aid, and introducing a neutral party may allow them to become more reflective (or creative) and accepting of alternative structures or approaches they had not otherwise considered, which will allow both sides to realize positive results."

What lessons can be gleaned from these insights for those of us serving as clients, advocates, or neutrals in the dispute-resolution process? First, always ensure that you look beyond the dispute at hand and consider the bigger context for the companies and individuals on all sides of the dispute. Second, remember that the negotiation may look very different from each seat at the table. Third, consider how you can work to creatively carve a path to resolution that addresses the parties' interests, rather than a narrower decision that may come from a court.

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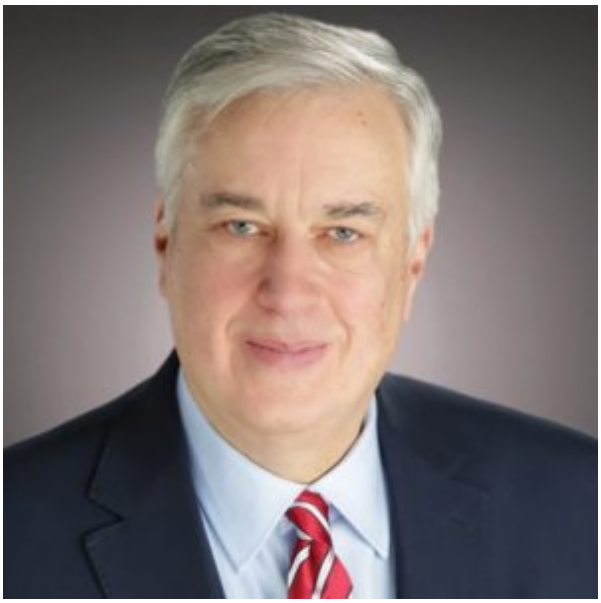

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Taking Your Mediation Practice Online in the Face of COVID-19

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Having served as a mediator for twenty-plus years, I am generally a proponent of having the mediation take place in person, with all decision makers physically present. I have always believed it was important to be able to see people during the mediation in order to secure trust and develop rapport, and also to read and evaluate micro-expressions during the process. Humans by nature connect and evaluate one another in various ways, including through eye contact and body language, both of which are visual cues, as opposed to voice inflection, which can, of course, be detected over the phone. Yet, from time to time, I have conducted mediations by telephone, although I have tried to limit those to instances where the issues were discrete enough that telephonic shuttle diplomacy would still get the job done. However, in the face of COVID-19, at a time when so many courts are not even allowing in-person hearings or any hearings at all, finding a way to conduct online mediations becomes essential for many to continue their business.

Many practitioners are turning to existing tools, such as WebEx and Zoom. These programs still satisfy that "in-person" touch that so many mediators and participants desire because they allow the parties to hear and see each other via webcams, and they also allow for separate sessions to be created, thereby mimicking joint and private caucuses. While these are great options, there are a few considerations that users should keep in mind. First, no matter which platform you choose, you must be facile with the program and have the ability to not only use it yourself, but also be able to guide the participants who may not be as familiar with the platform so that they are equally comfortable. To that end, aside from taking the many training sessions that are popping up, be sure to practice the use of the technology yourself. There is nothing more frustrating to a mediation advocate or participant than technology that impedes rather than enhances the mediation process. Thereafter, I would recommend that you set up a time before the actual mediation to virtually "meet" with each side, including clients, to be sure they are equally comfortable with the technology. Just as you would ensure that participants are comfortable in your conference room and understand where the amenities are located, they need to be sure they know how to use the mute button, or discretely request, set up and/or participate in a private caucus session. Second, as the mediator you need to ensure that all parties are comfortable with the confidentiality of the online process. It is easy to gauge confidentiality when you are sitting in a private conference space and can determine that what is being said is only being heard by the actual participants who are present in that room. With online programs, there is a limited view of where the other participants are physically sitting. Moreover, all of the platforms have recording features, which you should ensure are turned off and you should request that all participants do the same. You should review and identify the confidentiality expectations with all the participants and stress the importance of maintaining confidentiality of the process; whatever presentation you normally give for confidentiality should be modified for this new format. Further, you should stress, in advance, that the parties themselves should be in a private space where they cannot be overheard. The parties should not be on public WiFi and should be in an area with good connectivity to

avoid disruptions to the process. Third, you need a contingency plan in case the technology does not work and/or the participants, despite prior testing, cannot get it to work.

Mediation is always dependent upon the parties having trust in the mediator and the process. It is important to keep in mind that not everyone is comfortable with or trusts technology. Therefore, in order for the process to work while utilizing these alternative methodologies, it is up to you as the mediator to do your part to properly set the stage, and establish the trust in you, the technology method, and the process. Any good mediator spends time setting the stage in advance by reading position statements and speaking to the parties in advance; now mediators should add a review of the technology to ensure that the parties are comfortable as one more step to achieving a successful process. How you build that extra time into your fee structure must be decided by each of you, but presently, my thought is not to charge for X hours of technological preparation.

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By Leslie A. Berkoff

The Continuing Value of the Joint Session in Mediation

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Traditionally, the joint session has been the foundation of the mediation process. In biblical times, sparring community members often resolved conflicts by gathering together in an open forum alongside other community members to discuss and resolve disputes in a collaborative fashion. In more modern times, the joint session has built upon this foundation to serve additional purposes, such as allowing the mediator to set the tone for and explain the mediation process to participants. In addition, the joint session provides an opportunity for the mediator to lay out the protocols for the mediation session, such as confidentiality regarding the information being exchanged and how the caucuses will work. Most importantly, the joint session allows the parties a chance to communicate directly with one another.

In that regard, it is important to remember that the origins of mediation are rooted in joint sessions rather than separate caucuses. Further, mediation was not dependent on party representation through counsel. Over time, perhaps starting in the 1990s, the mediation process morphed and the line between mediation and litigation blurred. Mediation participants began introducing litigation-based issues and demands into the mediation process at the expense of focusing on a more traditional exchange of thoughts, concerns, proposals and needs. That trend tracked with the increased number of parties retaining counsel to represent them in mediations — lawyers who were almost always litigators.

As a result, the dynamic of the joint session has been threatened. Some counsel view the opportunity as a quasi-litigation forum to posture and argue — even pounding the table to demonstrate the righteousness of client positions while the clients remain mute and entrenched in their positions. When a session is used in such a way, the mediator (who has no authority to make rulings on arguments) risks morphing into a referee in an effort to maintain some control over the process. When viewed as an opportunity for advocacy, mediation loses its essential client-driven nature with the potential for parties to speak and contribute to a creative and collaborative end result. In such settings, mediation is nothing more than a precursor to litigation or a stop along the path to the courthouse.

In recent years, some advocates have requested — and some mediators have decided — to dispense with the use of the joint session universally across the board. For some, the fear grew that allowing lawyers to use the joint session as a courtroom podium simply did not advance the mediation process and caused more harm than good.

Others who are more cynical believe that there is a more calculated purpose to seeking to dispense with the joint session: a belief that the desire comes from the individual parties thinking they can slant the facts and the mediator's focus more easily if they are in separate caucus rather than having the other side hear their view of the world and refute it directly.

Some experienced mediators believe that a more troubling basis might exist for the threat to the joint session. Specifically, in order for a joint session to be truly effective and impactful, the lawyers must prepare themselves and their clients. In order for that to be fruitful, time and effort must be expended. Lawyers and clients might not want to commit time and resources to preparing for the mediation, and this lack of preparation may result from a lack of faith in the ability of the process to work. Mediation can and does work for parties when the right mediator has the full participation and commitment of the parties. Cynics suggest one other possible reason for the threat to the joint session: the self-interest of lawyers who might be incentivized to keep the hourly clock running, although one would hate to think that this is true.

Now, in fairness, there can be some solid reasons and justifications for lawyers or even mediators to want to dispense with the joint session in a particular matter or be concerned about its use in a specific case. Emotions might be running too hot to bring the parties together due to prior history, and this might derail the entire process. A lawyer might have a client who is difficult to "manage," and the client might say or share things that could adversely impact the mediation process or undermine the client's case in open caucus. We have all had clients who have a tendency to just say too much against advice. (This is why, as an advocate, I wear high heels so I can stop on an insole.) All fun aside, in this mediator's view the joint session is an opportunity to showcase to the other side why settlement is in everyone's interest and how everyone gains in the process (this is very different than grandstanding and trying to prove you have the winning hand or that your position is better than the other party's position). Mediation should be a settlement-focused, persuasive and cordial process. Let's emphasize this again: Courtesy and civility to the other side (and

obviously the mediator) is paramount; harsh or condescending comments will get you nowhere.

Despite the threats to the joint session, the usage of the session, if the foundation and framework are properly laid out, can be an extremely effective tool in the mediator's toolkit. Of course, the joint session should be modified to meet the needs of each specific case and, if appropriate, as previously indicated, dispensed with only if the cases so warrant. The basic premise behind the joint session is that the clients have the chance to speak; in fact, this might be the only opportunity for a client to speak outside of a courtroom or deposition — both of which include much more limited and controlled statements. This is a time for the clients to have a proverbial seat at the table. When clients have the opportunity to have a voice and advocate their own positions, without the filter of an attorney, additional facts, opinions and important issues come to light and can impact the process in a positive way. Also, allowing your client to hear the other side directly can be very illuminating for them, which allows both sides to see the issues through the other's eyes.

Both clients and attorneys determine their strategies in response to the positions taken by the other side. In mediation, that decision can be impacted by the manner in which the message is conveyed. Thus, both the lawyers and clients can assess the sincerity of the other side's story or belief and commitment in their side of the case and position, as well as understand why they feel justified or aggrieved. You can also evaluate your own client's ability to project as a credible witness in an open forum and project toward a courtroom setting; this cuts both ways, for both the other side's client and your own. During this time, the legal arguments take on a life of their own and can lead to a more personalized and successful process.

It is important for the mediator to diligently control this process. Prior to the mediation, both in writing and in separate calls, I emphasize the importance of the nature of the presentations to be made at the joint session; they are to be settlement-focused, and the client should be allowed to actively participate and speak. This is a collaborative process, and the parties can (and should) identify the key areas of concern, voice their grievances and try to focus the discussion in a manner that enables the other side to "understand where they are coming from." This is where clients should focus on needs, not wants. It is common that through this face-to-face dialogue, each side learns something new about the other's position, which up until this point has not filtered through their counsel and legal papers. The joint session is also a chance to present each side's version of the case or issues to the other side. While the joint session is not a time for argument, it is a time for a party to express the basis for its position in a manner that provides the other side the opportunity to understand the basis for that position.

In order to set the tone for the joint session, I speak with counsel jointly and at times separately, and sometimes with their clients, prior to the mediation. I also emphasize to each of them that the written statements that will be shared among the parties should be settlement-focused, persuasive statements — not litigation-based treatises. I also discuss who will be present at the mediation, or perhaps who should be present. For example, at times, the existence of an intractable personal conflict between two specific individuals might preclude resolution of a conflict, while involvement of others with authority might accomplish resolution in a more peaceful manner. I encourage the parties to give careful thought to what information to bring, collect and have available, such as demonstratives in appropriate cases.

Moreover, at times other than when there is a bankruptcy trustee in place or a litigation committee, the parties might have existing longstanding relationships with one another. As such, they may have things that not only need to be said, but thoughts on constructing a resolution that might facilitate an ongoing relationship. At times, parties have been creative in resolving their differences by speaking to one another and compromising on current or future business terms or dealings in order to resolve the dispute at hand. This is accomplished much more easily without the lawyers trying to negotiate basic deal points or shuttle back and forth with a number exchange. This gets to the heart of the original purpose of mediation and the joint session, allowing the parties to speak and trade items, or dollars, in order to resolve the dispute.

Moreover, the joint session is also not just for the parties to assess each other. Rather, the session also allows the mediator

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to assess the dynamics among the parties and get a read on how they interact with each other and where they (versus their lawyers) are entrenched in a position, or those things that matter most to them individually. This can be very helpful in determining how to manage the process during separate caucus, as well as picking a path to develop the negotiation process and further resolution. The joint session also allows the mediator to see how the lawyers are interacting with one another and perhaps determine that there might be other factors at play in the inability to resolve the matter, such as significant personality differences that need to be managed or implicit bias concerns wherein each side might be underestimating, undermining or undervaluing the options and statements of the other to the potential detriment of the client's concerns.

All of these factors are not readily apparent outside a joint session and interplay among the parties. Separate caucus only shows a window into one specific side of the negotiation process. While the mediator can utilize the joint session to even the playing field a bit and mitigate some of these concerns, huge issues in this area (which can be flagged in early calls) might lead to a real consideration to dispense with the joint session; therefore, keep this in mind when you hold an advance lawyers-only call and how the attorneys interact with one another. The mediator's job is not to serve as counsel to the parties, so incompetent lawyering cannot be fixed by the mediator, such as by suggesting defenses to one side or claims to the other (that would be a remarkable breach of ethics by a mediator). However, the mediator can manage evidence of implicit bias that might be adversely impacting the process and manage the parties so that hot personalities do not get in the way of the process.

Despite all of the foregoing, there are indeed times when a joint session should be skipped (*e.g.*, when the exchange of vitriol or threatening messages will lead to a breakdown in communications and the overall settlement process). However, it is still a valuable tool that should not be automatically pushed aside. So, from this mediator's perspective, the session should be utilized judiciously when it serves a purpose, and not by rote. Lawyers: When a joint session is utilized, please encourage and prepare your clients to speak! Mediation is a client-driven process that allows the chance for clients to create a solution that meets both of their needs more effectively than what might be achieved in court. Allowing this forum for open dialogue and an assessment of each side's position is invaluable to resolution. Always keep in mind something I emphasize and have now named the "four C's of effective mediation": civility, cooperation, creativity and collaboration. The joint session can be an excellent place to ensure that these four concepts are embedded in the mediation process. abi