A Business Manager's (and Business Lawyer's) Guide to Commercial Mediation

By: Dale E. Kleber

While mediation and arbitration are commonly used forms of ADR, many business managers (and even some attorneys) are not fully aware of the significant differences between mediation and arbitration. For the reasons outlined below, mediation is steadily emerging as the ADR method of choice for resolving business disputes. Through the process of facilitated negotiation, mediation truly returns control of the business dispute to business managers.

Overview of the Mediation Process

Mediation is an informal, voluntary, non-binding process in which a third party neutral, trained in facilitation and negotiation techniques, helps the parties explore common ground and arrive at a mutually acceptable resolution to their dispute.

The principal distinction between mediation and other forms of dispute resolution-principally, arbitration and litigation-is that a mediator does not impose a decision upon the parties. The mediator assists the parties in creating their own solutions. It is often said that the mediator controls the process of mediation, while the parties determine the result of that process.

Typically the mediation process begins with a joint session where the parties explain their issues to one another face-to-face, as the mediator moderates the discussion. Then, the mediator usually caucuses with each party separately.

While the parties are in private session, their communications with the mediator are confidential unless expressly earmarked for sharing with the other party. The mediator carries messages-clarifications, questions, proposals, offers, and counteroffers-back and forth between the parties, and may even bring the parties back together again. The mediator employs proven techniques to facilitate the negotiation, find compatible interests, narrow differences, suggest creative settlement options and guide the parties toward an agreement.

If they cannot agree, the parties may undertake binding arbitration or simply return to the court system, and the mediation is deemed to constitute inadmissible settlement discussions in any subsequent proceeding.

The parties, however, may still benefit from an "unsuccessful" mediation by narrowing the scope of the issues to be arbitrated or litigated or by achieving a better understanding of the strengths and weaknesses of their own case and their opponent's. But as noted below, in the overwhelming majority of cases, mediation succeeds.

Role of the Mediator

The mediator helps the parties (1) clarify information and eliminate gaps or discrepancies, (2) define their respective issues and interests -- which rarely are only financial in nature, (3) develop options and alternatives to achieve such interests, (4) communicate their interests and concerns the opposing party, (5) hear and understand the other party's concerns, (6) arrive at a mutually satisfactory negotiated solution and (7) enter into an enforceable memorandum of understanding describing the agreed terms.

Through a variety of techniques, including active listening, objective questioning, reality checking and BATNA and WATNA analysis ("best/worst alternative to a negotiated agreement), the trained mediator helps each party analyze their respective interests -- not just their negotiating positions -- and develop options to realize those interests

A skilled neutral can enable the parties to reach an agreement that they would not have achieved on their own. An effective mediator can: (1) prevent "reactive devaluation," the proven tendency of one party to oppose or discount a proposal merely because it originates from the opposing party; (2.) overcome "selective exposure" and "selective perception," the habits of ignoring adverse information while focusing on favorable facts and failing to be objective; (3.) diffuse destructive negotiating behaviors and emotions; and (4.) utilize proven strategies to overcome impasse in the negotiations.

Three Big Problems with Litigation:

Uncontrollable Expenses, Unpredictable Risks and The Vanishing Trial

Every business manager is familiar with the principal drawbacks of litigation: It is extremely costly, and the expense and exposure of a lawsuit cannot be budgeted with any certainty. The expenses of a relatively straightforward commercial lawsuit can easily exceed six figures; the costs of more complicated cases often exceed seven figures. Court outcomes are highly unpredictable since judges vary in expertise and quality; different juries hearing exactly the same case can reach totally different results. Mediation eliminates the expense and high degree of risk associated with litigation (and arbitration) - precisely what skilled managers strive to avoid in their business model.

It is widely acknowledged that less than 5% of all civil cases filed are actually tried to a conclusion. A recent study determined that over 98% of the civil lawsuits filed in Federal District Court in 2006 were disposed of without a trial. Only 3,555 federal civil cases were tried in that year, a 70% drop from 1984. (The dramatic decrease in the number of trials did not result from fewer lawsuits being filed - to the contrary, during the same period the number of federal civil cases filed soared by 300% - from 66,144 to 259,541). Similar data available from 21 states indicate that the number of civil jury trials fell by 40% from 1976 to 2004.

The question is obvious: if almost all cases settle eventually or never result in a trial, isn't it prudent to take proactive actions to resolve lawsuits through mediation sooner rather than later - before significant dollars have been sunk (dollars that could have been used to fund a settlement) and parties' positions have hardened? If a party really wants its "day in court," statistically it may be more likely to find it in a mediation session.

Mediation Contrasted to Litigation and Arbitration

Mediation allows far more flexible remedies than litigation and arbitration, which are limited to determining legal rights and damages. Mediation allows two or more parties to negotiate creative, business-driven solutions to their dispute.

The parties can negotiate over much more than dollar damages -- contracts can be reformulated and terms renegotiated; credits or debits can be granted; payments can be accelerated, deferred or discounted. Products can be re-worked, services can be restructured; deliverables can be redefined; intellectual property rights, royalties and territories can be modified; post-sale covenants can be revised. Employees can be transferred to more productive environments and exit packages can be restructured. Mediation can do things that litigation and arbitration simply cannot.

A skilled third-party neutral, however, is essential to facilitate and orchestrate that process of negotiation. A mediator with transactional expertise and actual business experience can be particularly effective in helping the parties identify all available options in a commercial dispute.

Mediation does not "split the baby," a common criticism of arbitration, especially when a reasoned decision is not provided by the arbitrator(s). Of course, compromise is a necessary part of settling any business negotiation, but in mediation, the parties

choose the compromises that they are willing to make, consistent with their respective business interests. They are never forced to accept a "baby" that has been "split" according to the dictates of a third party.

Since mediating parties will not have a result imposed upon them by a judge, jury or arbitrator(s), fewer resources are expended on fighting over how the dispute is going to be argued -- as distinguished from the substantive disagreement itself. For example, when the parties are bound by the decision of a third party (litigation and arbitration), who the decision maker will be, what inputs the decision maker will be allowed to consider and how the decision is to be reached become far more critical concerns, so more time and expense is necessarily allocated to issues involving venue, jury selection, choosing arbitrators, discovery disputes, pre-trial motions, rules of evidence, admissibility, jury instructions, status conferences, etc.

Is Mediation Effective?

Mediation has proven to be highly effective. Many of the better mediators report success rates in excess of 90%. Overall statistics show that mediation works approximately 80-85% for parties who initiate the process themselves and about 50-60% of the time in court-mandated mediation programs. In addition, academic research indicates a significantly higher compliance rate with mediated agreements versus court judgments. This seems to occur because parties are more likely to adhere to settlement terms when they have participated in creating them.

Mediation is also very cost effective. While each commercial dispute is unique, many two-party business disputes are resolved with a day-long mediation session at a cost of $5,000 to $10,000, usually split between the parties -- a fraction of the expense of litigating the same dispute.

A Final Perspective on Mediation

Disputes and conflict are an inescapable part of the business equation, but the preferred method for resolving most business disputes is rapidly evolving away from the purely adversarial model. There will always be a need in certain cases to establish legal rights and remedies or set a precedent through litigation or binding arbitration.

Mediation, however, provides a framework for business parties to negotiate and structure their own solutions to business conflicts with customers, suppliers, employees, co-owners, joint venture partners and other key constituencies. Mediation can often preserve such important relationships.

Pragmatic business managers who understand and utilize mediation will realize a competitive advantage because mediation offers the most time-efficient, least costly, most flexible method of resolving most commercial conflicts (Likewise, the commercial litigator, business attorney or adviser who understands the value-added proposition presented by mediation will benefit from a higher level of client satisfaction.) ▪

About the Author

Dale E. Kleber is a court-certified mediator and arbitrator and the principal of Accord ADR Services, which is based in the Chicago area. He has participated in the negotiated settlement, mediation, arbitration or adjudication of nearly 1000 commercial, employment, construction and insured disputes. He practiced corporate law for over 20 years, beginning his career with one of Chicago's largest law firms, eventually moving in-house where he practiced for two publicly-held corporations. He served as Vice President, General Counsel and Secretary of a $4 billion food manufacturer and as a member of the company's Management Committee. Prior to attending Vanderbilt Law School, Mr. Kleber, worked in Washington, D.C. as the Press Secretary and Chief Legislative Aide, respectively, for two U.S. Congressman. He also founded a small real estate development company and has served as the general contractor for upscale custom homes, which have received national recognition and regional and local awards for excellence in construction and design.