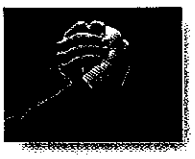
Like personal relationships, business relationships sometimes turn bitter. And when they reach a point of contention where business partners view the differences as irreconcilable, former professional allies often consider a divorce, complete with recompense for damage done. It is here that business associates face a crossroads: Should they litigate or mediate?

BUSINESS BREAK-UPS:



Litigate or

Mediate?

By Joe Epstein, ESQ and Lynne S. Bassis, ESQ

Litigation and mediation are very different approaches to business disputes. And every conflict requires a careful evaluation as to which path will be most effective. But when you or your client is standing at the proverbial fork in the road, weighing the pros and cons of both approaches, several factors can help point you in one direction or another.

Litigation often makes the most business sense when:

- There is a need to establish legal precedent;
- Parties or companies fear appearing weak or need to set a standard to prevent future legal attacks;
- There is a likelihood of success;
- Little or no trust remains between the parties;
- Neither has a business or personal need to part amicably;
- Parties need immediate injunctive or other equitable relief.

Absent these six factors, before taking your associates-turned-adversaries to court, you may want to carefully consider your options with a mediator. In certain situations, business mediation may prove more efficient and cost-effective than engaging in no-holds barred legal warfare, which could wage on for months or years and dig deep into the pockets of everyone involved. If disputants place a high value on the business relationship and hope to restore a mutually beneficial partnership, then mediation may rebuild that bridge, without burning as many financial ones as heading to court.

Other factors that may make mediation the right choice are:

- The risks of litigation are substantial;
- The direct and indirect litigation costs are substantial;
- The facts are clear and discoverable;
- Maintaining productive relationships post mediation is desirable.

Here are a few examples of when and where a mediation strategy can be deployed to keep you or your clients out of court.

PRE-LITIGATION: SIMILAR PRIORITIES

In situations where some degree of trust remains among partners, pre-litigation mediation may offer the best opportunity for resolution. This approach works best if all parties have some similar priorities. If key stakeholders are willing to honestly discuss the situation in the controlled setting of mediation, parties desire a quick and cost-effective solution, or they hope to restore the business relationship, mediation may be a strong fit.

In pre-litigation mediation, everyone involved must willingly fully disclose their perception of the situation and agree they can engage in productive dialogue. If legal counsel attends, they must take a problem-solving approach and work collaboratively and confidently through the negotiations to produce a fair and just compromise.

Cases that lend themselves more readily to pre-litigation mediation are those involving professional associations, family firms, and suppliers and customers. Certain types of cases — employment issues, professional liability, contracts, and potential class action situations — are also strong candidates for alternative resolution strategies.

EARLY MEDIATION: CREATIVE STRATEGIES AVOID COURT

Those who have just filed a lawsuit can also consider early mediation. In these cases, communication breakdowns and distrust often make it necessary for the parties to gather information through the formal discovery process and start to build their cases. But once the decision to engage in early mediation is made, they can direct counsel to take only depositions from key players and postpone taking statements from those not directly involved. This approach can defer the costs of a full scale legal battle and still provide a reasonable settlement.

Early mediation allows stakeholders to explore creative solutions to the conflict and potentially reconcile critical business relationships. As with pre-litigation, at this point some level of trust and shared goals must exist between parties. They must remain open-minded to creative solutions and engage in solution-oriented dialogue. This is especially relevant if they hope to maintain an on going relationship.

Since a lawsuit has been filed, it's highly likely communication has broken down.

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Mediators can play an invaluable role at this stage, engaging the various stakeholders, mending trust fences where possible, and guiding parties to an agreed upon discovery plan before convening the mediation.

One cautionary note needs to be raised regarding early mediation. While some formal discovery prior to mediation is desired, disputants may need assistance crafting that plan. Some parties have enough trust to handle this on their own. Other fighting factions harbor too much distrust to cooperatively form a discovery plan and may require the assistance of outside counsel or the mediator.

Mediation remains an option for disputants throughout the course of a case, from its early days before litigation develops and all the way through trial proceedings.

REFINING YOUR DECISION TO MEDIATE OR LITIGATE

Businesses are becoming more and more sophisticated in their cost/benefits analysis of litigation verses mediation. In certain cases, litigation is clearly the best option. This is especially true of corporations involved with multiple suppliers, vendors and other partnerships. Bending too easily to an out-of-court settlement may prompt potentially predatory plaintiffs, motivated by monetary gain, to start filing frivolous lawsuits. Companies caught in this situation need a show of legal strength to thwart any perception of weakness among other business associates.

Some companies consider getting a few courtroom wins under their belt to be good business. This approach, when successful, discourages a deluge of lawsuits by setting legal precedents and building a high financial barrier that will make it difficult for plaintiffs to get to the mediation table. If company leaders and counsel are confident their strategy will close the case in their favor or force the plaintiffs to bow out, then moving ahead with a suit is the wisest choice.

CRAFTING YOUR MEDIATION STRATEGY

Companies considering mediation should expect a custom designed strategy that will work best with their case. The mediation must address the nuances of the parties involved, the legal, business, and personal issues in play, the personalities of the disputants, business and relationship history, short- and long-term goals, and much more. Choosing mediation as an alternative route to dispute resolution and a mediator to handle that resolution requires a careful analysis. *(See the sidebar for 13 Considerations in Creating a Mediation Strategy.)*

Mediators come in many different varieties, levels of training and expertise. When choosing a mediator, look for a professional mediator who is proactive, creative, experienced, facilitative, insightful, instinctive, empathetic and assertive. The top notch mediator knows that a cookie-cutter approach will not lead to a fair settlement that is satisfactory for all parties. He or she must possess the flexibility and skills to design a game plan that fits the issues of the case and the unspoken expectations of the disputing partners. Keeping this in mind, consider interviewing prospective mediators, get references and gather information about their track record to ensure your choice can produce the best possible resolution.

PREPARING FOR MEDIATION

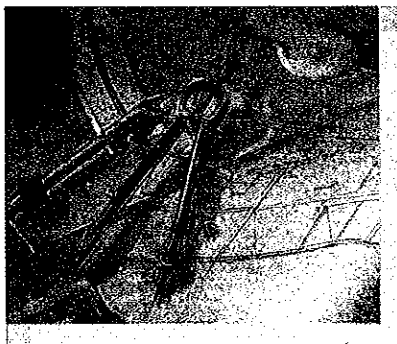
Preparing for mediation requires the same foresight and strategy as preparing for trial. Astute counsel will engage in the same preparation and use the same tools of persuasion to carve an effective path to resolution. Mediation themes, theories, clients, and experts are all part and parcel of an effective mediation. The client should be a significant focus and participant in prepping for the mediation — they often exert more influence on the other disputants than anyone else present at the mediation table. And mock mediations, like mock trials, are invaluable in the process.

A detailed mediation checklist is a hallmark of a good mediation strategy. Your checklist should contain at least the following:

- Pre-mediation persuasion strategy;
- Communication and persuasion strategies targeting the mediator before and during the mediation;
- Realistic risk analysis with a best alternative to a negotiated agreement and a worst alternative;
- Process to ensure all parties have the information they require for a productive mediation;
- Plan to handle relationship and emotional components in the conflict;
- Participants at the mediation table and how it will be set;
- Identification of stakeholders who might have influence or possess veto power of terms of settlement and if and how they should be engaged.

Preparation for mediation requires significant attention and analysis, analogous to prepping for trial. It requires a thoughtful plan and a carefully considered strategy for success.

Business mediation offers the opportunity for a dynamic and creative resolution. In mediation, parties can engage in a collaborative process with an open file philosophy. Businesses can use a facilitative approach that encourages open and candid dialogue that opens the door to a greater sense of fairness, maintains relationships, and encourages creative solutions to complex conflicts. When mediation is the right choice for you or your client, negotiators and partners in conflict can build a bridge to resolution rather than scorching the earth with full-blown litigation.



Designing a Successful Mediation Strategy

In crafting a mediation strategy, consider these 13 questions:

1. Is this an appropriate case for pre-litigation or early dispute resolution?
2. What would be the best time for this mediation?
3. How can parties use their mediator to assist in the exchange of information necessary for a productive mediation?
4. Who should be at the mediation?
5. How can information, themes, interests, needs, and positions be creatively, efficiently and persuasively presented?
6. How do parties and the mediator handle fear at mediation?
7. Should pre-mediation caucuses, site visits or staggered starts be used?
8. Should there be joint sessions and, if so, when should they occur, who should speak and how should they be structured?
9. Should there be party caucuses, negotiator only caucuses, and/or principal only caucuses?
10. In multi-party cases should there be pre-mediation meetings with the plaintiff's side, with the defense side or, in a multi-defendant case, should the mediator meet with each defendant separately or with certain combinations of defendants?
11. Should co-mediation be used? If so, what blend of skills and/or attributes should the parties be seeking?
12. In multi-party cases or multi-issue cases, should settlement pods be used with appropriate participants?
13. What are the underlying interests, needs, and motivations of the key stakeholders and how can they best be explored during mediation?