Mediation Strategies and Considerations

By James W. Walker

We have all heard the maxim that "ninety-nine percent of all law suits settle." The certainty that a settlement represents, and the fact it puts an end to litigation costs, may explain why we hear it so often. At the same time, a successful settlement requires correct timing and being positioned to justify or compel a settlement. Perhaps one of the parties is emotionally invested in the dispute. The case may be inordinately complex, or represent an important part of a party's business.

How do you direct a particular case toward mediation in a way that gives your company the best possible opportunity to secure a settlement at the earliest possible point in the dispute?

The first factor to consider is how the prospect of mediation arises in the case.

Is the dispute amenable to a pre-suit settlement effort? If you have already been involved in pre-suit negotiations, suggesting mediation before the suit is filed allows both sides to close the gap in a confidential and non-binding setting. Attempting mediation under these circumstances can be very effective because a settlement will mitigate the parties' litigation costs.

You should consider, as well, that most parties negotiating on a pre-suit basis are not so angry that there is an emotional impediment to a negotiated settlement. Similarly, an early mediation suggests the parties did not feel compelled to "win the race to the courthouse" due to forum selection or some other issue.

Has the mediation been ordered by the court? Most court- ordered mediations must be completed by a specific date set forth in a scheduling or docket control order. Courts often leave the selection of a mediator to the parties, and if an agreement cannot be reached, will appoint someone. Being ordered to mediate a suit provides both sides the cover they need to direct the case toward mediation without having to wait until one side finally breaks down and suggests mediation as an option. This also allows both sides to time the mediation session so that it offers the best chance to resolve the dispute.

The second factor relates to the type of mediator you should consider, given the context of the parties involved and the nature of the dispute. There generally are three different types of mediators you should consider: the substantive expert, the former jurist and the prominent neutral.

- The substantive expert. The dispute's subject matter may be so complex or technical in nature (for example, intellectual property, complex financial transactions or accounting malpractice) that having a mediator with substantive expertise will help to eliminate the learning curve during the negotiations. A mediator with subject matter expertise will be better able to evaluate the claims and defenses, and to craft a strategy for securing a resolution.

The substantive expert will also be more able to explain why there are certain weaknesses in claims or defenses that should be factored into the settlement position.

Both sides will want to watch for bias that the expert might bring to the mediation proceeding based upon, for example, years of experience in a specific part of the industry before accepting mediation assignments. Still, on those cases involving disposition of a complex matter, having a mediator with relevant expertise can make the difference between success or failure in securing a settlement.

• The former jurist. Sometimes the successful resolution of a dispute lends itself to the experience and perspective of a former trial court judge. This is particularly true where the dispute involves a layperson as plaintiff against a corporate defendant. At the end of the day, the retired judge can look the plaintiff in the eye and say "in all my years as a trial court judge, I never saw anyone win more from a jury than the company has put on the table." This can often successfully close out the negotiations.

• The prominent neutral. Sometimes there is a senior statesman who both sides respect and trust to be fair, and who can provide a reasoned evaluation of the dispute and the likely range of outcomes in such a way that moves both sides closer to a compromise. This type of mediator can be particularly effective in resolving a dispute between parties that have an established relationship and would like to see the issue decided by someone they mutually trust and admire.

The third factor to consider relates to the timing of a mediation in relation to the procedural status of a case. This factor requires considering the type of case you are trying to resolve. If you are looking to file suit and feel confident in the merits of your company's case, but the other side is playing hardball, you might decide to file a "shock and awe" pleading – a highly detailed complaint, complete with exhibits, such as key e-mails and correspondence that support your company's claims – to tell the complete story in a way that may cause a defendant to reevaluate its interest in litigating the matter rather then trying to settle.

The advantage of such an approach is that, by exposing these kinds of details to the light of day, it educates your opponent about the risks that litigating can present. This may prompt a reluctant party to negotiate. If successful, it prompts a mediation sooner, rather than later in the procedural history of the case, with significant savings.

Sometimes one or both sides in a dispute needs additional information in order to make an informed decision about settlement and to reach a comfort level in accepting a compromise. In this case, once suit is filed, counsel should be instructed to reach out to opposing counsel and secure an agreement on the fundamental discovery both sides need to enable such an informed decision.

An agreement allowing for the exchange of documents and the targeted depositions of key fact witnesses as a predicate to a mediation will enable both sides to ascertain what seeing the most relevant documentary and testimonial evidence will really determine, as opposed to what their posturing suggests it might show, prior to filing suit. This gives both sides an opportunity to take stock of their respective claims and defenses before the full costs of completing discovery and proceeding to motions have been incurred.

Some disputes are simply not amenable to mediation until the parties sense they are nearing the point of no return. Perhaps the business judgment of a prominent officer of the company is in question. The amount in controversy may simply be so large that it bestows a bet-the-company mantle on the dispute. A bitter rivalry may have elevated the intensity level. Before filing, there may have been heated emotional exchanges of the sort that leave reason and sound business judgment on the courthouse steps.

This type of dispute may still be successfully mediated prior to trial, despite the investment of substantial litigation costs. It is not uncommon even for heated rivals to ultimately appreciate the certainty and refuge of confidentiality brought by settlement, in lieu of a public determination of right and wrong that results from a jury trial.

If used properly, mediation remains an important and effective means of resolving even the largest and most complicated disputes. The process has matured greatly over decades of use by corporate and outside counsel in all types of commercial disputes, but it must be utilized correctly in order to provide the greatest chance of success. This requires consideration of the timing and the most favorable mediator profile from the inception of a dispute.

These decisions should be seen as a threshold determination to be made at the same time as decisions about forum selection, choice of law and the initial claims and defenses that will be asserted in the pleading. In this way – regardless of the dispute's complexity, the personality and history between the parties, or the significance of the case to both sides – the benefits that flow from a proper and timely compromise settlement will become available. ■

James W. Walker
a member at Cole, Schotz, Meisel, Forman & Leonard, P.A., handles both trial and appeal of complex commercial disputes nation-wide for Fortune 500 companies, municipalities and individuals. His experience includes litigation in commercial contract and business torts, private associations, energy and electric utilities, municipalities, executive and professional liability and commercial insurance claims.
jwalker@coleschotz.com