Alternatives
TO THE HIGH COST OF LITIGATION

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Mediating Business Disputes: Why Counsel, Clients and The Neutral Must Emphasize Process, and Not Just an Event

BY JONATHAN B. MARKS

Why focus on process rather than the mediation event?

When disputing parties and their lawyers begin discussing the possibility of mediation, they usually view it as an event. Their primary focus is on picking a mediator, agreeing on logistics for a mediation session, and ensuring that people with authority will attend.

Sometimes, while discussing mediator selection, counsel also may discuss their views on the usefulness of pre-mediation submissions, as well as whether such submissions should be provided only to the mediator, or exchanged. They also may share views on whether the mediation's opening session should include lawyer presentations.

But their primary attention is usually on scheduling the mediation session, getting clients, attorneys and insurer representatives, if applicable, to the session, then letting the mediator do his or her thing.

This article focuses on the mediation of the complex disputes—those involving some combination of high stakes, multiple issues, multiple parties, fraught relationships, and the likelihood or reality of intense, drawn-out litigation. Its premise is that the chances of settlement can be substantially increased if the mediation effort embodies a nuanced and intentional approach, tailoring the process to the dispute and increasing the effort devoted to the mediation by counsel, clients, and the mediator.

The author has been a full-time mediator and arbitrator since 1982. He was co-founder and former chairman of Endispute Inc., as well as vice chairman of JAMS/Endispute. He now practices at MarksADR LLC, based in Bethesda, Md. See the accompanying author's acknowledgements box.

Almost all mediations appropriately bring clients, counsel and a mediator together for an in-person mediation session—the "event"—involving interaction with each other and the neutral, and mediator-assisted negotiation.

But in the author's experience, mediations of complicated, high-stakes cases have the highest prospects for success if the mediation effort is viewed not as a single event, but as an incremental process, in which the parties and the mediator work together to stage and to participate in multiple, tailored pre-mediation-session interactions. The steps are all aimed at increasing the likelihood that the participants will be able to move more quickly into productive, neutral-facilitated negotiations at the actual mediation session.

This article considers how attorneys representing clients in complex cases and their mediator can work together to develop and implement an incremental ADR process that has the highest likelihood of reaching a settlement.

It suggests that lawyers can most effectively represent their clients in complex case mediation if they do more than simply say to each other, "Let's select a mediator, get a date, and get together to try to get this sucker settled."

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It further suggests that a critical, early question for both lawyers and the mediator they select is: "What do we need to get done before we assemble the multitudes at the actual mediation session in order to have the best chance of getting to a deal or, at least, making real progress at that session toward settlement?"

Before answering this question, it's important to put it in context. There are a host of other issues that lawyers and a mediator, working separately and together, need to understand and deal with as they play their respective roles in mediating a complex case. For example:

- There are formalities to be tended to, including the mediator's conflict check and the drafting and signing of a mediation agreement that, among other things, ensures mediation confidentiality.
- There are multiple linked issues about how to conduct the mediation session and negotiations: strategic and tactical for the attorney; strategic, tactical and managerial for the mediator.
- In working privately with the client before and during the mediation session:
  - There are analytic and evaluation obligations for the attorney, aimed at helping the client consider settlement options that may arise in mediation against possible adjudicative risks, opportunities and costs if no settlement is reached.
  - There are also often counseling opportunities for the attorney, as, for example, through assisting the client in evaluating whether there are business options and solutions that might help turn the mediated negotiation about conflicting claims into something other than a zero sum game.

Even where these matters are appropriately attended to, a complex case mediation is far more likely to succeed if lawyers and the mediator, working together, focus on what can and should be done before the mediator convenes the actual mediation session.

The starting point for understanding why, in a complex case mediation, it's critical to focus on what happens from the time of mediator selection until the mediator convenes the session, is the blunt fact that complex business disputes that have escalated to the point of involving outside lawyers, and that are in or about to be in litigation, aren't likely to be easy to settle.

Business people involve inside and outside lawyers in their efforts to resolve their disputes grudgingly and only after direct, business-to-business discussions have failed. The dynamics of settling such disputes are likely to be multifaceted, with multiple barriers, which may include, for example:

- A history of unsuccessful and polarizing direct negotiations;
- Differing views about contractual rights and responsibilities;
- Upset or anger on the part of some about the past conduct of others;
- Worry by some that they are personally at risk because of their involvement in matters now in dispute;
- A suspicion that the other side is hiding something that would likely be revealed in formal discovery;
- Lack of information on an accused side about the underpinnings of another side's assertions of wrongdoing, and
- An inability to put such issues aside when defining business issues and objectives.

Whether from the perspective of attorneys representing a client in such a dispute or of a mediator being brought in to work with the parties to help them seek a settlement, the initial challenge in thinking about how to structure the mediation of a complex business dispute is diagnostic:

- Why hasn't our dispute settled?
- What are the barriers that now stand in the way of settlement?
- Are there incentives one or both sides have to try to get to a settlement?

The follow-up challenge is prescriptive: Given the barriers and incentives in a particular case, what can be done in mediation to confront and overcome barriers and take advantage of incentives?

Attorneys and mediators have unique and complementary comparative advantages in gathering information, thinking about, and generating a "prescription" for further action based on answers to these diagnostic questions.

Each attorney has access to and a confidential relationship with the client. Attorneys called in to advise a client about a dispute should be able to gather the information necessary partially to answer the diagnostic questions, albeit only from one side's perspective.

Through separate, confidential ex parte interactions with such attorneys and, sometimes, others on each side, a mediator is potentially able to access each side's diagnostic answers and seek prescriptive input. What the mediator learns will be partial and filtered, because the

About this Article

This article is an expanded version of a CPR Institute 2013 Annual Meeting session, "CPR Institute/DuPont ADR Counsel Workshop on Mediating the Complex Case."

Author Jonathan B. Marks thanks the other workshop participants for their helpful input: David H. Burt, Corporate Counsel to DuPont Co. in Wilmington, Del.; Jack Levin, a mediator and arbitrator who heads his own New York practice, and Jane Wessel, counsel in the London office of Crowell & Moring. Burt and Levin also are co-chairs of CPR's Mediation Committee.

The CPR Institute publishes *Alternatives*, which will feature highlights from the Annual Meeting later this year.

The hypothetical facts in this article involving the BigBizCo./Third Rock dispute were initially developed by David Burt in connection with his 2012 participation in a two-day workshop in Zagreb, Croatia, titled, "Mediate, Do Not Litigate," organized in cooperation with the Croatian Mediation Association and the American Chamber of Commerce in Croatia, and sponsored by the U.S. Embassy. Burt and Marks adapted and enhanced Burt's original hypothetical for use in the CPR Institute/DuPont ADR Counsel Workshop.

mediator inevitably will not be told the whole story, even where the understanding is that the mediator will not report what the neutral hears to the other side.

Nevertheless, even with filtered information, the picture that the mediator obtains will be more complete and balanced than that of either side. Given this specific information, the mediator is potentially able, even without disclosing confidential information, to make prescriptive suggestions about structuring the mediation that seek to put in place a process best able to overcome identified barriers, and take advantage of identified incentives toward settlement.

THE BIGBIZCO-THIRD ROCK DISPUTE

To put meat on these conceptual bones, the remainder of this article considers a hypothetical dispute that mirrors multiple complex business cases in which the author has been involved as a mediator.

The article describes an approach to mediating the hypothetical dispute that is aimed at illustrating how pre-mediation-session interactions among counsel, their clients and a mediator can increase the likelihood of the effort's overall success.

Consider the following circumstances: BigBizCo., or BBC, is a U.S.-based multinational that sells specialty metals to international vehicle manufacturers, sourcing most of its metal-grade ore from Croatian-based Third Rock Corp., referred to here as 3R. A steady supply of feedstock metal-grade ore is critical to BBC, which is 3R's largest customer.

BBC and 3R entered into a 10-year supply contract effective several years ago. In the contract, BBC agreed annually to take, or pay for, not less than 4,000 tons, and not more than 6,000 tons, of each of three grades of ore, heavy, medium and light. Under the contract, all disputes were to be resolved under Delaware law; there was no venue provision.

The relationship worked well for a few years. But a dispute arose because, in BBC's view, regulatory changes justified the company's seeking modifications in contractual take-or-pay requirements. These changes involved new government regulations in two key countries, greatly increasing vehicle miles-per-gallon standards, which inevitably would lead to massive retooling by multiple car and truck manufacturers so that they could make lighter vehicles.

BBC concluded that this retooling would significantly reduce auto manufacturer orders for specialty metals derived from heavy ore, and significantly increase such orders for metals derived from light ore. Invoking the contractual force majeure clause—due to "these game-changing government regulations"—for deliveries to start later in the year, BBC ordered only 1,000 tons of heavy ore. It stated it wouldn't pay for the additional 3,000 tons it otherwise would be contractually obligated to take. BBC also asked 3R to provide 7,500 tons of light ore, 1,500 tons above the contractual maximum.

'What Can and Should Be Done …'

The subject: Mediation preparation.

The context: Complex commercial cases.

The goal: Mediation isn't just readying for an event. It's an incremental series of steps to get to a resolution.

The pertinent language in the force majeure clause stated, "A party is not liable for failure to perform the party's obligations if such failure is as a result of [various listed events, such as Acts of God, civil war, failure of electricity] or other unforeseeable circumstances beyond the control of the Parties against which it would have been unreasonable for the affected party to take precautions and which the affected party cannot avoid even by using its best efforts."

Responding, 3R rejected BBC's invocation of force majeure, demanded that BBC either take 4,000 tons of heavy ore or pay for the 3,000 unordered tons, and said it couldn't produce more than 6,000 tons of light ore. 3R asserted that BBC would be in breach of contract unless it agreed to take or pay for 4,000 tons of heavy ore.

Soon after 3R had sent BBC its response, executives from both companies met in London. In spite of both sides' statements that they wanted to find a resolution of the dispute, no progress was made.

In addition to arguing its force majeure position, BBC also raised a new claim, contending that two recent ore deliveries didn't meet contractual specifications. BBC also emphasized the importance of 3R's finding a way to supply more light ore than the contract obligated it to supply. 3R's executives rejected BBC's "force majeure excuse," said it wasn't possible to provide more light ore without major expense, and claimed that 3R would suffer dire consequences if BBC didn't meet its contractual obligations.

At the end of the meeting, the executives agreed to consult further internally, then consider a further meeting. Soon after the meeting, however, 3R decided it had no alternative but to protect its legal position. It filed suit against BBC in Zagreb Commercial Court. Two days later, BBC countersued in a Delaware federal court. A further executives conference call a few days later ended in a shouting match.

Two weeks later, after pressure from 3R's board, the company's general counsel—a Croatian citizen who had taken his legal training in the United Kingdom and the United States—authorized his U.S. counsel to raise the possibility of mediation with BBC's U.S. counsel.

After initially trading jabs about the viability—or lack thereof—of BBC's force majeure claim, outside counsel for each side agreed on a mediator. After multiple schedules were compared, a two-day mediation was calendared roughly 10 weeks later, and counsel agreed to stay all litigation for 90 days.

Having found themselves in disagreement about various pre-mediation issues, such as the need for pre-mediation submissions, counsel also agreed to ask the mediator to work with them on the preparation issues.

WHAT SHOULD HAPPEN NEXT?

Some mediators leave it to their case managers to "intake" a case—that is, get basic details from the parties, and set pre-mediation procedures as well as a mediation date. But, increasingly, mediators handling complex

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commercial and corporate cases seek to have a joint call with counsel immediately after they have been retained.

This author does that in every case. Attorneys involved in cases like the BBC/3R dispute should be seeking such interaction with the mediator they have picked, even if he or she doesn't suggest it.

My objective is to learn enough about the case to discuss how the overall mediation should be structured. The goal is a process that maximizes the chance of getting to a deal when we bring together clients, counsel and others for the actual mediation session.

If possible, even before a joint call, I ask the parties to send me the basic pleadings, which will at least outline the legal claims at issue. For many situations, it's often possible to find out what's happening in the case on the Internet just by having been told the parties' names.

In each of my matters, my case manager emails counsel before the joint call to say that I want to discuss the following questions:

- What does the dispute involve?
- Who are the parties?
- If in litigation, what is status of the lawsuit?
- What discussions, if any, have counsel had about structuring the mediation?

My case manager also tells counsel that the call's purpose is to work with the parties to get agreement on next steps, including a timetable for submissions and my further interactions with counsel and representatives, as well as the logistics for the actual mediation session.

The driver for seeking this immediate interaction is the recognition that I need counsels' input in order to think about how to structure the mediation. They obviously know much more than I do about the matter's merits, the business issues, the personalities, and the overall dynamics of why the case hasn't settled.

Through getting brief reports on a joint call and follow-up questioning during the call, I can usually quickly get enough information to decide whether my suggestions about the mediation process for the specific case can be pretty much cookie cutter, or must, on the contrary, be more nuanced and carefully tailored to deal with particular problems or barriers that would significantly otherwise reduce the likelihood of settlement. See the box below.

If I were asked to mediate the BBC/3R dispute, my joint call—along with my pre-call review of the competing complaints—would provide me with information about:

- The multiple litigation venues and the race to the courthouses;
- The parties' contractual relationship and dispute;
- The additional, not-yet-being-litigated claim by BBC that two 2012 ore deliveries had quality control issues;
- The fact that the parties' continuing business relationship was in jeopardy; and
- The facts that business efforts to get the case settled had gotten nowhere, and that there had been a shouting match.

Just those snippets of information would raise several red flags about potential barriers to settlement and suggest multiple questions, such as:

- What do the parties really think about their respective contractual cases?
  - Are there really polarized views?
  - How important to the outcome is the potential venue fight between Delaware and Zagreb?
- Is the allegation of out-of-spec 2012 deliveries a serious one?
  - If so, what needs to be done to flesh out the underlying facts?
- What's the relative importance to getting to a settlement of:
  - The legal fight?
  - The threatened business relationship?
- Even if there are significantly different evaluations of where the case would be litigated and how it would be decided, are the business imperatives sufficiently critical to both sides to trump or substantially lessen the importance of the legal fight?
  - Are there opportunities for restructuring the business relationship that might be sufficiently advantageous to both sides to justify both sides' putting less weight on their perceived legal grievances and judgments about the strength of their legal cases?
- What was the substance of the prior business discussions?
  - What kinds of options were discussed?
  - Why did they fail?

Precisely because those kinds of questions would be going through my mind as I was listening to counsel in the joint call in the BBC/3R case, I would be highly likely to conclude that the BBC/3R mediation process should involve more than my "standard" pre-mediation interactions.

If I reached that conclusion, toward the end of the joint call I would suggest that I needed to get more information on a confidential ex parte basis before I made any recommendations about the specifics of pre-mediation preparation, much less about the agenda for the actual mediation session.

Tailoring ADR

How tailored must the mediation process be?

As noted in the accompanying article, the mediation process for a case might be accomplished with a standard approach. But complex cases likely need a process that is more nuanced to deal with the case's specific issues.

My default, standardized approach—which I implement in a fair number of the cases—includes: (1) getting agreement during a joint call on mediation session date or dates, logistics and attendees, as well as pre-mediation procedures set out in the remainder of this paragraph; (2) getting a mediation agreement signed; (3) receiving pre-existing materials, such as the complaint, previously filed motions, and any court decisions; (4) receiving succinct but not cursory mediation submissions, ideally but not necessarily exchanged with the other side; (5) conducting separate, confidential ex parte telephone conferences with counsel for each side; (6) proposing by email and getting agreement on the agenda for the initial part of the mediation session; and (7) bringing clients and counsel together and conducting a one- or two-day mediation session.

—Jonathan B. Marks

I would suggest holding confidential ex parte calls, initially just with counsel for each side, as soon as possible. I'd usually say:

> Let's get a mediation agreement in place, to lock in confidentiality, and then proceed in two linked phases. In Phase 1, I'll hold confidential ex parte calls, with follow-up if needed. Based on those calls, I'll recommend and we'll agree on what we're going to do before the scheduled mediation session in order to increase the likelihood that we can hit the ground running when we come together for the mediation session. We'll then implement that agreement in Phase 2.

My aim in the follow-up ex parte calls would be to get as much information as possible about what the fight was really about, what the key barriers to settlement were, and how far along each side had gotten in working up legal and factual issues relating to the contractual claim and the deficient delivery claim. I'd also want to know the thinking each side had done on their own about possible settlements, including business solutions.

Once those ex parte calls had taken place and consensus had been developed about what Phase 2 might look like, we might end up with the accompanying Phase 2 Mediation Schedule agreement, with each of these elements aimed at advancing the ball on a particular potential barrier to settlement before the session, rather than waiting to deal with them at the mediation session.

WHAT DOES THE SCHEDULE ACCOMPLISH?

There are multiple conclusions to be drawn from the events set out in the schedule.

Given that the litigation itself had just started and that the ore delivery issue hadn't been fleshed out at all, the meet-and-confer during Week 1 would have two objectives.

First, by getting counsel orally to outline their key contract arguments, the aim would be to make sure that the Week 5 mediation submissions engaged on key issues, eliminating the possibility that these submissions would turn out to be "ships passing in the night."

In addition, getting details from BBC on its ore quality control concerns would allow 3R to understand and investigate BBC's claim, and set the stage for possible further business and technical dialogue that might narrow or even resolve that issue before the mediation session.

Based on the premise that the business issues—and the possibilities for finding a business solution—are both complicated and very much the purview of business people rather than the litigating lawyers, the ex parte discussions during Week 2, and the possible later interactions involving the mediator and business people, would aim to get discussions and, if possible, negotiations concerning business elements of a possible settlement started before the actual mediation.

At the least, these interactions would allow the mediator to get educated with regard to the parties' objectives and to understand the potential problems with and barriers to finding a business solution.

The provision for multiple mediator discussions over time with both counsel and the business people also would allow the mediator to at least begin to reach a conclusion about the relative importance of the legal dispute and of the business relationship to finding a mutually agreeable settlement.

Only rarely in a dispute such as this one would the mediator be able to conclude, based on such interactions, that business imperatives driving both sides toward settlement were sufficiently dominant to reduce to insignificance even highly polarized views on legal issues and on likely in-court outcomes.

Given the high likelihood that negotiating positions at the actual mediation session will be driven, at least to some degree, by each side's risk analytic judgments about their legal case's strengths and weaknesses, the schedule provides for exchanging merits-based mediation briefs. That ensures that the parties' legal and factual views on the merits will be put on the table.

The schedule also provides for further mediator discussions with counsel on whether reply submissions make sense, in terms of closing the loop on each side's substantive arguments before the actual mediation session, in order to reduce the need to take time for such discussions at the session.

The schedule doesn't try to define the agen-

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Phase 2 Mediation Schedule—BBC/3R Mediation

Week 1	Counsel for each side meet and confer by telephone, with mediator participation, with regard to: • Key legal and factual issues that each side believed were relevant to a discussion of the likely outcome on key contract issues, in preparation for each side's drafting of opening mediation statements. • Details of BBC's claim that two 2012 ore deliveries had quality control issues.
Week 2	Mediator has confidential, ex parte telephone conversations with senior business representatives and counsel for each side to discuss business issues, constraints, objectives and options.
Week 3	Possible mediator-facilitated discussions involving business people and technical experts on each side with regard to outstanding factual issues relating to 2012 ore deliveries.
End of Week 5	Parties provide the neutral and each other with mediation submissions dealing with the key legal and factual issues that will be litigated if no settlement were reached.
End of Week 6	Mediator holds ex parte telephone conferences with counsel on each side to discuss: • Status of parties' engagement on litigation-related legal and factual issues, including both force majeure and quality-control disputes. • Possibility of further ex parte and/or joint discussions involving mediator and client representatives concerning business issues. • Possible usefulness of reply submissions.
Week 7	Possible further mediator interactions with business people and/or counsel on business issues and options.
Beginning of Week 8	Due date for possible reply mediation submissions to be provided to mediator and other side.
Four days before mediation session	Mediator communicates with counsel about the mediation session's agenda.
	Mediation Session

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da for the actual mediation session. That would put the cart before the horse. In a complicated, multi-issue case, particularly one where there appear to be business relationship issues as well as legal and factual disputes, it makes sense to wait until after most pre-mediation interactions have been completed to decide how to use time at the actual mediation most effectively.

For example, the issue of whether there should be plenary session merits-based presentations by counsel for each side shouldn't be decided until after mediation statements have been submitted, and the mediator has been able to consider whether and to what extent legal and factual—as compared to business—issues define the critical resolution path.

One thing can be said with certainty: Given the extensive pre-mediation-session substantive exchanges that will have taken place, both orally and in the submissions, even if it made sense to have some kind of litigation-related presentation at the beginning of the mediation, a long, "dog-and-pony show" presentation at the outset of the mediation session wouldn't be necessary. Of course, that assumes that the mediator had gotten commitments from counsel that all mediation participants, including the business representatives, would have read the written submissions.

Lawyer presentations at an opening plenary session might be limited, for example, to "closing the substantive loop" by replying to points made by the other side in each reply mediation submission.

Beyond that, there are many options for trying to move from the pre-mediation-session preparation phase to the in-person, head-to-head negotiation phase of the mediation.

For example, after an initial, brief opening session in which the mediator reminded attendees of confidentiality rules, it might make sense for the mediator to move immediately to convening a joint meeting with just the senior business executives on both sides.

Or it might make sense for the mediator to begin shuttle diplomacy with all or a group of attendees from each side. In this context, the mediator might also get agreement that if, as matters progressed, negotiations stalled based on polarized views about how a judge or jury will deal with specific substantive issues, a further plenary session for lawyer presentations and discussion of those issues would be helpful.

The key point is that the mediator will be in a much better position to make the most effective choice about the in-session agenda and process after he or she has worked with the parties in the incremental process that is described in this article.

* * *

The foregoing illustrates how, in a complex case such as the BBC/3R dispute, pre-mediation-session efforts can make a critical difference in teeing up a matter for success at an actual mediation session. Even with all these efforts, there's no guarantee that the parties, working with the mediator, will be able to get to a deal at the scheduled mediation or, failing that, make enough progress to recognize it's worth continuing to work toward settlement.

But it should be clear that if all that counsel and the mediator had done in setting up a BBC/3R mediation were to agree to a mediator and 10-page pre-mediation submissions, and then to show up on the scheduled mediation session, they would have started that mediation session in a very different place: They would have had to tread a much more difficult path toward getting serious negotiations started at the session than if they had worked with the mediator on the pre-mediation efforts set out above.

* * *

Next month, using a different case hypothetical, author Jonathan Marks will extend his analysis to explore in more detail how pre-mediation efforts can interact within the-mediation session efforts by the mediator and mediating parties to increase further the prospects for settlement.

CPR News

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Information on the Foreclosure Mediation Unit can be found at http://bit.ly/XbXgxi. The program was nominated by Robert F. Copple, who heads his own law and ADR firm in Scottsdale, Ariz. Copple, long active in the CPR Institute, is a member of CPR's Patent Mediation Task Force.

* * *

New York conflict resolution practitioner Irene Warshauer, a veteran CPR Awards judge (and editorial board member of this newsletter) introduced the awards for the Professional Articles, and accepted them on behalf of the winners.

The long-form law review winner was "Mediation: The New Arbitration," by New York academic Jacqueline Nolan-Haley, a law professor at the Fordham University School of Law. The article focuses on mediation's relationship to arbitration, and concludes that the latter adjudicatory process is hurting the general utility of mediation as an alternative to litigation.

Mediation's "loss of identity" as it moves "toward the arbitration practice zone," writes Nolan-Haley, "limits the spectrum of options available to disputing parties, leaving them with a single forum with variations of adjudication. This deprives parties of the primary benefit of mediation—a type of mercy, which provides relief from the rigidity of the formal justice system, with its adversarial orientation."

Nolan-Haley traces the evolution and rise of mediation practices and declines in arbitration. Then, she focuses on lawyer's "aggressive behaviors" in mediation advocacy, evaluation, and hybrid med-arb processes. She conducted a study of lawyer mediation behaviors, and provides empirical results, which demonstrates the negative effects of mediation's migration toward arbitration processes and behaviors.