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Mediating Complex Business Disputes: How Pre-Mediation Interactions Affect In-Session Negotiation Success

BY JONATHAN B. MARKS

In the April *Alternatives,* I suggested that expanded and focused pre-mediation-session interactions among a mediator, lawyers, and clients can substantially increase the likelihood of a successful settlement negotiation at the actual mediation session. Using a business dispute hypothetical, I sought to demonstrate how such interactions could help identify and deal with barriers to resolution that might have impeded or even prevented meaningful negotiation at the mediation session had they gone unaddressed. (See "Mediating Business Disputes: Why Counsel, Clients and the Neutral Must Emphasize Process, and Not Just an Event," 31 *Alternatives* 49 (April 2013).

In this month's article, a new hypothetical illustrates additional ways in which mediators and lawyers can interact to increase the likelihood of overall success as the mediation process evolves. Here, however, I focus both on pre-mediation-session barrier identification and management, and on the linkages between those efforts and in-mediation session interactions during the settlement negotiation process.

I frame my analysis through the "SellCo/BuyCo" hypothetical, which is an amalgam of cases I have mediated. The hypothetical is accompanied by commentary suggesting conclusions about best practices that can be drawn from focusing on the hypothetical's specific facts.

THE SELLCO/BUYCO DISPUTE

SellCo is a small U.S. company owned by a successful 60-ish entrepreneur. BuyCo, the U.S. division of an international manufacturing company, bought the development rights to a high technology product from SellCo.

SellCo's owner parted with the product for an upfront payment of $25 million and a contingent revenue stream. He decided to sell after he concluded that SellCo could not afford the multiyear capital investment required to develop the product, particularly because the product's potential use in various nations was subject to time-consuming and expensive government approval processes.

About three years after the sale, BuyCo decided to stop developing the product. BuyCo's decision to stop development cut off what SellCo calculated could ultimately have amounted to as much as $200 million in royalties and other milestone payments.

After BuyCo rebuffed the SellCo owner's efforts to persuade it either to continue development or, as he put it, "buy out my right to future payments," SellCo invoked an arbitration clause in the parties' contract, claiming breach of contract.

BuyCo responded, denying liability and claiming it had acted properly and within its "broad contractual discretion" to decide to shut down development. BuyCo also counterclaimed for fraud in the inducement, alleging that SellCo had failed to disclose problems with the product that, had they been disclosed, would have led SellCo to decide not to enter into the contract.

The parties selected a three-neutral arbitration panel. The parties began pre-hearing information exchange, thus embarking on a panel-mandated schedule that would lead in nine months to a two-week arbitration hearing.

Informal discussions between outside counsel led to a decision that the parties should take a last shot at settlement before embarking on the intensive preparation that they estimated would cost each side at least $1 million. Brief direct negotiations, both between outside counsel and at the client-to-client level, got nowhere, revealing only an apparently wide zone of disagreement. The negotiations foundered, before either side even articulated a concrete dollar demand, over which way money should flow.

ORGANIZING THE MEDIATION

At counsels' suggestion, the clients agreed to mediate and selected a mediator. The arbitration tribunal was neither involved in nor informed of the mediation effort. The mediator and the parties agreed to schedule and lock in two days for a mediation session. They also agreed that the mediator would convene a joint telephone conference with counsel. They would discuss both logistics and what the mediator and the parties could do leading up to the mediation session in order to increase the chances that a settlement could be reached.

As a result of the call, a pre-mediation schedule was put in place. (See Exhibit 1.)

This combination of pre-mediation interactions allowed the mediation to proceed incrementally, through a series of steps aimed at increasing the likelihood that progress could be made when the mediator finally convened the client representatives and attorneys at a mediation session.

As these steps proceeded, the mediation almost came apart, and had to be rescued by the mediator.

SellCo's initial mediation submission was nuanced, and accompanied by a notebook with many exhibits. The submission set out in detail, with multiple cited and submitted cases, why SellCo asserted it would be able to prove breach of contract, in spite of various contract clauses that appeared to provide BuyCo discretion on whether, when and how

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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.

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to proceed with product development. It also provided detailed rebuttal to BuyCo's claim of fraudulent inducement.

By contrast, BuyCo's submission, to the mediator's surprise, was sketchy. It did little more than rehash points already made in BuyCo's arbitral pleadings.

Within hours after the initial submissions came in, SellCo's outside counsel called the mediator to voice in colorful language extreme unhappiness with the imbalance in the submissions. "They have **ing sandbagged us," he said. "They aren't serious about settling. They're just milking us for information to help them in the arbitration while giving us nothing in substance in return."

SellCo's counsel told the mediator he had been working to help his client, SellCo's owner, "get reasonable about settlement." Counsel added that he knew the arbitration risks, but said his client would "stand firm unless he believes the other side is taking this process seriously, and I'll support him in doing that. But he's going to go ballistic when he compares our submission with the other side's."

Later the same day, the mediator set up a telephone call with BuyCo's outside counsel and their in-house attorney. The mediator, without quoting SellCo counsel's strong language, explained the problem. "Without disclosing confidences," the mediator said, "I can tell you that I think SellCo's attorney understands his case has problems. But unless you lay out your views about those problems, in full detail, with case citations and documentary support, he's not going to be able to keep his client from shutting down."

The mediator continued, "Without in any way telling you now how I would come out on the key issues, I'm not going to be able to help you—even as devil's advocate—with regard to the risks the other side faces, unless you lay out your case, rather than holding it back for arbitration."

After some resistance, BuyCo's counsel agreed to provide a significant responsive submission by the deadline several days later, a commitment that the mediator reported to SellCo's counsel. In parallel, SellCo's counsel agreed to put in a brief responsive submission.

A few days later, before receiving the responsive submissions, the mediator went ahead with previously scheduled ex parte calls, aiming to have a confidential discussion about each side's view of the case and about possible settlement barriers and incentives. In the SellCo call, its counsel said, "While there might have been a time when my client wanted to take back the development rights as a part of a settlement, that's not in the cards now. My client's health isn't great. He simply wants to be paid a significant sum to put this behind him. He's willing to put aside his anger at BuyCo's bad-faith decision to abandon the product, but only if the price is right. I think he'll be reasonable."

Getting the Deal Done

The issue: Maximizing the prospects of a settlement.

The challenge: Integrating the pregame.

The outcome: Even with information, including barriers, set out beforehand, mediation will happen on the fly. See the Exhibits. For the benefit of parties, advocates, and neutrals, a veteran mediator assesses participants' interactions before and during the sessions.

With SellCo counsel's permission, the mediator, in his confidential call with BuyCo's attorney, was able to say in response to an inquiry that SellCo wasn't interested in getting the product back as a part of a settlement.

The mediator also learned in his call with BuyCo's counsel that the company's U.S. and European management professed to be angry with SellCo's owner. "They feel," their lawyer said, "that they were lied to when they entered into the agreement. On top of that, they think they did nothing wrong in carefully deciding that it made no sense to continue product development. They reject any allegation that they proceeded in bad faith. They tell me their decision required them to write off more than $50 million in development costs."

He continued: "Sometimes they say we should go for broke, arbitrating to conclusion in order to try to get a judgment against SellCo and its owner for $50 million. They say SellCo's owner has to remember he signed an indemnity provision that we think puts him personally on the hook for any damages we recover."

Exhibit 1. Mediation Schedule — BuyCo/SellCo

Week 1	Parties provide the mediator with pre-existing written materials, such as the arbitration pleadings, the parties' contract, and a joint document submission.
Week 4	Parties provide the mediator and each other with submissions, discussing the key issues that each side contends should determine how the arbitration panel will decide the case—which way money would flow, and how much money would flow. Submissions to be crafted based on the understanding that they would be read and considered by each side's business decisionmakers as well as counsel and the mediator.
Week 5	Mediator to hold separate confidential telephone calls with attorneys for each side to discuss the case on a confidential basis: • Which merits issues are the subject of agreement, and which are the source of disagreement. • Each side's views of the barriers—such as differing views about likely outcome and possible interpersonal and business issues—that might stand in the way of a meaningful negotiation. • The incentives that each side might have, such as business considerations, to try to get to a settlement.
Week 6	Parties provide brief responsive submissions, commenting on the points made in the other side's initial submission. Thereafter, the mediator provides guidance to parties concerning the agenda for the mediation session.
Week 7	Two-day mediation session.

BuyCo's counsel also said that his client's management recognized that BuyCo would have little chance of collecting a big judgment against either SellCo or its owner. But he emphasized that in unrestrained moments, his company's managers continued to say they would get great satisfaction in pushing SellCo and its owner into bankruptcy.

Following up, the mediator tried to get a better sense of BuyCo's view of a possible settlement, with carefully phrased comments, such as, "I hear all that, but it's very hard for me to see that there is any chance this case will settle with money flowing to BuyCo or, even, for a walkaway." The mediator came away with the impression that BuyCo might both give up its own claim and pay something, perhaps litigation costs plus a kicker, but not a lot, to end the dispute.

A few days later, the planned responsive submissions were exchanged. In a follow-up call with the mediator after the exchange, BuyCo's counsel said he was satisfied that, taken together, the set of four submissions fairly presented each side's views. (See Exhibit 2 for an analysis of the preparatory steps.)

THE SESSION

Soon after the mediator had completed his review of the reply submissions, and a few days before the actual mediation session, the mediator sent an e-mail to both sides suggesting an agenda for the mediation session.

Exhibit 2. Preparation Takeaways

Dealing With The Unexpected: In spite of efforts to plan for and manage a structured pre-mediation process aimed at increasing the likelihood of a successful mediation session, Murphy's Law often intrudes. In the *SellCo v. Buyco* matter, a glaring lack of reciprocity in information sharing threatened to derail the effort before it could get much past the starting block.

The mediator didn't spot the risk before it materialized, and had to scramble to defuse emotions and come up with a fix—the commitment from BuyCo's counsel to provide a detailed substantive responsive submission. Both the mediator and SellCo's counsel had to trust counsel for BuyCo's commitment, and there remained a risk that if BuyCo's response wasn't "seriously substantive," as SellCo's counsel put it, SellCo would pull the mediation plug.

In other cases, where one or both sides have voiced concern during an initial joint call about whether there will be reciprocity in submissions—or where the mediator has intuited such a risk—the mediator has gotten counsel to agree initially to provide submissions ex parte only to the mediator. The parties also agree that the mediator will allow the submissions to be exchanged only if he concludes that each side has made a roughly comparable effort to set out their respective merits views.

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Deciding Whom to Talk To: In most cases, pre-mediation-session ex parte interactions between the mediator and the parties will be limited to their outside—and, in some instances, inside—counsel. That said, at least in high stakes, complex disputes involving continuing business relationships, or a business relationship gone wrong that might be resurrected, the mediator can gain valuable information and begin the actual process of looking for a solution by seeking out and holding early ex parte conversations. The discussions, mostly by phone, are with senior business people on each side, and usually with their attorneys. But, as a matter of practice, this is often hard to arrange. More important, early in the process the mediator often doesn't know enough about the dispute's dynamics and barriers to justify pushing for such interactions.

Further, handled correctly, the neutral's pre-mediation-session ex parte conversations with counsel can generate sufficient information relevant to business issues and potential barriers to allow the mediator to make needed decisions about managing the process. In fact, responding to mediator queries about whether there are barriers to settlement involving "personalities" or "failed client efforts to solve the problem," counsel will often provide information about their clients that they wouldn't be willing or able to convey in the presence of those clients.

Here, the mediator got useful insights into the attitudes and objectives of both sides' business people from the BuyCo and SellCo counsel. Most important, while a mediator has grounds to suspect potential volatility in mediating any failed business relationship, the separate input from the companies' respective counsel signaled a material risk of volatility that influenced the mediator's decisions about structuring the actual mediation session. The discussions provided helpful factual background that could guide the mediator in his personal interactions with the clients at that session.

In spite of the mediator's preference for fostering substantive dialogue in a plenary meeting opening a mediation session, in this case he believed skipping opening presentations by counsel would be prudent. He was concerned that even restrained presentations by counsel would further polarize already skeptical and volatile clients.

The mediator sent an e-mail to counsel: "Viewing your four mediation submissions as a whole, both sides have done an excellent job in setting out your views on key issues. While I know that counsel for each party would have comments on points made in responsive submissions, we'll not take time during our initial joint session to hear further from counsel on the merits. Hence, we'll proceed as follows:

- I'll convene a relatively brief joint session for all participants during which I'll remind all of mediation confidentiality and discuss how we will proceed.
- Then I'll adjourn the plenary session and start what I expect to be a series of ex parte meetings, in an effort to get negotiations going and move them forward.
- If, as our efforts proceed, it appears that progress is being impeded by significantly different views about how things will play out in arbitration on specific issues, I may suggest some direct dialogue, including attorney presentations on specific issues. But I'll defer any such decision for now."

A few days later, the neutral convened the mediation session. By then the mediator was familiar with the merits issues, having spent considerable time reviewing the parties' submissions and documents, and in interactions with the parties' counsel.

After making brief opening remarks to all participants, the mediator began shuttle diplomacy to try to get a negotiation started. After spending more than a half hour walking through the problems he saw in BuyCo's legal and factual arguments—and, particularly, its responsive submission—SellCo's counsel asserted that the case would settle only if SellCo was paid money. The owner demanded that the mediator find out whether BuyCo was "here today to write a check."

The owner said his objective was to obtain a settlement that involved a complete break between the parties, with BuyCo retaining the product. "For the right amount of money," he

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said, "I'm even willing to give up any right to future payments if BuyCo later is successful in developing or monetizing the product."

When the mediator asked whether SellCo had an opening demand, SellCo's counsel said, "Our demand is $115 million." The mediator immediately said, "Starting with such a high demand won't, and I'm putting this very mildly, get a happy reaction. I predict it will lead BuyCo to say it's going to counter with a demand that SellCo pay it $50 million or more." SellCo's counsel responded, "We hear you, but that's where we are."

After the mediator left the room with SellCo's owner and his counsel, counsel for SellCo managed to meet the mediator in the hall, telling him that he knew this demand was "way high," but that "this was where the negotiation had to start."

BuyCo's senior executive said he was "outraged" when he heard the $115 million number: "Why the hell did we waste our time coming to this mediation if that's what they think their crap case is worth. We've got the resources. We should just walk away, and pull out all litigation stops to drive SellCo into the ground. They'll get what they deserve."

The mediator said, "I agree that SellCo's starting so high isn't on its face a good omen. I think SellCo knows they're stretching. But I think they're doing it because they feel they don't know where you are. I understand you're unhappy, but there are good economic reasons for BuyCo's putting an end to this dispute. We can debate how much, but there is at least some exposure here, and the dollar and opportunity costs are going to be substantial. I'm confident that in the end there are good business reasons not to let your anger, justified or not, get in the way of your money."

The mediator urged BuyCo's representatives not simply to toss back across the table what he called "a counterpoint 'stick-it-in-your-ear' demand of 'Pay us $100 million or more.'" "That may," he said, "cause us to crash and burn before we even get started. I think you can protect yourself without taking a step

Exhibit 3. Day One Takeaways

Effective Use of Mediation Time: The mediator's decision, because of the volatility risk, to forgo attorney presentations at the opening session meant that he was faced, in initial ex parte sessions, with counsels' eagerness, as one put it, "to be sure you understand why they're trying to pull the wool over your eyes."

Both took more than a half hour to talk through their points. In follow-up sessions involving merits discussions, the mediator tested some of those points by repeating them to the other side and asking for reactions. This took more time than would have been necessary had the points counsel made ex parte to the mediator been made in front of the other side in an initial plenary session. But in the mediator's judgment, this "inefficiency" was justified because of his concern, based on pre-mediation interactions, about the polarization that might result from initial joint-session presentations.

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Negotiation Management: A mediator's skill in managing the negotiation process almost always is at the heart of whether progress is made at a mediation session. Where, as in the BuyCo/SellCo dispute, it turns out that the issue is basically who will pay what money to whom, the mediator's task is, at bottom, facilitating an offer-counteroffer process.

Put another way, the mediator needs to manage a positional bargaining process that is fraught with risks of posturing and miscommunication.

Much of what the mediator said and did in the negotiation described above was driven by what he discovered as he interacted in real time with the parties with regard to their actual and proposed negotiation movement, rather than being based on what he had learned in his interactions with the parties prior to the in-mediation session negotiation.

That said, the mediator was better able to deal, again in real time, with the critical problems of an overly aggressive SellCo opening offer, and of the way the money was going to flow, because of his pre-mediation interactions with counsel for each side.

Most important, based on his ex parte call with BuyCo's counsel, the mediator came into the negotiation session reasonably certain that BuyCo was willing to pay, rather than insist on being paid, as a part of a settlement.

While the mediator needed to be careful how he sought to use this judgment in coaxing BuyCo into the bold move of conceding the direction of money flow, he pressed earlier and harder than he might otherwise have done had he been completely at a loss about whether BuyCo was looking to be paid or to pay.

As a result, he was able both to truncate multiple negotiation rounds and eliminate the possibility that a polarizing response from BuyCo of, say, "Pay us $50 million," in response to SellCo's aggressive $115 million demand, would be tabled, and shut SellCo's volatile owner down.

Although this information was softer, the mediator was reasonably convinced that SellCo's counsel was privately going to push his own client quite hard, given the combination of counsel's pre-mediation session ex parte comments, including "I think my client will be reasonable," and his seeking the mediator out after making the $115 million demand to say that the number was high.

This gave the mediator confidence that if he could persuade SellCo to offer BuyCo money, no matter how little, in its first proposal, he would, at least, have an ally in BuyCo's counsel when he told BuyCo's owner that unless BuyCo responded by backing way off the $115 million demand, the mediation would crater. The mediator sought to and did confirm this judgment by talking privately with SellCo's counsel before taking the BuyCo proposal into the room with SellCo's owner.

More generally, given mutual suspicion and an inherent fear in direct negotiation about giving away too much, neither side was inclined to tip its hand about true negotiating positions. It was only with the mediator's pushing, cajoling, and coaching that the parties were willing to retreat from extreme positions, and to signal, by progressive offers and counteroffers, that their settlement evaluations—driven by their respective risk analyses—weren't in completely different universes.

Brief direct negotiations, both between outside counsel and at the client-to-client level, got nowhere. The negotiations foundered before either side even articulated a concrete dollar demand over which way money should flow. Mediation was next. …

that mirrors what you see as the other side's unreasonableness."

"One option," the mediator suggested, "would be for BuyCo to counter that SellCo should pay BuyCo a much lower number, say $10 million or $20 million, to use 'plug numbers.'" The mediator added, "If you want really to help me do my job, I'd like you to consider a bolder move. The best way to find out what SellCo really is looking for is to give up on the issue of which way the money will flow and offer to pay SellCo, say, $2 million."

"We hear you," said SellCo's counsel, "but that will send a message that we're willing to talk in the mid-eight figures, and we're not remotely close to that. I hinted to you before the mediation session that we might be willing to write a small check to get rid of SellCo, but it's way too soon to move to their side of zero. They'll read it as a sign of real weakness."

"You can protect yourselves," the mediator answered, "by letting me convey such an offer with a very firm 'gloss.'"

After hard discussions, BuyCo agreed to counter with a $1 million offer, providing the mediator conveyed the number "along with an explicitly agreed commentary."

The mediator reviewed his notes and carefully prepared comments to make to SellCo before going to the SellCo breakout room: "Here's what I'm authorized to tell you about where BuyCo is," the mediator planned to say. "They've instructed me to tell you—and I'm editing some of their strong language—that they're more than just disappointed with your opening demand. They say, 'If SellCo really thinks $115 million is a reasonable place to start negotiating, we should just call it a day.' They also say they're not going to play tit for tat with you. They say they're not willing to respond to your $115 million demand. 'We are just going to ignore that, and try to put something on the table that will tell us quickly whether we can get anywhere.'

"They say they're going to make a bold move, hoping you'll then send a signal back that you want to get a deal done. They say they are 'making a huge concession by starting the negotiation on SellCo's side of zero,' and are offering to pay you $1 million to settle. They say they have 'more money, but not a huge amount more.' And they say, 'We're not paying you to settle this case anything close to the amount we paid you to buy the rights to develop the product. You need to come back with a counteroffer that establishes a top bracket well below what we paid you earlier if we are to get anywhere.'"

Saying he also would be happy to repeat what he was about to say to SellCo's owner, the mediator chose initially to report all this just to SellCo's counsel, without his client.

After SellCo's attorney had heard the counteroffer and the mediator's "gloss," but before he went back to his client, SellCo's counsel said for the second time that he knew the $115 million demand was way too high, but said his client insisted. He said his client worried that if he started too low, BuyCo nevertheless would make a counter demanding payment to BuyCo of all its damages. SellCo's counsel agreed that by taking the issue of who would be paid off the table, BuyCo had made a major negotiation move, even though it was only offering $1 million—which he said was "way too low."

After SellCo's counsel had a private meeting with his client, the mediator met with both of them. The mediator repeated what he had told SellCo's counsel, adding that SellCo's next move was crucial. The neutral suggested—given that it was late afternoon—that it might be better if SellCo considered its next move overnight. (See Exhibit 3, takeaways for Day One.)

THE SECOND DAY

During an overnight break, the mediator suspected that SellCo's counsel and other advisers were working to persuade the owner to meet BuyCo's demand that a counteroffer be made in the requested bracket. Negotiations proceeded the next day, with the mediator actively involved in suggesting moves and counter moves.

In addition, in order to get upward increments in the money offered from BuyCo's representatives, who were still highly skeptical that SellCo's owner would ever be, in their words, "really reasonable," the mediator privately made clear to BuyCo that he believed he needed to "push SellCo much more than BuyCo." But the neutral quickly added, "I may have to push you later. I'm pushing SellCo and its owner now; but you need to give me more to work with."

In private conversations with SellCo's lawyer, who continued to be an intermediary to the mediator on his client's behalf, it seemed to the mediator that his views of SellCo's significant arbitration risks—with regard to its affirmative claim, the counterclaims, and an attorney's fee award—were not materially different from those of SellCo's attorney. But SellCo's attorney confided that he was having a hard time moving his client down.

At a key point, the mediator sat down for a half hour with SellCo's owner, with his attorney's permission, to set out how the mediator predicted the arbitration panel would likely come out if the matter didn't settle. "I'll never know as much about this case as your lawyer," the mediator said. "But I have looked carefully at the 'jugular' issues, and I don't have any ax to grind. I'll offer you my 'two cents,' with the understanding that your lawyer's advice is worth at least a quarter."

After noting that BuyCo had risks and potential problems in the litigation—"which is one reason why they're willing to pay you money, rather than insisting you pay them"—the mediator then provided reasons why he thought SellCo was at significant risk, both with regard to its affirmative claim and in dealing with BuyCo's counterclaim.

Among other things, the mediator noted that the arbitration panel comprised three sophisticated commercial attorneys, two of whom made their living representing corporations, often in contractual matters.

The mediator said he thought it would be hard for SellCo's counsel to persuade the panel to overlook the contractual allocation of rights that literally gave BuyCo—in the context of its multimillion dollar upfront payment—"broad discretion" (absent bad faith, which the mediator said he didn't see) to decide whether and how to develop the product.

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The mediator also noted that one risk BuyCo had was that it would have no realistic recourse if the panel, for whatever reasons, went in the opposite direction with this analysis.

Soon after mediator's tête-à-tête with SellCo's owner, SellCo's attorney reported the owner's willingness to agree to settle at a number in the $10 million-to-$15-million range that the mediator had recommended as a logical end point for the parties' negotiations, and which the mediator already knew he could get from BuyCo. (See Exhibit 4 for the lessons learned.)

Exhibit 4. Overall Takeaways

The synthesized mediation described in the accompanying article mirrors best practices, at least in the context of the commercial disputes on which this author concentrates.

These best practices illustrate why mediation adds value to resolving disputes that would otherwise be turned over to a third party for decision, whether to arbitrators or some combination of judges, juries and appellate panels.

But for mediation, each of the several disputes synthesized into the description above likely would have gone to final, binding and non-appealable arbitration, or, at the very least, settled much later in the course of litigation, after significant additional transaction and opportunity costs.

If we look back over the course of the mediation effort described above, multiple takeaways can be teased out.

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Risks of Direct Negotiation: In this dispute, there was little, if any, likelihood that further direct negotiations could have gotten anywhere between the business people. The executives were antagonistic to each other—to put it mildly. Nor would direct negotiation between their attorneys have helped at that point, even though they got on well with and respected each other.

Both because of his pre-mediation-session interactions and what he learned as he worked with the parties at the mediation session, the mediator was able to deal with the business people to dampen their antagonism and focus their attention on trying to find a solution each could live with.

* * *

Merits-Based Dialogue: Given strong doubts about getting to settlement, neither side would have been willing, without pushing by the mediator, to articulate their best case arguments for the other to consider and evaluate.

While it started off on the wrong foot, the pre-mediation exchange of written views on merits issues framed the parties' interactions on whether and how each should discount claims for settlement purposes.

The premise is that getting one or both parties to realize, at the least, that there are potentially credible counter-arguments to positions that their lawyers and clients have previously thought relatively impermeable should affect internal deliberations about settlement valuation.

By getting those views into each side's hands before the mediation, the efficiency of the in-person session was increased. Moreover, the presentation of merits-related views in writing, rather than orally, requires a discipline that tends to restrain a lawyer's temptation to stretch advocacy too far.

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Mediator Credibility: Focusing on pre-mediation submissions also allowed the mediator to get up to speed before the actual mediation session on merits-related issues, in parallel with his efforts, through ex parte interactions, to understand barriers to and incentives for settlement. This allowed the mediator, as he began meeting separately with each side to get a negotiation going, to react quickly and incisively as devil's advocate when counsel sought to "lobby" the mediator with counterpoints to the other side's arguments.

Mediators who can quickly convince lawyers and clients on each side they that they "get it" with regard to the parties' merits-related differences are much more likely to be listened to carefully when they attempt, using an entirely different skill set, to help the parties avoid negotiation pitfalls that otherwise would delay or stop movement toward a solution.

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The Mediator's Evaluation. Given the care with which a lawyer who believes his or her client is overvaluing a case must deliver that message—otherwise risking loyalty questions—it took the mediator's external analysis, carefully and respectfully delivered, to get SellCo's owner to make a final, significant move. Such shifts of a mediator's role, from facilitator, coach, coaxer, and devil's advocate to, in this case, arbitrator surrogate ("Here's how I'd be reacting if I were arbitrating this matter"), are risky.

A mediator who honestly says what he thinks—as compared to, improperly in my view, telling *each* side "what a terrible case you have"—risks alienating a side that is hearing that the mediator doesn't buy chunks of its case. The mediator risks losing his or her ability to be perceived as a neutral intermediary. Given that risk, shifting from devil's advocate to actual evaluator is best undertaken either as an act of last resort ("I can't think of anything else to do to break an apparent impasse") or, as happened in this case, as a gap closer.

At SellCo's counsel's request, the mediator's offering personal views with appropriate deference—"my two cents to your lawyer's quarter"—to SellCo's owner helped bridge the remaining gap preventing agreement. The mediator's ability to do that with full credibility—not just to SellCo's owner, but also to SellCo's lawyer—turned on the combination of his having worked, before he arrived at the mediation session, to master the parties' views and analysis on key issues by focusing on mediation submissions and exhibits.

The mediator also built on his earlier work by merits-related interactions with counsel at the mediation session as a part of his back-and-forth efforts to move the negotiation process forward. Those moves included asking counsel to justify, with risk analysis, a particular offer or counteroffer.

It's noteworthy that in this case the mediator didn't shift from devil's advocate to evaluator in his interactions with BuyCo. Nor did he disclose to BuyCo that he had offered merits-related views to SellCo's owner to move him to a final deal.

The mediator did what was necessary, and not more, to get the deal done during the mediation session. His ability to accomplish that goal turned in material part on work he had done prior to arriving at the session.