

In a COVID-19 World, Using Creative Mediation Techniques Before Litigation or Arbitration May Be Best for Managing and Resolving Business Disputes

By CONNA A. WEINER

The unprecedented global business disruption caused by the COVID-19 pandemic will require commercial disputes to be managed differently. Organizations must think about the future now to preserve their business relationships, with a focus on success for all. More concretely, the COVID-19 has made dispute resolution alternatives to litigation even more important than ever; they may be the only practical options if parties cannot reach a resolution themselves.

As I have written previously, even in a pre-COVID-19 world, a robust mediation before litigation or arbitration made tremendous business sense. Business leaders desire to preserve current business relationships; avoid public fights with collaborators, customers and regulators; and focus on driving their business objectives rather than

dealing with a lengthy process culminating in a binding decision issued by an adjudicator, not an agreement crafted by the parties. Filing a lawsuit is expensive, invites counterclaims, exacerbates conflict and kicks the settlement off-ramp down the road. A robust mediation process can help (or force) the parties to prepare for any next steps.

The benefits of and special techniques appropriate to these types of pre-litigation mediations are even more critical to consider given the current situation. Done right, mediation before litigation provides the following:

Speed: Quick resolutions will be critical as businesses grapple with existential threats, and mediation is clearly the most



efficient form of alternative dispute resolution. Court schedules will be limited at best for the foreseeable future. Compared to mediation, arbitrations, which are often quicker than going to court, can still be a challenge to coordinate and conduct quickly particularly if a three-party panel is involved.

“Remedy” Flexibility: Mediation provides the parties with

the opportunity to get help structuring flexible, business-focused remedies for their disputes. Litigation and arbitration result in enforcement of a contract or not; judges and arbitrators simply are not empowered to explore with the parties a middle ground or creative solution that reflects the circumstances.

Practicality: Any fear that suggesting mediation where it is not required by contract will make an advocate look weak or unsure about their case is significantly ameliorated in today's environment. These are special times requiring the ultimate in practical, forward-looking thinking.

The Caveat: However, there is a significant caveat to all of this: Successfully mediating before litigation or arbitration requires special techniques and a change in the way advocates think about the typical mediation, which often focuses on a single in-person session and careful selection of the mediator. A flexible process guided by a neutral mediator involving extensive preparation, such as fact-gathering and even interviewing of those involved in

the dispute, and requiring lawyers to put aside the litigation mindset and share facts and legal arguments with an adversary is critical. Multiple sessions and follow-up can create a framework for having productive discussions and defining success. It's also important for business clients to play major roles, particularly CFOs, risk managers and other executive and functional leaders, which keeps discussions feeling like a solution-oriented business negotiation.

Finally, as with many pre-litigation business disputes, it may be smart to enlist a mediator with a business and transactional background, as well as litigation experience, because discussions will often proceed on two tracks: litigation risk and business problem solving or restructuring. Selecting a mediator with previous global inside counsel experience, which always includes a significant dose of project management designed to meet the needs of many stakeholders from different cultures and a focus on practical, creative and speedy business resolutions, will also be very helpful.

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