

Prepare to Settle

Develop a Pre-Mediation Framework for Complex Business Disputes

BY LAURA WATSON AQUILA & TONY ROSPERT

Consider this typical mediation scenario and how the parties could have avoided it by exchanging alternative settlement scenarios and outlining a framework for resolving the case in advance of the mediation: Two companies, both members of a joint venture involved in a complex and contentious lawsuit, have been patiently waiting in their respective conference rooms for hours while a mediator conducts her version of shuttle diplomacy. The parties have previously exchanged monetary settlement offers, and the mediator has devoted most of her time and attention to trying to broker a lump-sum settlement payment, without success. To break the impasse, the mediator proposes a scenario in which the defendant buys out the plaintiff's share in the joint venture — a complete business divorce. While the concept is attractive to both parties, the mediator and the parties are left scrambling to develop what an acceptable settlement structure might look like. The mediator does her best to help the parties create a framework for a mutual separation, but even this seasoned mediator does not have the intimate knowledge of the parties' business relationship necessary to offer substantive assistance on the deal's technical terms. As a result, the parties cannot reach a settlement and everyone leaves the mediation feeling disenchanted with the process.

Prior to mediations involving complex business disputes, parties like those described above typically exchange offers and counteroffers focusing only on the dollars involved. They may exchange mediation briefs addressing their strengths and weaknesses regarding the substantive legal and factual issues, but they often spend little or no time constructing a common framework to

negotiate an actual resolution. Instead, the parties often rely on the mediator to structure the settlement "on the fly" during the mediation. In a complex case, the mediator may not have the background or grasp of the facts and the law needed to create an effective settlement structure and foster positive negotiations. It is no surprise, then, that mediations often fail because the parties talk past one another and the mediator.

The parties should instead iron out structural issues prior to mediation by identifying different settlement scenarios. Such a pre-mediation framework provides a road map outlining how the parties propose to structure a settlement should they reach a compromise. By addressing the structure and potential settlement terms prior to the mediation, the parties can help ensure they are in the same bargaining zone before investing the time and incurring the costs associated with mediation.

Step 1: Brainstorm Settlement Structures

To develop a common framework for mediation, each party should first discuss with its counsel possible settlement scenarios that address its needs and goals, with the primary focus being what it hopes to accomplish at the mediation and the desired end result. The parties possess insights into their business relationship that the mediator does not, making them best suited to develop a settlement structure that will work for them and their businesses going forward. This certainly does not mean that the parties will agree on a settlement payment or final resolution. Rather, it suggests that they can at least develop a path to settlement that will facilitate the mediation process.

While the necessary inquiries here may be fact-specific and there is no one-size-fits-all

formula for settlement, common issues arise in complex business disputes that the parties should consider. First, is there a scenario in which the parties could continue to do business together, or has their relationship been soured by the litigation process? If the parties believe there is a path forward together, they should contemplate settlement terms that will enable the relationship to succeed. For example, would they need to draft a new contract governing their relationship or could their existing contract be amended to clarify the provisions that resulted in the current dispute? Dollars and cents still matter here — the parties will need to determine whether one must pay the other some amount for past damages — but the goal is that if a monetary agreement is reached, structuring the settlement will not impede a successful resolution.

Another scenario to explore involves one party buying out the other side's business interest, stock, product line or asset in dispute. If this type of resolution is possible, the parties should consider various settlement structures in which each party is buyer or seller. They should contemplate the documents that would have to be drafted to facilitate such a transfer and whether any unique provisions warrant examination during mediation.

The parties should, of course, also consider the "typical" settlement scenario in which one party pays the other some amount of damages and they terminate their business relationship. In this case, the parties must determine how they will dispense with any current business that is in the pipeline, how their affairs will be wrapped up and any resulting settlement provisions that may be necessary.

Consenting to a structure prior to mediation can help establish trust between the parties by demonstrating that they are serious about a settlement, which can continue into the mediation and increase the chances of resolving the complex case. There is no doubt

there will be obstacles along the way to a possible resolution, but agreeing to a potential settlement structure in advance at least puts the parties on the same path.

Step 2: Agree on Basic Settlement Terms

Certain provisions or concepts are common in most settlement agreements and warrant the parties' attention up front should they reach an amicable resolution. For example:

- What claims are being released?
- What parties will be released?
- How broad are the releases?
- Is a confidentiality provision and/or non-disparagement clause necessary?
- Will the parties cover their own attorneys' fees and costs?
- What is the accepted method of payment for a monetary settlement?
- Are terms needed to address unique circumstances, such as tax issues?

Reaching consensus on these critically important issues prior to the mediation can help avoid a worst-case scenario: The parties agree on a settlement structure, but a satellite issue such as confidentiality derails an amicable resolution.

Step 3: Distill the Ideas Into a Term Sheet

Once each party and its counsel have fully developed the possible settlement scenarios and terms, counsel should memorialize them in writing. The proposed term sheet should outline paths to settlement that warrant further discussion with the other side. The document should be flexible so it can easily be altered at the mediation should changes to the terms or structure be necessary. While it also should be streamlined and fairly brief (i.e., several bullet points), it should include all the provisions for each settlement scenario that the party believes are vital to settlement.

Step 4: Share the Term Sheet

Once each party has distilled its settlement framework into a written document, the parties should exchange them, and also decide whether they wish to share their term sheets with the mediator. The parties should stipulate that trading term sheets is purely an exchange of information and requires no agreement by either party to the other's proposed terms to proceed to mediation.

Step 5: Evaluate the Term Sheets and Prepare for the Mediation

With the other party's term sheet in hand before mediation, each party should carefully evaluate all settlement proposals that are on

the table. Each should consider whether it is worthwhile to have additional pre-mediation exchanges with the other party, or whether clarification of any of the proposed scenarios is necessary. If either party proposes a creative solution not previously considered, the two sides should play out that scenario and see if it is workable. The parties should evaluate risks and rewards as they would before any mediation, but they now are equipped to explore several paths to achieving settlement.

Preparation is Key to Success

The simple steps described above can help facilitate a successful mediation. Developing a pre-mediation structure that provides each side with a clear understanding of the other's position delivers many benefits. It does not ensure that the parties will agree on a settlement payment or final resolution before (or even at) mediation — these outcomes may not be possible. Rather, outlining a structure allows the parties to focus on the critical issues in the dispute, which may help expedite the process. In addition, agreeing on a structure prior to mediation demonstrates the parties' commitment to reaching a settlement, creating candor that will be valuable throughout the mediation. If each party is willing to invest the time to

have thoughtful pre-mediation settlement exchanges with the opposing party and its counsel (and, perhaps, the mediator), the potential for achieving a successful resolution can be greatly enhanced.



Laura Watson Aquila is an associate at Thompson Hine LLP, where she is a member of the firm's Business Litigation group. Ms. Aquila is skilled in resolving complex business disputes involving multiple parties and claims in federal and state courts across the country. She has been a CMBA member since 2008. She can be reached at (216) 566-5824 and Laura.Aquila@ThompsonHine.com.



Tony Rospert is a partner with the law firm Thompson Hine LLP in its Cleveland office. He focuses his practice on complex business and corporate litigation involving financial service institutions, commercial and contract disputes, indemnification claims, shareholder actions, business transactions, pre- and post-closing merger disputes, class actions, regulatory enforcement and tax controversies. He can be reached at (216) 566-5861 or Anthony.Rospert@ThompsonHine.com.

The experienced financial experts at **McManamon & Co.** will help your clients navigate complex financial issues.

McMANAMON & CO., LLC
CERTIFIED PUBLIC ACCOUNTANTS

➤ Damages & Evaluations

➤ Business Valuations

➤ Fraud Investigations & Deterrents

➤ Insolvency & Restructuring



Jeff Firestone,
CPA, CFE
Director of Litigation Services

phone: 440-348-1878
jeff@mcmanamon.com
www.mcmanamon.com/bar