

### Mediating the Billion-Dollar Case

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**M**ediating every case requires digging into the case, active listening to the parties, good communication and sensitivity on the part of the mediator. But the billion-dollar case or even those involving multiple hundreds of millions of dollars are often company-threatening cases that require particularly special attention. Here are some suggestions for billion-dollar cases:

#### **Present and Discuss a Procedural Plan**

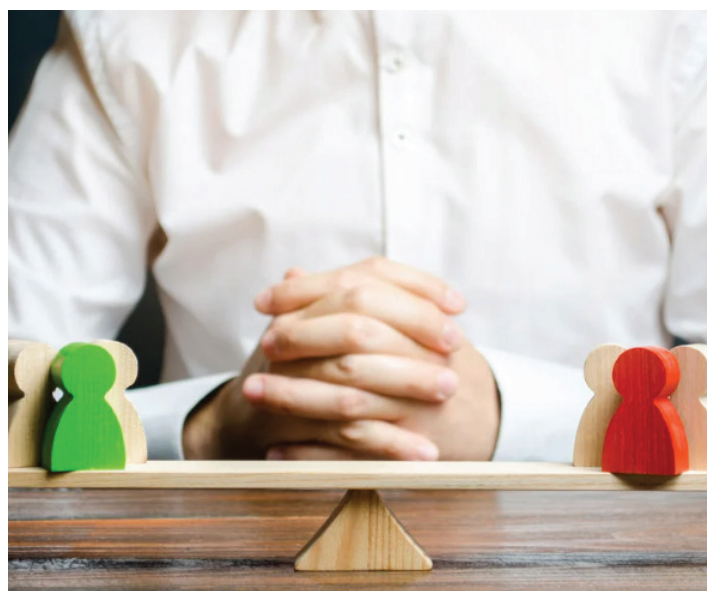
Parties in a huge case should be made to feel confident that the Mediator is giving them a pathway forward that will help them actually get to a settlement.

As soon as I hear from counsel retaining me, I send out an email to set up a planning meeting, and in that email I propose that we discuss (1) the nature of the case(s), (2) dates for materials to educate me, (3) dates for separate meetings counsel and senior representatives, and often multiple such pre-meetings and (4) the date(s), format and location of the main mediation session(s).

My goal is to help counsel and their clients feel comforted from the very outset that I am committed to helping them resolve the case or cases.

#### **Show You Really Care and Make Clear You Are Always Available on Short Notice**

I emphasize to both sides that I really care about helping them get to a resolution and will dig into their case(s), put in all my energy and be available essentially 24/7 just as I was in the mega cases I handled as litigating counsel. I let them know



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that I am available on short email notice to help them think through ideas or constructs as to what might work for settlement. I will Zoom with them; I will travel to meet them and their clients.

#### **Be Sure You and Counsel Have Access to Key Decision Makers**

The involvement of key decision-makers in a billion-dollar mediation is crucial, but the issue is when. Plainly the CEO, COO, CFO and board members often will not have the time to participate from the outset. Ultimately there may be decision-makers that cannot be at the mediation table in the early stages. In some cases, the general counsel or the head of litigation will take the immediate lead on behalf of the company.

However, discussion should be had with company counsel to assure that they have access to the appropriate decision-makers. I also offer to meet or speak with top executives and/or the company's board of directors when it comes close to getting to a deal or when negotiations get stuck.

### **Separately and Privately Show Each Side the Risks of Proceeding on the Litigation Path**

One reason I often share a separate confidential written "mediator's illustrative offer analysis" with each side's counsel is to give each side something in writing that can be shared with senior executives that explains the risks and costs of litigation, but does not dictate a conclusion.

My analyses do not declare winners or losers, but they do allow the parties to assess themselves their own percentage likelihood of prevailing in the litigation and to see in a stark color chart or charts the potential monetary risks along with the enormous costs of litigation.

### **Be Sensitive to the Securities Laws**

Public companies in very large company threatening cases must operate in compliance with securities law obligations that may require reserve changes and disclosures if formal settlement offers are made by the company. As a result, it can be explained to both sides at the outset that the parties may need to work with "offer recommendations" rather than firm offers until a final recommended settlement is reached.

In reality, when board of directors' approval is needed to make an offer of a particular size and when all the details surrounding a monetary proposal are very important, a deal is not fully done until it is done.

### **The Conditional Offer and Brackets Are Your Friends**

It is often very difficult to move parties to particular amounts other than very small moves without them first having an idea of where discussions might go. The best icebreaker for this is the "conditional offer" or "range." For example, if the plaintiffs have moved down from a \$1 billion demand to \$900 million in their fourth offer, and

the defendants moved up to only \$50 million, the conditional offer presents an excellent solution for either of the parties to incentivize the other to make a bigger move.

The construct of the conditional offer is "we will move to \$X, if you move to \$Y." Putting it into our hypothetical, I might advise the defendants in their next move to make a conditional offer such as "we will move up to \$200 million if plaintiffs move down to \$600 million."

The plaintiffs could either accept the offer, which creates a new bargaining "range" between \$200 million and \$600 million, or present plaintiffs' own conditional offer in response, such as "plaintiffs will move down to \$800 million if defendants move up to \$400 million."

These conditional offers convey enormously helpful information. They show the ranges around which each party would settle. With competing conditional offer ranges, one can calculate the mid-point between the two mid-points, and test how close that is to a neighborhood in which a settlement might be achieved.

### **Brainstorm Every Conceivable Path to Resolution**

From the outset, I am trying to think of every conceivable approach to settlement, whether pure cash, payments over time, apologies or public retractions of alleged defamatory statements, sale or transfer of assets, renewing or creating business partnerships or any other potential solution.

I ask counsel and then party representatives to help brainstorm about alternatives to cash—if there are any—at pre-meetings so that everyone has an idea of what might be on the table once we get to exchanging offers or offer recommendations at the main mediation session.

### **Be Optimistic**

I know that the parties and counsel in large cases like these will have bouts of pessimism about the prospects for settlement at one point or another, but I remind the parties that I have settled most of the cases I mediate and am optimistic that I can help settle theirs. I try at every opportunity to display optimism, enthusiasm and commitment. Humor can also help, and I try to use it when I can.

## Help the Parties Put Themselves in the Other Side's Shoes

It is critical in negotiations that the parties see the case from the other side's perspective. I am always trying to get each side to at least recognize why the other side is behaving as it is. Sometimes I will ask the party counsel and representatives that are in their negotiating room to "play the other side" and make the next bid they would make if they were on the other side.

The discussion that follows with each participant coming up with a number they would choose if they were in the other side's room and the reasons for it helps the parties better see the other side's perspective.

## Be Persistent

Believe it or not, companies faced with company threatening exposure can freeze. It can be very hard for senior executives to recommend huge settlement amounts to a board. The company is used to making business deals. Paying enormous litigation settlements, even if practically necessary and obvious to a neutral party, is difficult to process.

If we cannot settle the case at the first mediation session, I am right there the next morning reaching out to both sides to find a path to continue. Almost inevitably, we find a way. It helps for the parties to know that you will keep pushing.

## To Zoom or Not to Zoom?

Zoom and its other video conferencing competitors provide a compelling resource for conducting a mediation or at least pre-mediation and post-mediation conferences with each side that can happen on short notice wherever participants are located.

I have found that parties are often most comfortable, engaged and focused on getting to a deal in an in-person main mediation session, but sometimes the parties are just too far apart geographically or "life gets in the way" for one or another key participant so that they cannot all come to an in-person meeting in another city.

Even though the in-person main mediation session is the gold-standard when possible, I have also had great success—really almost equal success—with both full Zoom mediations as well as "hybrid" mediations when one whole party team or one or a few key players in an in-person mediation session are hooked in by Zoom on large television screens in a physical conference room at a main mediation session.

Once we have already had our main in-person mediation session or sessions, it is much easier to continue with separate Zoom or even telephone shuttle diplomacy to finally get to an agreed resolution. Sometimes one additional in-person session is required to get everyone (or almost everyone) together with sufficient commitment and full attention to closing a deal.

## Conclusion

Mediating the billion-dollar case presents company-threatening challenges that require particular mediator attention and focus such as being cognizant of a public company's securities law obligations, being sure that there is a communications stream in place to reach the highest-level company decision makers and showing the parties a 24/7 commitment and determination to help them get to an acceptable resolution that their case warrants.

**David W. Ichel** is a full-time mediator, arbitrator and special master in complex commercial disputes, both national and international at Federal Arbitration (FedArb). He retired from Simpson Thacher & Bartlett in New York.

