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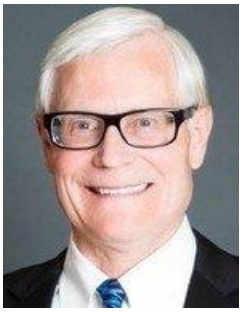
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

4 Opportunities For Mediators To Settle Big-Dollar Cases

By **Robert Fairbank and Kimberly West** (August 27, 2020, 4:06 PM EDT)



Robert Fairbank

Kimberly West

We believe that, over the last five to 10 years, mediation in the business world increasingly has evolved into two distinct markets that require materially different approaches and, often, time frames for resolution: (1) large, multimillion-dollar, highly complex cases that ultimately settle in the seven, eight or nine figures, more often than not requiring a longer period of settlement efforts; and (2) other business and legal disputes involving lower damage amounts and less complexity, which often settle during a single mediation session.

Focusing solely on the first category in our mediation practice, we perceive this arena of cases to be a specialized market that demands innovative and continually evolving approaches in order to identify specific stages of the dispute, or windows, when the timing and opportunity to facilitate a settlement are most ripe and the mediator can be most effective in persuading the parties to compromise.

This article follows up on a previous Law360 guest article, "Mediation Tips for Settling Big-Dollar Business Disputes." In that article, we discussed various tools and techniques for identifying and maximizing the windows of opportunity to settle major cases.

Here we discuss in more depth when these windows might arise depending on the litigation stage of the case when it is first brought to the mediator, and how the mediator can still have a productive impact on settlement dynamics before the optimal window arises.

Specifically, in seeking to resolve the largest and most complicated disputes, how and when does a mediator successfully bridge a gap that may be millions of dollars apart when, even after substantial time spent challenging each side on their respective risks and weaknesses through an in-depth evaluative process, the parties are nowhere near the same ballpark or landing zone after a few rounds of formal moves?

How does the mediator keep the process alive and remain useful when the parties get stuck at numbers that are extremely far apart at the end of the day, and the realistic risks and challenges still have not been absorbed sufficiently by one or both sides to trigger significant movement despite the mediator's candid assessment of each side's strengths and weaknesses?

Over the last several years, we have observed the following patterns in disputes depending on the stage of the litigation when the mediation occurs, and correspondingly, when the right window for settlement arises.

1. Prefiling of a Lawsuit

Often, cases that have not yet begun the formal litigation or arbitration process are most difficult to settle, as neither party has incurred the costs or burdens of litigation by, for example, having their business executives deposed about a sensitive or potentially embarrassing area of inquiry, or getting an adverse ruling from the judge on a significant issue or cause of action.

Neither side is likely to have sufficiently considered or absorbed a realistic and practical sense of the potential outcome of litigation, and the related risks they face.

We have found that disputes that are brought to mediation in the prelitigation stage often fall in two categories.

The first includes cases that are ripe for settlement in the prefiling window due to factors that might include concerns about the publicity of a lawsuit, taking legal positions that are unique to the particular dispute but contrary to the party's interests in other areas, and precedential impact of a ruling on future cases. The parties may also have an ongoing business relationship that they want to maintain, which litigation would threaten.

The second category includes cases where it is premature to achieve a settlement without more information about the merits of the case from discovery or early rulings from the judge, but both sides decide to mediate because they want to test the ability to settle quickly and see if the other side blinks, so to speak.

In this latter set of cases, the defendant may be resistant to a quick settlement before litigation out of concerns that it will become an easy target for others who are similarly situated to bring lawsuits against it — for example, in intellectual property infringement cases against major websites that host multitudes of different licensed material — and does not want to encourage other would-be plaintiffs to bring similar holdup cases by putting any significant settlement dollars on the table prelitigation.

The plaintiffs, particularly if they are confident in the strength of their potential claims, will likely hold firm at a high number and decide to litigate, and thus the early-stage mediation appears to be a dead end.

In these kinds of cases, however, even if an early settlement seems like a long shot, the mediator can — and should — still make the effort productive and beneficial by establishing the foundation for a later settlement. How?

One trend we believe is emerging in this bifurcated market is utilizing the resources of a two-person mediation team and significant investment of time beyond the initial mediation session, both valuable and effective components in ultimately resolving the most complicated kinds of disputes.

By undertaking an in-depth analysis of the merits of the case, eliciting information and forcing the parties to confront tough questions about their respective positions, the mediator can give the parties

the advantage of an early preview of how the case might play out that otherwise may not begin to materialize until at least the discovery stage.

Even in this premature window, this kind of intensive evaluation of the case begins to instill a sense of realism into the potentially resistant client, counsel or insurer at an early point about the challenges they face if the litigation proceeds. The mediator should then stay engaged with the parties through regular updates until the dispute becomes riper for settlement, and consider exploring proposed numerical brackets or ranges for further negotiations to start to narrow the monetary gap and get a better sense of where a settlement might ultimately be achievable.

2. Pleading or Early Discovery Stage

Similar to the prelitigation stage, the mediator should give the parties an early dose of realism by evaluating the case as much as possible without the benefit of complete formal discovery. This can either result in a successful settlement at that time, or the mediator may have to wait several months to actively reengage after further discovery, additional litigation expense, and/or a possible impending summary judgment ruling that have perhaps softened one or both sides.

Assume, for example, that the mediator is presented with a case following an initial public offering, in which the shareholder plaintiffs have many viable causes of action that were upheld at the motion to dismiss stage just prior to the mediation, including breach of fiduciary duty and conspiracy claims based on alleged acts of self-dealing and conflicts of interest by company entities.

It is unclear at this stage, however, to what extent the evidence will actually support the factual allegations. Over the next few weeks (or months) following the mediation, the mediator should press the defense on what avenues the plaintiffs would likely be pursuing in depositions of executives and force them to confront the risks of the potential lines of inquiry. Ultimately, the defense may decide to settle rather than go down the road of embarrassing and perhaps risky discovery.

3. One to Five Months Before Trial

In the months leading up to trial, when the record is most developed and the parties are at their busiest in trial preparation mode, the mediator should invest the time to do a deep dive into the merits of the case by reviewing expert reports, key depositions, mock jury results and other significant material.

The mediator should ask to conduct a videoconference session to interview a party's lead expert to independently evaluate their credibility and persuasiveness, or watch video clips of deposition testimony from important fact witnesses, and give a candid assessment to the parties.

We have found this investment of time and effort, and frank confidential feedback by the mediation team, to be welcomed by the parties in many cases at this stage of the case, and it often can trigger a settlement when a party is forced to confront the potential impact of a particularly shaky witness at trial or damaging area of testimony.

4. Eve of Trial or Upon the Start of a Trial or Arbitration Hearing

The time when parties are imminently about to face the music on the eve of trial is traditionally thought of as the best chance for settlement — one notable recent example being the state of California and Sutter Health's historic $575 million settlement to resolve antitrust claims on the verge of a high-

profile jury trial in 2019 after having just completed a week of jury selection.

However, sometimes an opportunity to settle a dispute may arise just after the beginning of trial, when new and potentially unforeseen dynamics emerge that alter one side's perspective and willingness to negotiate.

Assume, for instance, that a case is first brought to the mediator one month or so before trial, with a confident plaintiff in an eight-figure breach of contract matter against a Fortune 500 company. The plaintiff presents a strong case on the merits, and consequently holds out for a high number up until the beginning of the trial.

Shortly after the arbitration hearing begins, however, a wild card disrupts the plaintiff's view of its case: The arbitrator makes comments suggesting skepticism of plaintiff's case and its experts. The plaintiff, feeling that its ability to fully and successfully present its case is being stymied, agrees to a settlement at a materially lower number than it was willing to consider before.

In sum, we believe that, in this bifurcated mediation market, the complicated, multimillion-dollar matters are differently situated from other mediated disputes. The different phases of a large case present unique opportunities for the mediator to make progress and lay a foundation for settlement when the time is right, whether that optimal window arises soon after the scheduled mediation session or several months down the road.

Robert H. Fairbank is a mediator and the founder of Fairbank ADR. He is an adjunct professor at the University of Southern California Gould School of Law and the co-author of a treatise on California civil trial practice, "California Practice Guide — Civil Trials and Evidence" (The Rutter Group).

Kimberly M. West is an assistant mediator at Fairbank ADR and has contributed annual updates to the "California Practice Guide — Civil Trials and Evidence" since 2012.