TECHNOLOGY-RELATED MEDIATIONS AND ARBITRATIONS

By David Allgeyer and Harrie Samaras

Below are tips to consider for mediating or arbitrating technology-related disputes.

Mediation tips. *Consider whether mediation is likely to be beneficial.* Factors to consider in deciding whether to pursue mediation for a dispute are: the parties' goals for managing the dispute; the suitability of the dispute for mediation; the general benefits of mediation; the motivation of the parties to pursue a problem-solving, rather than an adversarial, process; the relationship between the parties and their counsel; and the practical realities such as whether the parties have the necessary resources to negotiate worthwhile trade-offs.

Be diligent in choosing a mediator. Identify what the parties need from a mediator in terms of particular credentials, style, and skills. Compile a list of mediators who may satisfy those needs. Interview candidates to determine if they in fact meet the parties' needs. Communicate to mediator candidates what the parties are looking for. Obtain references from candidates and contact references to determine whether the mediator is likely to meet the required needs.

Prepare yourself. Prepare yourself before preparing the party representatives.

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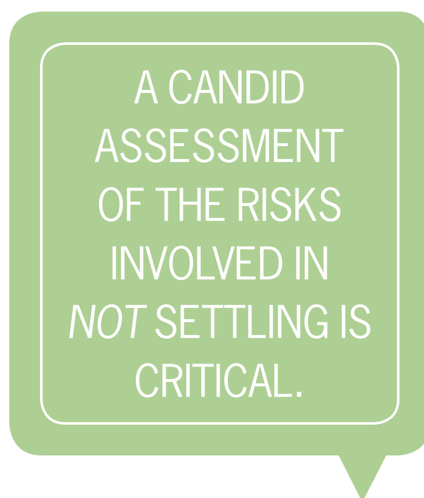
Think ahead about how the mediation session is likely to unfold in the case and find a proactive strategy for responding, rather than reacting. Before the joint conference planning call, be prepared to address: the date and location of the in-person session, information exchange, who is attending, specifics of the process, written submissions, and any issues particular to the case.



Think about who should attend the mediation. Determine who needs to be informed about the mediation before, during, and after the session, along with what information should be provided and by whom.

Counsel will want to investigate and gather key information related to the dispute. Information from the other side may already be available through discovery. Counsel should investigate the factual and legal issues in the case and understand their client's business interests. Drafting a set of key issues or terms to be addressed during the mediation, along with a settlement agreement that incorporates possible terms and conditions, can expedite a settlement.

Prepare party representatives. Explain what mediation is and is not. Review key facts and documents to ensure that all relevant facts are known and there are no discrepancies. Discuss who should attend, which should be someone with full settlement authority. A candid assessment and acknowledgment of the risks involved in *not* settling and their magnitude is critical.

Realistic and well-defined BATNA (best alternative to a negotiated agreement) and WATNA (worst alternative to a negotiated agreement) should be identified. A strong, realistic BATNA allows a party to negotiate a more favorable settlement or walk away from the session—at least for that day. A realistic WATNA lets a party know when it is time to accept a settlement rather than risk the worst, or reject a settlement that is not as favorable as the WATNA.

Arbitration tips. *Determine whether arbitration is best for disputes that could arise.* Arbitration is particularly attractive to parties

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in a business relationship who simply need their issue decided so they can move on. Similarly, arbitration provides businesses with a private forum where the confidentiality of sensitive information can be maintained. Arbitration is generally much less expensive than litigation. Disputes are usually resolved within a year rather than years. The parties select their arbitrators, so they can find decision makers they trust to be neutral and have significant background in the law and subject matter of the dispute. If you believe arbitration would be a good way to resolve any disputes under a contract, be sure to include an arbitration clause in the contract. Parties rarely agree to arbitrate a dispute after it has arisen if the contract does not require it.

Draft a viable arbitration clause. If the parties must have a side litigation about whether to arbitrate, they have lost a key advantage of arbitration. To avoid this, make sure the clause is clear and unambiguous. Instead of copying an arbitration clause from another agreement, it is better to start with a model clause of an arbitration provider such as the American Arbitration Association or the International Institute for Conflict Prevention & Resolution. Then decide the number of arbitrators—one or three—and the location for the arbitration. Be sure that either the contract or arbitration clause specifies what law will govern.

The clause can also address the qualifications of the arbitrators, limitations or guarantees of discovery, time to decision, and even require mediation before an arbitration is filed.

Be ready for the preliminary hearing. One of the key advantages of arbitration in a technology-related dispute is that the parties can help fashion a process uniquely suited to their dispute. Counsel should discuss their areas of agreement and disagreement with the arbitrator at the hearing to set the course of the proceedings.

The parties can also adopt discovery procedures best suited for the case. Discovery in arbitration is usually more focused and limited than in court. There usually will be fewer depositions and no interrogatories. Because the rules of evidence in arbitration are relaxed, the parties may be able to short-circuit some of the discovery common in technology cases in court.

Think differently about experts. Lawyers accustomed to jury trials tend to pick experts who will "play well" for a jury and are expert at testifying in court. In arbitration, the same considerations do not apply. An arbitrator versed in the issues and technology can gauge the expert's testimony by whether it makes sense technically, not by external factors. Thus, counsel should consider using qualified employee scientists and engineers as experts. This can save money and also be more persuasive.

Embrace flexibility at the hearing—but be persuasive. The rules of evidence do not apply in arbitration. Thus, hearsay will likely be admitted, as will evidence that might not be admissible in court. This provides counsel with opportunities to provide evidence in a logical way without as much concern for technical evidentiary requirements.

That doesn't mean anything goes. First, there is little use in presenting double-hearsay or other evidence that arbitrators will not find useful in deciding the case, even if it will be part of the record. Arbitrators will disregard unreliable evidence. Worse, relying on questionable evidence undermines your case.

Second, despite popular opinion, arbitrators do not have to listen to all evidence presented. It is true that the Federal Arbitration Act lists as a ground for overturning an award "refusing to hear evidence pertinent and material to the controversy." Note, however, the evidence must still be "pertinent and material." Arbitration rules allow arbitrators to decide what evidence meets that standard. ■

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