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Deal-Dispute Mediating: A Former Deal-Maker's Perspective

This is prime territory for mediation—especially because it's not easy for judges or arbitrators to resolve disputed issues of business judgment, nor may they impose on the situation the kind of resourceful business solutions that the parties can hopefully fashion with the mediator's assistance.

BY JIM FREUND

Most of the business disputes mediators handle are what I call "one-shot dollar disputes," involving parties with no continuing relations squabbling over money. This often becomes a zero sum game, with few variables that can prove useful in crafting a creative resolution. And since things usually end up in court if the parties are unable to reach a negotiated agreement, the litigation alternative forms the measure against which the parties evaluate any proposed mediation resolution.

There is, however, another kind of situation ripe for mediation that presents a blend of "dispute" and "deal" factors—what I call "deal-dispute mediating." Here, although specific items are in dispute (or even the subject of active litigation), other vital issues separating the parties aren't litigable at all. Rather, they're business matters, not involving claims of legal wrongdoing, that need to be resolved for final agreement to be reached. While the litigable disputes involve prior issues, these other matters deal with current and future issues relating to assets, liabilities, transactions and conduct—all of which can be difficult for the parties to reach agreement on without the help of a neutral.

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The need for deal-dispute mediating can arise in a number of different contexts—for example, a corporate joint venture that has soured, or a financially troubled company (with too many mouths to feed) attempting a turnaround to avoid bankruptcy, or a business breakup between long-time partners, each of whom wants to remain in business. I consider this prime territory for mediation—especially because it's not easy for judges or arbitrators to resolve disputed issues of business judgment, nor may they impose on the situation the kind of resourceful business solutions that the parties can hopefully fashion with the mediator's assistance.

By the way, just because some of these issues aren't litigable, don't assume that the level of ferocity between the parties over their outcome is diminished. Quite the contrary, I've found that ill will and bad feelings in a deal-dispute mediation may achieve a higher pitch than in a one-shot dollar dispute. The parties here aren't just quarrelling over past events but about stuff that's happening currently—new grievances occurring daily. Moreover, there's generally a high level of distrust that each side feels toward the other with regard to anything having forward-looking consequences. I've witnessed situations where the resulting emotions approach those in testy protracted marital squabbles.

So, for instance, in a business divorce case, the contested past issues are often of the who-did-what-to-whom or who-milked-the-company variety. The *present thorny* issues involve how to divide the assets, liabilities, employees and customer/clients of the business between the partners. Some of the *future* issues arise because the former partners will now become competitors, while others relate to complex matters that cannot be totally resolved at closing—an asset with substantial unrealized potential, a liability of uncertain dimension.

There are both similarities and contrasts between what works for the mediator in the one-shot dollar dispute and what's needed in a deal-dispute mediation. There are, however, two constants that I believe pervade all forms of mediated proceedings, including those of the deal-dispute variety.

The first of these is a lack of reality exhibited by the parties—not only displayed in the exaggerated positions they take on issues, but also as to their expectations regarding the terms on which a settlement might eventually occur. This can be the result of a variety of factors, but I have my own theory as to a principal reason for why this is so.

We've all heard people contrast mediation with litigation by noting that in litigation there's a winner and a loser, whereas mediation (if it works) produces what they like to call a "win-win" result. That sounds great—bestowing upon the mediation process a real "feel good" vibe. So, it's no surprise that a party envisions a "win" for himself out of the mediation—and, by the way ("We must be charitable, mustn't we?"), a win for the other guy, too.

There may be something to this viewpoint in one of those facilitated outcomes featuring an enlarging-the-pie resolution. But I regret to report that in the typical cases many of us mediate, a successful resolution is seldom viewed as a "win" by either side. Rather, it's considered as something I dub with the acronym "SCOPOL"—a Satisfactory Compromise Outcome Preferable to Ongoing Litigation. (Some parties may even take it down a notch to "barely satisfactory" or "not unsatisfactory".)

The only person who considers it a "win" is the mediator, who's now feeling good, having accomplished what she set out to do. No one else is jumping up and down clicking his heels. As the parties exchange unenthusiastic handshakes, they're wondering whether they gave up too much—especially in that zone between their exaggerated views on the merits and what it took to seal the deal. And while they occasionally thank the mediator for the effort expended, I rarely hear anyone say, "You hit it right on the nose."

Why is this the case? Because an outcome representing a clear-cut mediation "win" for Party A requires the settlement to be at a level that Party B would undoubtedly consider a "loss," to which Party B won't agree. And the mediator has no power to make him do so. Even though this is most commonly the case in one-shot dollar disputes, it also exists when there are multiple issues in deal-dispute mediation.

This disconnect between a "win" and a SCOPOL is the 800-pound gorilla in the room—a prime reason, in my view, why many

mediations that should result in resolving the dispute come to naught.

The second constant is that to achieve a successful outcome, the mediator has to be a good negotiator. If anything, this skill is even more vital in the deal-dispute area. The mediator's ability to persuade, willingness to bargain, mentality to conciliate, and knack of devising creative solutions to problems—these remain the keys to resolving impasse.

In the interests of full disclosure, I should note that—unlike most mediation professionals who hail from litigation backgrounds—for 30 years I was a transactional lawyer who negotiated all sorts of business agreements but specialized in handling mergers and acquisitions at the Skadden, Arps firm that led the M&A pack.

Although upon retirement two-plus decades ago I crossed over into resolving disputes as a mediator, I never lost my deal-maker's attitude toward solving difficult problems and moving things to closure. I like to think I bring a somewhat different mentality to dispute resolution than those whose experience has been primarily in the courts. The parties have, after all, hired me to help them reach a settlement—that's as strong a message as any corporate client ever gave me to "make this deal happen." I know why I'm there, and it's to get the problem resolved.

This deal-maker orientation is most evident in a deal-dispute mediation, which is chock full of handy moveable parts for the mediator's use in promoting overall compromise. I adopt an activist, judgmental approach to this (although it's also fertile ground for facilitative mediators). I'm all over the place—pushing, resisting, cajoling, expressing my views on the merits, and proffering compromises.

This, however, does not mean that the mediator should try to impose on the parties his or her own preferred solutions. Rather, the mediator must help the parties find their own mutually acceptable resolutions. So, while the mediator may have strong personal views on the merits of the various issues, he or she has to factor into any proposed resolution a healthy dose of feasibility—what it's possible to achieve.

If you're interested in hearing more about deal-dispute mediating, please see Part III of my book, *Anatomy of a Mediation—A Dealmaker's Distinctive Approach to Resolving Dollar Disputes and Other Commercial Conflicts* (PLI, 2012). It contains a comprehensive item-by-item treatment of a business breakup between partners—colleagues who have lately become adversarial but can't reach an accord on their own—in which the mediator needs to act in a creative fashion to bring about a negotiated resolution. I've always seen this as a logical direction for the practice of mediation to take—away from narrowly-defined litigable disputes and toward a more comprehensive approach to resolving conflict in fractious business controversies.

Jim Freund *is a retired partner of Skadden, Arps, Slate, Meagher & Flom, where he negotiated a number of major M&A transactions. The author of 11 books including Anatomy of a Merger, Lawyering, Smart Negotiating, and Anatomy of a Mediation, he is currently a commercial mediator on the FedArb panel.*