

Mediating Executive or Other Key Employee Disputes

By David W. Ichel

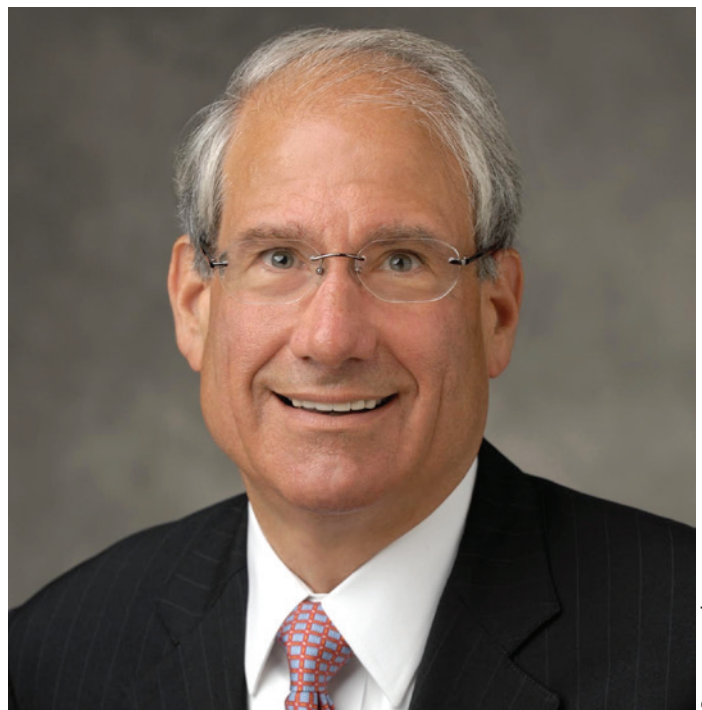
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A successful mediation requires sensitivity and attention to the needs of each side, but mediating executive or key employee disputes requires some specific considerations and alertness to sensitivities that merit discussion.

It's a Person's Career After All!

First, and foremost, we are dealing with a person's career –the place where the person has spent a good deal of her life energy. Thus, it is important for the mediator to:

- Let the claimant—whether a CEO, executive or other key employee like a television news anchor—know that you care and are listening. Actively listen to the person's side of the story and concerns.
- Help the employer team see the case from the employee's perspective so that they can understand what it could take to reach an accord. Actively listen to its side of the dispute, and understand the institution's needs, remembering that that the institution is made up of people as well who care about their own jobs.
- Help the executive/ key employee see the institutional needs of the employer and any factors the employee may be missing about the reasons for the employer's actions.



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Courtesy photo

Special Challenges Require Special Solutions

The types of executive and key employee disputes that benefit from mediation are too numerous to describe, but consider this sampling:

- **Discrimination, Harassment Claims.** Some disputes can involve an executive claiming discrimination or harassment. Some of these cases were brought or threatened as class actions. Others in this area can involve claims

for wrongful termination by the executive who has been blamed for such alleged conduct. Particularly in these highly charged cases, the parties need to feel heard. The mediator will need to learn how much of the solution is in financial recompense and how much can be bridged with other potential solutions such as an apology (written or personal), press release, official changes in corporate policy or organization, job references/recommendations, etc. Confidentiality will be an important negotiation issue.

- **Executive Departure to a Competitor.** Sometimes an executive leaves for a competitor. In other cases, the executive may be starting a new competing company (perhaps with private equity backing). These cases will generally involve restrictive non-compete/ non-solicit covenants and sometimes claims by (or concerns of) the company about misuse of company information. Here, attention should be devoted to creating negotiated restrictions that can fit both sides' business needs. Often times, there are unfinished remuneration issues as well. Confidentiality will also no doubt be a discussion point.
- **Executive Termination.** When an executive is terminated, there are often many layers of issues concerning compensation, benefits, ownership interests and restrictive covenants requiring negotiation, in addition to what could be important emotional issues facing the terminated executive. Here as well, there could be need for solutions involving negotiated press statements and employment references. Confidentiality will be an issue here as well.
- **Executive Compensation / Benefits Claims.** While these claims may be for specific items of compensation or benefits, there may be a variety of different potential solutions with similar costs or there may be an overlay of other personal challenges.
- **CEO-Founder of Public Company Cases.** These are cases at the confluence of public company fiduciary duty and private stock ownership.

They require sorting out the business, personal, ownership and governance needs of the CEO and those of the company, preferably without burning bridges. They may also involve one of the above issues such as claimed harassment. Confidentiality will be critical, but there will also need to be solutions as to what can be said to the press in any resolution.

- **Law Firms, Accounting Firms and Consulting Firms.** The above considerations are similar for disputes involving partners and other executives in law firms, accounting firms and other consulting firms.

The Mediation Process

After meeting with both sides counsel to plan the mediation schedule, I ask both sides to submit as a first step mediation statements that will not only outline the facts of the dispute, the claims and relief sought, but also provide confidential "for mediator's eyes only" suggestions for possible resolution. The executive and key employee area is one where creative solutions can make a real difference, and the parties are great sources of confidential ideas that might lead to a solution.

Early Separate Pre-Mediation Video Sessions Are Key Trust Builders

But the most important early work is in early Zoom pre-meetings I hold with each side, including especially the employee claimant. I sometimes will meet first with the claimant's counsel to let them help me understand the sensitivities I might face and then with both the claimant and claimant's counsel.

This is critical to really begin to understand what is driving the executive or key employee claimant's needs and to build the trust and credibility with the claimant to help guide the parties toward a resolution.

The pre-meeting with the employer team is equally crucial to help understand their side of the issues, build rapport and search for potential solutions that could potentially work for both sides' needs.

Mediator's Neutral Analysis

I often share a separate *confidential* PowerPoint mediator's analysis with each side showing a wide

range of risk and cost-adjusted recovery/exposure so that counsel on each side will have something objective from a total neutral to share with their clients. Sometimes I do this just before the main session. In other cases, I will share it during the main session. The idea isn't to convey who would win the dispute, but to set out confidentiality the risks and costs each side faces.

The Main Event

On mediation day, I generally hold an introductory session with introductions of everyone, some "housekeeping" instructions and a pep talk from me. If one side—particularly the employee—really wants to have opening statements, we will have them together, but in most cases, the parties want to remain separate and proceed in separate caucuses, with me shuttling from side to side carrying offers, messages and ideas.

In some cases, such as alleged harassment cases, it may be important to keep the parties completely separate from the outset until there is a resolution or a breakthrough where contact seems warranted by both sides.

Here, again, the important thing is listening to each side, making sure that the employee is fully heard and raising questions to tease out the nuances and difficulties in the dispute and to continue to gather ideas for resolution and then sharing with each side the other's offers and needs and work with them on ideas for resolution. I am optimistic about all progress.

To Zoom or Not to Zoom?

A Zoom mediation may become the most practical for cases where important players are overseas, and this mediator has had a lot of success in Zoom meditations when both sides are equally committed to the process. There are some cases, however, where it becomes an advantage to the process that all parties must invest their time to be present for an in-person mediation.

Solutions Menu

Whether the difficulty in the case is discrimination/harassment, alleged wrongful termination, executive

departure to a competitor, CEO/ founder issues or a compensation and benefits dispute, it is important to always remember that there are always a whole array potential solutions, and the only limit is really the collective imaginations of the parties, their counsel and the mediator.

If all of us are working together, we will almost always get to the promised land. Here are a few menu examples:

- Remuneration and benefits
- Ownership Interests
- Continued Employment
- Promotion, Reassignment
- Apologies (personal and/or written)
- Press statements
- Confidentiality
- Restrictive Covenant revisions that work for both sides
- Recommendations/ References
- Organization Policy, Governance or Other Changes
- Releases

I tell the parties early and often that I will give the mediation my "all" to help them solve their dispute. Convincing the parties that you are really willing to do that goes all long way. Providing the continuing optimism, listening and sharing of ideas for resolution should bring it to resolution.

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.

