



## TECHNOLOGY MEDIATION

# WHAT'S THE PROBLEM?

BY MICHAEL H. DIAMANT

**M**ediation is increasingly becoming a preferred means of settling disputes, avoiding the costs and time delays of litigation, or even arbitration. Mediation is nothing more than facilitated negotiation with the assistance of a third party neutral. Ideally the mediator is a person trained in mediation techniques and possessing knowledge of the underlying subject area in order to best assist the parties to reach a mutually acceptable resolution.

When effectively employed, mediation can resolve everything from consumer disputes, business disputes, landlord tenant disputes, family and domestic disputes, and employment disputes, to complex regulatory and technology disputes.

Effective skill sets and methodologies are as wide-ranging as the disputes themselves. While there are no bright lines, the issues vary depending on the types of disputes.

- In **consumer disputes**, the issues are relatively simple. There is a dissatisfied consumer who

is seeking a refund, repair, or some type of compensation with generally limited dollar amounts. The dispute and its resolution is not primarily about relationships between the parties.

- In **domestic and family disputes**, and to some extent employment disputes, emotions and relationships are the key issues that need to be addressed. Often the real emotional issues are not necessarily related to the current dispute, but rather to years of interactions and relationships resulting in real or perceived slights or mistreatments.
- While **business disputes** to some extent involve individual relationship issues, they generally focus on money issues, whether cash or other consideration. Here the mediator needs to find the business needs of each side and then work with them to try to find a resolution that ends the dispute and minimizes costs. That way, each party can move forward and go about their business, maximizing the dollars each

has after the dispute is resolved, taking into consideration the legal and business costs of litigating the dispute.

### Technology Disputes Are Different

Technology disputes can be different and often involve the failure of a device, system, software program, or material. In these disputes, while there are obviously business issues and business people generally must be involved, also involving the engineers can be key. Engineers and lawyers share a logical resolution approach. However, while engineers tend to want to understand and fix the underlying physical problem, lawyers and business people tend to look only at the ultimate costs and business issues and often just focus on finding an economic solution. This difference can be crucial to the successful mediation of a technology dispute.

Successful mediations take significant preparation by counsel, the parties, and the mediator. Prior to the parties meeting with the mediator, the mediator needs to be educated in the issues the parties think are important. It is generally helpful for the mediator to have a background in technology to better understand the issues and language, and to more quickly gain the confidence of the parties.

A basic requirement of a successful mediation is to require that persons with full settlement authority attend. In technology disputes, it is generally also important to have technical people present.

Engineers by training and mindset tend to focus on the underlying physical problem and its cause. For example, if the dispute revolves around a complex mechanical system that manufactures a product or component, the

business people first think about what they paid, the delay cost, and their rights to recover their economic losses. However, the engineers tend to be more, or at least as, interested in the reason for the failure and if and how it can be fixed. Focusing first engineering problem, often gets the engineers talking about the issues that really interest them, rather than economic issues or legal rights.

After a general discussion of the dispute and the parties issues and needs, it is helpful to have each side articulate what they perceive as the reason for the failure. The business people may say that they did not get what they paid for or that they delivered exactly what was ordered and the buyer changed its mind. Or the business people might simply say that it did not work. Engineers, on the other hand, want to know why it did not work, and often, how can it be made to work.

### **LESSON LEARNED #1: LET THE ENGINEERS FIGURE IT OUT.**

In a software implementation dispute that I mediated, one of the engineers for the licensee, during a party caucus, stated that he had a number of questions regarding the design choices in the software. I asked and received permission to go to the licensor's caucus and ask the questions. Counsel agreed to allow its engineers to answer and I took the response back.

After a couple of more rounds, it became obvious to me, as mediator, that using an intermediary was inefficient. Good engineering strives for efficiency in process as well as design. Engineers hate perceived inefficiencies. So, at that point, I suggested that the engineers be permitted to speak together in a separate room to exchange questions and answers, in the context of confidential mediation settlement discussions to assure that the questions and responses would be conveyed accurately and more quickly and efficiently. To assuage the concerns of counsel I told them that I would moderate the discussion and that counsel could sit in, but not participate. All reluctantly agreed. The engineers quickly began to have a highly technical, productive, and non-contentious discussion. It soon becomes clear that the attendance of the lawyers, and later, the mediator, was superfluous. First the lawyers and then the mediator left the engineers to themselves.

As a result, a candid discussion and technical respect and trust developed between the engineers. Good engineers, with sufficient good data, should come to only one conclusion as to physical reality. They may disagree as to whether one design is more efficient, too costly, or better

suited, but they should not disagree on how it worked or why it failed.

A successful joint meeting of engineers, ideally, will lead to a shared understanding of what happened, and an engineering solution. In this case, the licensee had already replaced the rejected system. However, when the engineers reported back to the business people and their counsel, the newly developed trust between the technical people lowered the level of hostility and distrust, and the business people were able to agree on a settlement. The parties left the session, exchanging business cards and discussing the possibility for a new project together.

### **LESSON LEARNED #2: STEP-BY-STEP ENGINEERING SOLUTION SERVES BOTH PARTIES**

Another technique that can work in engineering cases is for a mediator, who understands the engineering issues and has a technical background, to work with the parties and guide them through a process to solve their technical issues as a working group. This is not a negotiation or resolution of right and wrong, but rather, developing an engineering solution to solve both parties' issues. In one example, I was selected to mediate a contentious dispute between two companies that had been engaged in a series of litigations and failed settlements over many years relating to whether a processed mined material supplied by one side met the technical specifications of the contracts. The purchaser needed the materials as an additive for a patented commercial industrial product that was unique which it fully believed would lead to large highly profitable sales. The seller wanted to produce and sell the material as it was highly profitable to it also. This would seem like a win-win for both parties. However, the seller insisted that the product as produced met specifications and the purchaser insisted that it did not. There had to be a solution.

Rather than try to negotiate an overall solution, which clearly was not going to be successful, I suggested that, like all engineering problems, it had to be broken down into a number of smaller simpler problems each to be solved in order. First, the parties had to develop a more detailed specification for the material that the buyer agreed would accept and seller agreed that it could produce. To avoid any further dispute, the refined specifications included a detailed description of chemistry, particle size, and the acceptable miniscule level and chemistry

of mineral impurities. After several weeks the specifications were agreed upon. It then took several more weeks, with multiple telephonic mediation sessions and many rounds of testing, for the seller to confirm that it believed that it could produce materials meeting the agreed detailed specifications.

Finally, the parties, with the help of the mediator, worked together to find available test equipment that could analyze the material to determine compliance with all of the specifications and then to test that equipment so that both buyer and seller were satisfied that the tested materials would comply and meet buyer's needs. This sounds easier than it was. There were a number of fits and stops and starts, each had to be resolved, often with mediator intervention and suggestions. But ultimately, once the technical engineering problems were resolved, the parties and the mediator were able to focus on negotiating a long term mutually profitable business relationship.

### **APPLYING LESSONS LEARNED**

While all disputes have a central problem or problems that sometimes can be ignored to get to a big picture dollar settlement, in technology disputes, first determining the engineering problem and using the mediation process to assist in understanding and solving it, can get the parties working together, enabling them to resolve the entire dispute.



*Michael H. Diamant practiced as a business and technology litigator for 45 years and has been an arbitrator and mediator of technology, IP, and business cases for over 35 years. He is a graduate of Case Western Reserve University with a B.S. in Engineering with high honors and of Harvard Law School with a JD, cum laude. He is a member of the American Arbitration Association Large Complex Case and IP/Technology Panels; the International Center for Dispute Resolution; the Panel of Distinguished Neutrals of the International Center for Conflict Prevention & Resolution; and the Tech List of World's Leading Technology Neutrals of the Silicon Valley Arbitration and Mediation Center. He is a Fellow of the College of Commercial Arbitrators and of the Chartered Institute of Arbitrators (London, England). Diamant practiced with Kahn Kleinman Co. LPA, prior to its merger with Taft in 2008. At the end of 2016, Diamant retired as an equity partner. He has been a CMBA member since 1971. He can be reached at (216) 706-3949 or mdiamant@taftlaw.com.*