

Business Mediation Handout

Corporate Counsel Section Quarterly Dinner 3/9/2017

Objective

As corporate counsel, you know how to work a deal. How can you transfer those negotiation skills to mediation, when you are facing a lawsuit that is fraught with risk and cost? Having to resolve a dispute for your organization can be a stressful job that requires you to navigate between management, outside counsel, and an opposing party. One tool for resolving a business dispute is mediation, and we want to provide you with a practical approach. Our panel of mediators will give you tips and suggestions for preparing and participating in the mediation process, so that you can create an action plan that leads to an agreement, and you and your organization can get back to focusing on its core mission.

Questions for Panelists

- 1) There's a saying that "negotiation is where people get emotional about the money and mediation is where people get the money after becoming emotional." With a room full of experienced negotiators, how would you briefly describe to our audience of corporate counsel the difference between a negotiation process and a mediation process?
- 2) How can corporate counsel benefit from the saying that "mediation makes sense when you want to end a problem but not a relationship"? What business relationships have you seen restored through mediation? How was trust reestablished between entities?
- 3) Do you think that corporate counsel could call a mediator to help resolve organizational disputes between business units of a company? Where have you seen mediation applied within a corporate environment?
- 4) What are the perceived barriers that corporate counsel face when presenting mediation to business people? How can you help corporate counsel address those barriers?
- 5) When is it helpful for corporate counsel or corporate employees to speak up in mediation, or meet with the other party?
- 6) What are circumstances in which a senior manager or a CEO should be encouraged to attend mediation?
- 7) Is it helpful for internal and external counsel to clarify their respective roles? Have you seen a model of internal & external counsel collaboration that worked especially well?
- 8) With respect to early mediation, how should corporate counsel consider the pros and cons to an organization of mediating a case early?
- 9) Senior managers are often people who want to be in control. Do you have any stories of senior management appreciating being in control of the outcome in mediation?

- 10) Sometimes mediation is described as a slow march to the middle, in which one party starts stratospherically high and the other party starts absurdly low. Are there shortcuts to this process? Is there anything corporate counsel can do to foster a more collaborative process?
- 11) How effective are multi-step or tiered dispute resolution clauses in contracts? What are tips to drafting those?
- 12) What are other intervention strategies outside of court that you recommend corporate counsel be familiar with, for example, arbitration and early neutral evaluation?
- 13) To what extent are apologies helpful in a business mediation context?
- 14) Typically, a mediator is provided with a mediation brief before mediation. What aspects of a mediation brief do you find most helpful? How can corporate counsel help improve a mediation brief?
- 15) What are your thoughts about the concept of manipulation or “spinning” of mediators and of the mediation process? What about encounters with a bullying advocate?
- 16) To what extent does the attitude of corporate counsel affect the outcome in mediation?
- 17) How does the mediation process change when the dispute involves an international party such as from Europe or Asia?
- 18) What are the best practices that you have seen when corporate counsel is engaged in selecting a mediator?
- 19) Is it helpful if internal counsel attend mediation training, and if so, which one do you recommend?
- 20) How have you seen the privacy and confidentiality aspects of mediation being useful to family businesses, that are traditionally discreet about their inner workings?

Further Reading

Panel Materials

Using questions to guide your understanding in mediation:

<http://brownresolution.com/vivian-maier-conflict/>

Third-Party Materials

Questions for corporate counsel:

<http://www.mediate.com/articles/LeathesMbl20140711.cfm>

Corporate counsel tips for business mediation:

<http://www.mediate.com/articles/ClaiborneZbl20160729.cfm>

Use of early mediation for business disputes:

<http://www.mediate.com/articles/MarshBbl20150606.cfm>

Contrast between corporate counsel making a deal and resolving a dispute:

<http://www.mediate.com/articles/PhillipsPbl20140118.cfm>

Crafting tiered dispute resolution clauses in business contracts:
<http://www.mediate.com/articles/zeytooniambl20141121.cfm>

Collaborative approach to mediation:
<http://www.mediate.com/articles/WeissSlow.cfm>

CEO impressions of mediation:
<http://www.mediate.com/articles/GrahamKbl20160606.cfm>

Importance of listening skills in business mediation:
<http://www.mediate.com/articles/WaresJbl20131025.cfm>

Research on corporate counsel perceptions of ADR:
<http://www.mediate.com/articles/LivingWithADR.cfm>