

CONSIDERATIONS FOR DIRECTORS PREPARING TO MEDIATE

Representing a corporate entity in mediation is different to personally being involved in mediating a conflict. This worksheet is designed to help directors prepare to mediate on behalf of their corporation.

This is intended to be an internal document. You need not share your responses with anyone.

What is the scope of your authority?

The degree of autonomy that your governing Board of Directors can grant you can vary significantly. It is important that this be considered by the Board in advance of the mediation and be clearly established. Many mediators will ask Board representatives to confirm the scope of their authority at the beginning of the mediation.

It may be important to ensure that your authority is properly documented and granted in the course of a duly constituted Board meeting before the mediation takes place.

What some corporations do...

- Grant their corporate representatives full authority to settle the dispute however they feel is best
- Determine parameters in advance that their representative is authorized to work within to settle the dispute (example: a maximum amount involved in an acceptable settlement)
- Require that any settlement be ratified – taken back to the Board for review and approval – in order to be binding on the corporation

What will you do if you like a settlement option that was not anticipated by your Board?

Mediation allows for creativity and the exploration of many possible ways to address a dispute. As a result, settlement options could arise that may not have been predictable.

What some corporations do...

- Have non-participating directors available for contact during the mediation to offer direction to their representative
- Involve the corporation's lawyer in the process to help consider such possibilities
- Make prospective settlements conditional on a legal or Board review

Mediation Tip: In the event that a prospective settlement cannot be final or binding at the conclusion of your mediation, it can be helpful to establish a timeline by which any follow-up steps will be completed. This allows all mediation participants to be clear on when next steps will take place.

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How will you avoid personal feelings/emotions interfering with doing what is best for your corporation?

The impact that the dispute has on your corporation can extend to affect you personally. You may develop negative feelings toward others involved in your conflict as a result. It can be a challenge to act in a way that serves the best interest of your corporation when you are engaged emotionally in the dispute.

What some corporations do...

- Involve more than one corporate representative. Multiple people participating in the process can help one another ensure that their actions best serve the corporation
- Limit or avoid the participation of anyone who is very personally attached to the conflict or easily emotionally engaged by other mediation participants
- Utilize the flexibility of the mediation process to offer a prepared opening statement and attempt to avoid circumstances that may heighten emotions in the course of mediating (this can include asking the mediator to establish specific ground rules, minimizing the amount of time that all mediation participants are together and taking breaks to calm down)

What kind of relationship will your corporation have with the other party after the dispute is resolved?

The way that the mediation process is structured can vary. Whether or not participants will have an ongoing relationship can impact how this flexibility can best be leveraged to allow the process to be most effective.

What some corporations do...

- Ensure that the potential of an ongoing relationship with the other party is considered in advance of the mediation and avoid “burning bridges” unnecessarily
- Capture in the settlement agreement details of any future interactions needed to conclude the matter (example: establish a timeline for the exchange of release documents)
- Take advantage of the mediation opportunity to establish an interaction plan with the other party. Even if mediation does not conclude in full resolution, clarity surrounding this can often be helpful

Mediation Tip: Unlike individuals, corporations often have the luxury of being able to select from amongst a number of individuals who will represent the corporate entity at mediation. It can be helpful to consider the dynamics, personalities and relationships involved in the dispute and select the representative most likely to allow the mediation to conclude successfully.

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