

DEAL MEDIATION
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What is deal mediation?

I have seen no definitions of this concept, but among business people and commercial mediators, the term is certainly developing. In my experience, a deal mediation may be distinguished from litigation mediation in a number of ways.

Among the differences there is firstly no existing litigation or structured dispute between the parties. Secondly, the parties may therefore choose to be unrepresented by counsel. Thirdly, the parties may already be commercially connected through some form of agreement, or may wish to negotiate a new agreement, but need a facilitator.

These differences alone can create a completely different complexion in deal mediation from that in litigation mediation.

Let me offer as one example the case of two principals in a commercial corporation who hold 50/50 interests in shares and have in fact, a shareholders agreement. This would typically be a document which was negotiated with some care and consideration, signed and then deposited in a drawer or a file not to see the light of day for some years. Why does it surface now?

It may be that the shareholders have different styles and different strengths, and that over time their different views have led to breakdowns in communication, or even to deadlock. When events of this type occur, there is inevitably a domino negative effect on staff and on the work environment generally. These typically translate into a negative effect on revenues in a "small business". A situation such as this may come to the attention of the corporate solicitor, but he or she would most likely be in a position of conflict in attempting to mediate between the principals of the company.

So how does a mediator get the mandate to conduct a "deal mediation" in circumstances such as this? It is possible that one of the principals who knows a mediator, makes the contact. However, in those circumstances the other principal may not be prepared to agree to a person suggested by the other equal shareholder. Perhaps the corporate counsel will make a recommendation. In circumstances where corporate counsel becomes involved, it is probably most likely that he or she would offer the names of two or three mediators and let the parties decide for themselves who they should use. In some measure this could lead to a "beauty contest" where the shareholders either together or separately interview potential candidates for the mediation. However, such a meeting or meetings offers the mediator an opportunity to ask many questions of the principals, the answers to which will be needed in the mediation process. The referral

might come from a neutral service provider consulted by one of the parties, or by a lawyer for either of them.

Once the parties agree on a mediator, there should always be a mediation agreement. The individuals themselves will be the parties to the mediation. The corporation may also be a party. In the course of the preliminary interviews, the mediator should have discerned some of the different views and styles of management from the parties.

Keeping those in mind, the mediator should have a carefully crafted mediation agreement delivered in draft form to the parties along with a template for a statement of issues. The mediator should remind the parties that an issue for one is an issue for both.

While the documents are out to the parties for review and completion, the mediator should be considering what he or she has learned about the goals of each of the parties, their understanding of the shareholders agreement, the nomenclature which will be used in the mediation to overcome any potential imbalances, and generally their consideration of the type of techniques which may be necessary to employ during the mediation.

The parties should be instructed to list all the issues on their minds; what they believe to be their own strengths; their goals for the company in the short term and medium term and possibly even the long term; to undertake to work together with the assistance of the mediator in negotiating new strategies for the ongoing operation of the company, the increased potential for sales and revenues, and ultimately the unification of management and management philosophy.

Once the mediator receives the statement of issues from each of the parties (and they must have sent copies to each other as well), the mediator should look for obvious similarities in each aspect of the statement of issues. The mediator should list those similarities to later demonstrate to the parties that they may not be as far apart as they thought.

In terms of the differences between the parties in their statements of issues, it is still possible to look for generic underlying issues; for example, trust, frustration, and such matters which are not usually addressed in these actual words.

In the first meeting, emphasis should be put on the voluntariness already demonstrated by the parties having agreed to mediate, having signed the mediation agreement, and having appeared in person for the mediation. These are all positive signs of voluntariness and a willingness to achieve an agreement. The venue for the mediation should be neutral, and not at a place of business of either party. A hotel boardroom is perfect.

The parties should be told that they have an important role in negotiating their new deal and that with the assistance of the mediator, it is the parties themselves who will become the authors of their deal. They should also be told that by virtue of authoring a deal, they will be most likely to live up to its terms.

It should be established very early in the first session, that the parties have similar goals in connection with the business of the company itself; for example, it may be that they wish to build sales to a certain level over the next five or ten years, and then sell the company, dividing the proceeds. Once this sort of framework is established, the mediator can work on a consistent basis through each of the steps, working the parties in the direction of small, but growing, points of agreement.

Language should be addressed and certain terms dispensed with. For example, the concept of "complaint" can be changed to "observation" or "concern". The concept of "I have a solution" can be changed to "suggestions" with a positive spin. Changing nomenclature in this fashion will overcome the use of language which has one party pushing the buttons of the other to become angry and lose focus.

The use of flip charts is very important. It is an old technique, but if the issues are listed by the mediator on a flip chart, then the parties can be asked to work together to find potential solutions, focusing on the chart, and not on each other.

I had a deal mediation recently where a business retreat was going to be held later in the year. There was a goal established in the mediation to develop a unified management front so that the principals could sit side by side, shoulder to shoulder, and discuss their philosophies in common, and their mutual goals, to their management and staff.

In cases where there is a target date for the resolution, a timetable should be worked out to ensure that enough dates are made available by the parties and the mediator to complete the task at hand.

This is only one typical example of a deal mediation. It is quite possible that mediators will become involved in negotiating deals in the first instance with the parties directly and that the lawyers will only become involved in drafting and finalizing the contract.

The emphasis in each of these situations is in making the deal, or the new deal, and not mediating a resolution to the conventional dispute.

