

## BEST PRACTICES FOR MEDIATORS IN COMPLEX BUSINESS DISPUTES

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### ● *What to Do*

- Learn as much as possible about the parties before having contact with them, then continue learning. Know at least as much about every aspect of the dispute as the parties do.
- Listen carefully, and observe the individual's body language and other non-verbal behavior. Don't assume that your reading is accurate. Seek clarification by paraphrasing what you hear and perceive; ask the speaker if you got it right; continue the reflective listening ("What I hear you saying is ...") until you have it right.
- Take thorough notes.
- Anticipate what strategies will and will not work with each person in the mediation.
- Know when to put the parties together and when to keep them apart.
- Know when and how you can use the parties' counsel and when counsel is an obstacle, and how to work around counsel without alienating them.
- Gain the confidence of each person in the mediation; credibility is important.
- Do not "game" the participants; they will find you out and you will lose their trust.
- When insurance is a major source of any payout, understand how the insurance carrier operates and have its representative in the room.
- Get assurances that all of the decision makers are in the room for any mediation session. If that is impossible, they must be available by phone.
- Be flexible.

### ● *What Not to Do*

- Don't let your knowledge of the substance of the dispute get in the way of a settlement.
- Don't assume that you know better than the parties what resolution is in their best interests; they know things about themselves, their relationships, and their business that you don't know.
- Don't rely on pure facilitative and pure evaluative styles, because they don't exist. The parties engaged a mediator to support them in reaching a resolution, not to protect or advocate a concept. Use what works, so long as it is honest and legal.
- Don't give up. The mediator is the paid optimist in the room. If the case doesn't settle in the time allotted, keep in contact with the parties. As long as the parties are talking, there is hope of settlement.
- Never try to impose a resolution on the parties.
- Never leave a settlement without a written agreement, even if it is to be supplemented later.
- Never draft the settlement agreement.