

Positively Neutral

Arbitration and Mediation for Attorneys and Their Business Clients



Rob Harris
Mediator and Arbitrator
robert.harris@positivelyneutral.com
www.positivelyneutral.com
914.482.2448

Welcome to the Second Quarter, 2022 edition of my newsletter, in which I share hopefully relevant and interesting content pertaining to the arbitration and mediation of business disputes. This quarter, I'd like to discuss business divorces, by which I mean the ending of a business relationship between co-owners, or a separation of a senior level executive from the business.

Business divorces are among the thorniest disputes to mediate. Perhaps not so much for the mediator—after all, that's what we sign up for. However, well-intentioned attorneys who should be applauded for believing mediation is in their client's interest face potential blowback. This is especially the case when the attorney does not have an established relationship with the client.

Often, the business divorce will be the first time that the attorney has represented the client. A lawyer who serves as general counsel to the business may determine there is a formal conflict of interest or simply (and perhaps wisely) elect to recuse from representing the individual owners. Thus, the business owner is left to begin a new relationship with a new attorney.

The attorney—whether newly engaged or longstanding—faces challenging circumstances. A dispassionate review of the dispute may cry out for a negotiated resolution. The dollars at issue, while meaningful, often are insufficiently substantial to make protracted litigation a worthwhile investment. Also, the nuances of disputes between business owners involve shades of gray that make it difficult to reliably predict who will be victorious. Finally, an all out litigation battle typically imperils the company's value that both parties desire to maintain.

Armed with this objective assessment, the attorney—wanting to obtain the best result for the client—also must confront the emotion engendered by a business divorce. The attorney understands that the client retained him to be a strong advocate to champion the cause. If early on the attorney recommends negotiation instead of litigation, he risks damaging a budding client relationship before it blooms.

When the respective attorneys brave the storm and communicate the realities of litigation, their clients may (grudgingly) agree to mediate. When they arrive at the mediation, however, the clients often are tense, guarded and emotional.

That's when a mediator who understands the dynamics of a business divorce earns his keep. A primary goal for the mediator should be to engender the clients' support for the mediation process. By doing so, the mediator enhances the likelihood of mediation success. Also, and this is important, the mediator will foster the client's confidence in his counsel.

So, how can a mediator work to obtain “buy in” for the process by the disputing business owners?

First, at the earliest opportunity, the mediator should impress upon the parties that they are fortunate to have attorneys who perceive the value of negotiation instead of incurring substantial legal fees. Let the clients know that mediation is a sign of intelligence, not weakness. The mediator should re-emphasize this point throughout the day.

Second, in the separate sessions with each side, the mediator should make sure that he, not the attorney, takes the client’s incoming fire and delivers any requisite unpleasant messages. Here are a few examples:

- The mediator should provide the client with an opportunity to vent, by asking the client, not the attorney, to provide the background story.
- The mediator, not the attorney, should let the client know about the other side’s grievances, whether real or perceived.
- The mediator, not the attorney, should tee up the discussion about any weaknesses in the client’s position.
- The mediator, not the attorney, should deliver to the client the unpleasant news that the client’s preferred resolution (e.g., continuing to co-own or work for the business) may not be realistic.

Third, a mediator can turn the attorneys into problem solvers when the parties understandably become impatient as hours pass with a seemingly fruitless process of back and forth offers and counteroffers in exasperatingly small increments. The mediator can enlist the attorneys’ support to alter the negotiations from negotiating a precise number to negotiating within a bracketed range. For example, suppose the parties remain far apart, with Client A demanding \$800,000 while Client B is offering \$200,000, the attorneys (who have notions of where the case ultimately may settle), may agree that the parties should negotiate within a narrower range of \$450,000 to \$625,000. Presented by their attorneys with this suggestion, clients (finally) perceive meaningful progress, rekindling a productive mediation.

Fourth, if a dispute does not settle by the end of the scheduled mediation, the mediator—sensing resolution remains within reach—can help dispel client frustration by inviting the attorney to include him in follow up discussions with the client, enabling the mediator to absorb any client displeasure while working to make further progress.

Armed with these tools, the mediator can provide a supportive backstop that will facilitate meaningful progress while fostering the attorney/client relationship.

--Rob Harris