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Mediation Can Be a Power Tool for In-House Counsel

Sue Reisinger

General counsel who avoid mediation are omitting a powerful instrument from their legal toolbox, according to a recently published book by Practising Law Institute. "Financial Services Mediation Answer Book," edited by mediator Layn Phillips, attorney Pierre Gentin, mediator Jill Sperber and in-house counsel Lindsay Goldstein.

Co-editor Gentin is the former head of global litigation and regulatory investigations for Swiss-based Credit Suisse bank (where he worked with Goldstein) and is now a partner in the litigation group at Cahill Gordon & Reindel in New York.

Corporate Counsel senior reporter Sue Reisinger spoke to Gentin, along with Joseph Salama, the global head of litigation and regulatory enforcement at Deutsche Bank in New York, about using mediation successfully. The conversation has been edited for clarity and length.

CC: Pierre, how did this book come about?

Pierre Gentin: Eighteen years an in-house litigator convinced me that mediation is a uniquely effective way to disrupt the inertia of litigation across a range of financial services disputes. Each of us [co-editors] saw the strong value of a new mediation resource containing practical contributions from highly



experienced mediation counsel representing plaintiffs, defendants and insurers; as well as direct guidance from prominent neutrals who mediate financial services disputes.

CC: Pierre has said that mediation offers a "special opportunity" for in-house counsel. In what ways?

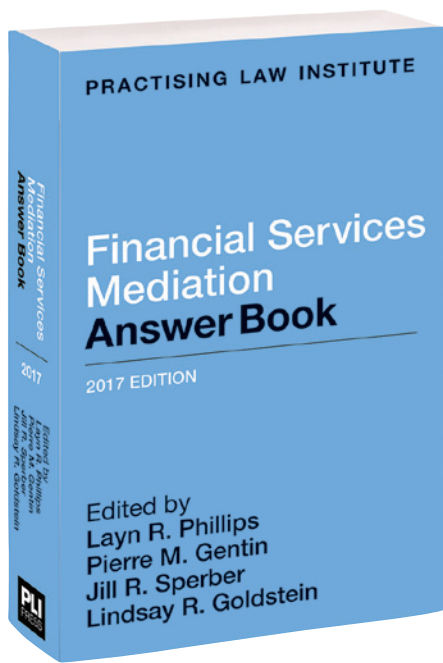
PG: In-house lawyers manage numerous ongoing matters and respond on a real-time basis to internal business clients. Time-intensive lawyering commitments like trials, courtroom arguments or extensive brief writing are not practical or sensible tasks for most in-house litigators. Mediation, on the other hand, provides a special opportunity for an in-house lawyer to set the strategy, play a key role in the mediation

briefing, and serve as advocate and negotiator at the mediation itself. An in-house lawyer's comments and actions at the mediation have unique credibility and impact.

Joseph Salama: I agree. In addition, mediations give the in-house lawyer the opportunity to hear directly the other side's view of the case and the view of the impartial mediator. They also give in-house lawyers the credibility to communicate first-hand information back to the client and facilitate critical discussions on strategy.

CC: With what kind of expectations should an in-house counsel approach mediation?

PG: Any lawyer approaching mediation should think through



various goals the mediation might advance for the client. While resolving the dispute on specific terms is often the ultimate goal, interim objectives include learning information, developing a rapport with a principal on the other side, and sending important signals. Mediation requires listening very carefully and staying alert to how the dynamic mediation process can open up new and creative options for resolution.

JS: My primary expectations when going into mediation are that both sides will act in good faith and the mediator will show up prepared, engaged and ready to work hard. My hopes are that I will leave the day knowing more than when the day started and with an open line of communication—unless, of course, a settlement can be achieved.

CC: What types of cases especially work well in mediation?

PG: Mediation is a useful mechanism across a diverse range of civil matters: large or small, complex or relatively straightforward, and whether two or multiple parties

are involved. Mediation is also very helpful if anger, personality differences or communication problems have previously prevented the parties from constructively discussing the dispute.

JS: I've had success mediating all types of cases, including cases against government agencies, although not all are willing to [mediate].

CC: Are there types of cases that do not lend themselves to mediation? If so, what are they?

JS: I can't think of a category of cases that I would exclude on a wholesale basis, but certainly there are circumstances where I think mediation may not be productive or could even be counterproductive. That, however, is usually a timing issue and not the case itself. For example, there may be some issues in a litigation on which the parties so fundamentally disagree, or that have broader impact to one or both of the parties beyond the specific case at hand—such as if a party is involved in several similar cases—that having the court weigh in on those issues before the parties begin settlement discussions is advisable. There also may be a companion regulatory matter that prevents a civil case from being resolved at a point in time that otherwise might make sense.

CC: From your own experience, what makes for a successful outcome in mediations?

PG: As an in-house lawyer, I found that establishing a personal channel of communication with the mediator, opposing counsel or a principal on the other side was often key to resolution. Outside lawyers should also forge those critical connections with the mediator and each other.

JS: The most successful mediations are the ones where you learn that your case wasn't as strong as you thought, whether as a defendant or a plaintiff.

CC: The book concludes with advice from 13 of the country's leading financial services mediators. What do you think are the most important pieces of advice offered?

PG: The mediators' comments point to four main themes: approaching mediation well-prepared and conducting oneself with candor and credibility; avoiding extremes in substance and tone; taking advantage of the unique opportunity mediation provides to speak directly with other parties; and taking the time to identify and select the right mediator for the dispute.

SR: Joe, what qualities do you look for in a mediator?

JS: I look for someone who has a significant body of experience. I have a slight preference for former judges because of the credibility that comes with it. I generally only use evaluative mediators, and only ones with a reputation for actually asking hard questions and expressing critical views rather than just shuttling numbers. And I like mediators with a reputation for staying engaged after the mediation, even if it means just checking in every couple of months.

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