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Advanced Strategies for Conflict Resolution Through Mediation and Ombuds Programs

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Introduction

- **Mediation:** Neutral third party facilitates communication and negotiation between disputing parties to assist them in reaching a mutually acceptable resolution.
- **Ombuds Franchise Program:** Impartial, independent, and informal resource designed to help franchisees surface concerns, explore options, and resolve issues through constructive communication that uses facilitated and coached conversations.

Both are confidential

Lessons from an Early Mediation Experience

Scenario

- Mediator: “You are going to lose this case.”
- Trial result: complete victory

Lessons

- Old mediation folklore: mediator tells each side privately that they have a weak case
- Implications for mediator credibility and trust in the process

Mediation Ground Rules

- Self-determination
 - Uncertainty of Court/Arbitration
 - Limited Remedies of Court/Arbitration
- Role of Mediator (Neutral)
- Confidentiality (two layers)
- Safe environment
 - dialogue
 - information sharing

Positions vs. Interests

Positions = What parties say they want

Interests = Why they want it

Example: Non-compete issue

Franchisor's position: non-compete is enforceable

Franchisor's possible interests:

- Other franchisees will leave system
- Vocal nearby franchisee(s)
- Proprietary information
- Competition – new franchisee entering geographic area

Focusing on interests enables creative solutions

Mediator Tools

- Reality testing & risk analysis
- Reframing
- BATNA (Best Alternative to a Negotiated Agreement)
Or WATNA (Worst Alternative to Negotiated Agreement)
- Bracketed proposals
 - Conditional movement to narrow gaps
- Mediator's proposal
 - Confidential accept/reject mechanism

Understanding How and When to Engage in Mediation

- Timing is Everything – Key Considerations for When to Mediate
 - Factors Indicating it May be Too Early to Mediate
 - A. Lack of Information
 - B. No Exchange of Settlement Offers
 - C. Personal/Personnel Issues
 - D. Absence of Engagement
 - E. External Factors

Understanding How and When to Engage in Mediation

Factors Indicating It May Be Too Late for Mediation (but should still be done)

- A. Escalating Litigation
- B. Time-Deadlines and Decisions (e.g., renewal deadline)
- C. Lack of Trust
- D. Culture and Misalignment of Values

Preparing for Mediation

- A. Thorough Review of Documentation / Information
- B. Conducting Pre-Mediation Conferences
- C. Aligning on Issues and Expressing Cogent Rationale for Position
- D. Setting the Tone
- E. Understanding Interests and Goals
- F. Identifying Solutions

Best Practices for Lawyers in Franchise Mediation

- A. Conducting Pre-Mediation Strategy Sessions with Client
- B. Utilizing the Mediator
- C. Transition from Trial Lawyer to Negotiator
- D. Agreement on Terms and Drafting
- E. Follow-up Procedures

Pitfalls for the Practicing Lawyer in Mediation

- A. Lack of Engagement
- B. Lack of Preparation
- C. Ineffective Communication
- D. Inflexibility in Negotiation
- E. Client Management Challenges
- F. Ethical Issues
- G. Ineffective Use of Mediator
- H. Setting Fixed Deadlines for Mediation

Ombuds ... what?

- Ombudsman (or Ombuds) Programs
 - What is it?
 - How does it differ from mediation?

Core Attributes of Ombuds Programs

- Independence
- Impartiality/Neutrality
- Confidentiality
- Informality

How does an Ombuds Program work?

- Franchisee: Benefit of a resource for coaching and conflict resolution
- Franchisor: Benefit of insights and de-escalation

QUESTIONS