



Mediation Matters

Practical Alternative to Business Disputes

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WE LIVE IN A competitive world. Business owners, executives and managers face disputes in some form or fashion almost every day. Whether it's issues with customers, vendors, suppliers, clients or employees, disagreements are bound to arise. Unfortunately, sometimes those clashes deteriorate into litigation, with resultant legal fees, court delays, bad publicity and the potential loss of a once-mutually beneficial relationship.

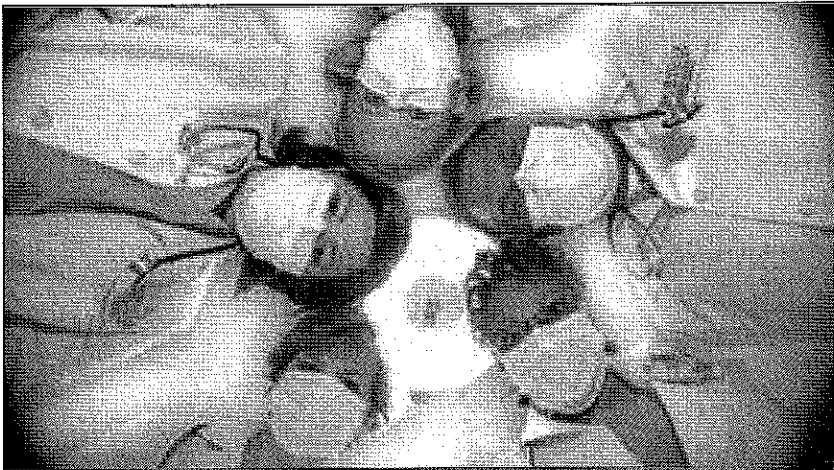
In order to avoid these costs and risks, the business and legal community is increasingly turning to "mediation." No, not "meditation," but mediation—a process that employs a neutral person to facilitate negotiations between disputing parties in an effort to reach a mutually acceptable resolution. The process has been utilized for decades in the labor-management arena. Now, not only are parties increasingly turning to voluntary mediation as a means of resolving business disputes, but court systems and government agencies are also requiring mediation.

Unlike an arbitrator or a judge, a mediator does not impose a solution on the parties to a dispute. Instead, a mediator works with the parties to assist them in defining their objectives and achieving a resolution of their differences. Although mediation is a nonbinding process, the result of this process is an agreement that is both binding and legally enforceable. The mediation process creates an opportunity to explore underlying business interests, instead of focusing on who "breached" an agreement, or the extent of a party's "damages."

For example, a claim for breach of a distributorship agreement may be settled by redefining territories. Disagreements between vendors and purchasers have been settled by agreements on future price discounts. In some employment disputes, a mere letter of reference or providing outplacement services may serve to resolve a potential lawsuit. A skilled, certified mediator can help the parties overcome hostilities and legal posturing to develop creative, business-driven solutions.

At its core, mediation is little more than facilitated negotiation. When business disputes arise or litigation develops, emotions heighten and communications become difficult. Involving a mediator is designed to change the dynamics of a negotiation. A mediator enhances the process of communication by working with the parties to clarify misunderstandings, encouraging the parties to make realistic assessments of their positions, and making suggestions for a mutually acceptable resolution. A mediator typically accomplishes these objectives by meeting with the parties (and their attorneys, if litigation is present), both in joint meetings and in separate caucuses.

Mediation is particularly desirable when certain factors are present: (1) the desire to avoid a legal or business precedent; (2) the need to avoid publicity and/or to ensure confidentiality; (3) the necessity of preserving a continuing business relationship; (4) the need for a quick resolution; and (5) the desire to avoid the high costs of litigation. Most



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skilled mediators estimate that in excess of 80 percent of their mediations result in settlement.

In contrast to litigation, mediation typically works for the following reasons:

Control by Parties. The participants have control over the process and the outcome. Parties have the opportunity and incentive to formulate business-driven solutions not generally available in court. In an informal and personal process, the parties have a sense of investment in the outcome and are more open to re-evaluating their perceptions about a dispute. Additionally, the parties can select a qualified mediator with specific expertise relevant to the type of dispute.

Greater Efficiency. Any lawyer will tell you that most lawsuits settle, at some point in time. In mediation, the mediator and parties can often telescope in hours the facts and legal issues that are likely to take months to develop in litigation. As a result, parties can avoid substantial costs in legal fees, litigation expenses and the indirect business costs associated with a lengthy legal action. On the other hand, the costs of a mediator generally pale in comparison, which are normally shared equally by the parties.

Flexibility. The process and the result are flexible and can be designed in the manner best suited to achieve the parties' goals and objectives.

Privacy and Confidentiality. The private and confidential nature of the process enhances the possibility of settlement. Parties are less reluctant to disclose sensitive information once they become comfortable with the mediator and the mediation environment. Many businesses opt for mediation to avoid adverse publicity that may have an even larger negative impact upon the company than the dispute itself.

In view of these considerations, it is indeed the rare business dispute that would not lend itself to consideration of mediation. When confronted with a potential business dispute that may well lead to litigation (if it hasn't already), mediation offers a relatively inexpensive and quick method of resolving the issue. ●