

LEGAL AFFAIRS: Let's talk it out

Negotiation and mediation better than court to solve business disputes

By Meldon Ellis

As a lawyer engaged in the area of business disputes, I have experienced a shift in my practice from traditional litigation towards more flexible, cost-effective approaches to settlement, such as mediation and negotiation.

Litigation is the process of pursuing a legal contest by judicial process that is ultimately decided by a third-party adjudicator, usually a judge. Litigation is often described as a "win-lose" process, or a "zero-sum" game, with one party prevailing in the end and the other losing. As any business owner that has been faced with lawsuit knows, litigation is expensive and often everyone loses, even the victor in the court proceedings, given the high cost of legal fees and the inevitable delays involved.

Other approaches to resolving disputes, such as negotiation and mediation, are often described as "win-win" processes, where both parties to the dispute have a role in creating the solution. Although these processes are often referred

to as alternative dispute resolution methods, or ADR, vastly more civil cases are ultimately resolved by negotiation and mediation than by adjudicated outcome. Indeed, it is widely acknowledged that only two percent of civil lawsuits that are initiated end up in trial.

What is important is the approach and attitude of the professionals involved. For example, does a lawyer actively approach a business legal dispute from the perspective of traditional litigation, or does he or she approach it from the perspective of solving a problem? **Negotiation**

Negotiation can lead to a settlement at almost any stage of a legal process.

Typically, negotiations in legal disputes are informal and usually occur between the lawyers involved rather than the parties themselves. Many a litigation lawyer has reached settlement of a dispute on the courthouse steps the day a trial is

scheduled to proceed or even in the courtroom corridor after the case has commenced. Yet, to achieve the real economic benefits of a negotiated settlement – reduced legal costs – it is incumbent on the parties to resolve their dispute at some earlier stage.

Mediation

Mediation is a process for facilitating settlement or agreement between two or more disputants and is facilitated by a mediator who is trained to encourage dialogue between the parties and uncover the underlying interests of the parties. In mediation, the parties themselves define the terms of their agreement rather than having a decision imposed by a third party adjudicator.

Business owners are increasingly recognizing the many advantages of mediation processes versus traditional litigation paths.

Advantages of mediation:

The main advantages of mediation to small businesses are



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as follows:

- 1) **Certainty of outcome:** In mediation, the parties themselves control the terms of the settlement; nothing is imposed on them by a third-party adjudicator. The mediator facilitates settlement but the parties make the final decisions. Mediation, therefore, eliminates the huge factor of uncertainty that is present in all courtroom trials, given that the final outcome in a trial is within the power of the judge and out of the control of the parties.
- 2) **Focus on interests rather positions:** Mediation focuses on the underlying interests of the parties and attempts to create solutions that meet those interests. Skilled mediators are adept at ferreting out hidden interests that, once dislodged, may facilitate settlement. For example, a party's concern about the confidentiality of the terms of settlement, or concern about an ongoing business relationship with the other party may be significant factors in why a case will settle in mediation. By contrast, the court process is open and adversarial which often can damage business relationships.
- 3) **More durable agreements:** Mediations often result in more durable agreements because the parties themselves have negotiated the terms rather than having terms imposed on them by a third party. It is presumed

that parties will have a greater investment in honoring their own terms versus those that are ordered by someone else.

- 4) **Cost effective and faster:** Perhaps the most important reason business owners choose mediation is that it is almost always less expensive than marching on with court proceedings. A typical civil case can take years before a final outcome at trial, and even after a successful trial outcome it can take months or even years to implement or collect on the judgment. By contrast, a mediated settlement can often be resolved in one or two sessions over a few days or weeks. And the terms of settlement can be implemented immediately. Litigation is expensive, despite constant efforts by the court system to streamline procedures. The benefits of litigation can often be outweighed by its costs.
- 5) **Confidentiality:** Unlike most court cases, which are matters of public record, most mediation is confidential. With the advent of the Internet, the final judgment in a court case is disseminated around the world the moment it is pronounced. The terms of a mediated settlement are confidential and do not leave the mediation room.

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