

Mediate, Don't Litigate

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The prolonged economic downturn has forced businesses and individuals to rethink the way they do things, including handling legal disputes. As part of the effort to avoid protracted court proceedings, more litigants are turning to alternate forms of dispute resolution, most notably mediation and arbitration. Having brought, defended and tried cases for three decades, I have become a true believer in mediation. Why? Because it works. It's also faster, better and less costly.

Mediation is a facilitated settlement negotiation conducted by a trained neutral person chosen by the parties or appointed by a court or agency. The state court system has embraced mediation and maintains lists of court-approved mediators. With limited exceptions, parties to a New Hampshire Superior Court lawsuit filed after January 2008 are now required to engage in alternate dispute resolution before trial and are choosing mediation in the vast majority of cases.

Significantly, some litigants are opting for private mediation before it is required by the court, and even before a suit is filed.

Among the chief reasons to consider mediation when you or your business is managing a legal claim is cost. Court litigation is prohibitively expensive for smaller companies, in most cases. Legal wrangling, trials and appeals drag on for years, with costs greatly reducing the potential for meaningful recovery, even by those who prevail. In addition, fee shifting (unsuccessful defendant pays plaintiff's lawyer too) in employment, consumer and other statutory cases motivates those sued to get a case resolved sooner, before attorneys on both sides run up significant fees. For plaintiffs, a binding settlement, even in a lower amount, can be far more attractive than having the jury's award disappear several years later on appeal or in bankruptcy.

While litigants are aware of the out-of-pocket expenses of counsel fees, discovery costs and expert witnesses, often overlooked is the "lost opportunity" cost of litigation. Courts work on their own timelines. The state system is seriously underfunded and understaffed. Hours spent by company managers and staff answering interrogatories, producing documents, attending depositions or waiting in courthouse lobbies keep them from their real jobs. Criminal cases get priority on the docket which can force civil trials to be postponed. Litigants have little control over trial dates or say in who their judge will be. Juries are the luck of the draw.

Mediators are generally selected by mutual agreement by the parties to a case. The mediation itself (often an intense, but one-day, event) is scheduled at a time and location acceptable to the clients and their counsel. A verdict from a judge or jury can be half a loaf or none – and the uncertainty of a possible appeal always lies ahead. A successful mediation results in a written settlement agreement enforceable in court that cannot be appealed.

Monetary amounts are far more likely to be paid in a matter of weeks rather than years. Mediation also affords flexibility, as terms can be agreed to that are beyond a court's power to order.

CONFIDENTIALITY AND CLOSURE

With few exceptions, trials, hearings and even the filings in a case are open to the public and press. Such disclosures alone can cause serious damage to a company. Confidential business or potentially embarrassing personal information often comes to light in the presence of the media or competitors in higher-profile cases. Litigation can affect the public reputation of a professional service or consumer-based business, and even deter customers and/or future employees. Under New Hampshire law, the mediation process, as part of settlement negotiations, is confidential. No one may attend, other than those authorized by the parties. Statements made by counsel or the litigants in mediation in furtherance of settlement are not admissible in any subsequent court hearing. Mediators cannot be summoned to testify about the proceedings, and generally destroy their notes once the mediation is concluded. The mediator will often confer with parties separately in confidence about their priorities and bottom-line positions in order to help craft a mutually agreeable resolution. They are bound not to divulge such information to the other side and take their responsibilities very seriously.

Litigation is highly stressful. There is an intangible value to just having it over. This is especially true if the parties have, or would like to have, an ongoing relationship. A vendor and purchaser may have had a long association before the dispute arose. Perhaps one or both would like it to continue, but the mere existence of the case makes that unlikely. The pendency of an employment discrimination case, particularly one in which the employee continues to come to work, can polarize the workplace, and negatively affect productivity.

As in romance, timing is everything. Some cases mediate better before they are filed and positions harden. Others require some discovery and expense to be incurred before they are in the best settlement posture. Clients should press their lawyers early and often as to the advisability of mediation, because a settlement is almost always preferable to protracted and expensive litigation. Statistics show that 98 percent of claims brought are ultimately settled. Why not get on with it?



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