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Mediation as an Alternative to Public Litigation of Sensitive Business Issues

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More than one hundred years ago, Abraham Lincoln was quoted as saying: "Discourage Litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner often is the real loser, in fees, expenses and waste of time."

Lincoln was mainly trying to persuade lawyers to act as peacemakers and good members of the community by advising them to help resolve disputes without litigation. This he felt was simply a better practice than to be just another hired gun litigating your opponent into the dust. In truth, in the business community, this is often simply better legal and business advice than encouraging a business to initiate or continue a lawsuit.

Not all controversies or problems are appropriate for mediation. The decision to seek an alternative to litigation may, however, be most important in two situations.

> **When the continuation of a business relationship (such as vendor-purchaser or employer-employee) is more important or could provide greater long term benefit than victory by litigation; or**
>
> **When the business has proprietary information or trade secrets at risk which might be subject to disclosure to the public (and particularly where such information may not be protectable in a court proceeding).**

Mediation to Preserve Relationships

Most businesses employ alternative dispute resolution tactics nearly every day in their relationships with employees, customers and vendors. Litigation is and should be the exception to the rule when handling problems in these relationships. Were this not the case, certainly these businesses would not last long nor be successful.

Preservation of all of these relationships is essential for development and growth of any business. Our society seems, however, to be transcending into one that is

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ever more litigious and this may cause a strain on an already tenuous bond.

Early referral of a dispute may prevent the initiation of litigation. If litigation has already commenced, one of the goals of mediation can certainly be the rebuilding of a damaged relationship. Professional mediators are trained in the use of special techniques designed to allow the parties to address their own problems creatively and to reach their own binding solution.

Often, simple miscommunication or the desire to tell one's story, is the missing element which first results in a bruised ego or growing mistrust, and then ends in a broken relationship. The process of professionally facilitated mediation can be handled in such a way that the parties have both the opportunity to give their version of the problem and to really listen to the other side's version of what happened and what is important. This can all take place in an environment set up for a relatively relaxed, informal and positive conversation.

If saving the relationship with a valued key employee, an important customer or supplier is more important than trying to achieve a costly "victory" in court, then mediation can be the answer.

Mediation to Protect Proprietary Information

Any lawyer who has spent any time in the records section of any courthouse has undoubtedly come across a litigation file which contains some type of "sealed" envelope of evidence or records. Often, parties in business disputes deal with trade secrets and other information which their competitors would love to get their hands on. Attorneys for such litigants will then seek "protective" orders or use other procedural devices to protect such sensitive and valuable information from dissemination to the wrong hands.

Unfortunately, the judicial clerks, posting or docket clerks, copy room clerks, records retention clerks, secretaries and judges, adverse counsel and others who populate the courthouse and repeatedly interact with court files, are not usually particularly adept at nor informed on the issue of protecting such files from unauthorized eyes. Typically such files are public, pursuant to the Freedom of Information Act or some local state open records law. Often there is no way to tell who has opened a file, let alone who has copied part of its contents or even removed parts. Frankly, it happens in every jurisdiction. If it were your customer or price list that might be subject to such unregulated disclosure, would you not take reasonable steps to protect this information? Once you sue or get sued, you lose much of your control over your records, let alone control of the outcome.

In litigation, you face a hostile opponent who may very well be able to use the power of the court to pry open your vault of confidential business secrets. You may also

find that your fate is in the hands of a judge or jury that has less regard for your business than you do, and a different attitude about your trade secrets. Once the judicial forum is invoked by either party, however, it may become impossible to remove your business from it.

Alternatives in Dispute Resolution

There are a number of different ways to resolve disputes. The following is a brief list of some of the more common varieties and some differences between them.

Mediation This is a process that typically is voluntary. It is more and more often, however, being ordered by courts, so it is worthy of investigation. It is best conducted by a specially trained neutral facilitator who will use special techniques to bring the parties to a voluntary final resolution of their dispute. The parties will develop their own solution, which can be binding, or nonbinding, partial or complete.

The process of mediation is typically not subject to disclosure and all communications with the mediator can be confidential. The mediator will often caucus or discuss issues privately with one party at a time at some point during the mediation. The mediation can last a few hours or a few days, according to the agreement of the parties. The process is fairly informal and usually held at a location designed for the comfort of the parties in order to facilitate dialogue and trust. At the end of the mediation, the parties can settle, or they can decide to go to court or another forum if they have not reached a binding agreement.

Arbitration This is also a private and confidential procedure which, unlike mediation, is adjudicatory in nature. The parties typically will select one arbitrator or a panel to hear the case. The parties will present their case in a fairly formal fashion. Rules of evidence and procedure guide the process, just as with a judicial case, although the rules are generally somewhat more relaxed. Pre and post trial motions, subpoenas, evidence and witnesses are all a part of this process.

Typically, the decision of the arbitrator is binding on the parties, just as with a judicial decision. The parties usually can go to court to enforce the arbitration decision. Because the process is much more drawn out and complex than mediation, it is usually much more costly.

Mini-trial and Rent-a Judges Parties to a dispute may decide to hire their own private judge to decide their case. This is usually a retired judge who will use existing court rules, although the parties can decide by agreement to modify the rules for reasons of time, cost or confidentiality.

Often a mini-trial will severely limit such aspects of the process as discovery, cross-examination and extensive presentation of evidence. In some situations, executives from the opposing businesses will "present" their case to a neutral. This is not a negotiation or a mediation. It is an abbreviated statement of positions, justification and basis for position. The parties will typically decide if the process is binding or not.

A private judicial decision of this type can result in the parties retaining control of the situation and the information, and should greatly reduce the time needed to reach a conclusion. There is no judicial precedent to such decisions, so a private ruling can be made.

When not to Mediate Mediation is designed to bring the parties to a dispute together so they may gain insight into the other party's apparent justification for their position, and well as being required by the process to more closely break down and examine the elements of their own position. It is also designed to facilitate the parties in looking at their mutual problem in a more innovative and flexible way than, perhaps, they had previously.

Mediation, however, will meet resistance when the parties do not have sufficient information to make an informed decision. It will tend to be less successful if the parties cannot gain the same frame of reference on critical aspects of the controversy. Additionally, it will certainly fail if one of the sides is merely using it as a fishing expedition, rather than as a good faith device to resolve a dispute. Having all reasonably ascertainable facts before the mediation begins will assure a better result.

Mediation is becoming more common in business disputes as the court system becomes more expensive and bogged down with other cases. The time consumed by executive, staff and counsel, let alone the cost, can be devastating to any business. Add to this the judicially imposed loss of control of the result and the potential for wholesale disclosure or your trade secrets, and the prospect of litigation can be daunting.

Mediation, rather than the "win-lose" situation sought in litigation, uses a public "win-win" strategy to allow the parties to formulate their own solution in privacy. Mediation can result in protection of your confidential business information while you rebuild an important relationship, or at least quickly resolve what would otherwise be a continuing distraction from running your business.

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