



Newsletter

APRIL 2006

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Our office will be closed for the following holidays:

May 29th, 2006 – Memorial Day

Our next newsletter will be mailed out the beginning of July 2006.

Remember if you have an article that you would like to contribute to our newsletter just fax it to us for our review. We must receive the article no later than June 15th for our July newsletter.

INSIDE THIS ISSUE

- 1 **Making Effective Use of Alternative Dispute Resolution for Small Businesses**

- 4 **How to Keep Your Assets from the Clutches of the IRS**

SUITE NUMBER CHANGE

Effective immediately our suite number has changed to **504**. Everything else about our address stays the same. Please change your records, databases, Quicken and/or QuickBooks accordingly.

MAKING EFFECTIVE USE OF ALTERNATIVE DISPUTE RESOLUTION FOR SMALL BUSINESSES

Most business owners are small business owners, competing in an increasingly intense and flattening global environment. As can be seen from the efforts of the current administration to reform the justice system, there are many disadvantages identified by business interests in the current system. This article will discuss those disadvantages, the alternatives, and how you can maximize your efficiency and profitability through the effective use of alternative dispute resolution.



THE PROBLEMS WITH THE COURT SYSTEM

In business, we make commitments to perform. Those commitments are written and verbal contracts. These contracts are promises, and parties making these promises rely upon each other to fulfill them. When one party or the other fails to keep those promises, disputes arise.

These disputes can prove costly. Supply chains for good and services are interrupted; the aggrieved party must scramble to meet customer's needs; uncertainty and decreased profits are likely to result. Lawyers inevitably enter the scene at great cost and disruption.

Traditionally, in the event of a contract breach, one party will hire a lawyer and begin a negotiation process which may or may not achieve satisfactory resolution. When it does not, off to court with a lawsuit.

Lawsuits have several inherent disadvantages for business:

- The parties lose control. Lawyers and judges become the masters of timing and procedure. Disputes can take years to wind through the system.
- Juries are empanelled with little or no expertise in the subject matter to decide who wins or who loses.
- The parties lose the ability to communicate with each other in order to resolve the problem. Relationships are ruined.
- The cost of business escalates significantly due to these delays and attorney's fees.
- Businesses embroiled in litigation can lose a competitive edge.

This system's inherent drawbacks interfere with the small business owner as much, or more so, than the international corporation. Often small business owners have a narrow supply chain, and have built their businesses on personal relationships. These personal relationships become embattled with the advent of a lawsuit. Lawyers will instruct their clients not to discuss the case with the opponents outside of their presence, thus bringing communication—the lifeblood of commerce—to a halt.

Shifting to a global perspective, it is undeniable that the Earth is flattening for business. We compete with not only other local businesses, but also form strategic alliances which span the globe. For lawyers, this horizontal configuration of business means that jurisdictional issues develop. Where will you sue if there is a breach of contract? What law will apply? Lawyers know that it may prove difficult to compel overseas businesses to answer in American courts in the event of dispute.

Moreover, it can be an economic disaster to permit competition to gain strategic advantage with intelligent use a cheaper, tailored, and more efficient way to resolve the inevitable problems associated

with business. American business must adapt to the flattening world through intelligent use of alternative dispute resolution in order to remain competitive.

HOW TO PREVENT THE WAR

Wise companies are often incorporating mandatory mediation in their contractual agreements prior to instituting litigation. Mediation is a much more flexible vehicle than the court system or arbitration for resolving business disputes. Requiring good faith participation in mediation prior to the filing of a lawsuit provides several strategic advantages to the traditional court system. These advantages include:

- **Control.** Rather than lawyers and judges dictating the pace and tempo of the dispute resolution, the parties remain in charge. An agreement is reached only if it is acceptable to both sides, after all issues are on the table in an informal setting. The trigger and method of ADR is agreed by the parties in the contract, and is therefore a known method and expense for which businesses may plan.
- **Constructive Dialogue.** When mandatory mediation is incorporated into the contract, the parties expect to keep the dispute de-escalated, and will often delay in the hiring of an outside attorney for a time sufficient to fully explore all possible ways the dispute can be resolved. This affords maximum opportunity to allow a healthy business relationship going forward.
- **Creativity.** A talented and trained mediator can assist the parties to craft a workable solution which may involve ingenious and creative options which are not available in the court system or even arbitration. The ability of the mediator to “think outside of the box” is his or her stock in trade. The adversarial process is held in abeyance in favor of the more elegant solution.

With mediation, costly war is, at best, prevented, and at worst, held in abeyance to actively pursue peace. Such clauses are frequently seen in real estate sales contracts, and contracts involving construction, and other businesses. The future for American business must include this alternative dispute vehicle to prevent the war.

DISTINGUISHING THE TYPES OF ADR

Arbitration vs. Court Litigation

- Arbitration is “court-light.” In arbitration, there is a one or three arbitrator panel that will issue an “award;” that is, they will decide who wins and who loses, and for how much. This is the same function as the court. with the iudge and

jury.

- Some feel arbitration is faster and more convenient to the parties than is the court system. Others who have utilized arbitration might disagree, as there are lengthy delays for discovery, expert depositions, etc. which are common to both.
- Arbitrators will have a level of education and perhaps expertise that is greater than a typical juror.
- Some feel arbitration is less costly than lawsuits. However, arbitration can be equally as expensive, or more expensive, than a jury trial because the attorney's fees are the same, the expert's costs are the same, and three arbitrators must be compensated by the parties. A judge is a salaried employee of the county and is provided at no cost to the litigants in court.
- Parties to arbitration often worry about the possible influence, through social contacts, promise of future business, or otherwise, that the opponent may have over one or more of the arbitrators. In the court system, the juries are paid nominal amounts by the county and are not in the business of issuing awards for a living.

Mediation vs. Arbitration

As you can see, none of the advantages of mediation: control, constructive dialogue or creativity, is available to the parties in arbitration. Lawyers are litigators, and arbitrators are judges at arbitration.

Arbitration does not prevent the war; it only changes the theater of battle. In contrast, mediation offers many opportunities that arbitration does not.

- Mediators do not issue "awards." They reason with and persuade parties to craft mutually agreeable solutions.
- Mediations can occur without significant delay. This allows minimum disruption of commerce and business.
- Mediations require the parties to communicate. This allows the real underlying issues to be raised and resolved, thus increasing the possibility of future collaboration and business.
- Mediations may be convened and conducted in more creative fashions. Current technology allows mediations to be held through teleconferencing as well as in person. This minimizes the disruption to decision makers.

In the last decade, many lawyers, and some non-lawyers, have become specially trained to assist businesses solve their disputes by way of mediation. While some knowledge and expertise of the subject area can be helpful, more often the skilled mediator applies tried and true techniques in dispute resolution to successfully guide the parties to an agreed result. There are no losers in mediation, and often the root cause of the dispute can be identified and resolved so that business may continue in the future. This result is highly unlikely following jury trial verdict or arbitration award.

Preventing the war is far cheaper than fighting it. For example, the cost of mediation may be as much as \$5,000.00 per day, split between the parties. Anyone who has paid an attorney's fee in a dispute understands the cost savings and economic advantages of mediation over going to war.

MAKING THE PEACE

History is full of missed opportunities to make a just peace after war can not be avoided. Most litigants feel like combatants in a war of attrition in which resources are spent fighting rather than making profits. Many have personal interests and emotions invested in the dispute.

Lawyers are trained well to be litigators and to fight for their clients. They are the generals in a profitable war. Surprisingly, the majority of lawyers who litigate are not trained to make the peace. Only in the last ten years have law schools offered any courses of significance in ADR, and none are typically required as part of a core curriculum to graduate with a law degree.

Mediators are particularly skilled in navigating impasses that the parties can not overcome. Indeed, skilled mediators view impasse as opportunity.

It is a fact that, on many occasions, war can be ended only after the combatants are exhausted, either emotionally or financially, from fighting. If this is the case, mediation can assist in directing the parties to conducting more streamlined discovery to obtain facts which are at the crux of the dispute. Therefore, even if litigation can not be avoided entirely, mediation can assist in bringing it to an earlier end. This benefits the parties tremendously.

WHAT TO EXPECT AT MEDIATION AFTER LITIGATION IS COMMENCED

Participants in mediation after a lawsuit is filed are represented by their attorneys. Each side may choose to provide written briefs to the mediator outlining their respective positions in the dispute. Sometimes these briefs are confidential.

During the mediation process, there may be occasions when all parties are in the room together explaining positions. More often than not, however, the majority of time in mediation is spent in separate "caucuses" where

information can be confidentially shared with the mediator. The mediator's role is to listen and facilitate discussion, and most importantly to find the crux of the dispute and to work toward resolving the problem and/or harmonizing the parties' positions.

CONCLUSION

Success in any business dispute is measured by the just peace, which is result in the continuing success of the venture. Misunderstandings and personality clashes with the inherent emotional issues they create must be separated from the truly irreparable conflict. When mutual profit is at stake, it is essential that the parties move quickly to attempt full and fair resolution. A skilled mediator can assist in this process, and make concrete suggestions to fashion the relationship going forward to avoid pitfalls and prevent foreseeable future disputes.

Robert M. Tessier is a California attorney since 1986 and co-founder of the Centres for Excellence in Dispute Resolution, an organization committed to helping businesses succeed by preventing and resolving commercial disputes. He has earned the highest rating from his peers (AV Martindale Hubbell) and frequently lectures on the subject of dispute resolution. For more information on the services provided by Mr. Tessier and the Centres for Excellence, visit www.cedrs.com.

HOW TO KEEP YOUR ASSETS FROM THE CLUTHERS OF THE IRS

The IRS code makes it a felony to remove, deposit or conceal any property upon which an IRS

levy has been authorized and when done with the intention of defeating the collection of taxes. This does not, however, mean that you must actually turn over to the IRS assets subject to seizure. In fact, IRS agents do not have the authority to force a taxpayer to produce any property for seizure.

Example: You may continuously move the location of a car or boat under threat of seizure. But if you volunteer the location of the asset to an IRS agent, the disclosure must be truthful. As with the bank account subject to constant relocation, the car or boat can be continuously moved to defeat seizure. Still, this tactic is not recommended, no matter how desperately you may want to keep the asset. Eventually the IRS locates and seizes the more significant assets. Safer strategy: Convey, sell or encumber the asset before the collection process reaches the point of lien and seizure. For example, it is considerably smarter to sell your car and then lease it (or another car) back. Here the IRS would have no car to chase and you would avoid a "hide-and-seek" game you are bound to lose.

Nor can the IRS enter either residential or business premises for purposes of seizing property unless you either voluntarily consent to such entry, or the IRS agent has obtained a warrant or a court order, "writ of entry."

You do have the right to examine the writ of entry. You can also confine the agent to the specific premises described in the writ. However, this only applies to private areas. The IRS does not need a writ of entry to seize assets on public garage, for instance, can be seized by the IRS without a writ of entry, while the same auto in your garage cannot.

Property in another state can also slow the IRS. The local agent must then transfer your file to an agent in that state.

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