

The Fast Track to Negotiations

Avoid Litigation and Save Time, Money and Stomach Lining with Alternate Dispute Resolution

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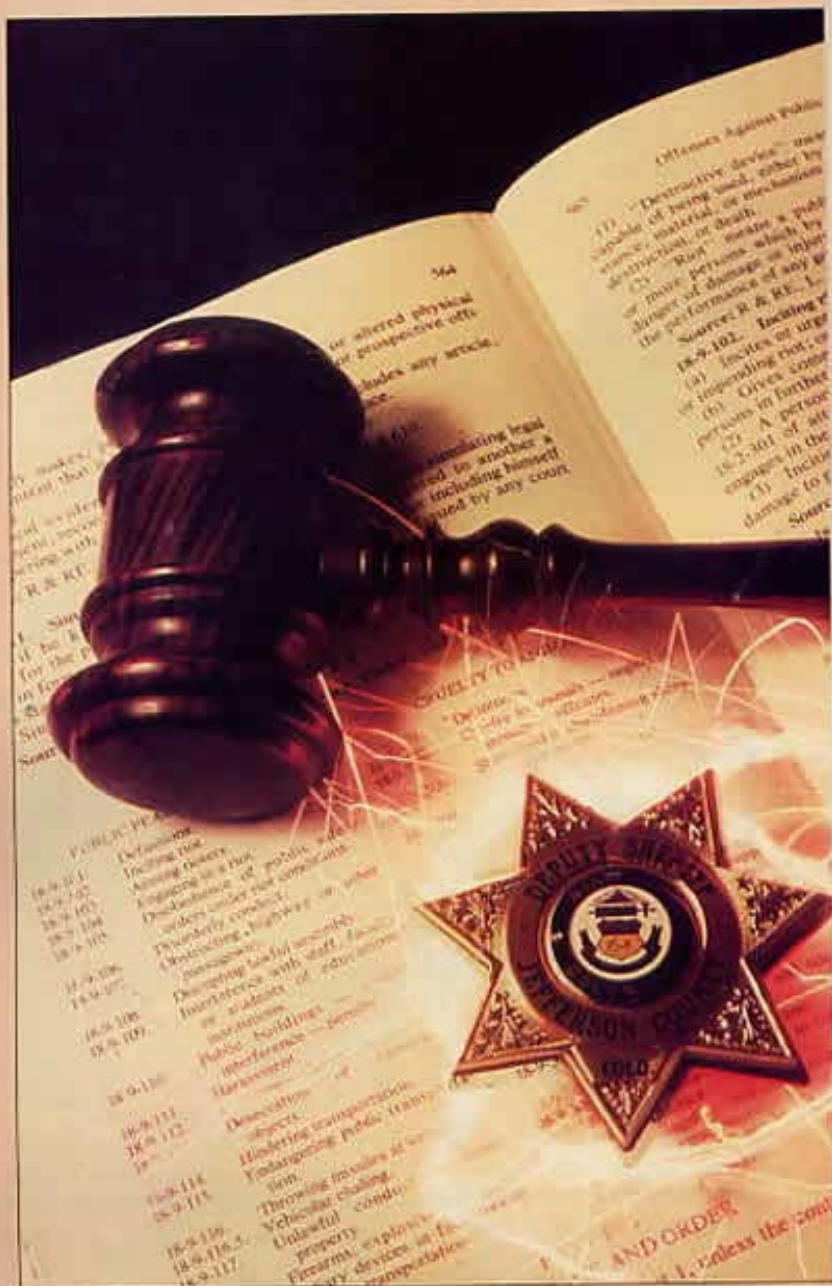
Once upon a time, conflict resolution meant swords and armor. But those days are long past, at least in the business world. Today, litigation masquerades in a more civilized version: combat by court trial. But blood is still shed, in the form of time, money, and stomach lining.

When factoring the costs of running a business, no one can dismiss the possibility of ending up in civil court, either as plaintiff or defendant. With the world growing more complex each year, that possibility edges ever closer while the chances for outright victory decrease. In most cases, the financial burden for mounting an attack or a defense must be shouldered up front.

There are alternatives, ones that can help make the experience less costly, less time consuming and, frequently, less adversarial. Alternate Dispute Resolution may be the answer.

Although Alternate Dispute Resolution, with its components of mediation and arbitration, is becoming more common, especially among larger corporations, many small businesses are inexperienced with this growing practice. This is unfortunate, because ADR has demonstrated an astounding track record in recent years, for both quick resolutions and relatively bloodless ones. Many times the combatants not only resolve their differences, but also — because many ADR methods soften the acid-producing hostility of traditional litigation — continue a productive business relationship.

As the wallowing barge of litigation plows ever more slowly through increasingly treacherous legal seas, it



it any wonder that businesses — from the smallest sole proprietorship to the largest multinational — are jumping ship for the sleek speed of the clipper named ADR?

HISTORICAL PRECEDENT

Although the lay person often views the legal system as monolithic, it actually experiences a constant evolution. On more than one occasion, the U.S. judicial system has undergone fundamental change.

By the middle of the nineteenth century, U.S. court procedures had become so unwieldy that a general outcry arose among all parties involved — litigants, lawyers, and judges. In 1848, New York became the first state to completely rewrite its procedures for trying civil lawsuits in state courts.

Fifty years later, great legal thinkers, like Roscoe Pound, again called for reform. He wrote in 1906, "Uncertainty, delay and expense, and above all the injustice of deciding cases upon points of practice, which are the mere etiquette of jus-

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...have created a deep-seated desire to keep out of court, right or wrong, on the part of every sensible business man in the community."

Those sentiments echo the feelings of the modern business person. Nor are the highest levels of government unaware of the problem. In 1982, U.S. Supreme Court Chief Justice Warren Burger expressed the

thought that many of the "conditions that caused the dissatisfaction in 1906 are still with us...". The delays and high costs in resolving civil disputes continue to frighten away potential litigants, and those who persist and ultimately gain a verdict often see up to half of the recovery absorbed by legal fees and expenses."

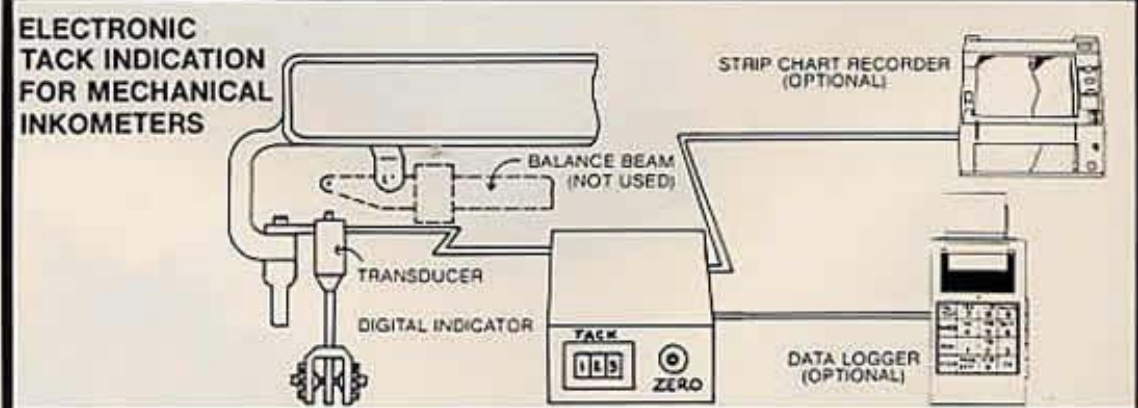
In 1938, Mr. Pound's successors revolutionized the system with the adoption of the Federal Rules of Civil Procedure.

MEDIATION

Of all the ADR options, mediation is usually the least complicated and least expensive. Essentially, the involved parties agree to sit down and

informally present their arguments to a neutral third party, often someone with legal and technical expertise in the field. The mediator functions as a facilitator and, if necessary, a referee. Unless all sides reach an agreement, the suggestions and judgments of the mediator are nonbinding.

Can anything so simple actually



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work? The people most experienced with mediation emphatically say yes. Mediation firms agree that a successful resolution can be reached about 85 percent of the time. Also, mediated settlements are seldom broken, but if broken, they can be enforced like any other contract.

Considering that the mediation process is nonbinding, there is something almost metaphysical about the success rate. A closer examination reveals some logical explanations for this success. Businesses are familiar with the give-and-take of negotiation. They also want to control their own destiny and be part of the decision-making process, instead of having it imposed by decree. Mediation supplies both.

The fulcrum for a successfully mediated dispute is the mediator. An experienced mediator will have the ability to sense when the parties are ready to compromise, competently suggesting alternatives and moving the proceedings toward a mutually satisfying conclusion. Many mediated sessions end in a win-win situation, a significant consideration toward keeping a

business relationship intact.

Mediation is also fast — generally concluded in one day — and private. Lawsuits can give a business the stigma that something has gone wrong. They can make clients, suppliers, and employees nervous, in addition to possibly giving competitors an edge. Mediation is a closed-session procedure, unlike the public forum of court.

With the cooperation of all sides, mediation can be appropriate for practically any civil dispute, big or small, including personal injury cases, real estate or landlord/tenant disagreements, partnership and commercial contract conflict, employment disputes, and a multitude of others.

ARBITRATION

Despite mediation's high success rate, the limiting factor remains the willingness of opposing parties to consider the process. When former allies become adversaries, anger, frustration and a sense of betrayal — along with a strong desire to strike out and punish the other side — can overpower the reasoning mind's desire to get the matter

resolved and get on with business.

Although nearly 90 percent of civil lawsuits are settled before trial, the damage may have been done by then, and a great deal of time and money wasted.

In essence, arbitration follows the same course as mediation: the parties submit their dispute to a neutral third party, or parties, depending on the complexity of the disagreement. Unlike mediation, the arbitrator's judgments are normally final, and only under unusual circumstances can the decision be appealed, either to the court system or to another arbitrator. Nonbinding arbitration is also an option.

Arbitration works most efficiently when the dispute is one of fact: one party stepped beyond the boundaries of the contract, defaulted on promised action or broke a law. New questions of law are best left to the procedural and evidentiary safeguards of litigation.

The biggest corporations in the country, indeed, in the world, now include arbitration clauses in their contracts as a matter of course. Smaller businesses are beginning to follow that lead. Including an arbi-

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tration clause or clauses in a contract can be relatively simple, but, in a complicated negotiation, they can be very detailed.

Because arbitration agreements are contractual in nature, the parties have broad power to specify all issues, terms, and conditions. They may even decide to exclude certain issues from arbitration. While state and federal statutes provide basic procedural guidelines for conducting arbitrations, the contract can delineate a multitude of specific provisions: how to notify each other of a dispute; where to hold the evidentiary hearings; selection of the arbitrator(s); the arbitrator's qualifications; the extent of his or her power to decide and to bind the parties to the decision; how cost will be apportioned; what jurisdiction's law will be applied; what appellate opportunities will be available (if any); and other factors.

For simple contracts, many lawyers believe a general-purpose arbitration clause provides adequate protection. If the intent of a contract clause is primarily to avoid the hassles of lengthy and debilitating litigation, a statement

like, "any disputes between the parties shall be settled by arbitration," may suffice. This language can be adequate to indicate that the parties intend to arbitrate differences and is usually sufficient to permit a court to enforce the intent.

BEFORE YOU ACT

You should understand that there is a tradeoff for the speed, reduced costs, and efficiency of binding arbitration: you may lose the opportunity for a complete judicial review of grievances.

With arbitration, the safeguards and protection provided by the judicial rules of procedure and rules of evidence are greatly reduced. These rules were developed to ensure that both sides receive a fair hearing and that justice is served. The best jurists and thinkers in this country have carefully developed these procedural and evidentiary safeguards through argument and deliberation for hundreds of years.

With this in mind, no one should assume that mediation, arbitration, or any of the currently evolving ways to resolve contractual disputes

are magic beans. There are certainly cases when litigation represents the best alternative. And, the different types of Alternate Dispute Resolution are not always interchangeable. Careful thought and the advice of experienced counsel come before any final decision is made.

Still, few would disagree that ADR techniques are here to stay and can offer viable and often quicker, less expensive, and more gentle options to traditional methods.

For more information:
American Bar Association
Standing Committee on
Dispute Resolution
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