

ALTERNATE DISPUTE RESOLUTION

This process can help you settle legal disputes without resorting to litigation, as well as save you time, money and aggravation

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Once upon a time, resolving a conflict meant donning swords and armor. Fortunately, those days are long past. Today, litigation masquerades as the more civilized version of trial by combat, but we still shed blood in the form of time, money and stomach lining.

No one can dismiss the possibility of ending up in civil court — either as the plaintiff or the defendant — when calculating the costs of running a business. As the world grows more complex each year, such a possibility edges closer to becoming a

probability, while the chances for an outright victory decrease. Furthermore, in most cases, businesses must shoulder the financial burden up front for mounting an attack or defense.

There is an alternative, however, that can help make such experiences less costly, time-consuming and adversarial: alternate dispute resolution. As the name implies, this process deals with mediation, arbitration and their kinsmen.

Although alternate dispute resolution is becoming more common, especially among large corporations,

many small businesses are still unaware of this growing phenomenon. This is unfortunate because this process has, over recent years, compiled an astounding track record for both quick and relatively bloodless resolutions. Because many alternate dispute resolution methods soften the acid-producing hostility of traditional litigation, the combatants are often able to not only resolve their differences but also to continue a productive business relationship.

Let's examine some of the options available under this process.

Of all the options offered by alternate dispute resolution, mediation is usually the least complicated and least expensive. The basic form of mediation predates written history.

Essentially, the parties involved agree to sit down and informally present their arguments to a neutral third party, usually someone with legal and technical expertise in the field. The mediator functions as a facilitator and, if need be, a referee. Unless all sides reach an agreement, the suggestions and judgments of the mediator are nonbinding.

A Historical Perspective

The appearance of alternate dispute resolution could not have come at a more opportune time. Although laymen often view our legal system as monolithic, it is actually constantly evolving. On more than one occasion, the American judicial system has undergone fundamental changes.

For instance, by the middle of the 19th century, US 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 rewrite its procedures for trying civil lawsuits.

Fifty years later, great legal thinkers like Roscoe Pound again called for reform. In 1906, Pound wrote, "Uncertainty, delay and expense, and above all the injustice of deciding cases upon points of practice, which are the mere etiquette of justice . . . have created a deep-seated

desire to keep out of court, right or wrong, on the part of every sensible businessman in the community." In 1938, Pound's successors revolutionized the system by adopting the Federal Rules of Civil Procedure.

Before the Federal Rules of Civil Procedure were adopted, the judicial process was commonly referred to as "trial by ambush" because there was no reliable procedure to discover what facts, witnesses or evidence would be presented by the opponent. Although the process is often referred to as "trial by avalanche" today, the Federal Rules of Civil Procedure have removed some of the uncertainty, if not the delay.

The sentiments voiced by Pound over 85 years ago are echoed by many of today's businesspeople and even the feelings of those at the highest levels of our government. In 1982, US Supreme Court Chief Justice Warren E. Burger thought that several 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."

Can anything so simple actually work? People experienced with mediation emphatically say it can. Mediation firms agree that a successful resolution can be reached about 85 percent of the time.

Additionally, mediated settlements are seldom broken. But if they are, they can be enforced by the courts like any other contract.

Considering that the mediation process is nonbinding, there is something almost mystical about its success rate. A closer examination reveals some logical explanations for this. Businesses are familiar with the give-and-take of negotiation. They also want to control their own destinies and be part of the decision-making process. They do not want decrees imposed on them. Mediation meets these needs.

The fulcrum of a successfully mediated dispute is the mediator. An experienced mediator can sense when the parties are ready to compromise, offer alternatives and move the proceedings toward a mutually satisfying conclusion. Many mediated sessions end in win-win situations, a significant consideration if keeping a business relationship intact is important to all parties involved. By the same token, a seasoned mediator will realize when it is time to pull back and take a break to prevent

escalating emotions from damaging negotiations.

Mediation is fast — generally taking one day — and private. As common as lawsuits are, they can attach a stigma to a business. They can make clients, suppliers and even employees nervous, and possibly even give competitors an edge. Unlike public courts, mediation is a closed-session procedure and, often, no records are kept.

If all sides cooperate, mediation can be appropriate for practically any civil dispute, including personal-injury cases, real estate or landlord/tenant disagreements, partnership and commercial contract conflicts and employment disputes.

Despite the high success rate of mediation, the willingness of opposing parties to consider the process remains a limiting factor. 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 any reasonable person's desire to get the matter resolved and get on with business.

Litigation tends to calcify negative emotions, reducing the potential for constructive resolution and pushing the possibility of future business relations out the back door. Although nearly 90

percent of civil lawsuits are settled before trial (suggesting that the elusive creature known as "your day in court" is an endangered species), by that time the damage may have already been done and a great deal of time and money may have been wasted.

A second option offered by alternate dispute resolution — arbitration — in essence 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 award is final and binding because it is submitted to and confirmed by the court. The arbitrator's award becomes the court's judgment.

However, nonbinding arbitration is also an option when the arbitrator's award is not confirmed by the court or does not result in an enforceable contract.

Arbitration works most efficiently when the dispute is one of fact. For example, one party steps beyond a contractor's boundaries, defaults on a promised action or breaks a law. New legal questions are best left to the procedural and evidentiary safeguards of litigation.

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The biggest corporations in the world now routinely include arbitration clauses in their contracts. Smaller businesses are just beginning to follow their lead.

Including an arbitration clause or clauses in a contract can be relatively easy. Many lawyers feel a general-purpose arbitration clause provides adequate protection for simple contracts. If the intent of a contract clause is primarily to help the parties involved avoid the hassles of lengthy and debilitating litigation, a statement like, "any disputes between the parties shall be settled by arbitration," may suffice. This phrasing indicates that the parties intend to arbitrate differences and is usually sufficient to permit a court to enforce the intent.

Conversely, in complicated negotiations, such clauses can be very detailed.

Because arbitration agreements are contractual in nature, the parties involved have broad power to specify all issues, terms and conditions. They may even decide to specifically exclude certain issues from arbitration.

While state and federal statutes provide basic procedural guidelines for conducting arbitrations, a contract can

delineate a multitude of specific provisions including:

- How parties should notify each other of a dispute.
- Where evidentiary hearings will be held.
- How the arbitrator will be selected. (The US Arbitration Act calls for a single arbitrator, but a panel of three is not uncommon, especially in complex cases.)
- What kind of qualifications the arbitrator must possess.
- The extent of the arbitrator's power to make a decision and bind the parties to it.
- How arbitration costs will be apportioned.
- Which jurisdiction's law the arbitrator will apply.
- What — if any — appellate opportunities will be available.

Before you jump on the alternate-dispute-resolution bandwagon, be aware that there is a trade-off for the speed, reduced costs and decreased aggravation of binding arbitration. You may lose the chance for a complete judicial review of your grievances.

Using arbitration greatly reduces the safeguards and protection provided by the judicial rules of procedure and evi-

dence. These rules were developed to insure that both sides receive a fair hearing and that justice is served. These safeguards have been carefully developed, over hundreds of years, through the arguments and deliberations of this country's best jurists and thinkers.

With this in mind, no one should assume that mediation, arbitration or any of the presently evolving ways to resolve contractual disputes are cure-alls. There are cases when litigation represents the best alternative. For example it may be best to resort to litigation when questions of law predominate or when questions of fact are so complex that skillful cross-examination and the safeguards of court procedure are needed to determine the true facts.

In addition, the different types of alternate dispute resolution are not always interchangeable. Careful thought and the advice of experienced counsel should be used before making any final decision.

While mediation or arbitration may not best serve everyone's needs, few would disagree that alternate-dispute-resolution techniques are here to stay and can offer viable and often quicker, less expensive and gentler options to traditional methods.

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