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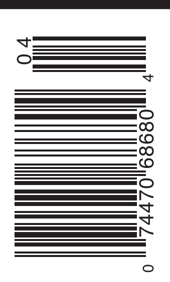

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Seeking solutions

Mediation is becoming increasingly popular among businesses as a means of solving disputes – while avoiding the costly, stressful and time-consuming process of fighting a case in court.

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by Carol Latter
Photo by Lisa Brisson

■ A truck delivers a large shipment of custom-printed fabric worth tens of thousands of dollars to a Connecticut children's clothing manufacturer. A busy employee oversees the offloading of the cartons, then signs for the boxes without inspecting them. Two months later, when the boxes are opened, it's discovered that the fabric is water-damaged. Calls to the supplier produce a stalemate.

The supplier claims that the fabric was delivered in perfect condition, and says the damage must have occurred at the purchaser's warehouse. The discovery that the buyer's warehouse recently repaired a leaky roof seems to lend credence to that claim.

The clothing manufacturer disputes that theory, pointing out that the boxes aren't damaged, just the fabric. The supplier refuses to take the merchandise back, and the manufacturer refuses to pay for the shipment. Each side disparages the other to its business contacts.

A lawsuit is brewing.

Every day, companies across the country unexpectedly find themselves embroiled in a dispute. The problem may relate to supplier issues, debt collection, a contract cancellation, copyright infringement, unfair business practices, or consumer fraud. Any of these problems – and many more – can cost a company time and money, create undue stress, and damage its reputation.

In recent years, a growing number of companies have been seeking non-litigation options to solve cases that could potentially drag on for several years. Rather than sue, or be sued, many have been opting to pursue mediation, which offers a number of significant benefits.

Peter Benner – chair of the Connecticut Bar Association's Alternative Dispute Resolution (ADR) Committee for three years, and now in private practice after many years with a major law firm – said ADR, whether it's arbitration or mediation, can be an attractive option for companies wishing to bypass the costly and time-consuming litigation route.

What's the difference between arbitration and mediation?

"Arbitration is an adjudicative process," explained Benner. "An arbitrator or panel makes the decision. It's more streamlined than a trial and it's usually expedited – no more than a year. It involves a panel of 'neutrals' who can be picked mutually, and they preside over a 10- to 15-day hearing." Neutrals are typically judges or lawyers with experience in the type of case being decided.

With mediation, "one day is the norm, sometimes two days. Most lawyers would be able to complete the average mediation within a day."

Benner said arbitration avoids a protracted court fight, but delivers a binding decision that may suit neither party. "I think it's important [for clients to understand that] arbitration can take two different routes, either to follow the law and the facts to find decisively for one party, or for the arbitrator to look for an equitable middle-ground. While I generally do not support the latter approach, there may tend to be a 'split the baby' result depending on the view of a particular arbitrator. Mediation does not run either of those risks and allows the parties, rather than the arbitrator, to shape the result."

By contrast, "mediation is a supervised and controlled negotiation – and when the parties are ready to throw up their hands and walk away, you have a skilled and experienced mediator to prevent that from happening," said Benner. Rather than have a third party decide the outcome, the parties themselves determine what's fair – or, at least, what they can live with.

For a company that can't afford to lose a case, or simply wants to maintain an ongoing business relationship with the other party, mediation can offer a more palatable and speedy resolution.

Among the many pros of the mediation process, Benner said, are vastly reduced costs, control over the outcome, early resolution, and a "more enduring" result.

"The principle of self-determination is central to the mediation process. **Essentially, you're eliminating the possibility of an adverse outcome.** You never have to settle unless you want to, and your interests are better served because you're not going to be involved in a protracted, unhappy process," he explained.

"In a mediation, the parties can make decisions about concessions, and come up with a much more creative and constructive solution. There will be an opportunity to create value that wouldn't exist otherwise."

Benner said the traditional litigation process involves a discovery phase in which the parties exchange information so as to better understand the basis of their opponent's case. In an era when a lot of business is conducted through e-mail or other electronic means, that process has evolved into "e-discovery," which he said has "caused a whole subset of extremely time-consuming procedures." In some cases, "it can cost hundreds of thousands, if not millions, of dollars and countless hours to identify, organize and retrieve e-documents. As a result, the process can be horrendously expensive."

He added that in

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many litigated cases, "people decide near the end that they can't afford to lose, and they settle on the courthouse steps." That translates to a lot of time and money down the drain.

Mediation, Benner said, "educates you to a more constructive process that can apply in everyday life." The parties may choose to exchange position papers openly, or make them confidential to the mediator. Then everyone sits down and talks about it.

"The mediator's job is to listen, talk and process the information. If you approach it the right way, it can really change the way people think about the conflict resolution process. **There are opportunities to resolve the dispute much earlier in the process than litigation typically provides.** You really see change happen right in the midst of this process. That what I love about it."

While people can sometimes become very emotional and hotheaded, "that can be very cathartic," he said.

Having recently left a large law downtown firm to practice mediation and arbitration on his own in West Hartford, "I stake my career on the fact that this is a process that people will be attracted to."

Alternative Dispute Resolution can also operate hand-in-hand with the litigation process.

"Often, entities who find themselves in a dispute will retain a private mediator even before the matter is put in litigation," said Judge Janet Bond Arterton, U.S. judge for the District of Connecticut. "And even while a case is pending in federal court, the parties may seek a private mediation on their own without involving the court, although they may advise the court of what they've done.

"Our view is that civil litigation matters need to run on parallel tracks – the trial preparation track, all of the discovery and readying the trial for disposition, and a parallel of continually considering and reconsidering whether there are settlement options that make sense."

She noted that **ADR is not only offered by private practitioners, but is part and parcel of the litigation system itself**.

"In 1998, the federal Alternative Dispute Resolution Act required ADR to become part of the policy of national judicial administration. The point of another civil justice reform bill, known as 'The Biden Bill,' was to have all of the federal district courts and courts of appeals take steps to reduce the cost and delay of civil litigation," Judge Arterton said.

The idea behind the legislation was to "enhance the parties' ability to be brought together to see what they have they have in common; this is a time-honored process for finding peaceful solutions. It is now recognized and institutionalized as part of the dispute resolution process."

She said when a civil matter is before the court, there are various points where the parties intersect: when setting the schedule for the case; during one or more status conferences; during hearings on motions; during the pretrial conference; and during the trial itself.

"At all of those points – and during the time in between – parties can request that the court make [an alternative] process available to them."

The first of two processes available is the Special Masters Program, which "enlists seasoned, recognized members of the bar to mediate pending cases in federal court." Introduced in 1965, it ran somewhat informally until 1985, when it became an official program of the district court.

This program, said Judge Arterton, "brings together the parties with a senior experienced litigator in that field. So for business disputes, the Special Master would be an actual practitioner of longstanding in the business law theater, who would know rather quickly what the legal and factual strengths of parties' claims were, and would have a good handle on an evaluation from their own experience." These attorneys work for free, as part of their pro bono work commitment.

Under the program, there are formal lists of Special Masters who satisfy at least the minimal 10 years in practice in the legal field in question, and have previous mediation experience.

When the case is handled via this route, "I might appoint a Special Master who, from my knowledge and experience, seems appropriate for the case, or I may e-mail the list to the lawyers and let them pick. We have to clear with Special Masters that they have no conflicts. Then the parties contact the Special Master directly and set up their own appointment for a mediation conference."

The second option is to involve neutrals who are not currently serving as attorneys.

"There are five magistrates and judges in this district who have played this longtime role as mediators, all of whom are very talented," Judge Arterton said.

She added, "There are no particular guidelines as to which cases should go where, and I think that various of my colleagues have different approaches as to when and with whom a case should be scheduled for a settlement conference."

While private or court-directed mediation offers many benefits to the par-

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ties in a dispute, it is also beneficial for the legal system.

"If we had to try every single case that wasn't disposed of or dismissed by motion, we would have a considerable backlog. So the advantage to the court is that it allows the trial system to work in a reasonably timely fashion," said the judge.

"The benefit to the parties, it seems to me, is that they are able to resolve their disputes themselves, and this is often in a way that the courts really can't provide. **Particularly where they've had an ongoing business relationship, they can come to agreement on certain aspects so that the relationship can move forward – which is not part of what a verdict would provide.**"

A mediated settlement also offers the parties more autonomy. "Business people who are able to reach an agreement will likely find a resolution that is superior to an outcome that is imposed on one side or another. If parties have reached an agreement, that agreement has a higher likelihood of being carried out, without the necessity of coming back to court for a further ruling or interpretation, which sometimes occurs when there's an imposed injunctive relief or monetary relief."

Judge Arterton believes that business people, for the most part, "want to run their businesses; they don't want to spend their money and time in non-business activities like litigation. I find that they are usually very practical individuals who understand that an early mutual resolution is going to have a greater benefit than a longer-term, expensive, litigated outcome."

She said there are cases that require a judicial decision. These may include non-compete cases in a very competitive industry, or cases in which a precedent needs to be set for the future.

But if the case involves money, the interpretation of a contract, or a claim and counterclaim over defective goods, "those are matters that business people know how to resolve. I think that **the practical aspect of a case makes mediation very useful and offers a high success rate**. The role of the private mediator or pro bono Special Master becomes very important in facilitating the parties' ability to get past any antipathy that is becoming costly for both sides."

Presuming a willingness by the parties to explore a mediated settlement, "it's a win-win, because even if they don't succeed in reaching a settlement initially, they have come to understand the case in a different way," she said.

For instance, a plaintiff may discover that the other party is in serious economic distress, and may opt for a partial settlement rather than see its opponent go bankrupt, in which case, it might get nothing.

Mediation will not work in all cases, Judge Arterton said, "but it should be tried. The logic is to get rid of what divides you and get working on what is mutually beneficial."

She thinks of mediation as "a business tool. In a world that seems to have a shortage of peaceful resolution, wherever and whenever it can be encouraged, that's a positive thing." **HM**

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