Resolving Business Disputes Outside the Courtroom
A Primer

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Are you a business person fed up with the frustrations of the court system? Or have you heard enough war stories to know that it just never seems to pay to fight an unfair bill, or pursue someone who has cheated you? This article will explain briefly the two most popular options for resolving your business disputes outside the courtroom.

Arbitration.

Arbitration is essentially a mini-trial in front of an arbitrator, rather than a judge or jury. In theory, arbitration is quicker and less expensive than a civil trial. Why? Because there is no lengthy "discovery" and "motion" practice (unless the process provides for it), and the trial is shorter because there is less time spent waiting on a judge and jury, and all the rules of evidence don't apply.

In practice, arbitration can be quite expensive, however, because the parties have to pay the hourly rates of the arbitrator (in addition to their own lawyer). Courts, in contrast, are paid for by the tax payer. Professional arbitrators are in business for themselves, and some are quite expensive. Still, arbitration is a good way to go, if you live in a jurisdiction with a large back log of cases in the courts. You could save years of waiting, by choosing arbitration instead of a court trial. You get a quicker result, and generally there is no appeal (except in the case of abuses by the arbitrator).

Arbitration is something that both sides must agree upon. Both sides must also agree upon an arbitrator, or firm of arbitrators. The arbitrator should be someone who is impartial: not a relation or former business associate of either party to the dispute. The arbitrator will have a set of rules, which both sides must follow. The court has rules that are law: court rules govern procedure before the court for all litigants. The arbitrator has his or her own private rules, and the parties must abide by them. Those rules set forth the costs of the proceeding, the

time table, and the terms under which the agreement is binding. When an arbitration is binding, this generally means that the winning party may petition the Court to have the decision entered and enforced as a final judgment.

Depending on the process that the parties agree upon, an arbitration can extend for one day, or it can proceed for longer, even weeks or months. Witnesses can testify, and be subject to cross-examination. Documents can be submitted, and the formal rules of evidence may be waived. It is common for lawyers to put together power point presentations and time lines to argue their case to the arbitrator. In most instances, the process is less formal than a court of law.

The American Arbitration Association is popular among business people and its website explains the process, and the costs. Your local community will have other arbitrators who may be more appropriate, and an experienced business litigator can advise you on your options.

Mediation.

The second common form of alternative dispute resolution is mediation. The primary difference between arbitration and mediation is this: mediation is not a trial with a final decision. In a nutshell, mediation is a facilitated settlement conference. Yet, it can be a powerful and valuable tool to the litigant because a good mediator may have a ninety percent or higher success rate in settling disputes through the mediation process.

What exactly happens at a mediation? Again, it depends on the mediator, who must be agreed upon by the parties. The mediator will give the parties a set of rules which will govern the costs and the process for the mediation. Most mediations follow a format similar to this: each party sends the mediator a confidential mediation memorandum a week or two before the mediation. In that memorandum, the party tells the mediator – in confidence – what he or she intends to prove at trial (should mediation fail). The party should also give the mediator a dollar amount to show what he or she is willing to pay or to receive in order the settle the case.

On the day of the mediation, the parties (with their attorneys) meet at the mediator's offices. The mediator usually has at least three conference rooms, and often cookies and candy and other goodies to keep the parties going. The mediation begins with everyone in a large conference room. The mediator opens the mediation, introduces him or herself, and explains the rules. Then, each party's lawyer makes an "opening statement", setting forth the strength of their position. The client may add his or her own comments. Depending on the history of the dispute, the initial meeting can be a little tense. But it is over before long and the parties then retreat to their own private conference rooms.

Then the mediator begins his or her work. The mediator meets privately with each side, to gain a candid and complete picture of their position. The mediator then engages in "shuttle diplomacy" back and forth, testing the assertion of each side, and using his or her experience to get a real feel for the likely outcome of the case, should it go to court. Once the mediator has completed his or her assessment of the case, he uses his persuasive abilities to convince both sides to come to a reasonable settlement.

A good mediator is very experienced, and uses that "gravitas" to convince the litigants of a fair outcome. A good mediator also has an even tempered, diplomatic disposition, which helps the parties stay the course. Mediations are usually long and difficult days, but more often than not, they work.

Alternative Dispute Resolution in the Contract.

As a business person, if you enter into a business contract, it may be wise to negotiate an alternative dispute resolution provision in the contract. This is analogous to having a pre-nuptial agreement before getting married. You hope the relationship goes well, but if it sours, you've agreed upon a method to end the relationship without going to court. If you are dealing with a larger, established entity on the other side, it may have a "form contract" for you to sign which already provides a method, such as AAA arbitration. You might not have much say in changing that selection. But you and your lawyer can always revisit that provision in the contract, if a dispute arises: for example, the parties could still agree to defer AAA arbitration and try a less expensive, one day mediation first.

Finally, even if you end up in litigation in Court, mediation and arbitration are still possible options for resolving your dispute. A number of courts have ancillary mediation and settlement services which are available at reduced or no cost. Before getting dragged down in discovery, the parties may agree to suspend the litigation, and give arbitration or mediation a shot. This is a strategic decision to make in consultation with counsel. If your lawyer advises you to seriously consider it, you would be wise to give it a try.

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