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MEDIATION: A BETTER OPTION

The Problem

Your company has a dispute with a customer or perhaps a vendor, and a valuable relationship is at risk, not to mention your money and your reputation. Are you doomed to fight it out down at the courthouse in the public eye? Mediating the dispute may be a better option.

Mediation as the Solution

Mediation is a positive alternative to litigation in which a trained, neutral third party helps parties settle their dispute in a private, informal setting outside of court. A mediator engages in "issue management" and "shuttle diplomacy" to help parties reach an agreed solution and settlement. However, a mediator cannot impose any settlement: the parties themselves decide whether to settle their dispute. The parties can choose to submit their dispute to mediation, or mediation can be ordered by the court.

Mediation provides a lower cost, highly effective way of resolving disputes through mediated and negotiated settlement. A negotiated settlement by definition is a *solution* that the parties *can* live with since they create it themselves, while a judgment from a court is a *result* that the parties *must* live with whether they like it or not. Mediation is a confidential process protected by statute, an attractive alternative to being forced to divulge business information and perhaps air dirty laundry in a public court proceeding.

Roughly 85% of commercial lawsuits filed in the courts are resolved through settlement before trial, whether through mediation or otherwise. With this in mind, company management, with assistance from counsel, should make early and aggressive use of mediation as a tool to avoid needless costs, business disruptions and wasted time as well as damage to reputation and other undesirable consequences of protracted litigation.



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Mediation that occurs early in a dispute is especially sensible in that it minimizes the cost of litigating the dispute, minimizes the disruption to business operations, and minimizes the damage to the relationship between the parties. Given that the vast majority of lawsuits settle at or before trial, seeking to settle early through mediation can save substantial amounts of time, energy and money. Generally, the only persons that are sure to profit from protracted litigation... are the lawyers.

Mediation in Texas

Texas has been a leader in providing parties with options beyond traditional litigation in the courts. The state adopted a comprehensive statute providing for mediation in 1987, and since then the courts of the state have embraced mediation to the point that referral of cases to mediators has become standard operating procedure in major population centers.

Most large cities in Texas have a local cadre of trained and experienced mediators available for hire. Publicly and privately funded Dispute Resolution Centers in many of the most populous areas provide low-cost mediation services to parties who cannot afford to pay the costs of private mediation. A list of Dispute Resolution Centers can be found at <http://www.texasadr.org/links>.

Texas does not regulate mediators, so there is no state certification or licensing process. Legal education and training, although helpful, is not required, and accordingly some mediators are not lawyers. A Texas mediator must meet the minimum training requirements set out by statute (in order to receive court referrals, a mediator must have at least 40 hours of basic mediation training, and for family law matters an additional 30 hours of subject-specific training is required), but that's only the beginning. Most active mediators participate in advanced training and many have years of experience specific to particular legal subjects.

A number of organizations in Texas can provide valuable assistance to parties seeking trained mediators qualified by experience to help them resolve their disputes. These include the Texas Mediator Credentialing Association (<http://www.txmca.org>), the Texas Association of Mediators (<http://www.txmediator.org>), and the Association of Attorney-Mediators (<http://www.attorney-mediators.org>).

If your dispute is of a commercial nature, select a mediator who has relevant commercial experience. Many mediators are lawyers with extensive commercial backgrounds: some mediators have even served as in-house general counsels in the trenches with business people and thus are well-equipped to offer a pragmatic approach to help you resolve your dispute.

Mediation by Contract

Mandatory binding arbitration can be and often is provided for in contracts. If you do not want a binding arbitration provision in your contracts for any reason, consider including a mandatory mediation provision instead, particularly in consumer-oriented businesses.

While mandatory binding arbitration is increasingly held in disfavor by many, including state and federal legislators, mediation is broadly favored precisely because it is highly effective yet voluntary, meaning that parties cannot be forced to settle a dispute against their will.

For additional information on this topic and other mediation matters, please contact:

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