



*8 VERY BAD REASONS . . .*

## **WHY BUSINESSES LITIGATE**

*By Paul Simon of the Business Mediation Network\**

### **REASON NUMBER 1 – CONTROL: LITIGATING TO FORCE THE OTHER PARTY TO DO WHAT YOU WANT**

Successful business people like to control their business environment to the greatest extent possible. They write business plans, prepare budgets and anticipate alternative scenarios. They also engage lawyers to prepare contracts dealing with shareholders, employees, customers, suppliers, etc. When things do not go according to plan, those lawyers are often told to enforce the contract; to require the other parties abide by the rules. Viewed in this way, litigation is often seen as a tool for businesses to re-establish control.

The problem is that entering the court system usually involves a near total loss of control.

Consider a hypothetical: Imagine a CEO asking an agency of the state or federal government to intervene and decide who is right in an issue between his company's sales, marketing and IT departments over a glitch in the e-commerce portal on its website. The CEO would be aware that the government agency officials know nothing about the company's business and, in fact, often have little business experience at all. Also, the CEO would understand that the government agency has a host of confusing procedures that will require each department to hire expensive lawyers to guide it through the maze of rules. Finally, the CEO would know in advance (1) that the government agency has thousands of other disputes to resolve first, (2) that it will take years of distracting efforts and expensive rule compliance to get the agency to focus on the dispute at a collective cost possibly greater than the problem is worth and (3) that 99% of similar issues that are presented to the agency by other companies are eventually withdrawn or settled in frustration without the agency making any decision at all.

Clearly, the CEO's decision to engage in such an expensive, convoluted and fruitless exercise in problem solving would draw condemnation from the company's investors.

Of course, it is safe to assume that of the 8 million or so business lawsuits filed in state and federal courts each year, none involve internal company disputes of the type mentioned above. However, it is likely that more than a few of those cases are disputes where some company contracted with a marketing firm to design an e-commerce portal which in turn subcontracted with a technology specialist to actually build the site. Once the project ran into trouble, fingers were pointed in different directions and a lawsuit was born.

Obviously, the difference between the two scenarios is control. A company has control over its internal departments but does not control the actions of third-party contractors and subcontractors. Rather, the company must try to enforce the terms of its contract with the third-party. That requires a lawyer's advice on the rights and remedies of the company under the contract. Naturally, the other parties also seek advice from their own lawyers. To no one's surprise, the lawyers will find ways to blame everyone except their own clients. Once this clash of opposing legal positions is mixed with a healthy dose of emotion and differing financial interests, it is often impossible for the parties to directly negotiate a resolution.

Once there is an impasse in negotiations, both business people and business lawyers have been conditioned to seek the coercive power of the courts to force the other parties to do what they want; an attempt to regain control. Unfortunately, what happens next is virtually identical to the opening hypothetical and the business parties actually lose control.

There is an alternative – business mediation.

Business mediation is a voluntary, private dispute resolution process where parties who have reached an impasse in direct negotiations agree to meet with a mediator who conducts a mediation conference with the parties. Each party has a person with settlement authority at the conference and may attend with or without lawyers. The mediator meets with both parties together and then normally meets individually with each party (referred to as a "caucus"). If the parties choose a mediator with substantial business experience, the mediator can help the parties to identify overriding business interests, to understand the alternatives in the context of their business and to fashion a settlement that can prevent wasted time and effort on what is likely a futile lawsuit. A settlement agreement following business mediation not only settles the current dispute but can allow the parties to update to the underlying contract if they wish to preserve the business relationship; something which is usually impossible in an adversarial lawsuit.

Mediation has several benefits over litigation:

**Mediation works** – An estimated 85% of disputes submitted to mediation settle.

**Mediation puts the parties in control of the process** - The mediator does not act as a judge and has no authority to force any party to do anything. The parties send decision-makers who can focus on the issue at hand and avoid the mind-boggling cost and complexity of court rules that require disclosure of documents, motions, depositions, electronic discovery and other pretrial procedural matters that sap the life out of 99% of business lawsuits not to mention the business people involved. Mediation puts real control back into the hands of the business parties.

**Mediation is fast and private** – It can take 30 days or less, it costs a fraction of litigation and is protected by laws of confidentiality. On the last point, many states have specific laws that protect the confidentiality of statements made during mediation. Statements made by the parties to the mediator or to one another during mediation are generally not usable by any party in later litigation. While this cannot shield information that is otherwise obtainable, it allows the business people in the mediation to speak freely and directly.

Business and lawsuits do not mix. Any time business people find themselves involved with the courts trying to force another party to do something (or defend the against that attempt), there will be great deal of frustrating inefficiency as well as posturing, strategies and gamesmanship. Much of what goes on in a lawsuit is only indirectly related to the underlying dispute and usually has very little if anything to do with what is good for the business as a whole.

Rather than to put themselves and their companies into a legal system that controls them, business managers would be wise to consider business mediation as a better way to exert real control over business disputes.

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