



Here's the new business mantra: Mediate before you litigate

Jeanette Belz, Margaret Crowley, 2/27/2012

If you have one breakthrough for your business affairs for 2012, let it be this: It is time to abandon judicial redress as the first course toward ending conflict.

Suits, countersuits and going to the court for "contractual violations" — real or perceived — are a profit-sapping fact of life for every business in America. Judicial redress is made even more difficult as state courts face massive cutbacks that make timely resolution of contract or business disputes nearly impossible.

Forty-two states have reduced their judicial budgets in the past three fiscal years in the face of greater service demands. Due to budget cuts, Reno Justice Court is now closed on Fridays and Sparks Justice Court is "dark" on Mondays.

In fiscal 2010, the Reno Justice Court heard more than 13,000 civil cases, while Sparks Justice Court heard more than 5,500, and these are just lawsuits under \$5,000. The limit was recently raised to \$7,500 so now more cases need to be processed in fewer hours per week.

Imagine a dispute crucial to your business stuck in such a logjam? Does it make sense to resolve a contract related dispute in the longest, most expensive, inefficient and stressful way possible?

Of course it doesn't. So why not add a mediation clause to your contracts? Mediation is a collaborative problem-solving process guided by a neutral, trained mediator who assists disputing parties in discussing their conflict, identifying and clarifying issues, exploring solutions and negotiating an agreement. Mediation is a voluntary process, so it can easily be conducted if both sides agree to try it.

One of the major advantages of mediation is that it helps sustain and hopefully, enhance a relationship you want to preserve with a customer, supplier or other contractor. A dispute over some aspect of your business relationship is negative, time consuming, costly and can easily escalate. Mediation, on the other hand, allows the parties to express their thoughts, listen to others and look for creative solutions together, usually in just a few hours.

The powerful benefit of mediation is that an agreement is not reached unless both sides agree. Sounds really simple, but just think how different this is from arbitration or litigation, where a third party (an arbitrator or a judge) determines the outcome of your dispute. Plus, you have to spend a lot of time and money preparing your case, waiting for it to get on the crowded docket, not to mention the negative energy and stress you endure until the case is heard.

Each year, litigation, and the threat of litigation, adds trillions in costs to businesses large and small. According to a report by consultant Towers Perrin, and reported in Bloomberg News, the direct financial cost of the U.S. tort system was \$254.7 billion, or \$836 per person in 2008. Collaborative focused mediation is a cheaper, quicker solution to civil lawsuits. With Germany's court system buckling at the knees, the lower house of German parliament, the Bundestag, voted unanimously last month in favor of a new mediation law. It gives new legal weight to mediation by creating a more defined role for mediators.

Mediation is especially effective when there is room to negotiate an outcome and the parties aren't totally focused on "sticking it to the other side." Parties to a mediated dispute are more likely to be satisfied with a mediated agreement because they are instrumental in creating it. You can always walk away from a mediation and move to arbitration or litigation, so there's nothing to lose.

The mediation revolution was not lost on one company, Georgia-Pacific, which was an early and effective adopter of mediation and other alternative dispute resolution techniques. While businesses may be giving up their "win at any cost" mentality, most find that they actually have much more to gain. In the 10-year period from 1997 through 2006, Georgia-Pacific estimates that its alternative approach saved at least \$42 million — a meaningful amount even for a company with billions in annual revenues, according to Bloomberg News.

So next time your business is negotiating a contract, why not include a mediation clause? More information about model mediation clauses for contracts can be found at the American Arbitration Association's Web site, www.aaamediation.com. Whether mediation is required by contract or parties simply want to use it for an existing conflict, this alternative dispute resolution tool is a great way for parties to develop their own solutions, end the uncertainty and get back to business.

Jeanette Belz and Margaret Crowley are mediators in Reno and members of the Nevada Dispute Resolution Coalition.