

## Focus ALTERNATIVE DISPUTE RESOLUTION

# Mediation worth a try for business disputes



**Marc Gold**

There are five good reasons for businesses to attempt to settle their commercial disputes through mediation. Beyond the obvious saving of time and money, mediation can also protect business interests, open business opportunities while preserving one's legal rights.

### Saves money

Lots of money. All lawyers know that most lawsuits settle before trial, often at the last minute, and only after large sums of money have been spent on legal fees, expert witnesses and so on.

Mediation offers a cost-effective alternative to litigation. Although the time and cost of mediation will vary with the complexity of the case, the overall cost of a mediation is a fraction of what it costs to take a dispute to trial. Most mediated commercial disputes settle, and while statistics are not readily available because of the confidential nature of mediation, it is generally held that 80 to 85 per cent of mediated cases do reach settlement.

### Saves time

Time is money, and litigation is a long and costly process. But the time

involved in litigating disputes also has real consequences for the running of a business. Owners and managers have to take time away from their responsibilities to gather documents, prepare for and attend discovery proceedings, attend at trial and so on. The loss of productivity can be significant. Moreover, the time involved in litigation is time spent away from taking care of business. Plans get delayed and business development is compromised, if not indeed frustrated. By contrast, a mediated settlement can save years of delay, allowing the parties to focus on growing their business.

### Protects business interests

Lawsuits are about rights and remedies. They do not focus on the business dimensions of a case. Nor is the legal process designed to help the parties explore where their business interests may lie. On the contrary, the focus of the legal process is backward-looking and rights-oriented.

In mediation, business managers and owners are in control of resolving their disputes. A good mediator will help the parties focus on their business interests so that they may develop options for resolving the dispute in a way that leaves both sides better off. Whereas a lawsuit can result in business interests being ignored if not indeed compromised, a mediated settlement does the opposite. Parties agree to a settlement only if their business interests are met.

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Mediator and arbitrator

Moreover, although there are many judges with considerable business experience, a significant number do not have any business background at all. In mediation, the parties can select a mediator with business experience, thereby increasing the odds that the business dimensions of the dispute will remain front and centre.

Finally, mediation is completely confidential. Parties resolve their disputes without publically disclosing trade secrets, business strategy or other information that is best kept out of the public domain.

### Business opportunities

It may seem counterintuitive to say that a business conflict may produce expanded business opportunities. We all have the experience of coming out of conflicts with less than we hoped, if not indeed less than we started out with. But in fact, mediation offers the possibility that one's business opportunities may actually be enhanced.

A skillful mediator will help the parties go beyond their legal posturing to identify and explore the underlying interests that drive them and their businesses. Through that process the parties may discover that there are ways to get more than they thought when they began the process. The plain fact is that mediation can help repair damaged business relationships, helping the parties to continue their relationships to their mutual advantage. Indeed, mediation can help identify new and profitable

areas for collaboration between the parties. And even where the relationship has been damaged irreparably, as happens in many cases, a mediated solution can help each party position themselves better to take advantage of their own business opportunities going forward.

### Legal rights

Of course, mediation does not always work. A deal cannot be reached. The parties cannot find common ground. But nothing has been lost. Unlike litigation or arbitration, mediation preserves all one's legal rights. Parties begin a mediation process with their full bundle of legal rights, and are free to leave the mediation process to pursue their legal rights if they so choose. Mediation leaves parties no worse off than if they had not embarked upon it at all.

### Conclusion

Business owners and managers should insist that their lawyers include a mediation clause in all commercial contracts. It can save money, save time, protect important business interests, expand business opportunities, all the while preserving the parties' legal rights. There is nothing to lose and a great deal to gain.

*Marc Gold is a mediator and arbitrator based in Montreal. He has more than 30 years of experience as a businessman, lawyer, law professor and community leader.*

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## Screening: Best in field can adapt approach

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lawyers make sure they “will not be in breach of a potential restraining order or allow a situation to develop without fully understanding the impact on the parties and the mediation process.”

Screening is also used by lawyers to select the preferred mediator for a case. “Mediators have different backgrounds as well as different approaches to mediation. The best mediator is one who can adapt his or her approach to the type of dispute as well as the parties and counsel involved in the dispute,” Hill said.

By its very nature, mediation must be fluid. The process is never etched in stone and will vary depending on the nature of the dispute and the parties involved. It can also change as the mediation itself unfolds. “As such, some screening is required to determine what approach is necessary,” Hill said.

Ultimately, it's about bringing

### Inside a screening interview

In her draft paper “Screening for Power Imbalances in Family Law Cases,” Hilary Linton, a family lawyer, mediator and arbitrator in Toronto, identified four key principles and elements of a screening interview.

#### ❖ Confidentiality

Disclosure of confidential screening information could put a party or child at risk of harm in certain cases.

#### ❖ Subjective and non-judging

It is intended to give the interviewer necessary information about how the client feels about participating in the proposed dispute resolution and what the client needs to fully

participate without requiring the screener to determine who is telling the truth.

#### ❖ Comprehensive

Interviews are generally conducted as part of a broader intake process, enabling the interviewer to understand the issues in dispute, the concerns each party has about them, and the outcomes each party seeks.

#### ❖ Support

Screening is intended to support the party being screened. Clients are never asked questions about what they have done to the other person during the relationship; they are asked only what they have experienced.

the right people together in the right way. Lawyers are also screening themselves for suitability. “If the client is not satisfied with their counsel...then it will create prob-

lems throughout the process,” Hill said. “It is more likely that they will not have respect for the process or the advice that they receive and will not be happy with the outcome.”

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