

RESOLVING SMALL BUSINESS DISPUTES THROUGH MEDIATION

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ABSTRACT

A revolution is taking place in the way Americans resolve their disputes. The so-called alternative methods of dispute resolution such as mediation and arbitration are increasingly becoming a primary choice for settling conflict. A growing number of large American companies have begun to embrace mediation as an alternative to litigation. The article describes the mediation process in the small business context. The advantages and disadvantages of mediation versus the judicial process are considered. Recommendations concerning the appropriate circumstances in which small business should use mediation to resolve conflict are provided. Also reported are the results of a survey of small business executives that measured their attitudes toward mediation and other forms of dispute resolution. The results suggest that most executives preferred mediation to other forms of dispute resolution. They believe mediation to be a cost-effective and efficient method of resolving conflicts with customers, employees, and suppliers.

INTRODUCTION

A revolution is taking place in the way American businesses resolve their disputes. The so-called "alternative" methods of dispute resolution are increasingly becoming a primary choice for settling conflict. Often alternative dispute resolution (ADR) removes the case entirely from the traditional court-based system for resolving disputes. Some courts have even incorporated ADR as a voluntary or mandatory part of their procedure. These changes are forthcoming because of weaknesses in the judicial system; Supreme Court Chief Justice William Rehnquist, a strong supporter of mediation and ADR generally, believes that the judicial system "particularly ill-serves . . . small businessmen who have contract disputes" (Rehnquist, 1989, p. 3).

Although there are circumstances where the court system is the superior method, mediation is particularly well-suited for the needs and problems of small business. Matz has characterized mediation as providing "a flexible, informal and relatively quick party-empowering way to get disputes out of the traditional judicial or administrative systems" (Matz, 1987, p. 4). The mediation process offers special advantages for the resolution of internal workplace disputes between an employer and employee (Conti, 1985), or to settle conflicts among shareholders of a closely held corporation (Soloman and Soloman, 1987). Meanwhile, litigation is usually criticized on the grounds of expense, time, uncertainty, and unpleasantness (Soloman and Soloman, 1987). Cost conscious corporate executives and in-

house counsel believe that litigation, "whatever the outcome, often proves counterproductive to business objectives" (McCoy, 1992, p. 22).

In this paper we describe the primary forms of alternative dispute resolution, with a focus on mediation in the context of the small business environment. Next, we present the results of a survey investigating the attitudes of small business executives with respect to dispute resolution. Then we explore in some depth the advantages and disadvantages of mediation. Finally, we describe those instances where litigation may actually be preferable to mediation.

ALTERNATIVE METHODS OF DISPUTE RESOLUTION

Several different mechanisms for dispute resolution are considered to be forms of ADR. The basic methods are mediation and arbitration with variations and hybrids of these approaches. Mediation differs from both the judicial process and arbitration because of its informality and non-adversarial nature. In mediation the parties must voluntarily and cooperatively resolve the case with the assistance of a neutral third-party. Arbitration is an adversarial process that resembles litigation but is less formal, and therefore generally considered to be less costly and faster than litigation. In arbitration the parties to a dispute attempt to influence the arbitrator to rule in their favor through a structured presentation of evidence. Arbitration may be voluntary or mandatory, binding or non-binding.

A popular hybrid ADR technique is the minitrial: a formal process that includes a limited discovery period followed by a structured but abbreviated presentation of the case. Typically the case is presented to a panel, including representatives for each party with authority to settle the case, and a neutral third-party advisor who conducts the proceeding. The advisor may act as an arbitrator by rendering a non-binding opinion on the case, and as a mediator by assisting the parties to negotiate a settlement.

Each method of ADR has its own set of advantages and disadvantages in comparison to the court system and each other. A thorough discussion and comparison of all the dispute resolution processes is beyond the scope of this article. Our focus here is on mediation.

THE MEDIATION PROCESS

Mediation is, in essence, a facilitated negotiation. The parties to a dispute meet with an impartial third party, acceptable to all disputants, who does not have decisionmaking power regarding their conflict. The mediator assists the parties in voluntarily reaching their own mutually acceptable settlement of the issues in dispute. Currently there are no licensing requirements for mediators who have various backgrounds such as psychology, business and law. Individuals and companies offering mediation and other ADR services have proliferated in recent years and may be located through the *Yellow Pages* under "mediation services." The largest and oldest provider of such services is the non-profit American Arbitration Association founded in 1926. Other market leaders include the for-profit companies Judicial Arbitration and Mediation Service and Judicate (Pollock, 1993). When selecting a mediator one should

consider an individual's training, experience, relevant specializations and neutrality. Services are generally billed at an hourly rate with an additional flat fee charged by some providers.

Direct negotiation between disputants (or their attorneys) can offer some of the potential advantages of mediation. However, when such negotiations are unsuccessful they tend to increase hostility between the parties and may increase the time required to resolve the dispute. McCoy (1992) believes that negotiation commonly leads to the adoption of "gaming techniques that work against an accommodative solution" (p. 22). Legal cases are commonly settled through negotiation prior to trial, sometimes on the courthouse steps, and often after needless time and expense (McCoy, 1992). Alternatively, an experienced mediator helps the disputing parties channel their anger and emotions constructively through a proven process to arrive at an immediate solution.

Unlike the fixed procedures in a civil or criminal court case, mediation processes vary depending upon the service provider. There is no accepted model or special method for mediating a business dispute. The seven stage mediation process described by Folberg and Taylor (1986) provides a good generic model that encompasses most mediation formats:

1. Introduction - creating trust and structure,
2. Fact finding and isolation of issues,
3. Creation of options and alternatives,
4. Negotiation and decision making,
5. Clarification and writing a plan,
6. Legal review and processing, and
7. Implementation, review and revision.

In a typical mediation, the mediator sets the tone by explaining the process and ground rules that will apply. The parties are given an opportunity to express their own perspective on the facts, information is shared and pertinent issues identified. Mediation provides the parties with a forum to discuss the sources and issues of their conflict face to face. Mediation also provides a unique opportunity to express feelings and anger to the other party. A skilled mediator assures that such exchanges will ultimately have a constructive impact on the resolution of the dispute. The mediation process is designed to move the disputing parties to an understanding of each other's perspective. It is also designed to surface the underlying sources of conflict as well as any hidden agendas.

Following the discussion of the facts and issues, the parties, with active assistance from the mediator, explore alternative solutions and negotiate a resolution to their conflict. The aim is to construct a creative, "win-win" resolution. If an agreement is reached, it becomes a written plan. In business related disputes this plan will usually become a contract, signed by both parties, and legally enforceable. Therefore it may be advisable for a businessperson to have the agreement reviewed by counsel.

Normally, the final agreement is the primary goal of mediation. This accord typically solves the present dispute by providing that the parties take certain actions in the future (for example, one party must pay a sum of money to the other party by a certain date). Other goals

of mediation are to reduce the negative effects of conflict and improve the ability of the parties to communicate and negotiate (particularly with each other) in the future (Folberg and Taylor, 1986).

Mediation works well for many reasons. It is a simple, easy to grasp process. The process leads to respect and understanding between the parties. Mediators are role-models with positive attitudes toward conflict and collaboration. Collaboration encourages creative problem solving by the disputants (Davis, 1989). The mediation process allows parties to express their feelings including the opportunity to "ventilate" strong emotions. Research in human psychology and animal behavior reveals a need for reconciliation (Davis, 1989), and mediation offers a meaningful way for the conflicting parties to meet this need. Finally, mediation gives disputants considerable control over the resolution of their own dispute (Lampe, 1992).

PERCEPTIONS AND USE OF MEDIATION BY SMALL BUSINESS

Previous research comparing mediation and judicial process on such factors as cost, speed, and the satisfaction level of involved parties is limited, especially for business cases. In fact, we were unable to locate any research done specifically for small business. The National Association of Manufacturers (NAM) estimates a sharp growth in business expenditures for legal services from \$19.8 billion in 1982 to \$57 billion in 1992 (Riegel, 1993). An increasing number of large American companies have begun to embrace mediation while small businesses generally have not (Lovenheim, 1989). More than 600 large corporations have entered an agreement through the Center for Public Resources in New York, a nonprofit firm that promotes alternative dispute resolution, to first try ADR in disputes with other companies that have signed the pledge (Jacobs, 1992). Even law firms have turned to mediation to resolve partnership disputes (Harlan, 1988).

Method

A study was performed to determine the perceptions, attitudes and opinions of small business owners toward mediation as a method of dispute resolution. Two thousand small business owners in a southwestern metropolitan area were randomly selected for a mail survey. The response rate of usable returns was about 9% (175 responses). Although this is a relatively low response, tests of differences between early respondents versus late respondents were not significantly different, evidence that there was not non-response bias. Also, recent marketing research literature (e.g., Dillon, Madden and Firtle, 1994) suggests that response rates for mail surveys without incentives or without a particular interest on the part of the respondent may easily drop to the range of five to ten percent. Of course, the obvious explanation is due to the tremendous volume of unsolicited direct mail that the typical individual or business now receives.

In this research 69% of the responses were from businesses with ten or fewer employees, 25% were from businesses with eleven to fifty employees, 5% were from businesses with fifty-one to one hundred employees, and 1% were from firms with 101 to 300 employees. Almost 60% of the responses originated in the service sector, 12% from

construction, 10% from retail distribution, 5% from wholesale distribution, with the remaining 13% from manufacturing and other industries.

The Kinds of Disputes Experienced by Small Business Owners

Most of the respondents (76%) have been involved in disputes during the last five years. Almost 8% have experienced six to ten disputes, and 7% reported being involved in ten or more disputes during the last five years. Table 1 reports the kinds of disputes experienced by those small business owners who reported being involved in at least one dispute during the last five years. Mediation users followed the general response pattern for the entire sample with two notable exceptions: they reported more personnel disputes (25.9% compared to 14.5%, respectively) and almost four times as many disputes with other professionals (25.9% compared to 7.5% respectively). An immediate explanation for this is not forthcoming except that it may be an artifact of the relatively small sample of mediation users (n=27).

Attitudes Toward Mediation by Small Business Owners

Most of the respondents (83%) knew that mediation existed as an alternative to litigation and other adversarial approaches to dispute resolution. However, only 20% of the respondents involved in disputes actually utilized mediation as a means of resolving it. A similar number of respondents (18%) reported using arbitration while three times as many (61%) reported using court proceedings as a method of dispute resolution.

Table 1

Types of Disputes During the Last Five Years

	Involved in Disputes	Mediation Users
Client Disputes	43.4%	48.1%
Personnel Disputes	14.5%	25.9%
Supplier Disputes	13.3%	14.8%
Disputes with Other Professionals	7.5%	25.9%
Disputes with Competitors	2.9%	3.7%

Note. Respondents could report multiple dispute types.

Based on their experiences resolving disputes, respondents were asked to provide their general attitude toward mediation, arbitration and court proceedings, on a five-point Likert scale. A 5 on the scale represented a highly positive attitude, and a 1 on the scale represented a highly negative attitude. Table 2 indicates the general attitudes towards these three forms of

dispute resolution as a function of the number of disputes that have been experienced in the last five years.

Table 2

Attitudes Toward Dispute Resolution By Number of Past Disputes

Dispute Resolution Method	Number of Past Disputes				
	Overall	0	1-5	6-10	10 or More
Mediation					
<u>M</u>	3.8 ^a	4.5 ^b	3.6 ^b	3.4	4.3
<u>n</u>	68	11	45	5	7
Arbitration					
<u>M</u>	3.5 ^a	3.7	3.4	3.0	4.3
<u>n</u>	69	11	47	5	6
Court Proceedings					
<u>M</u>	2.4 ^a	2.2	2.5	3.1	3.0
<u>n</u>	104	9	76	10	9

Note. Attitude judgments were made on 5-point scale (1 = highly negative, 5 = highly positive).

^a T-tests of combinations of the overall means concluded significantly different means at $p = .05$.

^b Significantly different means using the Bonferroni test at $p = .05$.

As we see in Table 2, overall, mediation was viewed as the most positive method with a mean score of 3.8, compared to a mean of 3.5 for arbitration and a mean of 2.4 for court proceedings. Interestingly, those few respondents who have not been involved in disputes in the last five years had a significantly more positive attitude than those who had been in from one to five disputes (mean value of 4.5 compared with 3.6). One explanation for this may be that there is a popular conception that mediation is a panacea for dispute resolution, but this perception may be altered when the reality of facing a dispute with any method of dispute resolution occurs.

Also of interest in Table 2 is the marked but not statistically significant positive increase in the attitudes towards both mediation and arbitration by those who had been involved in ten or more disputes. The small number of respondents in these subgroups prevented the observed means from being statistically significant (at the $p = .05$ level), but the evidence suggests that attitudes become more positive as experience with these two methods increases. A similar trend was not seen to be the case for court proceedings.

Mediation was also viewed as a cost effective method by the greatest percentage of respondents. Of those involved in disputes, 93% believe mediation is cost effective, while 79% believe arbitration is cost effective. In contrast, only 14% believe that the use of the courts is a cost effective dispute resolution technique.

Seventy-six percent of the survey respondents indicated that they believe that mediation saves time and money, and 50% of all the respondents indicated an interest in learning more about mediation as a resolution technique.

Attitudes Towards Mediation By Users of Mediation Services

Those small business owners who had actually used mediation as a method of dispute resolution were overwhelmingly in favor of it over arbitration or the judicial process. More than 95% of those who have used mediation cited it as a cost effective technique, while only 12.5% of this group cited the use of the court system as a cost effective technique. The mean attitude toward mediation was 4.2 (on a scale of 1 to 5, where 5 is the most positive rating). This was higher than the rating given to both arbitration and the use of court proceedings (mean values of 3.8 and 2.6, respectively).

ASSESSING MEDIATION FOR SMALL BUSINESS DISPUTE RESOLUTION

In comparison to judicial process, mediation generally offers many advantages although it does harbor a few disadvantages as well. The positive perception of mediation held by small business executives surveyed (particularly those who had used the process), relative to the adversarial methods of dispute resolution, is warranted in most situations. The following discussion elaborates on the benefits and drawbacks of using mediation rather than judicial process.

Advantages of Mediation

Much of the best data currently available with respect to mediation in comparison to judicial process comes from leading studies in the fields of divorce, child custody, and small claims court disputes. As we mentioned earlier, there is a dearth of studies concerning the use of mediation in small business disputes. However, divorce and child custody cases are notoriously among the most difficult to solve because of the high level of emotion evoked in such cases. We therefore believe these studies, in the sense that they may represent extreme examples, have relevance because they provide conservative guidelines for other contexts including small business. In addition, the small claims court research described below is relevant to small business because small businesses were parties in many of the cases reflected in the data for that research.

Saving Time and Money. The most appealing advantages of mediation for small business, compared to judicial process, are its lower cost and greater speed in bringing about conflict resolution. Pearson and Thoennes (1985) completed two separate studies of divorce cases, including contested child custody and visitation cases, and they found that successful

mediation saved disputants time and money in comparison to judicial process. The Center for Public Resources tracked 406 companies that used alternatives to the judicial process (mediation, arbitration, etc.) between 1990 and 1993. They found a savings of more than \$150 million in legal fees and expert-witness costs over litigation (Pollock, 1993). By diverting a case to mediation earlier in the dispute even greater savings can be realized (Pearson, 1982).

The benefits of mediation are, of course, the greatest if the mediation is successful. One advantage of court proceedings is that there is always a final resolution. Since the parties to a mediation must voluntarily consent to an agreement, not all mediations result in settling the dispute. However, reputable mediation programs do report a high percentage of success. For example, the American Arbitration Association (AAA) has a settlement rate greater than 80% for their commercial and construction industry mediation program (American Arbitration Association, 1992), and AAA's leading mediation program in Los Angeles has a 90% success rate for all types of cases (Arbitration Times, 1993). In 1993, this program settled 55 injury claims from a two-bus accident in just 68 hours of mediation with an estimated net savings of \$180,000 in legal costs (Arbitration Times, 1993).

Additionally, some community dispute resolution centers (CDRC's) provide free or low cost services and handle a variety of disputes including many cases involving small business as a party. Of the 742 cases that were mediated at one metropolitan CDRC during a one year period ending in 1990, 555 (74%) resulted in an agreement. Many of the cases resulted in an agreement even prior to formal mediation (or adjudication) simply as the result of intervention by CDRC personnel (Lampe, 1991). McEwen and Maiman (1981) found that almost 70% of cases diverted to mediation from the Maine small claims court resulted in an agreement. The most successful mediations in the Maine study were cases that involved business plaintiffs suing individual defendants (94%). Pearson and Thoennes (1984) found that about 80% of those exposed to mediation in child custody disputes produced their own agreement during or after the mediation process, while only 60% of non-mediating parties reached an agreement without a court hearing. A mediator of law firm partnership disputes reported that of the ten dissolutions he mediated, only two went into litigation (Harlan, 1988). Resolution of employee grievances through mediation also has been very successful (Sigler, 1987). It should be noted that if a case brought to mediation is not resolved through that process the unsuccessful mediation will increase the cost and may delay settlement of the matter (Solomon and Solomon, 1987).

Maintaining Privacy. Mediation also provides a greater opportunity to maintain privacy than does the judicial process. This can be important for a small business trying to guard its trade secrets or reputation. Since the courts are a public forum, privacy is limited. During litigation valuable information about a business may be given public exposure. The parties may be viewed by the public in a distorted light because of publicity surrounding their conflict (Solove, 1986). Parties to a mediation typically agree at the outset to keep information disclosed during the process, and the final agreement, confidential. Notwithstanding, the advantage of privacy such confidentiality may raise ethical issues where the public would be served by disclosure. An example could be a case involving injury caused by a defective product.

Providing a Sense of Control. Mediation offers psychological advantages that can lead to tangible benefits. These benefits are unlikely to accrue through judicial process. The mediation process is easy to understand, and it provides disputants with a sense of empowerment and control. Because of the inherent simplicity of mediation, the need for a lawyer is diminished. The parties are normally voluntary participants in the process, they may jointly select the mediator, they craft a resolution, and they voluntarily agree to follow that resolution. Mediation is a cooperative process that requires the parties to work together to find a resolution. There is virtually unlimited flexibility in finding a mutually agreeable solution.

Research demonstrates that satisfaction with both the process and the outcome are higher with mediation than the judicial process. From data gathered in two separate studies on custody and divorce mediation cases, Pearson and Thoennes concluded "that individuals who mediate are extremely pleased with the process whether or not they reach an agreement." (Pearson and Thoennes 1985, p. 463). In contrast, their research revealed fewer favorable evaluations of the legal system. For small claims court cases McEwen and Maiman (1981) also found somewhat greater satisfaction with the overall experience and fairness of outcome among parties whose conflict was mediated as opposed to adjudicated. The increased enthusiasm for mediation by the small business executives in our sample who had used mediation also supports these findings.

Salvaging Key Stakeholder Relationships. As we previously discussed, inherent to mediation are the attributes of empowerment and control, simplicity, required cooperation, and flexibility. These characteristics may result in several tangible benefits for parties who mediate their conflict.

Mediation provides a strong opportunity to salvage an ongoing relationship between disputing parties. Research by Pearson and Thoennes (1985) on divorce and custody cases indicates that when mediation is successful it is more likely to result in a better (or less strained) relationship between ex-spouses than the judicial process. McEwen and Maiman (1981) found that parties with a continuing relationship had a particularly high satisfaction rate (80%) with mediation. According to Sander (1985), mediation is very effective at resolving cases involving long-term relationships that will continue in the future. Because of its non-adversarial nature, mediation of employee-employer disputes contributes to the overall health of a business organization (Conti, 1985). Shareholders in a close corporation can use it to mitigate tensions, rebuild relationships, and soften future disputes (Solomon and Solomon, 1987).

In our study, 43% of the disputes experienced by the sample group in the last five years were with clients or customers. The next most frequent categories were personnel disputes (14.5%) and supplier disputes (13%). A small business's relationship with a valuable customer, employee, or supplier is more likely to be salvaged when mediation is used to resolve a dispute. At the least, animosity can be decreased through mediation, so the other party will be less likely to make negative statements that could hurt the business's reputation.

Fulfilling the Agreement. Research indicates that it is less likely that a party will renege on a mediation agreement than fail to comply with a court judgment (McEwen and Maiman, 1981; Pearson, 1982). Mediation also provides a greater opportunity to fashion

creative solutions and meet special needs than does court proceedings. In civil court proceedings the usual remedy is money damages to be paid by a specific date. This feature of flexibility is an additional reason for the greater likelihood of compliance with a mediation agreement than a court judgment (McEwen and Maiman, 1981).

Advantages of Judicial Process

Although we believe that mediation is generally superior to the judicial process, there are circumstances where litigation may be preferred. As previously discussed, the certainty that a resolution will be reached is one of the most important advantages of the court system. Several other reasons to use judicial process rather than mediation are discussed below.

Large Monetary Awards. Since mediation normally requires compromise it is not likely to result in one party receiving a maximum award. When a plaintiff has a strong case the court is likely to award a greater amount than the amount that would be arrived at through mediated settlement. McEwen and Maiman (1981) found that in nearly half the cases adjudicated by the Maine small claims court the plaintiff was awarded all, or nearly all of the claim, while this occurred in only 17% of the mediated cases. However, legal and procedural costs normally decrease the net amount received in a case that has been litigated. Compensation from an agreement mediated early in the dispute may compare favorably to the net amount received from a court award, even with a large verdict.

Exposure in the Public Record and Press. The court system also provides an opportunity for publicity and public exposure that is typically not available through mediation. If this exposure is desirable then the dispute should be taken to court.

The Possibility of Appeal and Making New Law. Furthermore, a mediated agreement is final as well as legally binding. It cannot be successfully appealed, except in very unusual circumstances. (Normally parties to a mediation would not have a reason to appeal an agreement they voluntarily entered into.) Also, mediation is not a vehicle to make or change law. This can only be done through a court case that is appealed.

Recommendations for Further Research. This article presents the best data currently available with respect to mediation and small business. Additional empirical research should specifically address the impacts of different methods of dispute resolution on small business. In particular, studies can be designed to compare small business disputes that were mediated with those arbitrated or adjudicated with respect to factors such as cost, speed, outcome, satisfaction, impact on the relationship, and compliance. Because of the potentially devastating effect a lawsuit may have on a new venture or small business, such specialized research would provide invaluable information.

Another area for future research is the relative lack of penetration achieved by mediation as an alternative to court proceedings. Although 83% of the respondents knew of mediation, only 20% had actually utilized it. The motivating links between awareness and use warrant exploration.

SUMMARY AND CONCLUSION

Small business executives are increasingly becoming familiar with mediation as an alternative to the judicial process for resolving disputes. These executives, and others who have used mediation, tend to have a high level of satisfaction with this method of conflict resolution. We have provided information regarding the advantages and disadvantages of mediation, and when it is best utilized by a small business.

Managers can be proactive and practice preventive law by drafting contracts with a clause requiring the parties to first submit any dispute to mediation. Should a controversy arise with an employee, supplier, customer, or any other party, the obligation to attempt to settle the dispute through mediation will pre-exist and not require a new agreement at that juncture.

When mediation is undertaken it is generally most beneficial soon after the dispute has arisen. Where a controversy involves a complex matter, or a substantial amount of money, a business person should first seek the advice of an attorney. We do recommend, however, that the attorney be supportive of mediation and have experience with the process. Law schools are increasing their emphasis on ADR and the number of attorneys knowledgeable about mediation is growing.

We recommend that business school classes in management and law cover ADR with an emphasis on negotiation skills and the mediation concept. As future entrepreneurs and managers, students should be aware of the pros and cons of mediation and other modes of conflict resolution. When faced with inevitable disputes they will be better prepared to effectively manage solutions.

Weckstein (1988) concludes that the search for truth in a dispute is aided by process values such as party participation, satisfaction, human dignity and protection of important relationships. As we discussed in this article, mediation is a unique option because it embodies these values and through them provides many advantages to small business.

In a 1985 speech former Supreme Court Chief Justice Court Warren Burger quoted a distinguished lawyer, Abraham Lincoln, in urging American's to refrain from court adjudication: "Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a real loser in fees, expenses and waste of time. As a peacemaker the lawyer has a superior opportunity of being a good man . . . Never stir up litigation. A worse man can scarcely be found than one who does this" (Burger, 1985, p. 4).

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