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## Harnessing the power of mediation to resolve your business disputes

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Let's face it. Conflict happens. It's pretty much rampant in day-to-day business life. But with revised deal points, replaced products or assuaged feelings, things usually get back on track in short order. There are times, however, when a business dispute resists home remedy. The situation escalates as negotiations falter and accusations of damage turn into a threatened or actual lawsuit.

As business owners, you've likely found yourself at this turning point more than once. It's not a happy place to be, even if you're the one gunning for legal action. The mere prospect of litigation usually brings up feelings of dread. For starters, there's the inevitable investment of your money, time and emotions — all precious resources. Then there's the specter of uncertain results and abdicating control to lawyers and the legal system. Catch 22; zero-sum game; lose-lose proposition: however you size it up, the litigation whirlpool seems inescapable.

But there is an escape route.

No matter what side of a conflict you're on or where you are in the litigation process, mediation is not only a viable option, it's an outstanding one that more and more business owners are exercising to resolve a wide range of disputes. Mediation provides a problem-solving forum in which disputants have equal opportunities to air their differences and tell their stories before a neutral professional. Mediators don't render decisions. They help parties explore avenues for negotiating and reaching resolution on their own terms.

The following profile of a mediation I recently conducted in a construction clean up case really brings home how efficient and effective the process can be in even the most complex and acrimonious disputes.

### Deconstructing the Anatomy of a Conflict

In June 2004, a perfect storm was brewing between New York City officials and private contractors who helped clean up the World Trade Center site. Whatever good will existed between the parties right after September 11<sup>th</sup> was long gone. Simmering hostility had turned into unbridled animosity capped by a complaint for over a million dollars in damages. A Federal judge assigned me to mediate the matter.

The mediation session took place in the conference room of a posh office in the heart of Manhattan. Present were three parties, four attorneys and me. One lawyer at the table nicely summed up the party line at the outset when he told me that there was no way the case would settle, which was why he had parked his car at a two-hour meter. Having met thirteen different times to try to sort things out on their own, the parties believed that this was just another perfunctory pre-trial exercise. They seemed to be on autopilot.

I duly acknowledged their take on the odds of settlement, but would not let it sidetrack the process. Rather, I reiterated my unbiased commitment to giving this mediation the best possible chance of success by listening and responding with integrity and objectivity to what I heard.

And so, for the fourteenth time, the parties related why they were right and the other guys were wrong. After everyone had their say, I turned to the lawyers and inquired how many years of experience they each had. The answers came: 41, 35, 26, 18 years. Tallying my own 13 years and some other variables, I said, "You mean to tell me that with 133 years of legal experience, 80 years of business know-how, six college degrees, five JDs and two MBAs, you think we need an overworked judge to resolve this dispute for us?"

This wasn't a flip or sarcastic remark. Being a skilled mediator and experienced lawyer, I knew that if they could cut through their entrenched perspectives, hurt feelings and destructive goals, the parties would have a breakthrough and find a mutually favorable solution. As is so often the case in stymied business dealings, they had become fixated on what was wrong — on their disagreements. There were fifteen claims of wrongdoing in the pending lawsuit, but the parties could only see one huge, insurmountable problem.

So I asked them to do something different. I asked that they reorient themselves a bit and tell me on what points they all *agreed*. Lo and behold, after looking at the issues one at a time for just one hour, everyone realized that there was substantial or complete agreement on all but three claims. With this shift in perspective, the atmosphere radically changed.

Indeed, buoyed by the prospect of imminent resolution, the parties wanted to adjourn for the day and come back in three weeks to finish up. But I knew adjournment was risky because, in the interim, emotions would resurface and issues would again appear larger than life. The parties heard me out and decided to proceed that day.

### Employing Shuttle Diplomacy

I felt that the three remaining issues were more likely to resolve if I worked with each of the parties separately. As I engaged in the shuttle diplomacy that mediators call *caucusing*, the parties' unrealistic expectations soon receded along with their feelings of being wronged. The more insight they gained into the realities and nuances of the matter, the more they expressed a desire to see it disappear in a quick and cost-effective way.

The caucuses also afforded a vital opportunity for both sides to negotiate without disclosing their bottom line to each other. The parties told me in confidence what they'd be willing to settle for. It turned out, as it almost always does, that they were much closer to agreement than their direct negotiations had indicated. Without revealing the offers, I was able to reassure the parties that they were within range of settlement. Surprised and relieved at the news, they became even more flexible going forward.

After several hours of these back and forth discussions, the matter resolved. We wrote up the formal settlement agreement, signed it and the parties shook hands genuinely thrilled that the ordeal was over.

### Understanding Why Mediation Worked in this Case and How it Can Work for You

Although it involved a unique and very complex set of issues, the profiled construction clean up case was actually quite similar to most matters I encounter in my mediation practice. The parties came to the table with a fervent belief that they were miles apart and that settlement was unlikely at best. The palpable anger and discord that pervaded provided the only apparent common ground.

Mediation is made for these kinds of situations.

Especially when confronted with conflict, people tend to focus on what's gone wrong instead of what's still right. Mediators are trained to look beyond this human tendency and encourage participants to pinpoint areas of agreement. As demonstrated in the profiled case, once people in disputes identify points of common interest and understanding, the opportunities for settlement increase exponentially.

Similarly, mediators help people get out of their own way. In the throws of conflict, people often find themselves driven by anger and stubbornly striving for short-sighted goals that fail to serve their larger business and personal needs. And so they become their own worst enemy. Mediators help people see where they're stuck and how to move through the obstacles they've created for themselves. Thus, in the profiled case, I took the opportunity in caucus to ensure that the parties understood the costs and risks of litigation. I asked them to tell me exactly how protracting the matter in court would promote their business and individual agendas. From this vantage point, all agreed that a courtroom battle would only undermine their interests.

The value of getting parties to look at conflict in the context of their own lives cannot be overstated. I believe it's one of the most effective tools in the mediator's kit. What seems so all-important in the midst of a dispute loses its potency when isolated and placed in proper perspective.

The profiled case provides a particularly poignant example of the power of perspective in mediation. Since the events of September 11<sup>th</sup> were part of the fabric of the dispute, I asked the parties in caucus what that historical day meant to them — how they felt when it happened and in the weeks that followed. This exercise put them all in a more cooperative mode as it tapped their innate desire to be helpful and conflict-free.

Whether you have a complex construction dispute, a business conflict or a personal grievance, mediation is an optimal forum for intelligently addressing and resolving everyday conflicts on terms that work for you.

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