The trend in business for resolving disputes: MEDIATION

While mediation used to be a form of alternative dispute resolution (ADR), mediation has become mainstream.

Today, virtually every dispute that is not able to be resolved through direct negotiation is proceeding to mediation. The only questions are at what stage of the process will mediation be held and who will be selected as the mediator.

Amy L. Lieberman
Mediation

When should parties mediate?

More often in business today, mediation can be mandatory, pursuant to a contract that requires mediation before arbitration or a lawsuit is filed, or pursuant to company policy that requires mediation before an administrative charge or suit is filed.

If the timing of mediation is not mandatory, the parties can choose from various options:

- Pre-suit. This occurs when one party, typically through counsel, sends a demand letter and suggests private mediation. The main advantage of this is privacy: no public suit is filed than can generate negative publicity or that will remain public information forever. The other advantage is that resolution can occur before much is expended in legal fees. The disadvantage is that, without formal legal discovery, parties are making decisions that are less than "fully informed." However, parties can save literally hundreds of thousands of dollars.
- After suit is filed, before discovery. The privacy advantage is lost, but now the primary advantage becomes avoiding the extensive costs and emotional and lost productivity drain of protracted litigation. The disadvantage is that, as with pre-suit mediation, much information will not be known.
- After discovery, before motions filed. Much of the costs of litigation will have been incurred, but it avoids the costs of filing motions, which can run in excess of $25,000, and it avoids the risk of loss if the court rules against a party on a motion that may dispose of all or part of a case.
- After motion is ruled on. At this point, the parties have given their best pre-trial shot at convincing the judge of the righteousness of their positions, and the outcome is known. The advantage here is to avoid the risks at trial, if trial is still available, or of an appeal, if the judge has dismissed the case.
- Post-trial. Mediation at this point occurs after a highly-undesirable result has occurred at trial and the losing party wishes to avoid paying a huge verdict, and/or wishes to avoid the process, costs and risk of an appeal.

Who should be selected as the mediator?

Selection of a mediator is made easier today by on-line research. Ask your lawyer for a recommendation. Search mediate.com, the American Arbitration Association, National Academy of Distinguished Neutrals, the American College of Civil Trial Mediators, or JAMS, for possible sources of lists of mediators. Mediator searches can be run by geographic location and by subject matter expertise and experience.

In making your selection, consider the following:

- Substantive expertise. Does the mediator have an extensive background in the type of dispute (i.e., real estate, employment, commercial, environmental, personal injury, domestic relations, etc.)?
- Reputation. Is the mediator well-known and well-respected in the legal community?
- Style. Do you prefer a mediator that is more directive, evaluative or facilitative?
- Availability. Is the mediator available within the time frame we need?
- Cost. While relevant, this should be the least important factor. Mediations generally last one day and if you can resolve your conflict in one day, it is a heck of a worthwhile investment.

Amy L. Lieberman is a mediator whose practice concentrates in employment and executive mediation. She is the author of "Mediation Success: Get it Out, Get it Over, Get Back to Business," available on Amazon.com. She is the executive director of Insight Mediation and has been listed in Best Lawyers in America and Southwest Super Lawyers in ADR for more than a decade.