



MEDIATION: Simply a Better Idea for Resolving Disputes and Managing Risk

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“He who avoids entering into litigation and seeks a friendly settlement rids himself of hatred, robbery, and perjury.” Pirke Avot (Ethics of the Fathers)

Introduction

Owners and managers of small, medium and large businesses, farms and home-based enterprises across the United States have begun to recognize the wisdom of avoiding litigation in favor of a friendlier settlement of disputes. People are learning that they do not have to sue or subject themselves to the nightmare of being sued. Mediation—one effective money-saving way to bring closure to disputes without getting involved in a lengthy, expensive legal battle—entails putting into practice the bumper sticker philosophy, “Give Peace A Chance.” Mediation, one form of alternative dispute resolution (ADR), is the best approach to reach a friendly settlement, reduce financial and psychological risk. In 2016–2017, 14,500 cases were mediated in Virginia compared to the 9,860 cases mediated in 2006–2007 (The Virginia Mediation Network, 2018, videos-Del. David J. Toscano). This statistic suggests that acceptance of professional mediation is growing in Virginia. Professional mediation in different areas such as family, commercial, domestic and tort/personal injury is increasing, as are other alternative dispute resolution services in the state. The McCammon Group reports that it has mediated more than 20,000 cases resulting in a mediation settlement rate of approximately 85 percent. (The McCammon Group, 2018, Civil Dispute Mediation). Data from (Virginia State Courts, 2018), reported 10,408 mediation exit surveys indicated that 96.8 percent of respondents found mediation very or somewhat helpful and 99.4 percent of parties would request mediation again.

Unfortunately, many individuals and businesses may not know that mediation or ADR is an option to settle disputes because nationwide Americans now spend a tremendous amount of money annually in direct litigation costs and higher insurance premiums (Employment Related Lawsuits: High Risk, High Cost, 2018, Significant Business Risk). The exact costs of litigation are extremely difficult to determine due to the large number and types of lawsuits filed each year.

This doesn’t affect me...

When we are not in a dispute, it is easy to forget how frightening and frustrating conflict can be. In his book, *Settle It Out of Court*, Thomas F. Crowley wrote, “When it comes to somebody else’s dispute, it’s

easy to appear sophisticated and confident.” As Shakespeare’s Romeo said, “He jests at scars that never felt a wound.” When we find ourselves amidst a dispute, our composure disappears. We may feel disoriented and alone. It is a new and scary game—a game we really do not want to play, and the sooner it ends, the better. You should be aware of all your options in the event the phone rings and you hear, “Mr. Jones, you’re being sued. Have a good day.”

Farmers, ranchers, business owners and managers must understand the basic concepts of alternative dispute resolution in order to use it effectively. ADR encompasses an array of mechanisms that may be taken to avoid litigation or to speed up dispute resolution. Mediation, arbitration, med-arb, private judges, mini-trials and other possibilities are included in ADR. Arbitration is the most publicly recognized form of ADR likely due to the public awareness of labor-management arbitration in major sports leagues (baseball, basketball and hockey) that have received major news coverage by television, radio and newspaper media. Although arbitration is the best-known form of ADR, it is not necessarily the best first choice for an individual, small farm or business to address conflicts or disputes. Mediation is a far better choice.

What is mediation and why is it simply a better idea?

Mediation is a cooperative, confidential, informal process, which, with the guidance of a trained and experienced neutral mediator, enables parties involved to reach constructive agreements to issues in dispute. Since nothing is binding until the parties reach an agreement, the mediation process enables participants to stay in charge of the outcomes. All negotiations are confidential and inadmissible in any court proceeding.

Mediation is simply a better idea because most ways to resolve conflict focus on determining a winner and a loser, which typically frustrates the parties and fails to yield productive, equitable results. By contrast, mediation offers an effective alternative because:

- *It costs less.* Mediation is inexpensive compared to the cost of litigation or administrative procedures.
- *It is private and confidential.* There is no unpleasant publicity.
- *It enables parties to retain control.* The parties control the outcome and are not bound to a settlement imposed by an outsider, such as a judge or an arbitrator.
- *It saves time.* Mediation can help resolve conflicts in a fraction of the time usually needed in court.
- *It is convenient.* Mediation is available at the parties’ convenience and is designed to meet their needs.
- *It can protect future relationships.* Valuable professional or personal relationships between parties can be preserved.

The key to understanding mediation is to realize it is non-coercive, which means that because the mediator has no authority to impose a decision, nothing will be decided unless both participants in the

mediation agree to it. If a mutual agreement is reached, its terms can easily be made legally binding by putting the agreement in the form of an enforceable contract. An important point to remember when considering mediation is that agreeing to mediate does not require you to give up any other legal rights. If mediation does not produce an agreement, you are free to pursue other remedies such as binding arbitration or to have your day in court.

It will not just go away!

Individuals or organizations that find themselves in a dispute they cannot settle themselves and which will not go away, realize they need to solve the problem somehow. Historically, the response has been, “Just call a lawyer!” An estimated 18 million cases flood our court system each year. “Generally... almost any civil dispute is amenable to mediation.” Virginia Supreme Chief Justice Carrico. (1995, March 27). It is also interesting to note that 95 to 98 percent of all disputes are settled before a judge renders a verdict, (Priest & Klein, 1984), but this often happens after three to five years of litigation, thousands of dollars in legal expenses, broken relationships, untold stress and lost productivity. Talk with anyone who has experienced a lawsuit, and they probably would agree with the French philosopher Voltaire, who said, “I was ruined but twice, once when I lost a lawsuit and once when I won one.” When you find yourself in conflict or a dispute that just will not go away, mediation can help in many ways. First, the mediation process can bring the dispute into better focus and help separate the people issues from the problem issues. When the parties know the process is confidential and impartial, they are more willing to open up and share their true concerns. One of the true goals of the mediation process is to discover the true needs rather than just focusing on the wants of the parties, this especially when the “transformational mediation” process is the chosen process use by the mediator (Goals of Mediation: <https://www.mediate.com/divorce/pp13.cfm>).

Second, the mediation process allows disputing participants to release their anger by meeting face-to-face and have a chance to speak their minds, respectively, and be heard. This is often a key step before a reasonable resolution can be reached. Sometimes parties just need to know they have had an opportunity to be heard. At times, a participant in a mediation case just needs to hear the other party say, “I am sorry for the harm I have caused you, I did not realize how my actions were affecting you.” Mediation can also be helpful by increasing awareness of the strengths and weaknesses of one’s position based on the other party’s comments or the mediator’s comments/questions. Often during mediation, everyone is surprised by the innovative and creative ideas for settlement suggested by the parties or the mediator.

The Chinese have an expression that translates in English to, “We cannot see the true face of Mount Lu because we are standing on top of it.” Often in disputes, we cannot see the true face of the problem because we are in the middle of it. Put another way, it’s hard to see the frame when you are in the picture. Mediation provides an opportunity to bring conflicting, often uncooperative, parties together, out of the picture, face-to-face. A trained mediator can then facilitate an open, honest dialogue of the problem and help the parties move to a new, broader perspective from which they are better able to see the true face of the dispute. From this vantage point the decision-making can be in the best interests of both parties, allow for significant monetary savings, creative solutions, and possibly strengthen, rather than destroy, the relationship.

In every state in the U.S. mediation is an option for resolving a dispute. You can check with your local mediation network in your community, check with your state court system or your state bar association for more information and a list of mediators. Keep in mind that while most law schools offer classes in alternative dispute processes, not all lawyers make good mediators. Be sure to take the time to meet and feel comfortable with the mediator before hiring him/her. Check the mediator's fee: the mediation fee is generally split between the conflicting parties, but be sure the other party will agree to this arrangement before you sign an agreement to mediate unless you are willing to pay the total mediation expense. A typical mediation with a trained and experienced mediator will last between two hours and two days depending on the complexity of the dispute and the parties' desire to reach an agreement.

List of Virginia mediators

In Virginia, a list of mediators and additional information can be found at:

www.courts.state.va.us/directories/home.html#mediation, Virginia Mediation Network, P.O. Box 29007, Henrico, Va. 23242, 804-316-5271, <https://www.vamediation.org> In summary, when you find yourself in a dispute, try mediation first. Why? It works.

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