



# Mediation:

## A cooperative approach to dispute resolution

By Brenda Boughton

**C**onflict. If you are running a business, it is almost inevitable that one day you will find yourself involved in some sort of conflict with someone – be it a business partner, a client, a customer, or a contractor.

It used to be that serious disputes ultimately ended up in court if the parties involved were unable to resolve the situation themselves. Each side was represented by a lawyer and the outcome was in the hands of a judge.

In the last decade or so, a new method of conflict resolution has come to the fore, and for certain kinds of disputes it is becoming the method of choice. It's called mediation. Mediation is a form of assisted negotiation, where each party still retains a lawyer, but where a neutral third party is brought in to help the two sides develop a solution to which they can both agree. The outcome of the mediation may be a written agreement, the terms of which can be enforced.

The mediation process can be initiated without the parties ever going to court, or it may be an

alternative that is put forth after litigation has begun, if the parties and their lawyers decide that a public legal battle is not the route to take after all, and think that mediation might work for them.

"Mediation is really part and parcel of a range of alternatives that are part of a dispute resolution system," says Harvey Sectar, the former dean of the Faculty of Law at the University of Manitoba and the university's current chancellor. Sectar studied conflict resolution at Harvard and has specialized in the discipline for the last 15 years through his company, Resolution Processes Inc. "Good litigators are problem solvers. Sometimes that requires going to court. Often it involves negotiating a settlement on behalf of their client with another lawyer, and sometimes it involves the use of a third party to assist in those negotiations, which is what mediation is. I view all of these options as part of a single system that has multiple channels available to good lawyers."

Mediation can work in both simple and complex commercial cases. The key is that

both parties have to be willing to settle. "There is no vindication in mediation," Sectar says. "Mediators don't say who's right and wrong, they say what's possible as a settlement. So I tell people that inevitably no one comes away from a mediation feeling happy, but the success is that you find a settlement that you can live with, one that makes more sense to you and is more attractive to each of the parties than continuing to fight."

Nathan Nurgitz, Q.C., has recently returned to Thompson Dorfman Sweatman LLP to practice commercial law with a focus on alternative dispute resolution, including mediation. Nurgitz, a former member of the Senate of Canada, also served many years as a justice with the Court of Queen's Bench, where he conducted well over 150 judicially assisted dispute resolutions (JADRs), a type of mediation presided over by a judge.

In his experience, mediation can be successful "as long as the two antagonists are talking, even if their discussions are entirely negative," he says. And moving from litigation to mediation

usually means lowering the expectations of one or both parties. "I would often start by asking the lawyer on each side if I need to have a heart to heart with their client about what is reasonable."

Companies large and small are turning to mediation for a number of reasons. It can be less costly than litigation and can require less time to come to an agreement, although in complex or highly emotional cases, "it's not feasible for the parties involved to settle early on," says Secter. "Sometimes you need to go through the discovery process. In a case where damages have been suffered, or if the consequences of the problem are still unfolding, you need the passage of a certain amount of time to understand what your claim is."

Mediation is also attractive to business because it's a private affair, whereas court proceedings are public. "Mediation allows the settlement to be confidential," says Secter, whose biggest case involved many millions of dollars and two very large entities who weren't concerned about costs. "They were concerned about confidentiality, on both sides. There was important proprietary information they didn't want disclosed and they didn't want their

customers, their clients, and their competitors to know they had this big problem with each other. They didn't want anyone to know how they resolved it in the end; they had to find a solution that didn't involve the public."

Another advantage of mediation is that "the two clients are going to determine the outcome of the case, and craft the nature of the decision, not the judge," says Nurgitz. "They have more control." And they can walk out at any time if they don't think the process is working.

The control that the process gives to the parties makes creative solutions possible. "The judicial process is very limited in what it can do," explains Secter. "It tends to look backwards to find fault, and award, usually money damages, to the party who was wronged. In commercial mediation we can look at solutions where we have the benefit of future possibilities. Notwithstanding whether the work that was done in the past was up to par, if you're entitled to something, maybe it will come from future work."

Both Nurgitz and Secter emphasize that the mediation process is usually much less stressful for clients than the court process. The dollar cost factor of a court case can be

estimated, but it's the non-quantifiable variables—the stress and health factors—that can be more costly to someone involved in a long and emotional trial.

There are, of course, instances when mediation is not appropriate. "Is there a burning legal principle that's at stake? Sometimes companies are looking to set a legal precedent," says Nurgitz. "That's not possible with mediation."

What is feasible following a mediated case is the possibility of a continued relationship between the two parties. "Litigation usually severs relationships," says Secter. Mediation is attractive because it requires that both parties agree, and agreement fosters the idea that a relationship can continue.

Going through a mediation process can also, in some cases, give people new skills for dealing with future conflicts. "Conflict isn't the issue... it arises all the time," says Secter. "It's the nature of being in business. It's how we look to solve conflicts that is the key. What mediation does is try to expand the portfolio of lawyers or business people and how they go about solving them." 