

## Sotomayor Law

Rande S. Sotomayor, Esq.



Mediation & Arbitration Services

# Business Trend - Mediation Is the Future

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Anyone who has ever been involved in litigation knows that the process of resolving disputes in the courts consumes resources – most notably money and time. Litigation counsel try hard to deliver value, but we know that budgets for the business clients we represent in court show outside counsel fees and litigation costs as red ink, no matter what. That's not even considering the risk of actually losing in court.

Businesses of all sizes are constantly working to develop conflict resolution approaches that reduce or eliminate the risk and expense of litigation. In surveys conducted in 1997 and 2011, researchers discovered a nearly 23% decline in the use of arbitration in commercial disputes. On the other hand, there was an approximately 10% increase in mediation of commercial disputes, and a nearly 20% increase in consumer mediation.<sup>1</sup>

Why is this? People used to think that arbitration was a faster and less expensive alternative to litigation in the courts. In fact, arbitration has proven to be very costly, and many practitioners and clients worry about arbitrators not following the law, and little or no ability to appeal. Then there is the expense associated with the efforts of many to challenge the results of binding arbitration.

In contrast, the results of mediation are completely within the control of the parties. If mediation is successful, the parties make a deal, i.e., enter into a business agreement, to resolve their dispute, just as with any other kind of business agreement. This is constructive. And fast. And much less expensive than the litigation or arbitration models involving motions, discovery and unpredictable decisions by third parties.

David H. Burt, Corporate Counsel to the DuPont Company, explained the business advantage of the mediation model perfectly in a recent article:

Business is about making agreements for common benefit, not about fighting for years at large expense. Arbitration is adversary in nature and therefore, in that sense, fundamentally unbusinesslike. Mediation, in contrast, is much more like business.<sup>2</sup>

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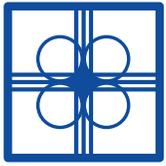
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How to begin? Most individuals ask me how to raise mediation with their opponent, and they are especially concerned about the possibility that their opponent will not agree to mediation. Here are some ideas:

- 1. Business planning for dispute resolution.** As part of your business plan, develop an approach for resolving disputes with clients, customers, vendors, employees, etc. This means actively thinking about what you would do if a conflict were to arise.
- 2. Contract clauses for mediation.** If your business enters into written contracts, be aware that solution-oriented businesses that do not want to engage in protracted legal battles are now including mediation clauses in their contracts. The idea is to build a mandatory pre-filing mediation process with a third party neutral into the relationship at the outset. Then all either party has to do if and when a conflict arises is to make a request for mediation under the terms of the contract. The clause can be simple or detailed as to the process.
- 3. Business policy of mediating disputes.** If you do not have a written contract, it can still be a business policy and philosophy to raise the concept of mediation with your opponent. Even if you are angry, or unable to speak to someone, it is still possible to make a written request for mediation, based on your company – or personal – policy to explore dispute resolutions that can advance the interests of all sides, instead of spending time, money and other resources on arbitration or court battles.

Pick up any newspaper, and you'll see a story about a conflict that has been mediated at some point in time. Mediation is not just for celebrity cases or litigated disputes. People hate to spend money on lawyers for litigation. But most people also try to avoid dealing with conflict. They will look for any alternative.

Based on the reported trends, businesses of all sizes are looking for inexpensive ways to develop solutions to business disputes. While mediation has been in use and effective for decades, its use and timing have mostly been controlled by courts and litigators after cases have progressed significantly. With further education about the process, and simple planning, businesses can develop policies and procedures for resolving disputes effectively through mediation before becoming entangled in the court system. Mediation is part of a value-driven economy – despite a storied past, mediation has much more in store in the future.

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<sup>1</sup> "The Evolution of ADR Systems at Large US Corporations," Ryan Lamare, *Dispute Resolution Magazine*, Spring 2014.

<sup>2</sup> "The DuPont Company's Development of ADR Usage, From Theory to Practice," *Dispute Resolution Magazine*, Spring 2014.

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