

Small businesses benefit from effective mediation

Process is flexible, allows for settlement agreements to be customized to need

By SHEILA LIVADAS

Amid soaring litigation costs and burgeoning court caseloads, more small businesses are turning to mediation to resolve disputes. Besides offering a way to explore settlement options, the process can cool tempers and save relationships.

Another advantage of mediation boils down to applicability. Its usefulness is not limited to a particular industry, and it can bring closure in cases ranging from lease disputes to clashes over family businesses.

Still, the process requires having an open mind.

“Don’t go to mediation if you really aren’t prepared to compromise in some fashion,” says Karl Essler, senior counsel at Bond, Schoeneck & King PLLC.

With roots stretching back to antiquity, mediation is a form of alternative dispute resolution in which a neutral third party facilitates the resolution process. Sometimes parties enter private mediation voluntarily, though some courts now refer new cases to mediation automatically.

In 2005, the U.S. District Court for the Western District of New York, whose jurisdiction includes Rochester, granted alternative dispute resolution a trial run. That pilot program has been extended indefinitely, prompting all federal civil cases filed in or transferred to the court to go to mediation unless expressly exempt.

“You will find yourself in a mandatory mediation program within probably three or four months after the lawsuit has begun,” says William Bauer, partner at Woods Oviatt Gilman LLP.

For many businesses, leveraging the control that mediation affords makes more sense than duking it out in court.

“When it comes time to make a decision as to what your position is going to be in the litigation, mediation allows you to have direct control over that, as opposed to a

judge or six or eight jurors,” Bauer says.

The guarantee of confidentiality in mediation also boosts the chance of reaching a mutually agreeable solution.

“So I think it’s really, really important that small business people who are in the mediation are prepared to very, very openly speak their minds honestly about the situation and not try to necessarily set it completely in their favor, but to recognize where there may have been mistakes made on both sides, because that gives the mediator a much better picture of how this all arose,” Essler says.

He adds: “I think any small business of any type can and should consider mediation as a potential cheaper and quicker way to resolve a dispute.”

Given the advantages of settling matters outside of court, the number of dispute-resolution professionals looks poised to grow.

According to the U.S. Department of Labor’s Bureau of Labor Statistics, employment of mediators, arbitrators and conciliators is projected to grow 9 percent from 2014 to 2024, faster than the average for all occupations and faster than the 5 percent average growth expected for legal professions overall.

Mediators and like professionals who have law degrees and experience in one or more specific legal areas will fare best in the next decade, but budget constraints could affect the outlook for those who work for state or local governments, according to the labor department.

Selecting a mediator who is knowledgeable about the subject matter at issue helps mediation move along, says Jill Schultz, partner at Davidson Fink LLP.

“And the reason for that is such a person will be best able to understand the issues and work with the parties to point out the strengths and weaknesses in each side’s case, and thus will be better able to help the parties settle if possible,” she says.

Involving key decision-makers in the mediation is another important step.

“You want the person who holds the purse strings for your company to be there in person, not just on the phone,” says Schultz, a certified federal court mediator

for the U.S. District Court for the Western District of New York, who also has performed private mediations.

Beyond attorneys’ fees, the decision whether to litigate should take into account the cost of having employees distracted by a courtroom battle. Even if mediation does not result in a settlement, the parties can return to the process at a later date if they wish.

“So it’s a very flexible process,” Schultz says.

What mediation unearths may be surprising.

“Sometimes (a party) may want something intangible, such as an apology,” Schultz says.

Settlement agreements can be tailored to parties’ particular needs and include confidentiality and nondisparagement clauses, as well as verbiage about exactly what each party will say after the case has wrapped up.

“I find that often the parties have a lot of anxiety over, ‘If we settle, what is going to be said?’” It could be something as simple as, “The matter is over, and we resolved our differences,” Schultz explains.

Though mediation has become more common, some misconceptions remain. Mediators do not “just split the difference—that if one party is at \$100,000, and another party is at \$300,000, the case is going to settle for \$200,000,” Schultz says. “And I think for that reason some parties have been reluctant because they assume that’s all the mediator is going to do. The mediator’s job is to do much more than take two numbers and divide them in half.”

Mediation generally works well in cases involving family businesses because, unlike litigation, it “might actually bring people back together,” Essler says.

In some instances, small business owners do not realize how lengthy and expensive litigation can be.

“And how difficult it can be on the parties to have their depositions taken and to testify in court—and to think about what that’s going to be like for the next several years,” Schultz says.

Sheila Livadas is a Rochester-area freelance writer.