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MEDIATION: THE BIG DON'T ARGUE

If you're headed for court, save yourself the hassle and the expense by trying to mediate your disagreements before they go before a judge.

STORY BY **DR. MARY CASEY**

Conflicts and disagreements will occur from time to time in any business — not just between employees, but also between a business and its customers. Resolving a conflict with an employee is one thing, but what if a business and a valued customer can't come to an agreement? What if the conflict reaches a crisis point, where one or both parties are considering taking the issue to court?

Before you think of taking a customer or client to court — or allow a customer to do the same to you — consider using mediation. This is especially useful if a business wants to preserve its relationship with a customer.

Mediation can be very successful — and it doesn't come with the risks associated with going to court, where you don't know if you'll win or lose, what the costs might be, what your relationship might be with the other party afterwards, and what damage that may cause to your business.

Mediation is a good option for cases where both parties are willing to listen, to discuss options, and are motivated to come to an agreement. It might also be the best option when both parties feel a judge's decision might not be favourable for either of them, or might not even end the dispute. Consider also that there are costs associated with preparing and running a case in court, and the losing party in any court case is also required to pay the legal costs of the winning party.

The mediation process

Mediation is a structured negotiation process in a controlled environment in which the parties involved are assisted to an agreement by a professional, independent person.

The mediator chosen should be a qualified professional who can therefore be completely neutral with regards to the disagreement and be unknown by the parties in conflict. He or she is usually given no information about the situation before the mediation.

Mediation works best when both parties have every intention of working towards a resolution. A willingness among both parties to listen is another requirement for successful mediation.

The parties involved in the conflict are given an opportunity to listen to one another — and they must listen. The mediator controls the environment, but not what is said, and he or she sets up the room (or rooms) in a way that gives both parties equal footing in the discussion.

The mediator then lays down the ground rules: for instance, no-one speaks while the other is speaking; the mediator gets the participants to decide who speaks first; and the real issues must be addressed. The parties are then given a pen and a piece of paper — if they are tempted to speak, they can jot down their point so they remember to talk about it when it's their turn. When I act as a mediator, I write the issues on a whiteboard as they come up so they can be addressed later in the session individually.

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Throughout the process, the mediator is there to guide the discussion and control what is usually an emotional climate — not to dictate or even make suggestions to either party.

With disputes between a business and a client or customer, mediation can be used for a number of conflict situations. A customer might want compensation from a business, in addition to a refund on the purchase of a product or service. Or a customer could be 'out to get' a business by generating negative publicity about the brand or its executives. Or the product or service of that business has damaged the customer's health and livelihood, and compensation is sought — mediation in that case would focus on the compensation amount.

Benefits of mediation

The entire purpose of mediation is to resolve the conflict at hand very quickly. It is a speedy alternative to going down the legal track, which can take months. At the same time, while the parties in conflict must stick to the real issues in mediation, they are also able to explore issues that are broader than what a judge might cover in a court case. Because both parties are involved in the final resolution, mediation can bring about a solution that is tailored to both parties' needs — preferably a win/win situation.

A factor in the success of mediation is that resolutions are made and both parties sign off on them — this can become a legal document. Examples of resolutions that can be made are that a customer agrees to not talk about the business any more. Both parties would also agree to keep the dispute confidential. Both would agree that no further action be taken after that day. Or they could agree to another mediation, but no letters, threats or the like can be made by either party until then. Or perhaps both parties would agree to meet halfway in terms of the original compensation amount sought.

Mediation between a borrower and lender

A few years ago, a property developer friend of mine took part in a mediation process to help solve a dispute with his lender. This developer borrowed a very large amount of money to establish a new

building development. The loan formed part of a series of round robin transactions where the advances by the lender were returned to the lender. The developer and the bank manager had a good relationship — the developer had borrowed money several times before through such arrangements. As such, the bank manager was lenient towards his customer and would "make things happen" within the bank to meet his borrowing needs. While the loan documents were in place, some benefits the developer received from the loan arrangement were really based on his relationship with the bank manager, and their mutual trust.

A new manager soon replaced the one who had made the deal for the developer. At the same time, things started to go awry for the developer and he was unable to pay back the loan through this type of arrangement. The new manager, who didn't know the developer or any of his history, took a firm stance, asking for the money or he would cut the loan. The developer's argument was "this was the deal" he had made with the previous manager, with whom he'd had a long professional history. The new manager, however, was not willing to take the risk on such a large loan amount.

The lender enlisted a mediator. During the process, the developer was sat down in one room and the bank manager in another — they never set eyes on each other during the whole process. The mediator moved from one room to the next to speak to them, and closed the mediation when both parties came to an agreement and signed off on it. Although the outcome was not exactly a win/win situation, there were great monetary savings, as the case did not have to go through the judicial system and both parties were satisfied.

It's worth noting that before you resort even to mediation, you should make sure you have good systems and processes in place in your company to reduce any incidences of customer complaints. In addition, it's a good idea to have a customer grievance procedure in place, which you can work with a human resources specialist to develop.

However, even once you've put these systems in place, you may still find yourself in a dispute with a customer that can't easily be resolved. If you do find yourself in that position, give mediation a chance before you consider going to court. It could save you a lot of time, money and aggravation. **mb**

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