

To Sue or Not to Sue - That's the Question: Here's the Answer

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Litigation is like the weather, everyone complains about it but no one actually does anything. In 1750, the famous French philosopher, Voltaire said, "I was only ruined but twice-once when I lost a lawsuit and once when I won one."

In 1900, an American humorist Ambrose Bierce, the Jerry Seinfeld of the day, said "Litigation is like a machine you go into as a pig and come out of as a sausage."

It seems that nothing is new and nothing has changed. That is until now. There is a change going on to try to reign in the excesses of our confrontational culture. With some luck, and with the insistence of people and business, we can change our society from one in which the first instinct when confronted with a dispute is to hire a lawyer and sue the *%#@*'s, to one where the first instinct is to negotiate a "win/win" solution to the satisfaction of all parties.

In the year 2000, 15,000,000 civil lawsuits were filed in the United States. That's a typical year. How many of these suits usually make it to trial? Less than 3%. And of these, how many go to a jury? Less than 1%.

Research has shown that in the cases that do go to trial, plaintiffs get less than the defendants' last offer 66% of the time.

It's obvious that in most cases, parties shouldn't risk going to trial. It should also seem obvious that there might be better ways of handling the 97% of lawsuits that don't go to trial in the first place.

Why should someone incur the cost of attorneys, experts, lost business time, and destroyed relationships, when a lawsuit is unlikely to ever get to a judge or a jury? Is it possible to change our cultural emphasis on confrontation and the gun-slinger style of handling problems to a more cooperative, collaborative approach? If we could make the change, litigation might be left to those hard-to-settle cases where there is bad faith or just a vast difference in approach or irreconcilable ill-will between the parties.

There is an effective and less costly alternative to litigation that can give parties significantly better outcomes than any jury could award. It's a method called Facilitative Mediation.

Facilitative Mediation is a process that brings parties together in direct negotiation with each other with the help of a neutral third party. Unlike litigation or even arbitration, it's informal, and there are no cumbersome court rules.

It's private. No one outside the parties needs to even know there is a dispute.

It's completely voluntary. If the mediation is not successful, the parties can still go to court.

It's confidential. The parties can suggest solutions and options that are different from what they would demand in a lawsuit. They can offer these options without fear that they will be used against them if they actually go to court.

A very important difference between facilitative mediation and litigation is that mediation focuses on the future not the past. In litigation most of the dollars and time is centered on proving a cause of action that will satisfy a judge or a jury of one party's liability.

Facilitative Mediation is faster, less expensive, less stressful, and more likely to result in both parties honoring their settlement agreements preserving positive long term relationships that a lawsuit would destroy.

At the heart of the mediation process is the examination of the needs and interests behind the positions or demands people make. When the mediator asks the right questions to uncover those needs, it becomes possible to create alternative solutions to the original demands.

A major requirement, and in fact, the whole purpose of facilitative mediation, is that the parties create their own settlement to their satisfaction, not attorneys, judges, arbitrators, or the mediator. The mediator can offer alternatives for them to consider, but the parties must be satisfied that they have reached the best workable agreement to meet their needs by themselves.

Mediation can be used at anytime in a dispute, even if a pending case is already on appeal. But the best time to start is when the dispute first arises and before positions have hardened by the filing of a lawsuit and accusations are thrown at each other.

There is no guarantee that Facilitative Mediation will solve all problems but there is an extraordinary record of success where it has been used. Some estimates are as high as 85%.

In addition, a recent survey in The Circuit Court of Grand Rapids, Michigan of completed civil and divorce facilitative mediations showed 100% compliance with civil mediations and 89% with domestic cases.

We said at the beginning that 97% of all filed lawsuits are settled before trial. It makes sense to settle them at the outset before incurring huge costs and destroyed relationships.

In this nation and this economy, it makes sense to start changing our culture from expensive and destructive litigation habits to one where direct cooperation yields successful and mutually satisfactory solutions without litigation. We need to make Facilitative Mediation the "People's Choice."

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