

TO MEDIATE OR NOT TO MEDIATE

“Which mediator should we use,” is starting to replace the attorney’s battle cry of “I’ll see you in court.” IBM, Coca-Cola, and AT&T are among 400 major American corporations that have signed a pledge to try mediation before pursuing litigation. Currently, cases worth \$8.9 billion are being mediated for companies signing the pledge. Maybe they see what many small companies know: too many lawsuits, too many lawyers and too much time, money, and resources wasted on them. Or perhaps they listen to their Japanese competitors who say that private mediation is the main method of resolving disputes in Japan and China, and who wonder why business must suffer such high legal costs in the United States. The rationale behind the move to mediation is that as a nation we can no longer spend so much time, energy, and talent on litigation.

Historically, Americans preferred compromise to court and mediation to trial. Two of the oldest colonies, Virginia and Massachusetts, had charters requiring mediation before going to court. And the patron saint of America’s legal profession, Abraham Lincoln, counseled that a good lawyer seeks compromise and settlement before court action. Today, with 15 million lawsuits being filed per year, Congress decided to pass a law encouraging mediation - - The Dispute Resolution Act. Three hundred alternative dispute resolution centers have been established by local communities as a result of the law, and all but a handful of states have mediators and centers as alternatives or adjuncts to their court systems. Mediation is a private face-to-face meeting between disputing parties before a neutral mediator who helps them work out an agreement to resolve their dispute. The advantages are numerous. It is faster (I’ll see you in court means 1 to 3 years while mediation means I’ll see you in 1 to 3 months). It is confidential - - no press, public, or court reporters permitted. Expense is less than court. Fairness is claimed to be better in mediation than in court by participants who’ve tried both. In general, the parties find it fairer because they are the center of attention rather than the lawyers, and are less self-conscious about speaking because of the lack of judge, jury and court reporters. Greater fairness is also claimed because mediators are not required to follow legal procedure like judges are. Success is greater because compromise decisions are easier to work out and no result is reached unless agreed to by all parties.

Lawyers have not been leaders of the mediation movement for several reasons. The main one is that mediation means fewer hours, lower fees, and thus less income. Another reason is that lawyers learn little about mediation because it is not in the law school curriculum and was not studied by many of today’s practicing lawyers. Some accuse lawyers of opposing mediation because it is conflict-avoiding and the lawyer personality is adversarial and conflict-oriented. My own belief is that lawyers do not know how to deal with mediation because it looks ahead at what each party can live with as a solution to the dispute. Quite simply, lawyers are trained to follow previous cases and to look for breaches and negligent conduct, not to sit down and say “let’s see how we can settle this mess.”

There are those who say mediation is devalued by today’s aggressive, competitive culture - - that it will not replace litigation which is exalted by all. My belief is that mediation is a kinder, gentler way to resolve disputes and will therefore become the dominant method of resolving them. Our pragmatic democracy is tired of too many lawsuits and ready to try a different approach.