

## **"Sue First, Ask Questions Later!"**

*by Lee Jay Berman*

This seems to be the direction of our society today. Get rich quick. We are in the middle of a *litigation explosion*. Count yourself lucky if nobody has yet sued you, your family or your company. Frivolous lawsuits are costing every American taxpayer roughly \$1,200 annually according to a leading source. With the increasing complexity of litigation, *real* people cannot continue to pay these increasing legal costs. No matter how well intentioned parties are at the beginning of a relationship, every transaction, contract or relationship carries the potential for a conflict. What else can one do? So called "Rent-a-Judge" arbitration can be as expensive as going to court, with preparation and discovery procedures, the legal bills can still run into tens of thousands of dollars – enough to sink a small business. Most attorneys will confess that many of the cases they have no right to win are the ones where the verdict surprises them, likewise many seemingly airtight cases go against them. The outcome is still a roll of the dice. A costly one at that.

Fueled by this uncertainty and spiraling costs, an increasing number of sophisticated parties are following their attorneys' recommendation and using mediation as an alternative form of dispute resolution that is a more efficient and less expensive way to settle their disputes. Mediation is a cooperative process that brings together parties involved in a dispute to achieve a solution, rather than the traditional, adversarial methods. Mediation is not a substitute for sound legal advice, but it is a substitute for litigation in a court of law. A professional mediator acts as an informed, neutral third party equipped with the skills to bring people together toward a mutually agreeable solution. The result of a successful mediation is a binding document detailing the terms to which all parties have agreed. In the rare case where an agreement cannot be reached (10-15% of the time according to the L.A. County Bar Association), the other legal remedies remain available. Conversely, submitting to binding or judicial arbitration usually explicitly waives all rights to an appeal or a jury trial.

Successful businesses recognize the inevitability of disputes and plan for them by adopting a risk management plan that includes mediation. Mediation, by its nature, is a voluntary process—all parties must agree to participate. The best way to achieve this is to insert a mediation clause into every contract with language insuring that any dispute arising from the transaction will go to mediation before any lawsuit can be filed. This is almost like saying, "Let's try the peaceful approach to problem solving first." For example, it is almost impossible to buy a house in California without signing a mediation clause. While deterring frivolous litigation, such clauses

will promote a cooperative relationship between a company and its clients and employees.

Businesses, large and small alike, spend considerable time and resources building commercial relationships, yet many of us have witnessed what a bitter court battle can do to these relationships. By utilizing mediation, disputes can be resolved while still preserving these valuable relationships and establishing procedures for future dealings in order to avoid a recurrence of such destructive disputes. For this reason mediation is especially important in cases where the parties to a dispute have (or hope to have) a continuing relationship such as landlords and tenants, employers and employees, businesses and clients, or divorcing couples with children.

Another benefit of mediation is that it is totally private and confidential. The first step in a typical mediation is for all the parties and the mediator to sign a confidentiality statement agreeing not to disclose any of the dealings or the outcome of the mediation. This way, the parties can brainstorm and negotiate in confidence and good faith.

Because conflict resolutions are rarely black or white, the problem solving portion of the mediation often resembles a brainstorming session looking for possible solutions to meet as many of the parties' goals as possible, many of which may not at first be obvious. There is often more underlying a dispute than money, therefore there is generally more at stake than money. In certain cases, issues like pride, acknowledgement of wrongful behavior, admission of guilt and apologies can play an important role in resolving a conflict. Sometimes it is as simple as clearing up a misunderstanding, after which an agreement is considerably easier. There is no room for these issues in a court of law where attorneys speak in a language unfamiliar to the average person and make procedural motions which at times seem to have little to do with the dispute itself. Mediation gives people a chance to actively participate in the creation of a solution to their disputes with the assistance of a skilled mediator.

These are some of the reasons mediation seems to be on everybody's lips these days. The time has come for the American people to have a dispute resolution system that is more swift, affordable, equitable and cooperative—one where they have an active voice in determining the outcome, while saving time, money and peace of mind.



*Lee Jay Berman is a full-time mediator and trainer based in southern California. He is a Distinguished Fellow with the International Academy of Mediators and a Diplomat with the California and National Academies of Distinguished Neutrals. He is the founder and President of the American Institute of Mediation, offering world class training for the complete mediator. He can be reached at 310-478-5600 or [leejay@mediationtools.com](mailto:leejay@mediationtools.com).*