

## *Think “Mediation” Before “Litigation”*

*By*

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Revolutionary leaders’ talents lie in exporting their ideas through followers who attempt feats that no one has ever tried. In America, and particularly in the Silicon Valley, innovators are the revolutionaries of today. These capitalistic revolutionaries see a goal, far down a narrow road. They accomplish their goals because they are not distracted by outside matters, while focusing on their vision.

This quality increases the chances for success in a venture, but can lead to failure in the goal of maintaining the success and retaining income produced the venture. It is the rare inventor who spots an accounting problem. And the truthful innovator will admit he or she hates to handle personnel problems. Innovators speak from the hip and lose patience with timely procedures for disciplining or terminating employees. They think “at-will” means you can fire someone whenever you want.

It has long been established that revolutionaries make bad bureaucrats and are often not the best managers. These jobs require attention to detail outside the revolutionary’s field of interest. Start up companies rarely have resources to pay for risk management, but usually find out the hard way that risk analysis is crucial to avoid losses from unexpected mistakes or claims. The first employee dedicated to risk analysis in a new business is often its general counsel; hired to defend the business when serious mistakes have been made or when a strategic partner or vendor has failed to deliver thereby putting the company at odds with its customers.

Issues in a conflict have usually been around or apparent from early in a relationship but after an unsuccessful attempt to resolve the conflict, no one knows what to do about it. In these cases the problem festers, and soon it is occupying too much time from in-house counsel requiring the attention of outside counsel. Once outside counsel is retained, the stakes rise rapidly and the battle lines are widened between the disputants. Often the next step is litigation and the stakes get higher still. Finally, after unimaginable sums of money have been spent on legal fees, a court orders mediation, or one of the parties counsel suggests it, and settlement is achieved.

Why do businesses wait to mediate until after they have spent enormous sums of hard earned? We believe that it is because mediation (the most effective method of settling disputes after negotiation) is an evolving business and most managers do not realize that it is available to them whenever required. Skilled mediators can be retained to help parties identify commonalities, and solutions to their conflicting needs. They also are effective in helping parties to recognize the legitimate interests of the other side, often leading to settlement. Acknowledgement of the legitimate interests can transform a business discussion from tug-o-war to respectful problem solving. It can lead to realization that the parties should go separate ways, increase investment, acknowledge premature claims, etc. A skilled mediator is trained to open up channels of communication to facilitate such transformation.

The court system is ill prepared to respond to business conflict in a timely manner. If parties are ultimately going to have to resolve their conflicts outside of litigation, business leaders should institute policies requiring mediation of business problems before a lawsuit is filed. Parties are advised to use counsel in mediation to ensure that agreements are properly drafted and legal issues are not overlooked. Early mediation of business conflict is effective because it occurs before the inevitable rise in damages occurs.

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