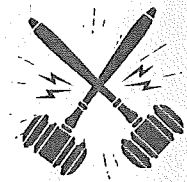


PRESENTING!

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**GOING TO COURT IS STRESSFUL, COSTLY AND ALL TOO PUBLIC.
MANY SAY THAT MEDIATION OFFERS A BETTER WAY
THAT IS FASTER, CHEAPER, MORE PRIVATE AND LESS LIKELY TO CREATE LIFELONG ENEMIES.**

BY ILIMA LOOMIS

PHOTO: THINKSTOCKPHOTOS.COM

T **TRACEY WILTGEN REMEMBERS** the friend who was building his dream home. He'd hired a contractor and was excited to get started. But a few months into the project, the dream turned into a nightmare. There was a building boom going on, and the contractor was falling further and further behind schedule as he focused his attention on other jobs. Even worse, the contractor seemed to be cutting corners. "The homeowner was really angry, because he felt some of the work wasn't done the way it should have been," she says.

He stopped paying the contractor, whose next call was to his attorney. "He said, we can fight this out in court."

That's where the story took a turn. Wiltgen had been doing volunteer mediation and suggested her friend try it. He reluctantly agreed.

Even though both parties were so angry they could barely speak to each other, they sat at the table and went through issues one at a time. Eventually they agreed on a timeline for addressing the problems and set up an account for the money still owed. "They were able to develop a plan together, feel good and move on without fighting," Wiltgen says. "I thought, 'Wow, this is a really great process.'"

While litigation is notoriously expensive, time-consuming and embarrassingly public, mediation can offer a better way to solve many business disputes, says Wiltgen, who now serves as executive director of the Mediation Center of the Pacific. "Almost any type of conflict is appropriate for mediation," says Wiltgen. "You can always go that next step and take it to arbitration or to court."

Other fans of the process agree. "I don't know why all business leaders don't insist on mediation," says Maryann Sasaki, a Honolulu attorney and private mediator. "It's time-saving, it's private, it's less contentious, you can fashion unique remedies you wouldn't be able to in court. People have a litigation mindset, but their perspective needs to be broadened."



Tracey Wiltgen, Executive Director,
Mediation Center of the Pacific



Sasaki was a student at Harvard Law School when she took an elective course in mediation. She immediately became a believer. "All they teach you in law school is how to go to court, argue a case, be a fighter," she says. "When I realized how much litigation cost, and I saw there was this alternative and all it took was people being civil to each other and not fighting to the death, I just thought, 'This just makes so much sense.'"

In addition to being faster, cheaper and more private, mediation can offer more flexibility in finding solutions to problems, Sasaki says. While a court will usually focus on monetary damages, a mediator will help the parties look at possible ways to address what's important to them. In one case, a colleague mediated a dispute between a pizza shop owner and the owner of a large shopping mall. When renovations took longer than expected, the pizzeria's opening was delayed, and the owner didn't want to pay rent for those months. "They went back and forth," Sasaki says. After two days of negotiations, the mall agreed to take the value of the rent in pizza coupons. "You couldn't do that in court."

Disputes often go beyond monetary damages, and sometimes mediators find that a simple apology is an important part of settling a case, she adds. "Everyone's had the experience of going through litigation and reaching an economic settlement and not really feeling satisfied," Sasaki says.

The Hawaii State Judiciary defines mediation as "an informal and private process in which a neutral third person – a mediator – helps disputing parties discuss and evaluate options for reaching a mutually acceptable agreement." The mediator can meet with the parties together or separately, talk with them about the problem, and discuss possible solutions. The process is voluntary and consensual, which means that nobody can force the parties to go along with a settlement they're not comfortable with. And it's nonbinding until both parties agree. "The function of the mediator is to help the parties find their own solution, and it's proven to be really effective," says Lou Chang, a private mediator and arbitrator in Honolulu.

Sasaki says she encounters plenty of business people who are skeptical of mediation, and think that going to court is the only option for their case. "They don't think it's a 'real solution,'" she says. "People want to



Maryann Sasaki,
Honolulu attorney and
private mediator



win or lose, they want a zero-sum game.”

Some people think mediation is a waste of time, and they'll end up having to go to court anyway. Others think it won't be enforceable. "It doesn't have the trappings of litigation – you just go into a room usually and sit across the table," she says. "People are very susceptible to not taking it seriously. They think, 'This can't really have the effect of a judge sitting up high on a bench.'"

Chang says there are always some cases that start out in mediation and end up going to court anyway. He wasn't aware of specific statistics on how often that happens, although he did note other studies that have found that only a tiny percentage of lawsuits actually end up being resolved by a jury trial – the vast majority end up being resolved through settlements.

Like Sasaki, Chang sees many advantages to mediation from a business point of view. "It's usually a very fast process," Chang says. "You can get into mediation in a matter of days, where if you have to litigate you're talking months or years."

That can be a big advantage in business, where the issues under dispute or broken relationships might be holding up an important project. "A lot of the time, you don't have that kind of time to spend on a long, slow process," Chang says.

Mediation also offers the participants more control over the process, notes Eliza-

"I don't know why all business leaders don't insist on mediation. It's time-saving, it's private, it's less contentious."

– **Maryann Sasaki**

beth Kent, a private mediator and attorney, and former director of the judiciary's Center for Alternative Dispute Resolution. The parties can decide everything from who the mediator will be, to where to meet, to how soon to get started. "You make the decisions. You can do it when you want to, on your time frame," she says. "That's not how court works."

Privacy is another advantage. While a lawsuit can air a company's dirty laundry, mediation takes place behind closed doors, and keeping both the details of the dispute and the terms of the settlement private can be a condition of the agreement. "You can solve the problem and keep the damage to your company to a minimum," Sasaki says.

Many people don't realize that participants in mediation can choose to have their agreement made binding by court order, she adds.

Much of the time, she says, when someone learns more about how mediation really works, it becomes an attractive alternative to litigation. "For a business person, the persuasive point is the bottom line. If you can get an outcome that you're happy with and spend tens of thousands of dollars less than if you litigate, that's very persuasive."

While people may think of mediation as a way of resolving a dispute with a vendor or landlord, many of Kent's cases might involve something as seemingly petty as the office sta-



Elizabeth Kent,
Private mediator
and attorney

**WHO
YA
GONNA
CALL?**

Having the right mediator is crucial to a successful negotiation, experts say. A good mediator possesses "gravitas" and is able to maintain control over the room and be taken seriously by all the parties, Sasaki says. "You sort of have to take charge of the situation, and they have to listen to you and believe your solutions are good solutions," she says. If a mediator is inexperienced or careless, "You're going to lose credibility with the lawyers, and they're going to become intractable and only

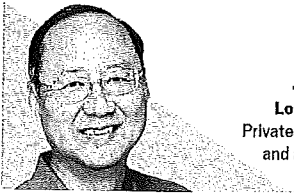
want what they want – that's how it goes off the rails."

You may need to ask around and rely on word of mouth to find the right person, says Chang. There are online sites offering reviews but "they're not super reliable," he says.

"Anyone can claim to be a mediator," he says, noting that no certifications or licensing requirements exist. Look at the person's training, experience and professional background, he says. Ideally, the mediator should have a background

that's appropriate to your industry and to the nature of your conflict – don't ask a divorce mediator to handle a real estate dispute, for example.

Some mediators tout their resolution rates, but "that you have to be careful about," Chang says. While the goal is to help people reach resolution, that may not always be the best outcome for every case, and some clients may simply not agree to the settlement, he notes.



Lou Chang,
Private mediator
and arbitrator



pler. She focuses on cases involving employee strife or personality disputes in the workplace – the kind of interpersonal issues that aren't covered by collective bargaining or employee contracts. When a dispute reaches the tipping point that

workers are no longer productive and can't resolve the problem on their own, or when the dispute spreads to involve other employees, that's when management usually calls her in, Kent says. "They realize it's either gone too far or it's getting close to going too far, and it's getting in the way of the work," she says.

While the triggering event may seem insignificant, it usually represents a "critical mass," Kent says. "It's not just the stapler, on top of, 'You don't say good morning to me,' on top of, 'You don't give me the information I need to do my job' – that's a big one – on top of, 'The tone of voice when you talk to me is so patronizing,' on top of, 'I can tell from your body language that you're angry with me.'"

Why call a mediator instead of working out a problem internally? In many cases, even a manager may be too close to the problem. "One thing that's different about a mediator from the supervisor is we're neutral," Kent says. "We're not involved on a day-to-day basis. We haven't lived it, and that brings a fresh set of eyes to the problem, along with our skill set."

The privacy of mediation and the focus on finding common ground can make it an especially good alternative for disputes within family businesses, Chang says. But those can also be among the most challenging cases. "You have not only the business relationship and history, but you also have family issues that might go back decades and involve all kinds of hurts and broken pride and slights, so you have to work through a maze of those kinds of sentiments that are impacting people's abilities to analyze their situation and approach the other parties," he says.

Other cases are challenging not because of emotion but because of complexity, such as when a major construction project hits a snag. "It involves multiple companies, multiple insurance companies. There are the owners and the design professionals, people blaming each other, people saying it wasn't my fault," Chang says. "There is not one item of dispute, but maybe 30."

While the case may be badly snarled, those types of disputes "almost always work out," Chang says. "If you have to solve those in court, you're talking expert witnesses and thousands of pages of records, and the costs of mastering all that history of a project that has so many moving pieces are so enormous that there's a high economic pressure on the parties to

"It's usually a very fast process. You can get into mediation in a matter of days, where if you have to litigate you're talking months or years."

— Lou Chang

RECIPE FOR RESOLUTION

Try these tips for a successful mediation:

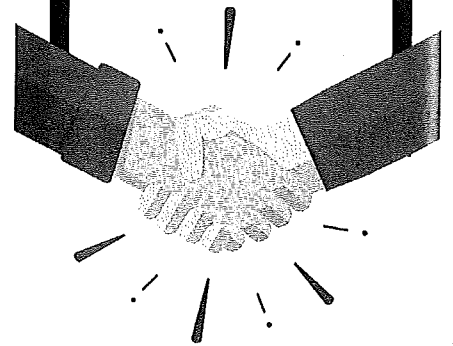
► **Think about timing.** You set the schedule, so pick a time that works for you. If the clock is ticking on a big project, you might want to resolve the problem right away. But if the dispute is getting personal and feelings are raw, mediation might be more successful if you give everyone a few months to get emotional distance.

► **Find a mediation service that fits your budget.** While private mediators might charge \$200 to \$400 an hour, non-profit mediation centers, like Mediation Center of the Pacific, offer services on a sliding scale or for a flat fee. "It's really cost effective," says Wiltgen.

► **Plan ahead by gathering all relevant information.** Think about your bottom line, but be open to other solutions you may not have considered. "People think, 'I'll go high and the other side will go low, and we'll meet in the middle,' but that's not really mediation," Sasaki says. "Mediation is finding the best possible outcome for both parties."

► **Be open.** During mediation, try to listen to alternative solutions with an open mind and a willingness to be flexible and hear the other side.

► **Consider bringing your own lawyer.** That's especially important if the case is complex or you don't feel confident in your ability to negotiate for yourself. "It isn't a necessity, but it is oftentimes advisable," Chang says.



find a resolution, because you can't afford the fight."

Chang could not discuss specific cases because of confidentiality requirements, but pointed to one Waikiki hotel project that became embroiled in a dispute over mold found in the walls. The case involved claims that the ventilation system hadn't been designed properly, that the design hadn't been executed properly, that the problem was actually in the maintenance of the building and job site, and that it was really the construction company at fault for not installing the proper openings to provide ventilation. "Even just given that single issue, you have tons of units involved, tons of conditions involved, questions of proper inspections and proper maintenance, proper construction, proper design," Chang says.

Through mediators, the parties were able to sit down, focus on each of the claims individually, and work out a way to resolve them. In the end, they agreed to a monetary settlement for the reconstruction of mechanical systems, with several different parties contributing to the financial settlement.

Still, not all cases are suited for mediation. A clear breach of contract with large monetary damages is probably worth litigating, since the remedy usually comes down to money and there's not much room for alternative solutions, Sasaki notes. Other cases "need to be about right and wrong, so they need to go to court," Kent adds. If one party has a serious mental illness or substance abuse issue that impairs their thinking or judgment, they may not be capable of participating in mediation.

Finally, if you are unwilling to bend, the process will probably not work – one reason court-ordered mediation tends to have a lower resolution rate than when the participants enter the process voluntarily. "If you go into it because the court tells you to, and you're thinking, 'I'm never going to give in or attempt to solve this problem,' you're just wasting everybody's time and money," Sasaki says.

Still, she's seen plenty of people who went into mediation as skeptics and came out believers. "It's really a shift in mindset," she says. "Once you see it work, it's much easier to envision it working for you."

For Kent, one of the most rewarding parts of the job is seeing clients transformed by that mind-shift. "For me, the best case is when somebody works hard to see it from the other perspective, and they're grateful they have," she says. "They usually say something to me like, 'Now I get it.' Because I think we know in our hearts that we're not always right, but we just couldn't understand the other point of view." ■



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