

Business Disputes: Litigation, Arbitration or Mediation?

By: Christopher J. Webb, J. D.

When was the last time you took a quiz? Been a while, eh? Wait; don't turn the page so quickly. This one is fun!

Roaming the diverse legal circles of our local county bar meetings, courts, ICLE programs, community dispute resolution centers, law schools and state bar functions, I observe the endless debate within our profession about how best to resolve a legal dispute. One of the observations I encountered is really quite simple: ***"Hey, don't tell me about the fact that only 2% of all cases go to trial -- that was true before you ADR folks started honing in on our turf! It just adds to the cost for the client. And the judges can't stand you when they're on the bench and will take your work when they're off."*** Or, how about a recent judge who said, ***"Our job is to judge and not outsource our job to non-judge substitutes!"***

Needless to say, as a dedicated ADR practitioner, I have been taken aback at times but started to think beyond my nefarious "neutral" nose. When I served as a former general counsel of a global durable goods manufacturer, my CEO often said when I entered his paneled office, "Chris, it's my job to give ulcers and not get them." So, in keeping with this philosophy I thought I would ask our readers to take a quiz for themselves and in the process perhaps get or cure an ulcer.

It is really quite simple to take this quiz. It requires only basic math skills (recall the fundamental reason we decided to pursue a legal career path was the Calculus 101 course we either took or didn't). It does, alas, require a moment of your time, a pencil and for most of us a little calculator that can be the "green" variety either wind or solar powered to save energy.

Below is a table that identifies 30 critical factors applicable to most material litigation brought by or against an organization in a business tort or other complex civil matter. Your task, Ms. or Mr. Phelps, is to put a measurement value on a scale of 1 to 5 on each factor. The maximum positive score is 150. See the math is not too hard. Using the table legend key below, write in your own highly-subjective (but invariably followed) judgment assessment for each factor and then add them up. Use "N/A" if you think one or more of my factors is bunk. Cheat all you want by changing a number or two *after* you have added up the table criteria the first time. No matter what, I think the results will surprise you.

Remember for purposes of the quiz, arbitration is binding without appeal as a matter of right and mediation is based upon the facilitative method as approved by the State Court Administrative Office. What would be great is if you would then email or send your result (anonymously or otherwise) either to me or your local bar association for compilation in another newsletter. Heaven forbid if you share the result with your clients or your favorite litigator or judge!

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The Table Legend key is as follows:

- 1 Negative
- 2 Unattractive
- 3 Neutral
- 4 Attractive
- 5 Positive

FACTORS	LITIGATION	ARBITRATION	MEDIATION
Controllability of Legal Expenses			
Manageability of Direct Dispute Related Costs			
Manageability of Indirect Dispute Related Costs			
Predictability of Tangible Collateral Effects			
Predictability of Intangible Collateral Effects			
Maintenance of Organizational Business Model			
Management of Risks relating to Traditional Discovery			
Management of Risks relating to Electronic Discovery			
Controllability of Risk of Adverse Fact Witness Testimony			

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Controllability of Risk of Adverse Expert Witness Testimony			
Enhancement of Business Purpose			
Maintenance of Morale of Organizational Personnel			
Promotion of Continuing Business Plan			
Protection of Intellectual Property Interests (Short & Long Term)			
Safeguarding Key Organizational Assets			
Controllability of Timing & Duration			
Minimization of Disruption to the Organization's Operations			
Maintenance of Present and Future Product Offerings			
Protection from Adverse Publicity			
Management of the Effect on Organizational Governance			

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Management of the Effect on Stockholder Relations			
Management of the Effect on Customer/Supplier Relationships			
Compliance with Legal Reporting Requirements			
Maintenance of Critical Financial Relationships with Insurance, Bonding, Financial and Other Constituents			
Ability to Utilize Creative Problem Solving Methods			
Ability to Continue Relationship with Opposing Party			
Management of Risk of Class Action Exposure			
Reduction in Risk of Decision Maker Error or Prejudice			
Predictability of Result			
TOTALS	0	0	0

FAVORABLE PERCENTAGE	0	0	0
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If you are curious about my own “findings,” please don’t hesitate to call or email me at your convenience. Oh, and by the way, the quiz was pass/fail -- you decide! At the end of the day, this exercise may point to a very important practical result: **Mediation of business disputes may be the most effective approach in serving your client’s best interests.**

From a mediator’s perspective, each one of the above factors represents a distinct area of inquiry that may be pursued through questions such as “How do you feel about [you pick one of the factors above],” or “Tell me more about [then name the factor to be considered],” or “How do you think the other side views [your identified factor]?” Whether as a mediator you are employing a facilitative or evaluative approach, the examination of underlying business needs through your questions will be valuable in bringing about a fair and prompt resolution of the business dispute.

Finally, if you plug into the above table different types of business disputes like a willful patent infringement case, corporate raiding business tort lawsuit, or stockholder derivative action, the outcome for the comparison table may tilt in the favor of arbitration or litigation. Once in while, “last-person-standing” arbitration without court rules of evidence or “bet-your-company” litigation seeking the application of injunctive power and nasty electronic discovery will be clear favorites.

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Biographical Legend at the conclusion of the article:

Christopher J. Webb, a sole practitioner in Farmington Hills, is a full-time mediator and arbitrator, current Vice-Chair of the ADR Committee of the Oakland County Bar Association, member of the Council of the ADR Section of the State Bar of Michigan, Arbitrator & Mediator with the American Arbitration Association, Neutral with International Institute of Conflict Prevention and Resolution and Trustee of the Oakland Mediation Center. Mr. Webb is currently serving as a facilitator regarding public water issues facing the Detroit Metropolitan Area.