

---

# Wilson & Orcutt, P.C.

## Business Law Newsletter

---



Wilson & Orcutt, P.C.  
201 Great Road  
Acton MA 01720

## HOW MUCH JUSTICE CAN YOU AFFORD?

Most litigation attorneys will readily admit that, when all is said and done, they are the only real “winners” left standing after completion of a lawsuit. The truth is that litigation is by far the most expensive and emotionally draining way to resolve a business dispute. It is rare for such cases to be taken by an attorney on a fee basis other than an hourly rate, and the time it takes to thoroughly prepare a case for trial, let alone actually go all the way through a trial, often bears no relationship to the amount in dispute. Legal fees can quickly become way out of proportion to the importance of a case, and that does not take into account lost productivity and distress experienced by the client in providing the attorney with the documents and information needed.

There are, however, alternatives, often referred to as ADR, or Alternative Dispute Resolution, and it may make sense and save time and money to include in business contracts a provision which requires ADR to resolve any dispute. Such a provision should spell out the type of ADR required, and should also provide that the prevailing party will be awarded attorneys fees and interest, in order to encourage both parties to seriously consider early settlement.

### **There are three primary types of ADR available.**

#### **Arbitration**

The dispute is submitted to one or more arbitrator who hears the parties' respective versions of the dispute and who renders a final and binding decision. Often, an organization such as the American Arbitration Association is used, who provides a panel of available arbitrators and detailed rules of procedure.

While less formal and certainly faster and less expensive than litigation, arbitration is adversarial in nature.

continued on page 2

July 1999  
Vol. 5 No. 1

continued from page 1

### **Mediation**

A neutral party, often an expert in the area of business in issue, is agreed upon by the parties who assists them in attempting to talk through and resolve their dispute. The mediator has no authority to impose a resolution, and makes no rulings or decisions. Instead the mediator helps the parties define the issues that separate them and helps them to formulate and transmit settlement options.

Mediation is even faster and less expensive than arbitration, and is often the ADR method of choice when the parties prefer not to escalate the adversarial nature of their dispute in the hope that they can maintain an otherwise mutually advantageous relationship.

### **Negotiation**

The parties, with or without the assistance of attorneys should always attempt to meet and try to reach an agreement. Needless to say, this is by far the fastest and least expensive method of ADR.

*A sample ADR clause in a contract  
may read as follows:*

### **MEDIATION**

The parties agree that if a dispute under this Agreement arises, they shall first attempt to directly resolve such dispute but, if such direct resolution is unsuccessful, they shall participate in at least six (6) hours of mediation to be facilitated by a mediator mutually acceptable to them and under the mediation procedures set by the mediator. If the parties cannot agree on the same mediator, each shall designate a mediator and the two (2) so designated shall choose a third mediator to conduct the session and such choice shall be binding on both parties. The mediation session shall be conducted within thirty (30) days of the date on which the mediator receives the request to mediate. The parties further agree that the costs of such mediation shall be shared equally by them unless they define other agreeable terms between them. If however, they do not resolve their dispute through direct negotiation or mediation, then they shall be entitled to proceed to litigation, or, if agreed between them, other dispute resolution procedures. The parties understand and agree that any mediation pursuant to this Clause shall not be binding on either party and shall not be admissible in any subsequent litigation.

*or:*

### **ARBITRATION**

Any controversy or claim arising out of or related to this Agreement or the breach thereof, shall be settled by arbitration in accordance with the applicable Rules of the American Arbitration Association, and judgment upon the award rendered by the arbitrator or arbitrators may be entered in any court having jurisdiction thereof. Notice of demand for arbitration shall be filed in writing with the other party to this Agreement and with the American Arbitration Association.

---

# A Tax Deduction You May Be Able To Live Without

Recent changes in the Internal Revenue Code have made it easier for you to claim a deduction for home office expenses. A home office used “regularly and exclusively” as a principal place of business or a place for meeting customers or clients may result in deductible expenses. Under prior law, a home office couldn’t be a principal place of business if there were other locations more important to the generation of income. Now, however, a home office qualifies if it’s used for business related administrative work and there is no other location where such work is done. In other words, you can deduct the expenses for a home office used for bookkeeping and record storage, even

if you have a larger and more prominent location from which you sell or deliver goods or services, so long as you don’t perform administrative functions there.

However, even if the deduction is available to you, you may consider not taking it. The reason is that, upon sale of the residence, you will have to pay capital gains tax to the extent of any depreciation deduction you have taken. Now that there is a permanent exclusion of gains on the sale of a principal residence up to \$500,000 for a married couple, you might end up paying more in extra taxes than you gain by taking the deduction.

As always, consult your tax advisor before making any decisions.

**Wilson & Orcutt, P.C.**  
201 Great Road  
Acton MA 01720

---

## A Primer On Severance Agreements

The increasingly litigious nature of our society as a whole is clearly reflected in the increasing number of claims brought by employees who have been involuntarily terminated. As a result, it is becoming more and more common for employers to seek written releases of such claims from their soon to become former employees.

In many ways, the process of negotiating the terms of a severance agreement is similar to negotiating a settlement of a lawsuit, with two important differences. The legal fees are much smaller and there doesn’t have to be a winner and a loser.

Typically, a severance agreement involves the exchange of a severance package (which might include lump-sum pay; continuation of benefits for a period of time, such as medical insurance; accelerated vesting or eligibility for retire-

continued on page 4

**Wilson & Orcutt, P.C.**  
201 Great Road  
Acton MA 01720

---

continued from page 3

ment benefits; and an agreement on the wording of references) for releases by the employee of potential claims against the employer.

In many cases the employee will want a release from the employer as well. There may be allegations of misbehavior such as missing money or company property, or the soon to be former employee may have been accused of harassment by fellow employees. In such cases, a release by the employer or an agreement to indemnify the employee against such claims may be worth more to the employee than severance pay.

In other cases, the parties may be concerned about what each might say to third parties about the other. So called non-disparagement provisions are becoming more common. Depending upon which type of claims are being released, the exact wording of the severance agreement may be of critical importance. For example, claims for age discrimination can only be released by specific language referring to the statute which authorizes such claims.

There are other, technical requirements which have to be met if the releases are to be enforceable. In some cases, the employer must be given some time after signing the agreement to change his or her mind, and to revoke it.

As always, the services of an attorney experienced in these matters is essential.

---

## Free Y2K Help

- The Small Business Administration offers a free service to small businesses. Call the toll free number at (877)789-2565 for a recorded memo of reports available by immediate fax back to you.
- The Y2K News Magazine at [www.y2knews.com](http://www.y2knews.com) is an online compendium of articles and links with a Y2K theme.
- The Year 2000 Information Center at [www.year2000.com](http://www.year2000.com) is another good source of information and links.

## The Wilson & Orcutt, P.C. Business Law Newsletter

EDITOR: DANIEL B. GREENBERG

The Wilson & Orcutt, P.C. Business Law Newsletter is published quarterly as a service to our clients and friends. Articles are meant to be only a summary of the law, and should not be construed as legal advice applicable to a specific set of facts. We purposely do not copyright the newsletter and readers should feel free to copy and distribute its contents.