



Mediation:
A Lean Approach to Resolving Disputes Without Litigation



FCIA Webinar
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INTRODUCTION...

- **Presenters:**

*Blase Reardon – FCIA Founder & Former President,
Lean Coach, Mediator*

*Paul Simon – President/CEO, Business Mediation
Network*

- **Q & A –Anytime**

- **Links, Feedback, Contact & Survey:**

**[https://businessmediationnetwork.com/
resources/presentations/fcia/](https://businessmediationnetwork.com/resources/presentations/fcia/)**

Webinar Summary. . .

- ***Mediation Uses Lean Principles to Resolve Construction Conflict***
- ***Lean Principles:***
 - Collaboration of All Parties (Owners, Designers, Contractors, etc.)
 - Deliver Value
 - Eliminate Waste
- ***Mediation:***
 - Neutral Mediator Facilitates Negotiation
 - Voluntary Settlement of Conflict
 - Avoid Lengthy, Expensive Litigation/Arbitration

Resolving Disputes . . .

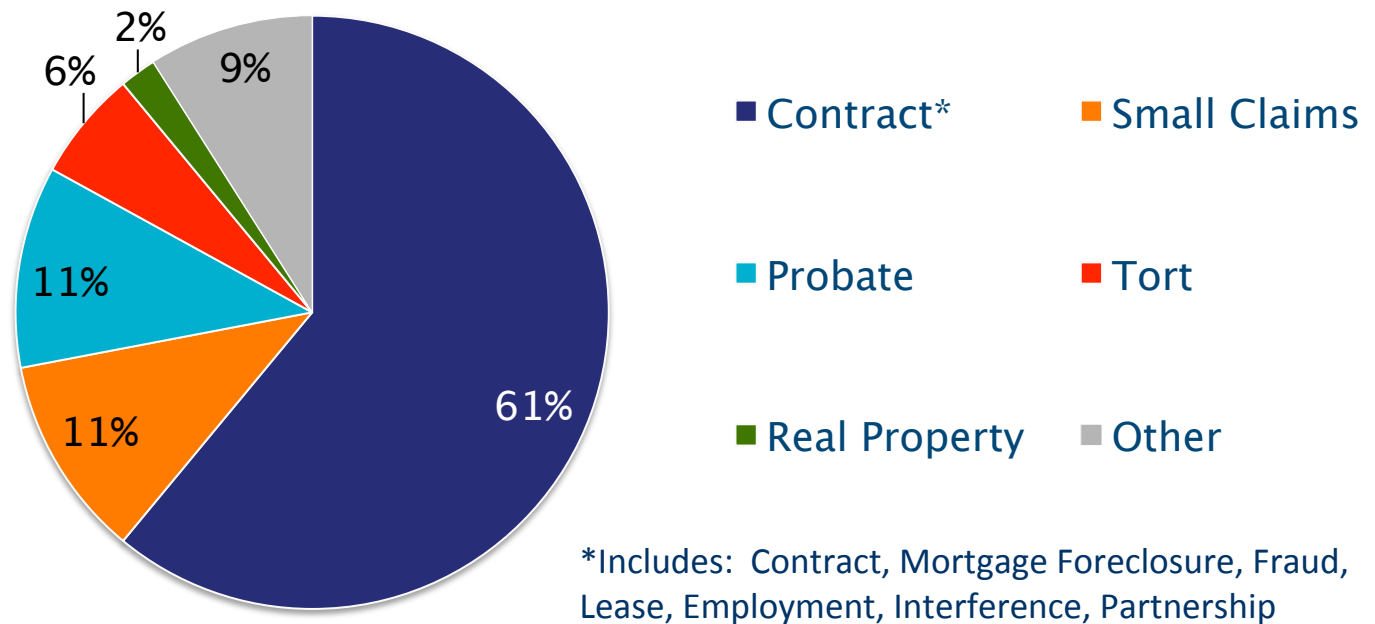
3 Basic Choices

- ***Litigation*** – Court filing, discovery, motions, adversarial hearings, Judge/Jury decision
- ***Arbitration*** – private litigation, Arbitrator makes a ***BINDING*** decision
- ***Mediation*** –
 - Private, Facilitated Negotiation
 - Neutral Mediator
 - Voluntary Written Settlements



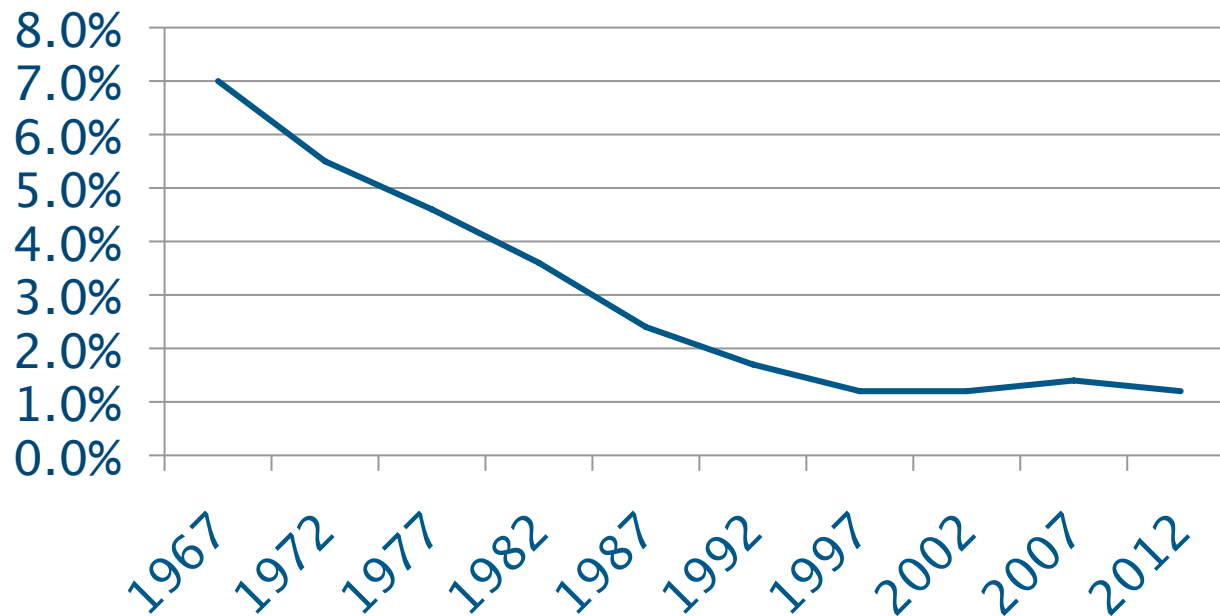
Litigation is the Usual Choice. . . Over 8 Million New Business Cases Each Year

Over 15 Million Civil Cases Filed Each Year



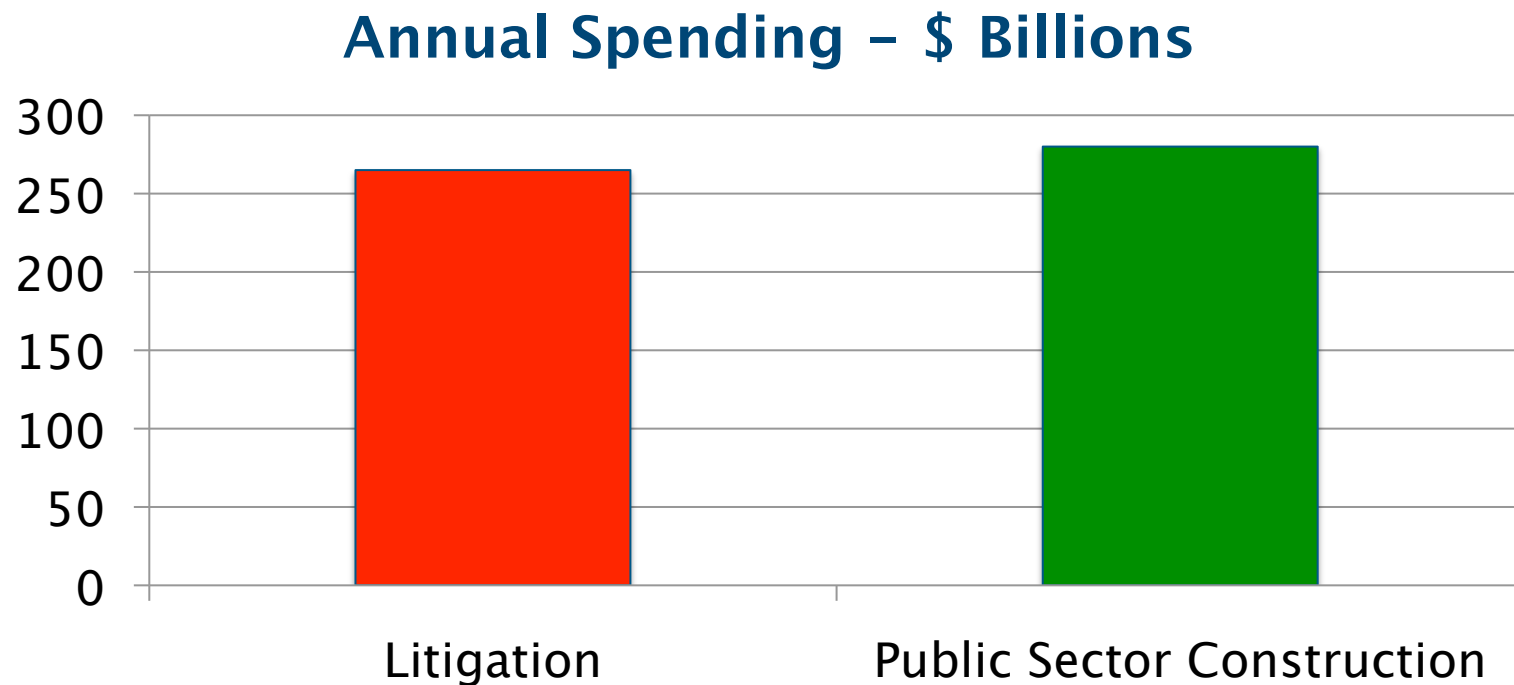
Trials Are Rare . . . Less Than 1% of Business Cases Go to Trial

Federal Civil Trials



Business Litigation . . . A Good-Size Industry in Itself

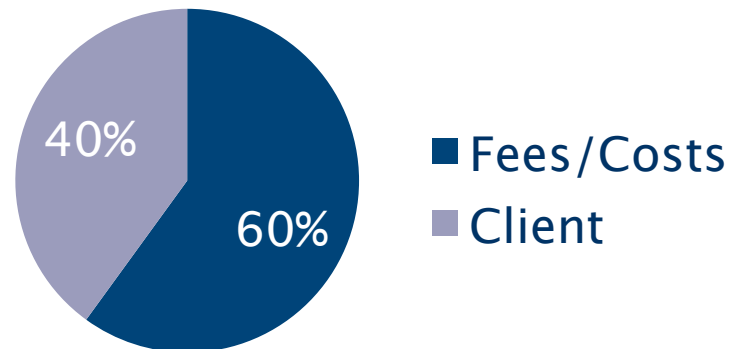
- ***Over \$250 Billion Spent by Business in Litigation – 1.66% of U.S. GDP***



The Litigation Tax . . . Cost of Discovery, Pre-Trial Preparation, Etc.

- ***High Transactional Costs of Litigation:***

Tort / PI Claims

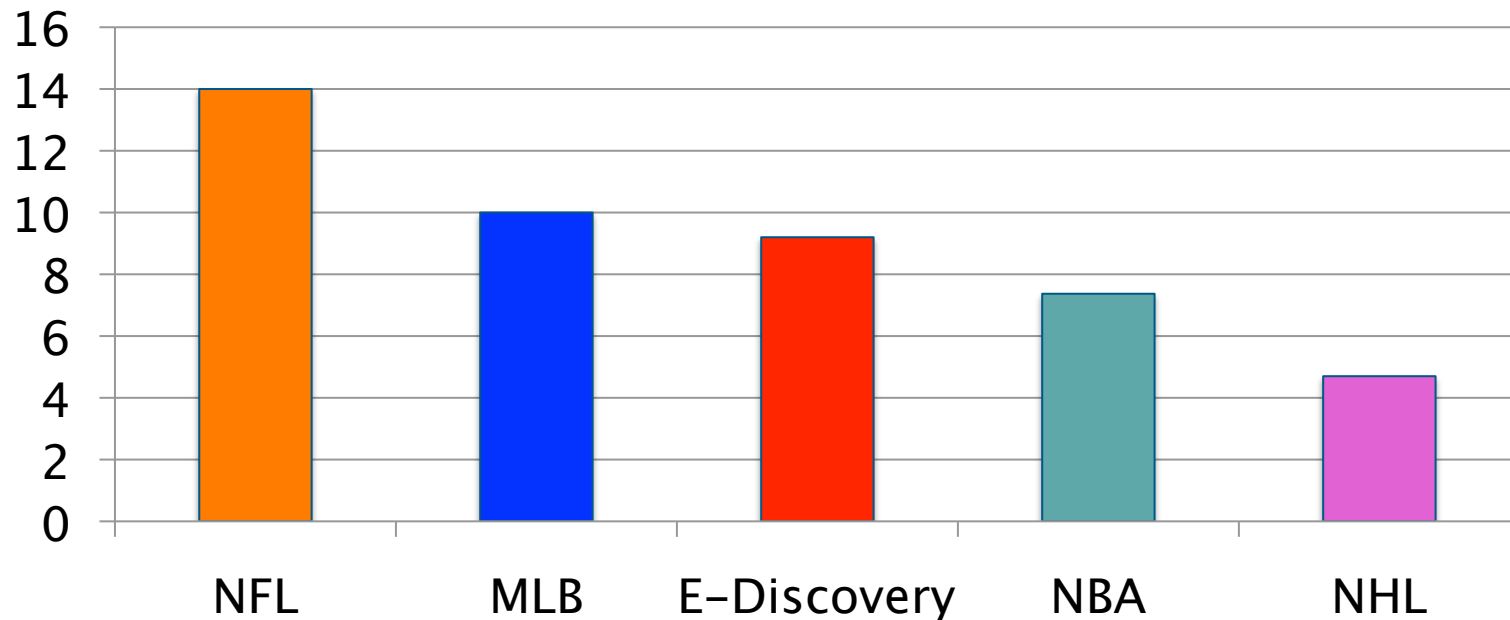


- ***Up to 90% of Litigation Costs are for Discovery***
- ***Electronic Discovery: MetaData = MegaBucks***
 - **New York employee lawsuit 2003**
 - **Now: Lawyers, CPAs, Software, Public Co's, Office 365**

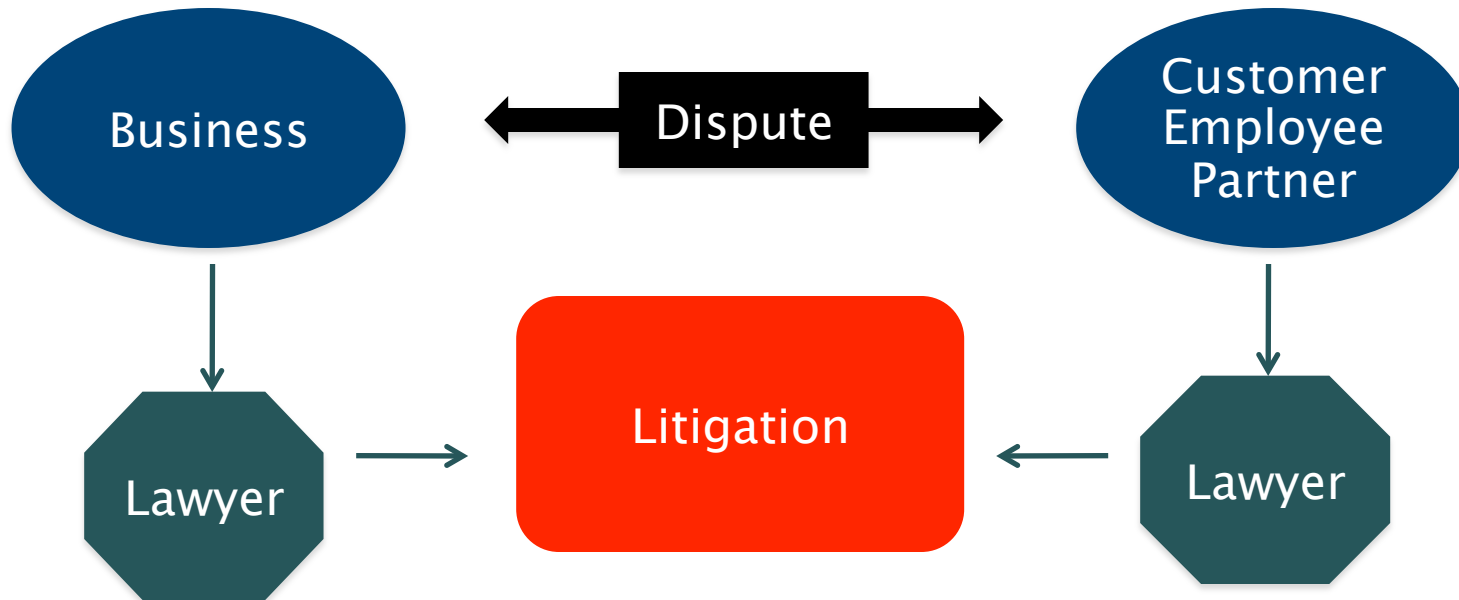
Electronic Discovery . . . The Fastest Growing Sport

- With a 15.3% Annual Growth Rate, the 15 year old Litigation Sub-Industry Adds Huge Costs to Lawsuits***

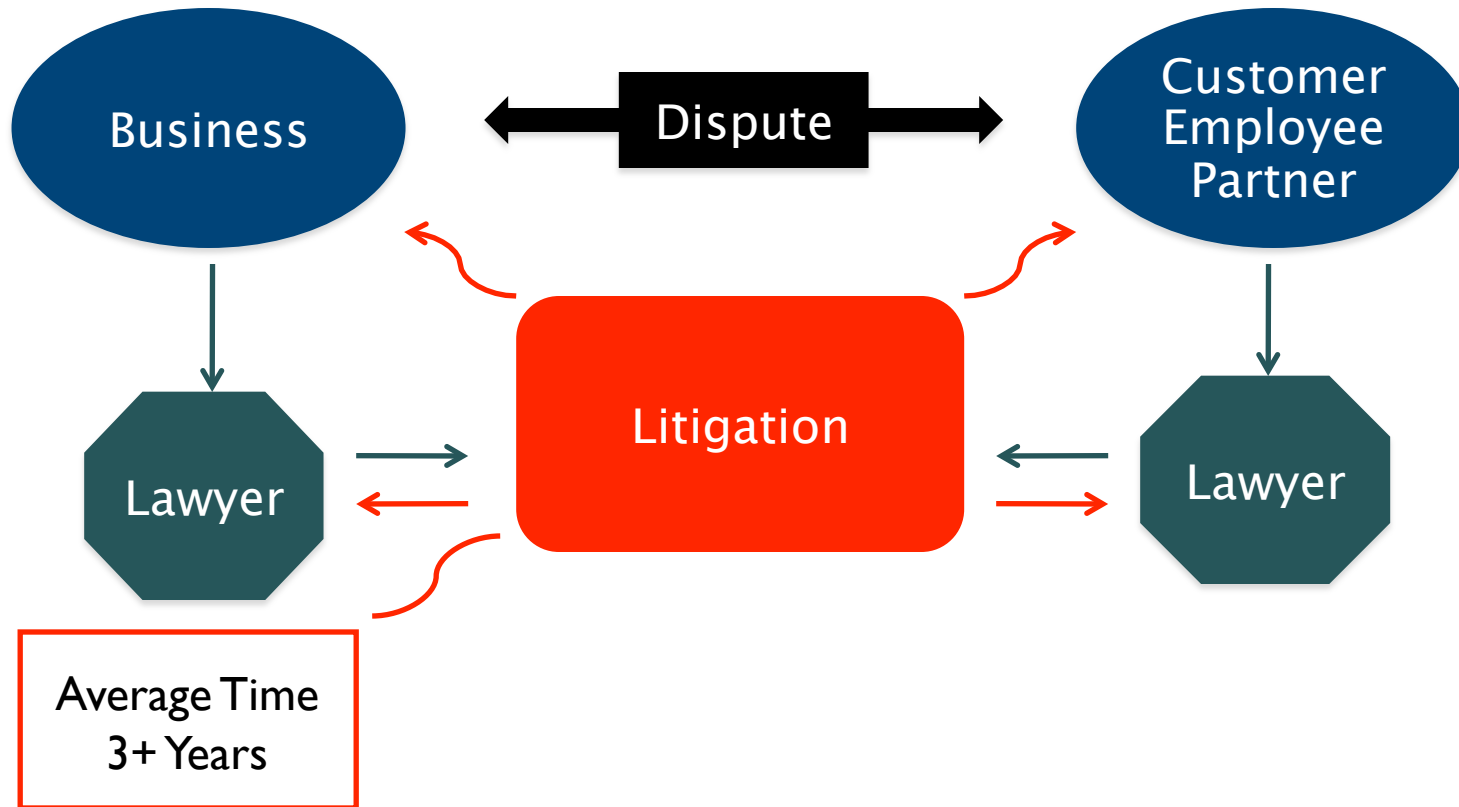
2017 Annual Revenues – \$ Billions



Litigation Model . . . Uncontrolled, Indirect, Slow, Costly

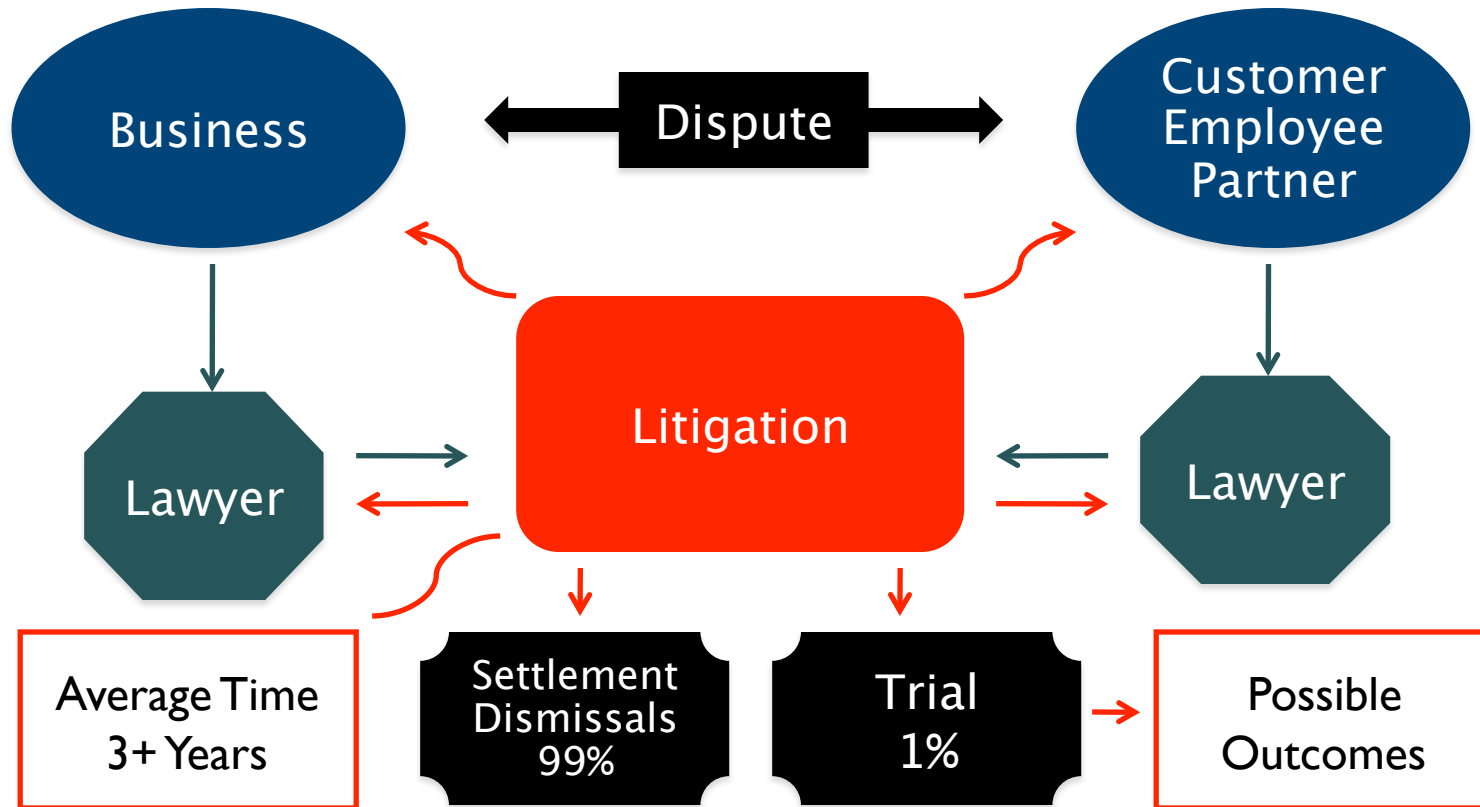


Litigation Model . . . Uncontrolled, Indirect, Slow, Costly



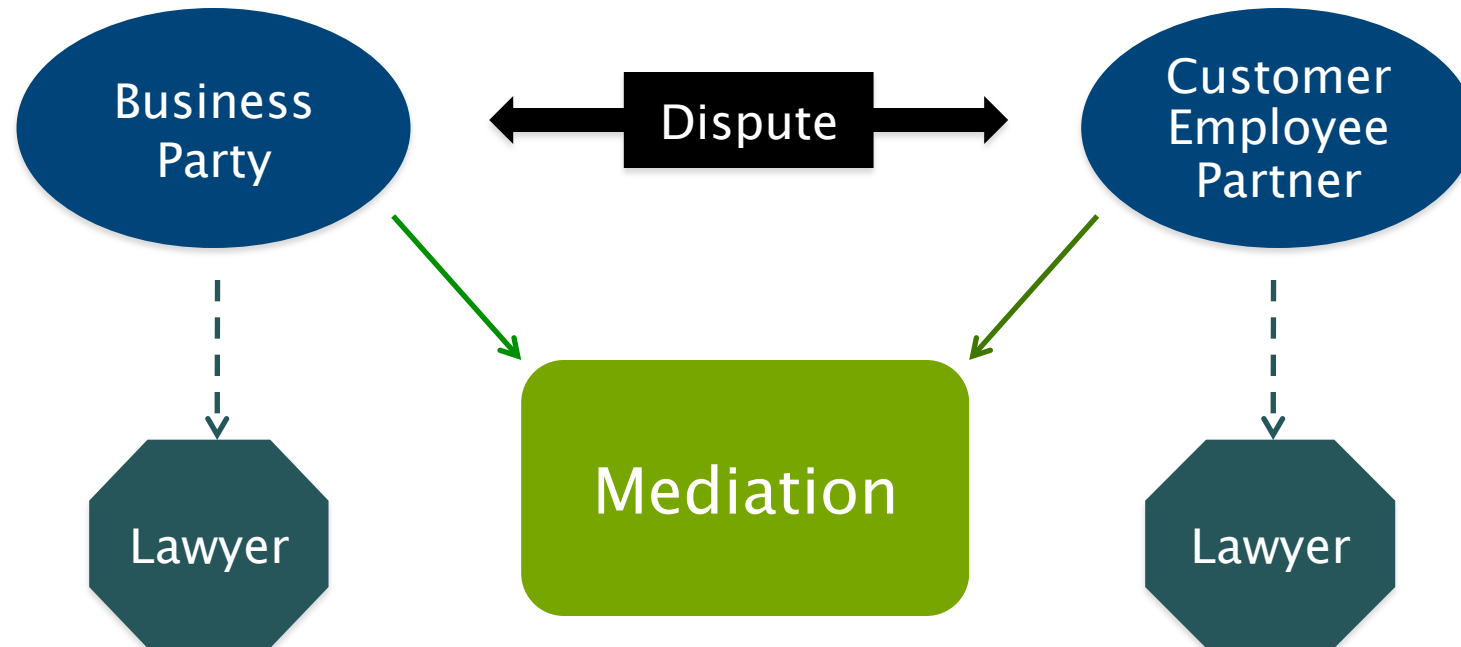
- Motions
- Document Production
- Depositions
- Electronic Discovery

Litigation Model . . . Uncontrolled, Indirect, Slow, Costly



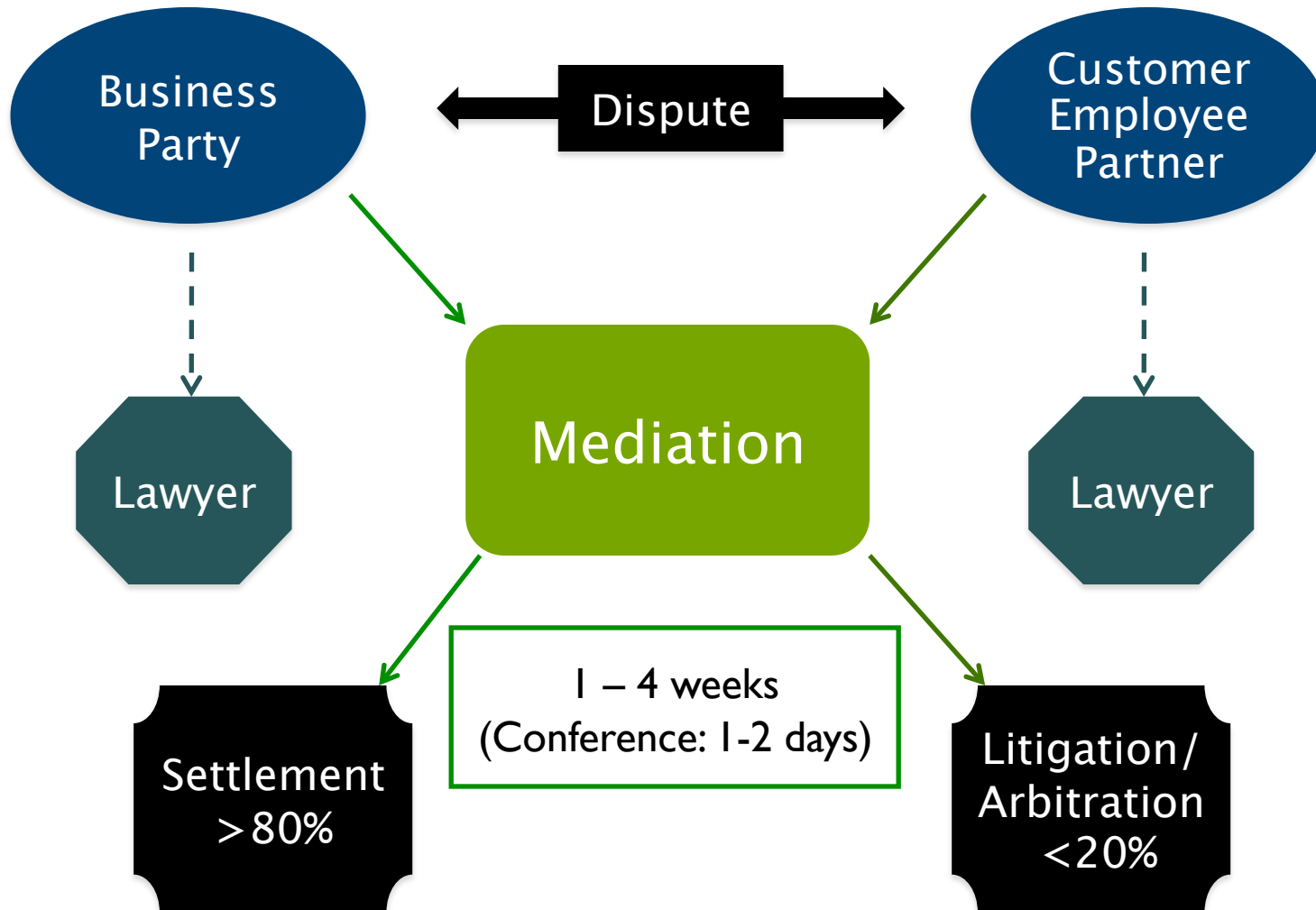
- Motions
- Document Production
- Risk of Loss
- Collection Efforts
- Depositions
- Electronic Discovery
- Appeals
- Damaged Relationships

Mediation Model . . . Controlled, Direct, Efficient, Business Focused



Mediation Model . . .

Controlled, Direct, Efficient, Business Focused



Mediation . . . Why it Works When Direct Negotiations Fail

- **Confidential** – mediation communications are protected from use in later litigation
- **Focused** – only purpose is to find solution
- **Productive** – authorized persons required
- **Mediator Chosen by Parties:**
 - Includes Private Caucus
 - Not Adversarial
 - Emotional Filter
 - Communications Bridge



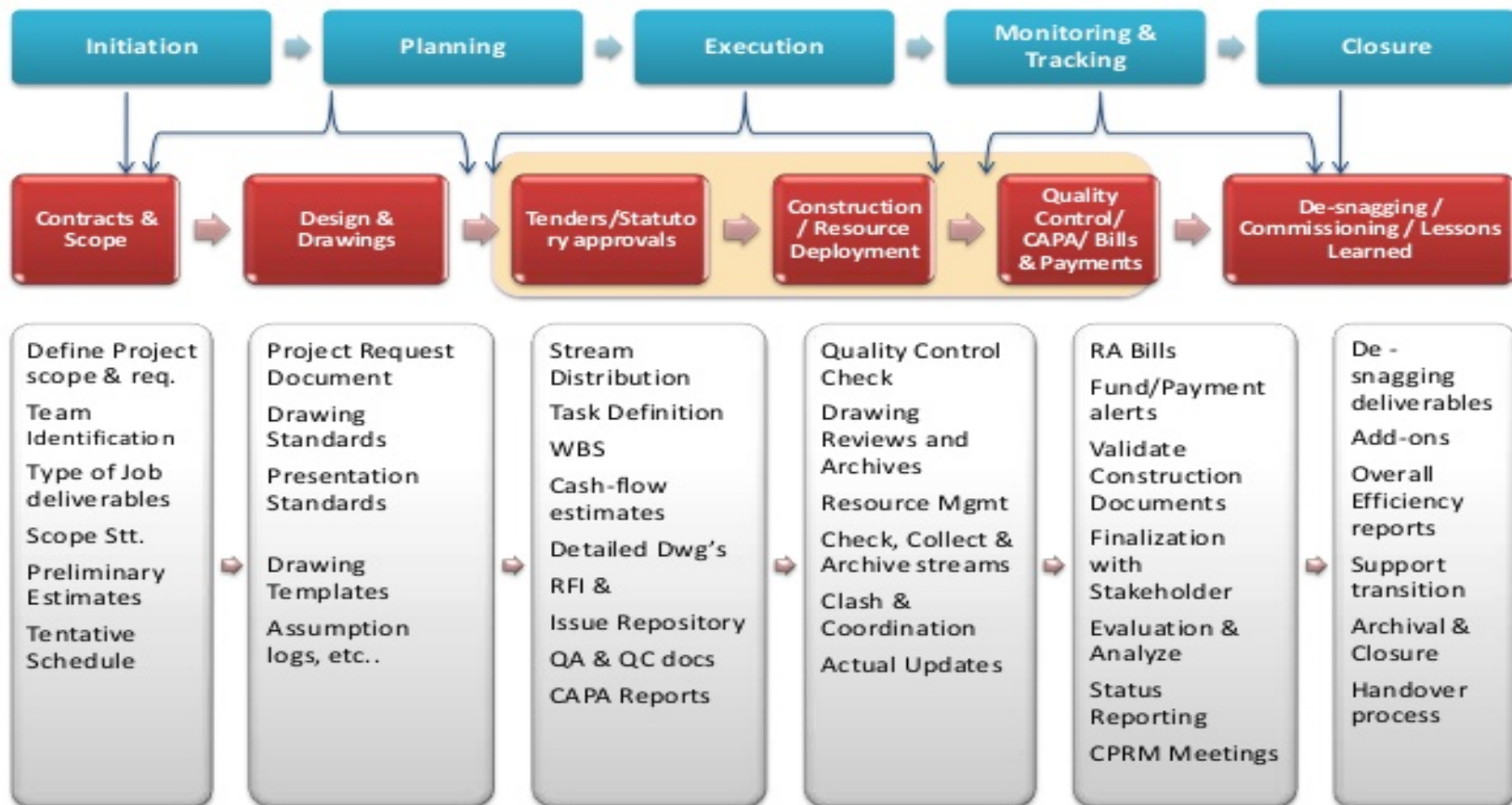
Mediation Is A Lean Approach. . . Applies Lean Fundamentals to Resolving Conflict

Lean Fundamentals:

- Intense focus on understanding **value** from the customer's perspective
- Delivering value & eliminating **waste** in the process
- Shift in **thinking** and **behaving** supported by **tools**
- Continuous **improvement** of processes
- **Respect** for people

Resolve Conflict Quickly. . . Preserve Continuous Flow of Construction

Construction Project Process Flow & Deliverables



Anticipation, Prevention, Solution . . . Sources of Conflicts in Construction

- ***Contracting***– Scope Creep, Inadequate Bids
- ***Planning*** – Final Design Documents, Specifications, Changes
- ***Execution*** – Permits Inspections, Interference, Unforeseen Conditions, Crew Cramming, Vendor Reliability, Delays
- ***Completion*** – Delivery, Collection, Warranty Claims
- ***General Business Issues:***
 - Employees
 - Lenders
 - Partnership / Corporate
 - Succession Planning



Example: Hand Off Delays. . . Percentage of Promises Completed

Ballard & Howell Study:

PPC = 54%



***Why? Prerequisite
Task Not
Completed***

Don't Let Disputes Hit Profits. . . Uses of Mediation in Lean Construction

1. Use Mediator to Facilitate Negotiation of Disputes During Performance:

- Establish Conflict Management Process to Keep Continuous Flow
- Commit to Resolving Disputes Before They Cause Delays & Losses
- Preserve Working Relationships
- Mediation > Arbitration (Med-Arb) Possible



Resolution Outweighs a “Good Case” . . . Uses of Mediation in Lean Construction

2. Agree to Mediation Before Litigation/Arbitration:

- Save Money and Time Preparing, Filing Lawsuits
- Private – Keep Business Info Confidential, No Negative PR
- Encourage Vendors, Others to Mediate > Avoid Getting Pulled In To Third-Party Discovery
- Mediate All Disputes: Collection, Employees, Contracts, Lenders, Partnership / Corporate, General Business



Planning To Use Mediation . . . Agree To Talk While You Are Still Talking



***One Mediation Conference
Before Filing Claim***

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- ***Use Dispute Resolution Contract Clause*** – Choose the forum
– Mediation before Litigation or Arbitration
- ***Stay In Control*** – Reduce chance of surprise lawsuit – Without *Mediate1st*[®] clause, most difficult party chooses the forum
- ***Mediation's Worst Case = More Info*** – Opportunity to meet decision-maker from other party, gauge motivation and commitment, see interaction between other party, lawyer

Mediators As Deal-Makers . . .

Business Mediators for Business Issues

- ***Mediators with business experience are better able to help solve business disputes:***
 - ***No Learning Curve*** – familiarity with business setting helps understand parties’ interests and motivations
 - ***Problem-Solving Skills*** – *win/win NOT win/lose*
 - ***Deal-Makers*** – facilitate negotiations rather than evaluate legal positions to predict winners / losers
 - ***Successful Business Attributes*** – persistence, consensus building, reconciling stakeholder interests, listening, probing, creative problem-solving

FCIA – BMN Dispute Survey . . .

Current Responses

- *Two-Thirds of FCIA Members Responding Have been involved in a Dispute that Could Not be Resolved Between the Parties*
 - *Most of those were Contract Disputes, also Disputes over Collection, Employee Claims and Government Regulation*
 - *25% of those Claims resulted in a Lawsuit, 75% were Abandoned; In One-Half of Abandoned Claims, Parties Ceased Doing Business with Each Other*
 - *Ranking of Most Important Goals in Resolving Disputes:*
 - 1. Finding Mutual Benefit*
 - 2. Preserving Relationships*
 - 3. Getting It Over With*
 - 4. Winning*
 - 5. Money*
- **Results Consistent with Other Business Dispute Surveys*****

Litigation IQ Survey . . .

Responses vs. Answers

- ***How Many Business-Related Lawsuits Filed in US Annually?***
 - ***Correct Answer: Over 8 Million (27%)***
- ***How Long Does a Business Lawsuit Last?***
 - ***Correct Answer: 3 Years or More (36%)***
- ***What % of Business Lawsuits Go To Trial?***
 - ***Correct Answer: 1% or Less (9%)***
- ***Overall Score: 24% Correct Responses***

Consensus Among FCIA Members. . . Overwhelming Approval of Mediation

- ***Would the Knowledge that 80% of Disputes Resolved in Mediation Encourage Your Use?***
 - ***Yes - 100%***
- ***Would You Use Mediation If Access to Convenient and Affordable Program with Online Mediator Selection?***
 - ***Yes - 100%***
- ***BMN Offers Preferred Mediation Program for FCIA Members – Contact for Details***

Why is a Business Lawsuit Like a Hockey Fight? . . .

- *You can fight for a while if you follow the rules*
- *The fight ends when you are exhausted (or your opponent pulls your jersey over your head)*
- *Usually neither party wins*
- *Only the parties are penalized*
- *While you are in the penalty box, the game goes on without you*
- ***AVOID THE LAWSUIT PENALTY BOX!***





- Questions / Comments
- Survey Participation / Updates
- Mediator Training Information
- Webinar Evaluation & Feedback

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