

Don't Litigate That Data Breach Dispute! Resolve It Swiftly and Efficiently Through Mediation

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Agenda

1. Introduction to Mediation
2. Turning to Mediation in the Event of a Data Breach
3. Choosing Your Mediator
4. Impact of COVID-19 on Mediation

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Introduction to Mediation



Mediation is trending.

- There has been a change in litigation and dispute resolution during the past 25 years.
- According to the ABA, far more cases are resolved in alternative dispute resolution (ADR) than by trial, and the relative numbers continue to increase as mediation and arbitration continue to expand.

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What is mediation?

- A process of deliberation and discussion headed by a mediator who facilitates communication between parties regarding a dispute.
  - Usually culminates in a meeting in person.
  - Often involving brief written submissions to the mediator stating the case.
  - Often with telephonic follow up after the mediation session.

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Turning to Mediation in the Event of a Data Breach



Overview of Data Breaches

- A data breach occurs when confidential information is accessed by someone without authorization, whether intentional or unintentional, targeted or random.
- Motives for perpetrators often include financial gain, but not always.
- The source of data breaches are most commonly outside attacks on networked computers or emails with malicious links or attachments.
  - Others include disgruntled employees, stolen devices and even simple human error.

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Data Breaches Lead to Disputes

- Nearly all business information is in digital format, and that paradigm presents a host of potential dispute issues.
- Electronic information is fundamentally different from paper information: There is more of it; it is in many places at the same time; it's easier to lose or alter.
- Electronic information is protected by myriad regulations and laws, in the U.S. and elsewhere in this globally connected economy.
- Due to this, digital information is a breeding ground for disputes.

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Resolving Disputes Through Mediation

- Mediation provides a way to control dispute costs, and more and more contract drafters are including some form of alternative dispute resolution in their agreements.
- Relatively few cyber disputes arise from government regulatory proceedings or litigation.
- Most conflicts that arise from breaches of information have their roots in agreements between the parties as to how that information would be maintained.

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Resolving Disputes Through Mediation (cont.)

- Cybersecurity, privacy and confidentiality, cyber risk insurance and technology contract law are among the most dramatically shifting areas of the legal landscape.
- Rather than spending hundreds of thousands of dollars to try to fashion the law to a party's favor, with the risk of creating bad law, cooler heads are prevailing and the demand for cyber mediation has increased and will continue to grow.

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Mediation Benefits

1. Parties control process and outcome
2. Confidential
3. Saves time
4. Save money
5. Avoid or shortens litigation
6. Preserves relationship
7. Fair and neutral
8. Gives participants an opportunity to tell their story
9. Improves communication
10. Enables plaintiffs and defendants to discovery real issues in the dispute.
11. Not threatening
12. Utilizes expertise
13. Is a forgiving process
14. Helps avoid the risk of “showing weakness” or going first.”
15. Usually results in a “Win Win” outcome
16. Business solutions possible

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More Mediation Benefits

- Get valuable input on alternative techniques (baseball? Mediator's proposal? Hi-Lo?) that the parties may not have thought of.
- Keeping the dispute out of the courtroom allows for reduced media/publicity.

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When should you choose mediation?

- Sometimes, parties will have no choice regarding when to have at least one mediation. In some instances, the agreement at issue in the litigation demands that the parties mediate before filing a lawsuit or submitting a dispute to arbitration.
- If the timing of mediation is left to the parties, conventional wisdom recommends mediation as early as possible to avoid unnecessary attorneys' fees, expert fees, and other litigation costs. An early mediation may help save the parties' ongoing business relationship before litigation tactics irreparably sour the relationship. And, there is little downside to an early mediation. Parties can mediate more than once during a lawsuit, though multiple mediations are not commonplace.
- When considering whether the time is right to mediate, discuss with your lawyer (a) remaining factual and legal question marks, (b) an estimated budget for the case through different procedural stages, (c) and the other side's likely possible perspectives.

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Mediation can get to a result faster, which often makes for happy clients.

- Clients often prefer quick resolutions.
  - Puts money in their hand (plaintiffs) and removes hanging risk (defendants).
  - Solves the problem that created the litigation.
- Mediation can be much faster.
- Even if no settlement results, both sides may have refined their understanding of risk, issues at stake, and possible results.

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Choosing Your Mediator



Role of the Mediator

- Private mediation leaves the decision power totally and strictly with the parties.
- The mediator does not decide what is "fair" or "right," does not assess blame nor render an opinion on the merits of a case under litigation.
- Rather, the mediator acts as a catalyst between opposing interests attempting to bring them together by defining issues and eliminating obstacles to communication, while guiding the process to avoid confrontation and ill will.
- The mediator will, however, seek concessions from each side during the mediation process.

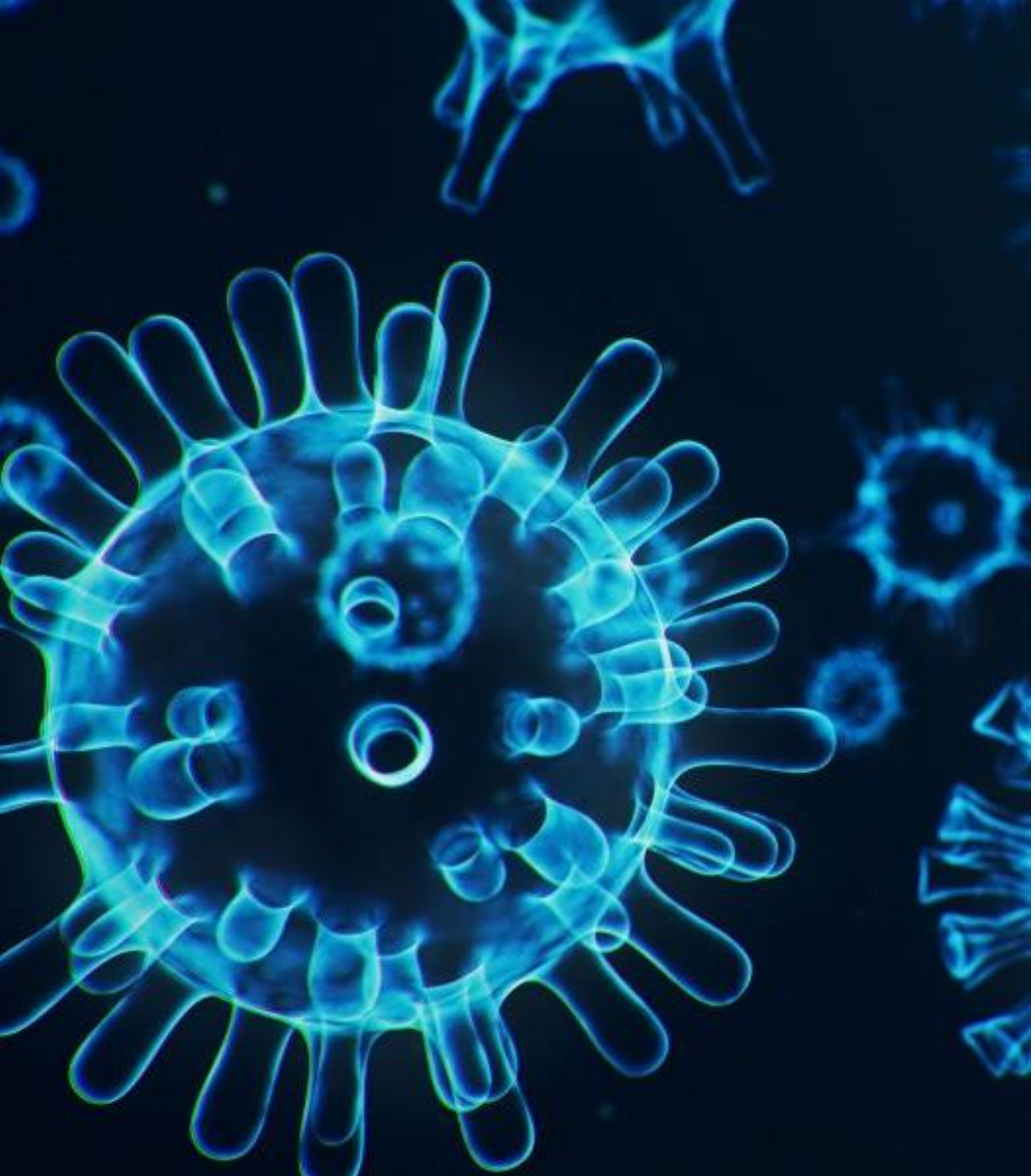
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How to Choose an Effective Mediator

- Your mediator should be an experienced and skilled mediator.
  - Emotional intelligence.
  - Helping them feel “heard.”
  - Helping people hear the “other.”
- Your mediator should know the technical nuances of the issues. Find an expert in the field.
  - The more they know, the more they can realistically assess, critique, and contextualize for the parties.

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Impact of COVID-19 on Mediation

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Overview

- Arguably, the COVID-19 pandemic has been the biggest challenge and opportunity for the mediation community.
- Despite the pandemic's drastic effect on the operations of judiciaries all over the world, the advantages that mediation provide, have become even more evident and is being used even more by potential parties.

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Push Towards Virtual Mediation

- The COVID-19 pandemic forced mediations to take place online.
- The online medium is enhancing and transforming how cases are settled. Many believe that cases are settling faster, more often, more cordially, more efficiently, and more reasonably online.
- Mediators are now engaged in a full-throated campaign to encourage the use of technology to make virtual mediation the new normal.

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Online Mediation Tools

- Zoom;
- Microsoft Meets;
- Skype; and
- FaceTime

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Advantages of Virtual Mediation

- Complex Jurisdictional Issues can be avoided
- Zero risks to the health of attendees – more individuals are in the safety of their home
- Time & cost efficient – cost of travel is cut

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Complex Jurisdiction Issues Can be Avoided

- Virtual Mediation avoids the issue of whether a specific court has jurisdiction over the dispute.
- Resolution through an agreement can be binding on the parties, thus avoiding jurisdictional issues altogether.

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Zero health risk to attendees

- As countries worldwide are urging individuals to stay at home, more and more parties are seeking alternative dispute resolutions.
- By conducting Virtual Mediation, it will help to decrease any potential health risk to attendees as they remain indoors.

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Time and cost saving

- Virtual Mediation provides substantial savings when compared to traditional litigation, which is known to be very costly.
- It has provided a feasible option for individuals who cannot afford traveling the long distances.
- It has also led to the reduction of costs and expenditure of less time as parties can participate in virtual mediation from their respective business locations and or residences.
- Parties also save costs as there is no need to rent a neutral facility to conduct the mediation.

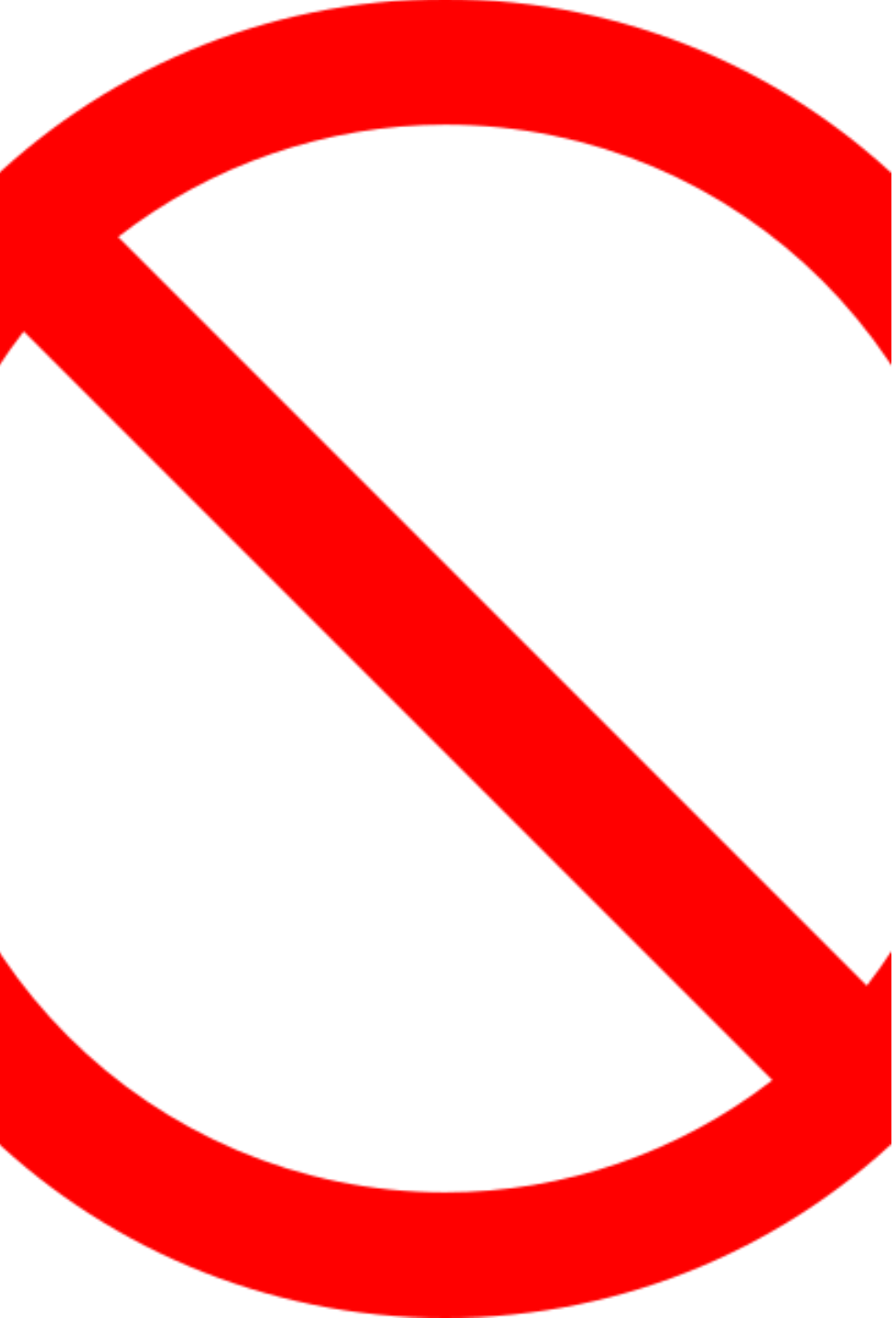
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Disadvantages of Virtual Mediation

- No in-person opportunity to gauge body language or social queues
- Potential Inaccessibility
- Possibility of security breaches and invasions of privacy with the technology used

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Potential Inaccessibility

- Individuals that are involved in disputes from off-line transactions may find it difficult to access computers at certain times.
- Additionally, virtual mediation may pose a problem for individuals with limited access to the internet. It can also affect individuals who feel uncomfortable or inconvenient resolving their personal issues online, such as family matters.

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Possibility of Security Breaches and Invasions of Privacy With the Technology Used

- As virtual mediation creates an electronic record, there is more possibility for a security breach or invasion of privacy.
- This allows a party to print our and distribute e-mail communications very easily. This can also be done without the knowledge of the other party. In turn, this may affect the development of open and honest exchanges in virtual mediation.

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Questions?

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Daniel Garrie is the Co-Founder of Law & Forensics LLC, Head of Computer Forensics and Cyber Security Practice Groups and has been a dominant voice in the computer forensic and cybersecurity space for over 20 years. Prior to Daniel's legal career, he successfully built and sold several technology start-up companies. Since co-founding Law & Forensics LLC in 2008, Daniel has built it into one of the leading boutique cybersecurity forensic engineering firms in the industry. Daniel has both a Bachelor's and a Master's Degree in computer science from Brandeis University, as well as a J.D. degree from Rutgers Law School. Daniel has led forensic teams in some of the most visible and sensitive cyber incidents in the United States. In particular, Daniel recently located and recovered deleted files in both private and public cloud computing environments using his patented software, Forensic Scan. This investigation took less than forty-eight hours to clean and recover the data from the servers of a cloud-hosting provider that was compromised by a malicious cyber-attack. Thanks to the Forensic Scan technology, that Daniel co-invented and patented (US9990498B2 and US9990497B2), and his own expertise, Daniel and his team was able to identify the source of the breach and remediate the problem in record time.

Daniel regularly testifies as an e-discovery, cybersecurity and computer forensic expert witness, authoring forensic expert reports on multi-million-dollar disputes. His ability to perform complex investigations and effectively communicate the results to a jury has made him one of the most sought-after experts in the country. His testimony has been pivotal in a number of cases, including one involving the embezzlement of millions of dollars from a large non-profit. Daniel was able to perform a thorough analysis of the alleged embezzlers' phone and computer, despite the embezzlers' attempts to wipe them, and identify concrete evidence of the embezzlement to a jury. Since 2008, Daniel has served as a Neutral and Special Master and in 2016, he joined JAMS as one of the organization's youngest Neutrals. At JAMS, Daniel serves as an Arbitrator, Forensic Neutral, and technical Special Master with a focus on cybersecurity, cryptocurrency, and complex software and technology related disputes. Some of the major cases for which he has served as an e-discovery special master, or forensic neutral include: *Hougan vs. City of Newport Beach, No. 30-2012-00582855* (Super. Ct. Cal. 2014)*; Small v. University Medical Center of Southern Nevada, 2014 WL 4079507*(D. Nev. 2014)*; C.D.S. Inc. v. Zelter and Amazon Web Services, Inc.*, (S.D.N.Y. 2016); *Jawbone, Inc. v. Fitbit Inc.* et al (Super. Cal., S.F. County 2018). In addition to his vast litigious experience, Daniel is well-published in the cybersecurity space, Editor-in-Chief of the Journal of Law & Cyberwarfare, author of more than 200 articles and books including, "Understanding Software, the Internet, Mobile Computing, and the Cloud. A guide for Judges", published by the Federal Judicial Center. He has been recognized by several United States Supreme Court Justices for his legal scholarship and is a trusted source and a thought leader for cybersecurity articles and opinions, being cited over 500 times to date.

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Mark Mermelstein, a trial lawyer with more than 20 first-chair trials, specializes in white collar criminal defense and complex litigation. He is also Global Co-chair of the firm's Cyber, Privacy & Data Innovation practice.
Mark focuses his work representing corporations and individuals facing allegations of securities fraud, healthcare fraud, environmental crimes, money laundering, violations of the Foreign Corrupt Practices Act (FCPA) and the False Claims Act, mail/wire fraud, and embezzlement.

Mark also focuses on asset recovery for corporate crime victims such as those victimized by cybercrime, such as theft of trade secrets, hacking, counterfeiting and other business crimes. In this regard, Mark routinely leads data breach and cybersecurity incident response efforts, as well as proactively advises on data breach mitigation strategies.

Mark has written many articles and has spoken extensively on many aspects of his practice. A frequent commentator on matters related to white collar crime, he has been recommended by *Legal 500* in both White Collar Criminal Defense, and Cybersecurity.

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Rod Thompson applies his deep experience in complex commercial litigation from three different perspectives—as a trial lawyer, mediator and arbitrator—to efficiently resolve even the most difficult cases. Before joining JAMS, Mr. Thompson was an associate and then partner at a large international law firm for the first 20 years of his career, specializing in antitrust, competition and intellectual property litigation. For the next 20 years, he was a partner at a midsize Bay Area law firm known for success and its willingness to represent plaintiffs, as well as defendants, in high-stakes commercial litigation. All the while, Mr. Thompson served as neutral arbitrator, mediator and early neutral evaluator as time permitted.

Mr. Thompson brings the perspective of an experienced commercial trial lawyer/advocate to his role as neutral. As a mediator, early on in the process, he uses probing questions and effective listening to gain an understanding of the parties' underlying interests as well as the merits of their positions. He believes that confidentiality and flexibility make mediation an effective tool for resolving commercial disputes. The parties must trust the mediator to disclose their true interests/needs, knowing that confidential information will not be shared with an opposing party or counsel without permission. Using the flexibility of mediation, Mr. Thompson helps parties to adapt and structure the process to best fit the unique opportunities presented by their dispute and any actual or potential business relationships.

As arbitrator, Mr. Thompson manages even in the most complicated and challenging disputes to ensure that the parties have the benefit of an efficient and fair adjudicative process and a fully informed, justified and understandable decision. Whether serving as chair, a wing or sole arbitrator, Mr. Thompson will ensure that the parties are provided an adequate opportunity to gather and present their evidence and arguments. Always looking to manage the process, he will rule promptly and decisively, working with the parties to obtain efficiently the necessary information to provide a reasoned award.

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A new book by Daniel Garrie...

"No one is immune to a cybersecurity incident. Every industry and business sector—including the legal profession—is a target for hackers and cyber criminals."

Don't Fall Behind: A Cybersecurity Guide for Law Firms

As cybersecurity attacks continue to rise, the legal sector has been identified as one of the primary targets of cyber criminals. While studies show cybersecurity is considered a significant threat, survey respondents have indicated their companies are not taking proper measures to combat these threats. This concise guide offers steps all law firms should take to protect their networks and data against cyber attacks.