

The Reasons for Mediation's Bright Future

By Edna Sussman

Traditional litigation is a mistake that must be corrected. . . . For some disputes trials will be the only means, but for many claims trial by adversarial contest must in time go the way of the ancient trial by battle. . . . Our system is too costly, too painful, too destructive, too inefficient for really civilized people.

—Chief Justice Warren E. Burger of the U.S. Supreme Court

The growth of mediation over the past 15 years has been exponential, a tribute to the success of the process. Settlement rates in mediation are said to be on the order of 85 to 90 percent and are achieved long before the traditional “court house steps” at a significant saving of cost and time for the parties. User satisfaction is high as parties retain control and tailor their own solution in a less confrontational setting that preserves relationships and results in a win/win instead of a win/lose.

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Multiple drivers are at work to further the already resounding success of mediation as a tool for dispute resolution. There are now literally thousands of court-sponsored mediation programs around the country. Business lawyers are increasingly inserting step clauses in contracts that require an attempt at mediation before an arbitration or litigation can be commenced. State ethical obligations requiring that attorneys advise their clients about the availability of resolution through Alternative Dispute Resolution (ADR) are on the rise. Many government agency processes make an attempt at ADR a prerequisite to filing suit. Corporations are increasingly trying ADR, as exemplified by the signatures by 4,000 corporations of the CPR pledge which commits signatories to trying ADR before filing suit in a dispute with another signatory. Deal mediation and other innovative uses of expert facilitation are emerging. The EU, where mediation has not yet taken off, recently issued a mediation directive calling on all member states to enact legislation and take steps that will foster mediation. The long traditions of harmony and conciliation in the Far East will inevitably influence the resolution of disputes in our global economy and advance the use of mediation.

The widespread use of mediation and its continuing expansion is well deserved and is a natural consequence of the many benefits of mediation. However, even with the rapid growth of mediation as a testament to its effectiveness, some lawyers don't see why they cannot just

settle the matter themselves and often prefer to proceed with the litigation process. This article reviews the ways in which mediation provides a host of benefits not generally available in direct negotiation or in litigation. While not every case can be settled, the many benefits suggest that mediation should be attempted in virtually every dispute.

The Benefits of Mediation Over Direct Negotiation

Designing an Effective Process

Constructing a mediation process is an art form. Each mediation presents its own set of challenges with its unique issues, personalities, sensitivities and impediments to settlement. Who is at the table, what is on the table, when the discussions should take place, the sequence and manner in which parties and issues are addressed, all have tremendous impact on the likelihood of a successful resolution. A mediator can assess the distinctive characteristics of each mediation to design and shepherd the process. With direct negotiation there is no one who can embark on and implement such a fine-tuned analysis. Direct negotiation simply does not create a vehicle for adjusting the negotiating process to the needs of the specific case.

Persistence in Pursuing Settlement

The mediator is not a champion of any party but is a champion for settlement. Often in direct negotiation the lawyers meet, talk, fail to resolve and go back to litigation. Lawyers often feel that being the one to raise settlement again, and perhaps even again as the case unfolds, can be seen as a sign of weakness that will be a disadvantage in achieving the best result for the client. The mediator can persist in pursuing the settlement options as the case progresses and raise the issue again as more optimal times for resolution present themselves.

Providing an Opportunity for A “Day in Court”

Strong emotions are frequently found in the context of any dispute, whether it is a family dispute or a strictly business relationship dispute. In such cases settlement is best achieved after those emotions have found an outlet. Many litigants need to be listened to by an empathetic ear before they can settle, and they need to feel like they have

had their “day in court.” The mediator fills that role and enables the litigant to get the cathartic release of telling his or her story to one who appears to them to be sufficiently similar to a judge to fulfill his or her needs.

Identifying Impediments to Settlement

A mediator is in a better position than trial counsel to identify what is going on outside the narrow confines of the dispute that can be an impediment to settlement. Is there a financial statement issue that is driving the settlement process? Is someone about to retire and wants the settlement on someone else’s watch? Does someone have an outside confidant or adviser who must be brought into the loop for a settlement to succeed? The mediator can help craft solutions or bring outside parties into the conversation to obviate impediments to settlement.

Posturing Left at the Door

In direct negotiations lawyers generally continue to speak to the strength of their client’s case and posture in the effort to maximize their negotiating position. No sensible discussion of the strengths and weaknesses takes place. With a mediator, the posturing can be eliminated in the course of the conversations and areas of agreement can be developed. The mediator provides a safe environment in which more meaningful progress to settlement can be made.

Ability to Explore Underlying Interests

The mediator can meet privately with each of the parties and find out what they really care about. Often interests emerge that are not obvious and that a lawyer cannot bring up in a negotiation, either because it undercuts some position in the case or could be seen as a sign of weakness, or must be kept confidential. A mediator can identify those interests and assist in developing mechanisms to satisfy those interests in the settlement.

Providing a Realistic Risk Assessment

It is often useful to have an independent fresh set of eyes look at the dispute and assist the parties by helping them analyze the strengths and weaknesses of their case. Lawyers and parties often become convinced as to the strength of the case beyond any realistic appraisal. The mediator provides that independent unbiased review and can assist in the development of a more realistic analysis of the likelihood of success.

Getting the Client’s Attention

A mediation requires the participation of decision-makers with authority to settle. Indeed, pursuant to court order, and if at all possible in private mediation, such decision-makers must actually participate in person in the mediation session. The mediation provides the opportunity to get the undivided attention of those who must make the decision on settling the dispute.

Ability to Test Solutions

Using a mediator as an intermediary enables the parties to test settlement positions before they are disclosed to the other side. The mediator can assess whether the settlement proposal is likely to be productive and hold it back if it is not a feasible solution. Thus, parties can explore options without looking like they are giving in or negotiating against themselves. The mediator can utilize such negotiating tools as two-step offers (i.e., an offer is made conditional on the other side’s making another better offer as well) and other shuttle diplomacy techniques to drive the settlement process forward that are difficult to utilize in direct negotiation.

The Benefits of Improved Communication

Enables the Parties to Meet

The mediation provides a venue for the parties to meet and talk safely in a confidential¹ setting with the other party. The parties can directly educate the other party about their view of the case and reveal any emotional elements, thus providing a more realistic view of the case without a lawyer’s screening. The appeal of important witnesses can often be assessed at an early stage. These frank exchanges often lead to changes of heart and new perspectives on the matter.

Taking the Litigator Off the Hook

Often the litigator is retained because he or she is viewed as a fighter who will advocate for the client vigorously. It is sometimes difficult for the lawyer to draw back from being a champion for the client’s cause as litigation counsel and become settlement counsel championing the cause of resolving the dispute. The lawyer may feel that the client will view him or her with disfavor if he or she is not able to project continued confidence in the case. The mediator can help the lawyer bring about a reassessment of the case without undermining the client’s confidence in the lawyer by facilitating the development of a more realistic view.

Enabling the Party to Have a Voice

There are situations in which the party wants to settle but the lawyer is determined to fight on. The party may not feel so strongly as to change counsel because so much has already been invested in the lawyer’s familiarity with the case, but cannot persuade the lawyer that it is time to settle and move on. The mediator can ensure that the party has a voice and is in fact the last word on whether a settlement should be negotiated and on what terms.

Improving Communication Between Lawyer and Client

Sometimes the lawyer and the client are just not hearing each other. They may have very different perceptions of the case and where they want it to go; they may have had a change of heart since the matter started. Some-

times a lawyer or a client is so locked into a position that they simply are not communicating. The mediator can facilitate that conversation and make sure that each perspective is fully communicated and, most importantly, understood.

The Benefits of Mediation Over Litigation

Speedier Resolution

Court proceedings generally take some years to resolve a dispute, and the case may go on even longer if there is an appeal. The plaintiff must wait for the recovery and the defendant has the matter hanging over him or her. A settlement in mediation can often be concluded in a day. Even very complex, big-dollar cases generally resolve in one (or a very few) mediation sessions, which can be scheduled on an expeditious basis.

Reduced Cost

Preparing a case for trial is expensive. Discovery, motion practice and trial preparation do not come cheap. The expedited resolution of a dispute in mediation avoids all of those costs. The earlier in the process the mediation is commenced, the more likely the most significant cost savings will be achieved. While the dispute may not be ripe for resolution at an early stage, the mediator can assess when to press for settlement and reduce the costs incurred until that stage is achieved. The cost of the mediation itself is a small fraction of the costs incurred during the development of an average case.

Streamlining Any Exchange of Information

If the mediation process is commenced at the beginning of the litigation, or even better before litigation is commenced, the parties can work with the mediator to determine if any exchange of information is necessary before a meaningful conversation can be conducted. Generally such discovery, if any is deemed necessary, can be streamlined dramatically and involve a small fraction of what would be exchanged under court discovery rules. In many cases no exchange is needed. Especially in these days of e-discovery, such discovery streamlining can lead to huge cost savings.

Ability to Explore Creative Solutions

A judge must sit in a circumscribed universe applying the law to the facts and meting out remedies that are set out in the law. Mediation provides an avenue for the exploration of remedies unavailable in court that can achieve a successful result for all. An award of money damages or an injunction is not the optimal resolution of many cases and workable solutions in multiple settings can be achieved in mediation. For example, a mediation may achieve acceptable compromises on how a construction project should be adjusted to suit all, what new business arrangement can be made to replace the one in dispute, what alternate position is available for an employee

who claims discrimination, and what changes a franchisee will make to retain the franchise. Tools unavailable in court can be used to achieve resolution such as structured settlements, apology letters and references.

Party Control

Mediation affords the parties an opportunity to control the result. The mediator does not sit as a judge or jury but only as a facilitator to a settlement agreed to by the parties. Parties walk away with a result they feel they can live with as they have been the ones to decide it. The parties are not left to the mercy of whatever a judge or jury might rule.

Confidential Result

Mediation enables the parties to keep their dispute and the nature of the settlement achieved private and not available to the public in court files where it can be embarrassing, or serve as a detrimental precedent that triggers further litigation.

Confidential Process

The confidential nature of the mediation itself enables the parties to explore with the mediator their real interests and concerns and discuss the facts of the case without informing the other party. The mediator will not disclose information he or she is not authorized to disclose. It also provides the opportunity for the parties to speak to one another in a confidential setting, which encourages an openness not otherwise achieved and which often enables the parties to find innovative solutions.²

Maintains Relationships

Many disputes are between parties with an important personal or business relationship. Litigation's adversarial nature can drive a rift between parties who would be better served by maintaining the relationship. Mediation provides a venue for resolution of the dispute in a manner that preserves the relationship as common ground is reached consensually in a less contentious setting. Indeed, the relationship is often improved as a result of the collaborative process.

Less Burdensome

Litigation is a lengthy process and often requires enormous expenditures of time by the parties to work with counsel, work on document production, prepare for depositions and trial. All of these steps interfere with daily work and personal schedules. Mediation's prompt resolution relieves the parties of these burdens and minimizes disruption to their schedules.

Less Stressful

The mediation is generally conducted in a comfortable conference room, a setting much less intimidating than a courtroom. The scheduling of the mediation can be arranged at the parties' convenience. The mediator is

open to all that the party would like to discuss and can respond informally in a way that a judge or arbitrator cannot. Consequently, the process is much less stressful to the parties.

Elimination of Issues

Even an unsuccessful mediation is often useful to eliminate areas of dispute, narrow the issues in the case and uncover and organize issues for future discussion and negotiation.

Higher Rates of Compliance

It is said that settlements reached in mediation have a higher rate of compliance than court decisions. As the parties have themselves developed a resolution they feel is fair to them and that they are capable of performing, the likelihood of not fulfilling obligations of the settlement is reduced. For example, a structured settlement with payment terms within a party's ability to pay is much more likely to be paid and useful to the other party than a court-ordered money judgment that leaves the prevailing party with the unhappy task of moving forward with collection actions as the loser simply cannot make the payment.

Flexibility

Mediation is a flexible process. Different ADR techniques can be used as the particular matter dictates. For example, it can be preceded or succeeded by a mini-trial, mediation-arbitration can be considered, or a single neutral evaluator can be appointed to render an opinion on a legal or fact based point of difference. The process

can be fine-tuned to meet the needs of the case. If all else fails, the parties can continue in court with a better understanding of the case.

Conclusion

The many benefits of mediation and the steady growth of its utilization are the result of the recognized success of the process. Litigants continue to look for cheaper and faster ways to resolve disputes with greater party satisfaction. Acceptance of mediation is increasing in the international arena. Mediation's future growth is assured.

Endnotes

1. The questions that have been raised about confidentiality in mediation are discussed elsewhere in this issue. We will discuss in a forthcoming issue the extent to which a greater level of comfort in the confidentiality of the process can be effected through the use of a well-drafted pre-mediation agreement.
2. See footnote 1.

Edna Sussman is a seasoned arbitrator and mediator. She serves on the arbitration and mediation panels of many of the leading dispute resolution institutions, including the American Arbitration Association (AAA), the International Centre for Dispute Resolution (ICDR), the International Institute for Conflict Prevention and Resolution (CPR), the World Intellectual Property Organization (WIPO) and the mediation panels of the federal, bankruptcy and state courts in New York. She can be reached at esussman@hnrklaw.com.