MEDIATION: A REASONABLE AND COST-EFFECTIVE ALTERNATIVE TO COURT?

By Michael A. Levy*

You May Already be a Mediation Enthusiast.

If you accept as a fundamental principle the notion that all manner of legal conflict must ultimately be resolved, whether by collaborative agreement of the parties or the imposition of a resolution by a third party, then you may already be an aficionado of mediation as a rational and reasonable mechanism for resolving such disputes.

It is the nature of the human condition that conflict, whether in business, marriage or a host of other interpersonal relationships, permeates daily life. Differing predilections, beliefs, life experiences, biases and the like lend themselves to conflict. Mediation of disputes, while only one among several methods of resolving conflict, is rapidly becoming the most cost-effective and emotionally satisfying method of dispute resolution. This trend should accelerate given that courts, faced with fiscal restraints, are no longer able to provide adequate services to an overburdened legal system.

Factors Driving a Move Toward Mediation.

There appear to be several factors influencing the adoption of mediation as a preferred alternative means of settling legal disputes. Among them are:

(i) Court decisions and rules requiring strict adherence to the management, preservation and production of electronically stored information. Even the most unsophisticated business and professional people use e-mail on a regular basis. They create hundreds, if not thousands, of electronic documents in the ordinary course of their activities. Imagine the potential cost of having lawyers read through years' of such records to determine which must be produced in a lawsuit. Or, worse, imagine the imposition of significant financial or other legal sanctions imposed by a court because documents were deleted, sometimes even unintentionally. To a small business or professional practice, these costs can be financially crippling.

(ii) Cutbacks in court personnel. In May of this year, the *New York Law Journal* reported in an article, '*Painful but Unavoidable': Courts Trim Jobs,* that due to budget cuts, the New York judicial system was shedding 367 jobs, bringing to 1,151 the number of fewer employees in the courts than in August, 2010, less than one year ago. The cutbacks in New York, as well as similar cutbacks expected in other states, are certain to overload an already

overburdened system, virtually guaranteeing greater delay and increased expense associated with cases lingering in the courts.

(iii) The likelihood of more cases finding their way into state courts just to avoid more potentially oppressive discovery requirements being imposed on attorneys and their clients in federal courts.

(iv) Anticipated increases in divorce cases occasioned by continuing economic pressures, coupled with the enactment of no-fault divorce statutes.

How Does Mediation Work to Resolve Disputes?

In a nutshell, mediation is a process where a neutral third party, having no personal stake in the outcome, works with people in conflict to aide them in reaching an agreement fashioned by *them* to resolve *their* differences on terms that both parties are willing to accept. Mediators commonly use one or more of three principal styles of mediation - facilitative mediation, evaluative mediation or transformative mediation.

In the facilitative model, the oldest of the three, the mediator structures a process designed to "facilitate" an agreement by which the parties are assisted in identifying, analyzing and agreeing together upon options that will result in mutually acceptable resolutions.

Evaluative mediation is similar to a court settlement conference in which a judge attempts to assist the parties in negotiating a resolution by identifying the relative strengths and weaknesses of each party's case and making a prediction of the likely outcome if the case goes to trial. By focusing on "risk analysis" more directly than a facilitative mediator, the evaluative mediator may influence the outcome of the mediation.

Transformative mediation, a relatively recent addition to the mediation toolkit, rests on the values of "empowerment" of the disputants and "recognition" by each of them of the other party's needs and interests. In transformative mediation, the mediator seeks to empower the parties, allowing them to determine the process which the mediator will then follow.

Mediation vs. the Judicial Settlement Conference – Highlighting the Differences.

Litigants and attorneys who are not experienced in the mediation process frequently assume that mediation is merely a substitution for a judicial settlement conference where a judge participates in settlement discussions. There are, however, dramatic differences between the two.

Coercive vs. non-coercive.

A settlement conference with a judge, by its very nature, may be highly coercive. Often the judge, who evaluates the likely outcome, may be the same person who ultimately decides the case should the parties fail to reach a negotiated settlement. Given the roles of the parties in the room, proposals made by a judge can become highly coercive "suggestions." A mediator, on the other hand, is not inclined to

stray into an evaluative role without a specific request by the parties that the mediator offer an opinion. Where the court's interest is in disposing of the case and getting it off the docket regardless of who comes out feeling like a winner or loser, the mediation process looks for a "win-win" solution, a far more satisfying outcome where both parties feel their interests have been served.

Who conducts the discussions?

In a court settlement conference, the judge conducts the meeting. As noted, because the judge may ultimately be the person who presides over a trial, despite best intentions, the conference can be highly coercive. In mediation, the meeting is conducted by the mediator who has no decision making authority. The mediator will encourage and assist the parties in identifying and discussing issues in a manner designed to facilitate their accommodation and agreement.

Confidentiality.

Judicial settlement conferences are not confidential. Mediation, on the other hand, is completely private. The rule, "What happens in mediation stays in mediation," is the cornerstone of confidentiality in mediation. In most cases, the mediator and the parties will sign a confidentiality agreement prior to the mediation.

The clients' roles in the process.

Clients are infrequently invited to participate in court settlement conferences, leaving the discussions entirely in the hands of a judge and their attorneys. In mediation, the parties are an essential and integral part of the process, often providing considerably more input into the discussion than their counsel.

Time devoted to the process.

Many judges are burdened with hundreds of active cases. Court administrators are continually in the process of developing procedures and rules whose sole purpose seems designed to clear court dockets regardless of the perceived fairness of the process. Given the limitations on their time, judges do not have the luxury of devoting their energies to an open ended give and take process.

In mediation, the difference is stark. Parties are afforded as much time as is necessary to find common ground and agreement. It is not unusual for even a relatively simple dispute to take the better part of a full day to achieve a satisfactory outcome for both sides. Complex matters may take longer than a day, in some case several days spread over a period of time.

Nature of the discussions.

In a judicial settlement conference, discussions are usually centered on the legal rights of the parties – the "who-wins-and-who-loses" as the law sees it. Mediation, on the other hand, affords the parties an opportunity to discuss not just legal "rights," but also their respective "interests" – what is it that's really driving this dispute and how can we deal with it?

Options beyond the law.

Judicial settlement conferences tend to be narrow in scope, focusing solely on legal rights and remedies and the relative weight to be given to each side's position. In mediation, "the-sky-is-the-limit" is very much in play. For example, a judicial settlement conference in a wrongful discharge case is likely to involve a discussion over whether sufficient legal grounds existed for termination of the employee, and if not, what the dollar value of that wrong termination might be if a jury decides the case. This is a discussion limited to the legal "rights" of the parties and monetary compensation for a claimed violation of those rights.

Mediation, by contrast, may open the door to a discussion of "interests." The plaintiff may be concerned with his/her reputation in the community as a result of the discharge, and it's more important to save face than to be paid money damages. Perhaps a public apology would solve and salve the matter. Since a public apology cannot legally be directed by a court, there is little likelihood that it will ever be discussed in a judicial settlement conference, while it may be the keystone of a settlement in mediation. If the mediator can facilitate an agreement on the parties' "interests," it's more likely than not that it will lead to a resolution of their "rights."

Is There a Preferred Style of Mediation?

Many mediators have strong views on the efficacy of one style of mediation over the others. Others subscribe to the view that mediation, being an art and not a science, needs to be open to the possibility that more than one style – perhaps even all three styles - may be appropriate for the resolution of any particular dispute.

For example, assume that the mediator opens the first session believing that he/she will attempt to facilitate a dispute resolution by helping the parties to identify the underlying issues that have brought about the conflict and mentor them towards a settlement. Along the way, however, one or both of the parties might look to the mediator and ask, "What do you think the chances are that I might prevail in court on this particular issue?" If the other party agrees to hear the mediator's viewpoint, the facilitative process has taken on an evaluative component. That might lead to a discussion in which the mediator finds it useful to work in a joint session with both parties in which the mediator encourages each one to express a point of view while the other party is asked to articulate that viewpoint, not for the purpose of agreeing with the other party, but merely to acknowledge an understanding of the other's position. Mutual expressions of understanding are frequently a basis upon which parties are then able to consider finding alternative solutions to ending their conflict with an agreement that recognizes the rights and interests of each side. In this example, of course, all three mediation techniques, or styles, have been employed.

Time and Expense Considerations.

The following graphic illustration demonstrates the increasing costs,

both in time and money, in a dispute which moves from initial conflict to final resolution with a trial. Each stage along the continuum involves more time, more participants and more expense. The object of mediation is simple - to truncate the legal process through negotiated settlement as early along the continuum as possible.

THE LEVY CONFLICT RESOLUTION CONTINUUM©

E	**$$$$$+**						**The parties go to trial. There are 5 parties.**	***A third party imposes the outcome***
X	**$$$$$+**					**The parties go to arbitration. There are 5 parties (7 if there is a panel of 3 arbitrators)**		***A third party imposes the outcome***
P E	**$$$$+**				**The parties and lawyers mediate the dispute. There are 5 parties.**			***The parties control the outcome***
N	**$$$$**			**The parties hire lawyers. There are 4 parties**				***The parties control the outcome***
S	**$$$**		**The parties hire a mediator to assist in settling their dispute. There are 3 parties.**					***The parties control the outcome***
E	**$$**	**The conflict begins. There are 2 parties.**						***The parties control the outcome***
			T	***I***	***M***	***E***		

The Point of no Return vs. the Point of Diminishing Returns.

Generally speaking, the Point of No Return may be defined as the point beyond which parties must continue on their current course of action, because turning back would be prohibitively expensive or dangerous. More commonly, the Point of No Return is used to describe the circumstance when the distance or effort required to get back would be greater than the remainder of the journey or task as yet undertaken.

In mediation, the Point of No Return is more realistically viewed as a Point of Diminishing Returns. It is the point at which perceptions begin to become reality so that the emotional and financial investment of the parties in their dispute starts to fuel the motivation to continue the conflict at an emotional and financial cost that increasingly diminishes the settlement value of the conflict. Unlike the aircraft that has travelled more than half the distance to its intended point of debarkation and therefore has only one option – to complete its journey – the Point of Diminishing Returns in mediation allows for options to remain available since the parties are always remain free to settle their dispute at any time, even on the courthouse steps or even after a trial has begun but the verdict has not yet been rendered.

Precisely where the Point of Diminishing Returns is reached in any conflict is case specific given the variables of emotional and financial investment associated with each dispute. Identifying precisely when the parties have reached a point where "win-win" possibilities start to turn towards a "no-win" reality requires expertise on the part of the parties' legal counsel who need to engage in a continuing risk analysis of their case to determine at what juncture the parties are likely to begin expending more emotional output and dollars than can ever be recovered in a settlement of the dispute.

Consider the following illustration: Two parties are in conflict. They attempt to make a deal between themselves but are unable to reach an agreement. They proceed to hire lawyers to negotiate for them. Unsuccessful in the negotiations, the lawyers then recommend mediation as a process for bridging the gaps in their respective positions. The mediation results in a proposal by which each party gets something of significant value but has to give up something in return. Absent a compromise of their positions which accepts this notion of give and take, the parties are headed for a courthouse or hearing room. It is at this point where the parties need to assess whether a further investment of emotional output, additional time, and additional expense is likely to become greater than the benefits that can be achieved by agreeing to the settlement that's already on the table. Put another way, the question becomes, "Is it really worth another day, another dollar and more anger and frustration to continue this conflict when, in reality, the additional amount I can hope to get back starts to become fifty cents for every dollar I will have to spend to continue the fight?" This is the Point of Diminishing Returns and the point

at, or optimally, before which, the mediator hopes to assist the parties in fashioning a mutually acceptable resolution. It is the point at which it no longer makes common sense to prolong the dispute.

Mediation as a Cathartic Substitute for Trial.

Litigation often contains a strong emotional tension between the parties, particularly in disputes arising from interpersonal break-ups. Spurned spouses, terminated employees, cast aside senior business partners are but a few examples where one party (usually the defendant) exercises unequal power over the other party (usually the plaintiff) to sever a long-term relationship that the other was not prepared to end. Typically, the plaintiff commences the legal action, less out of a desire to seek appropriate legal remedies (i.e., money), but more out of a desire for personal revenge and to redress the original imbalance of power previously exerted by the defendant.

Skillful mediation conducted early in the litigation process provides a mechanism to help diffuse the emotional component by providing the parties a face to face opportunity, in a neutral environment, to confront one another in order to vent one's frustration, anger, and hurt. A capable mediator (with the aide of prudent litigants' counsel) will recognize the importance of this confrontation stage before a litigant can proceed to a rational equitable resolution of the case. Outside of mediation, the plaintiff may be left with an inordinately lengthy wait until trial for the anticipated confrontation. Along with that passage of time comes the attendant litigation costs and risk that the day may, in fact, never come because of dispositive motions or adverse verdicts and judgments.

If There is a "Win-Win" Solution, Does it Follow That There's a "Win Only" Solution?

Defining a "win-win" solution is easy for most people. Simply stated, it's a resolution by which both parties walk away better off than if they had not made an agreement and come to terms. The trickier question is whether a complete victory in court can truly ever be a win. If Plaintiff sues Defendant for $1 million, goes through a trial and two years later ultimately gets a $1 million dollar verdict, is that a 100% win? The answer is, "It depends." Let's assume the cost of getting to that verdict is $50,000 in legal fees. Would not Plaintiff have been $25,000 better off to settle for $975,000 on day one? Well, you might wonder, what if Plaintiff also recovers his legal fees? Again, you might ask, is there not a price associated with waiting two years to get to a verdict? And even if Plaintiff can also recover pre-judgment interest, is there not a price associated with the time that had to be spent in preparing for a trial, such as with depositions and other discovery? And what about the emotional toll associated with the litigation? Is there any price to be tacked on for that? Or how about the risk that Defendant, facing a judgment of $1 million dollars, plus legal fees, plus pre- and post-judgment interest, elects to file a bankruptcy petition? Would an early settlement have prevented that outcome? The answer is, as noted

at the outset, there has probably never been a legal dispute that cannot and should not be resolved.

Conclusion.

Mediation as a means of conflict resolution is no longer just a curiously interesting substitute for traditional means of dealing with legal controversy. A host of anticipated changes in how courts will function in disposing of cases may very well be about to render mediation not merely an alternative choice, but an imperative mandate. Faced with the burgeoning costs of litigation and delays in an overworked judicial system, mediation is clearly on the front burner as potentially the most efficient and cost-effective means of resolving many, if not most, legal disputes. There is little doubt that mediation is here and more likely than not, it's here to stay.

About the Author: Michael A. Levy is a founding member of Levy & Schneps, P.C., a Manhasset, New York law firm specializing in transactional and litigation matters, estate planning and administration, taxation and securities arbitration. Mr. Levy has been actively involved in alternative dispute resolution for the past 25 years. In addition to his private mediation and arbitration practice with Comprehensive Arbitration & Mediation Services, Inc. (CAMS), he is listed on the mediation rosters of the United States District Court for the Southern District of New York, the United States District Court for the Eastern District of New York, the United States Bankruptcy Court for the Eastern District of New York, the New York State Supreme Court, Nassau County, Commercial Division the New York State Supreme Court, Nassau County, Matrimonial Center and the New York State Supreme Court, Queens County, Commercial Division. Mr. Levy is also a member of the Large Complex Commercial Case Panel of the American Arbitration Association. The author is grateful to Patrick Michael McKenna, Esq., a mediation colleague and member of the CAMS mediation and arbitration panels, for reviewing and commenting on an earlier version of this article.