THE MODERN APPROACH TO RESOLVING DISPUTES – THE CASE FOR MEDIATION

"The odds of a plaintiff's lawyer winning in civil court are two to one against. Think about that for a second. Your odds of surviving a game of Russian roulette are better than winning a case at trial. Twelve times better. So why does anyone do it? They don't. They settle. Out of the 780,000, only 12,000 or 1.5 percent ever reach a verdict. The whole idea of lawsuits is to settle, to compel the other side to settle. And you do that by spending more money than you should, which forces them to spend more money than they should, and whoever comes to their senses first loses. Trials are a corruption of the entire process and only fools who have something to prove end up ensnared in them. Now when I say prove, I don't mean about the case. I mean about themselves."
Lawyer Jan Schlictman, played by John Travolta, in the movie "A Civil Action."

Anyone who has been involved in a lawsuit as a dispute resolution mechanism knows what a laborious and often mysterious process it can be. But the process is changing. The public is demanding a user-friendly system that encourages litigants to enter into early discussions about resolution of their dispute and avoid the time, expense and emotional drain of protracted litigation.

It is incumbent upon us as client representatives to promote mediation as a desired alternative to trial, i.e. mediation instead of trial. We need to educate our clients about how this process works and show that there are advantages in this approach to dispute resolution.

The approach to handling a client's cause and managing litigation has changed. Efforts are in process to develop a more cooperative approach to litigation, particularly during discovery. The Sedona Conference Cooperation Proclamation represents "a coordinated effort to promote cooperation by all parties to the discovery process to achieve the goal of a 'just, speedy, and inexpensive determination of every action."

The public has become intolerant of the notion of the trial lawyer as a "warrior" or "combatant." Lawyers who work in litigation as problem solvers who can penetrate the process and assist in resolving a dispute, not perpetuating it , are what the public wants.

A settlement is the best economic day for a client, considering the present value of money, and the cost of taking a case into the pre-trial and trial states (and possibly through appeal); the client has the use of funds now rather than the hope of some recovery later. The costs of litigation often surprise clients, particularly if expert testimony from physicians or technical experts is needed. The fees for these experts are quite high, usually involving several hundred dollars per hour. Considering the amount of time that experts need to prepare, testify at deposition and then appear in court, several thousands of dollars can be incurred quickly by just this aspect of the case.

In my view, settlement is the ultimate victory. It takes the decision making away from a third-party – a judge or jury – and puts it in the hands of the parties. Settlement results only from consent, so a case is settled when the parties have retained control over the outcome and have carved out a result for themselves. It does not happen unless there is agreement.

Studies have shown that the parties to a dispute risk more by going to trial if they walk away from a reasonable opportunity to settle. In of hundreds of cases in which negotiations have been conducted but the parties have not settled the results reveal a party who rejected settlement often does worse at trial.

Mediation has resolution of a dispute as its objective. The parties in a mediation know they have come to resolve their differences. The intermediary or neutral – the mediator – has the sole job of accomplishing that goal. It is a dedicated forum for closure.
Over the last several years, mediation has become the more popular means of resolving disputes. Mediation is available to litigants to achieve settlement. It is often overlooked by lawyers in the beginning stages of litigation, when mediation can lead to an early— and

appropriate— settlement. This is a big mistake, as it is at this early stage of litigation that the “best deal” can be achieved before the expense of protracted litigation.

There is a great deal of confusion among lay persons as to the difference between arbitration and mediation. These are forms of alternative dispute resolution, alternatives to a trial in the courthouse. Court systems are now designed to make sure that parties are advised about these alternatives and how they can expedite the resolution of a dispute and avoid the risks and expense (not to mention the emotional drain) of full-blown litigation. Many court systems have programs for early resolution, including the federal court in San Francisco, which has been a pioneer in these alternatives for resolving disputes without a trial.

Private mediation is a “supervised negotiation” away from the courthouse, with a trained and experienced mediator who has the skills of getting parties to talk and exchange views in an attempt to resolve their differences. This is in contrast to an arbitration in which the arbitrator actually decides the case. Our clients often do not understand the difference and it is our job to educate them on the mediation alternative to trial.

For example, the client must understand that:

• In mediation, the mediator guides the parties through the negotiation process so that any resolution comes because the parties agree.
• The mediator is not a decision maker, but a facilitator.
• The mediator is chosen by agreement only; a party cannot be forced to accept a mediator of a dispute.
• Mediators work in all aspects of litigation: complex civil cases, personal injury, professional negligence, complex insurance disputes and family law matters, particularly divorces and custody matters.
• A mediation is voluntary and is not binding. A settlement is reached only if the parties agree.

• A mediation can last from a few hours to several days (not necessarily in succession). Often the parties exchange “briefs” on their position before the mediation.

- Most important to note is that a mediation is confidential. By law, what takes place during a mediation cannot be used in the lawsuit as evidence. A trial court or jury does not hear about anything that was discussed during the mediation, nor is the subject of the parties’ respective positions at a mediation a proper subject of testimony at trial.

My experience is that the mediation process works well if certain conditions are met. First, the parties must be prepared to mediate. They must know their case well and have discussed their position with their lawyer and set some realistic goals for settlement discussions. Second, the parties must go to the mediation with a good faith desire to resolve the case. Third, a mediator must be chosen who is the right person for the case – someone whose approach to mediation fits the type of case and the parties involved. For example, if the case is volatile, then someone with a low-key style, using diplomacy more than persuasion, may be the right choice. On the other hand, if the parties are at odds, it may take someone with stature (such as a retired judge of some preeminence) to bring the parties together. And fourth, the mediator must be willing to work, to roll up the sleeves and stay the course until all settlement alternatives are explored. The basic rule is to keep the parties talking. So long as the parties are willing to communicate, there is a chance for a negotiated resolution.

As time goes by, our judicial system will rely more and more on courts and counsel directing litigants to a mediation alternative to litigation. The earlier the better.