"Please Mister, Don't Sue Me!"

by Lee Jay Berman

Most of today's business and professional society lives in fear of litigation. It is the single most powerful influence on any business decision. Litigation is expensive, time consuming and it commonly drags out for years in our overburdened court system.

Studies show that somewhere between 95 and 97 percent of all lawsuits filed end in settlement. Attorneys argue relentlessly over the facts and the law, only to settle based on negotiated compromise without resolution of facts or law. Most settle while explicitly *not* admitting guilt. The reality is that we do not so much operate in a *legal* system as we operate in a *settlement* system.

Bargaining in the shadow of an impending trial is what motivates settlement. In a word, duress. This is why a 1991 study in Oregon showed that only 50 percent of all settled cases were resolved by three days prior to trial. The other 50 percent settled within three days of trial, after numerous months of prior negotiation.

What is needed is a better negotiation environment. One which challenges the court system's very basic assumptions: that parties to a dispute are adversaries (ie. if one wins the other must lose), that the ultimate decision will be resolved through application of law, that disputes must be decided by someone other than the parties involved (the Big Brother syndrome), and that the dispute has to do only with material things (money or material resources).

Consider Mediation

Mediation is a process where parties to a dispute meet with an impartial, informed third party who assists them, and their legal counsel if desired, in a cooperative, collaborative, problem solving environment. Mediation is not a substitute for sound legal advice, but it is a substitute for litigation in a court of law. Unlike the misleading portrayal of mediation in Michael Crichton's *Disclosure*, mediation is not the same thing as a mandatory settlement conference or an early neutral evaluation.

All parties participate in the mediation session. The mediator, trained with the specific skills to bring people together, guides the process by assisting the parties to clearly define the issues in dispute, explore their options and facilitate an outcome which meets the participants' specific interests. Mediation is a more efficient process because the parties themselves, those closest to the case, are empowered to control the outcome by articulating their goals and interests, and crafting a solution which directly meets those interests.

In order to encourage the free exchange of ideas necessary to allow the case to reach closure, the process has two levels of confidentiality. The first step in most mediations is the signing of a confidentiality agreement stating that any information divulged during mediation is to remain confidential, is not admissible in court, and the mediator cannot be subpoenaed. This encourages the participants to speak freely. Secondly, the mediator will not reveal any information from private sessions or "caucuses" to the other party without permission. This encourages the participants to speak freely to the mediator.

The success rate in mediation is near 90 percent. Because resolutions to conflict are rarely black or white, the parties consider a wider breadth of potential outcomes than is available in a court of law. In mediation, any solution is possible. Additionally, because the participants' mutual consensus is what makes up the final agreement, compliance rates top 90 percent, making them significantly higher than other dispute resolution methods.

When should mediation be used?

Mediation should be initiated as soon as negotiations reach an impasse. This allows for resolution before the parties develop an emotional or financial commitment to litigation. However, it is never too late to mediate. Cases have been successfully mediated after judgement and prior to filing the appeal. Mediation can be especially effective when the issues are complex, when there are more than two parties or when there is a high level of emotion surrounding a dispute.

Many industries have embraced mediation, but none so aggressively as insurance, real estate and development, construction, employment and labor. The insurance industry and the trial lawyers have teamed to develop the National Pre-Suit Mediation Program identifying mediation as the preferred method for resolving disputes. In real estate, the California Association of Realtors have included mandatory mediation in their standard sales contracts. Recent laws mandate that subject to certain guidelines, homeowner disputes must be mediated and land use and environmental litigation will be referred to mediation by the courts. The construction industry has begun widespread use of "Construction Partnering", a series of regular meetings between principals and subcontractors resolving conflicts, clearing up misunderstandings and keeping communication lines open.

Successful Businesses recognize the inevitability of disputes and plan for them by adopting a risk management plan that includes mediation.

The best way to achieve this is to insert a mediation clause into every contract with language requiring that any dispute arising from the transaction will go to mediation before any lawsuit can be filed. This is almost like saying, "Let's try the peaceful approach to problem solving first." Mediation can be scheduled and conducted in a relatively short time so as to not effect any statute of limitations. In the rare case where an agreement cannot be reached, 10-15% of the time according to the L.A. County Bar Association, the other legal remedies remain available. While deterring frivolous litigation, such clauses will promote a cooperative relationship between a company and its clients and employees.

The California Dispute Resolution Council is currently tracking 75 bills in the state legislature mandating the use of Alternative Dispute Resolution (ADR).

Is it Legally Binding?

Mediated agreements typically contain language making them enforceable at law. Once the parties agree on an outcome and sign a final agreement, they are bound under law. Upon the agreement of the parties, the mediated agreement can be converted into a stipulated judgement giving the agreement the full force and effect of a court judgement.

Binding arbitration is common practice. Here, binding refers to an agreement to submit to the outcome of a process regardless of result. While this offers parties a feeling of finality, it also removes recourse if the arbitration process is unsatisfactory.

How is it different from Arbitration?

Mediation and arbitration both use a neutral third party, but that is where the similarity ends. The arbitrator is hired to listen to arguments presented by each side's respective counsel in an evidentiary hearing, generally police the civil code of procedure statutes governing discovery, and make a judgement. This evidence usually includes costly depositions and full discovery of the other side's case. It is essentially a private trial presided over by the arbitrator. Although facts and evidence are presented in mediation, they are used to determine the origin of a dispute and influence the other party's position.

The mediator facilitates a negotiation, acting as a catalyst helping to generate potential solutions and bring to light possible resources and outcomes on which the participants may not be focused. The arbitrator passes judgement.

In mediation, the participants retain all decision making authority. In arbitration, the parties have no say in the final outcome, they relinquish all control to the arbitrator.

Mediation tends to focus on moving forward, while arbitration deals only with the past. The final agreement, as drafted by the mediator, is essentially a list of consensus points between the parties. In arbitration, the decision is a final judgement mandated upon the parties.

Parties in arbitration generally require extensive case preparation and representation by legal counsel as the process is a legally based fact finding. In mediation, parties sometimes prefer legal representation, although it is not required.

It is important for any participant who is not represented to have some understanding of their legal rights and responsibilities prior to mediating in order to negotiate effectively and give their informed consent to the final agreement.

What does it cost?

Mediators usually charge hourly for their time. It is customary for each party to pay equally for the mediator's time to maintain neutrality. Since there is no major preparation required, they can generally be scheduled within a week or two. Most mediations can be resolved within a matter of hours or days.

By using mediation, corporate clients are able to reduce defense costs and increase efficiency by focusing on their core business and profitability. Nothing trims the cost of disputes better or faster than avoiding court all together. Plaintiffs and trial lawyers are able to receive reasonable compensation and contingent fees in a matter of weeks, rather than years.

John W. Martin, General Counsel at Ford Motor Company says, "Conventional arbitration proceedings just don't appeal to most general counsel." The cost of an arbitration, while significantly less expensive and time consuming than a court battle, includes many hours of legal discovery, research and preparation.

A recent Wall Street Journal article says "Single arbitrations have generated more than $1 million in fees for some [law] firms". It goes on to say "In another sign that they have banished expensive adversarial attitudes, many partners at law firms say they recognize that mediation is usually preferable to arbitration because of its speed, low cost and high success rate."

Businesses spend considerable time and resources building commercial relationships. By utilizing mediation, disputes can be resolved while still preserving these important relationships by targeting the problem, not the other person. For this reason mediation is especially valuable in cases where the parties hope to have a continuing relationship such as employers and employees, or landlords and tenants.

People are demanding a dispute resolution system that is more swift, affordable, equitable and cooperative–one where they have an active voice in determining the outcome, while saving time, money and peace of mind.

Lee Jay Berman is the President of THE MEDIATION ALLIANCE, INC., a full-service mediation firm dedicated to utilizing the talents of field-specific, professionally certified mediators who understand the intricacies of your business. For a copy of the mediation language described above or more information on using mediation or training in mediation skills, contact Mr. Berman at 213/383-0438.