Mediation:
Through the Eyes of New York Litigators

Report of the Mediation Committee of the
New York State Bar Association Dispute Resolution Section and
The Alternative Dispute Resolution Committee of the
New York City Bar Association

February 17, 2011

1. Introduction.

Is mediation the "wave of the future" or is it a "fad"?
Is it a "catalyst to help parties reach agreement" that is a "joy when it works," or "lots of conversation" that's often a "waste of time"?

The Mediation Committee of the State Bar Dispute Resolution Section and the Alternative Dispute Resolution Committee of the New York City Bar surveyed New York civil litigators to explore their views on mediation. They responded, as illustrated above, with opinions ranging from dismissive to enthusiastic and everything in between.

The lawyers' views were probed from several perspectives: what they like and dislike about mediation; whether they personally prefer to mediate or litigate; what they tell their clients about mediation; how they raise the possibility of mediation with opposing counsel; what factors they consider in deciding whether to mediate a case; what they think of court-mandated mediation; what factors most affect the success of mediation; and, finally, whether and how more mediation should be encouraged.

Richard S. Weil, a litigator and mediator with two decades of ADR experience, conceived and directed the survey and wrote this report.

Many others contributed significantly to this project. Margaret Shaw and Abigail Pessen, Co-chairs of the Mediation Committee of the State Bar Dispute Resolution Section, and Peter Woodin, Chair of the City Bar ADR Committee, each of whom is a distinguished mediator, were enthusiastic supporters who contributed valuable suggestions for the design and content of the survey and this report.

Twenty highly respected and experienced mediators gave generously of their time to conduct interviews.[1] Glen Parker and fellow members of the Cardozo Dispute Resolution Society[2] obtained a grant to use an online survey program, organized the data base and did all the data entry. Kathy Heider and Bryana Wachowicz of the State Bar smoothed the way for the questionnaire distributed to State Bar members. Alan Rothstein, General Counsel of the City Bar, contributed valuable ideas for the structure and distribution of the interview and online questions. And, of course, the project would not have been possible without the participation of all the lawyers who took time to give their thoughtful responses.[3]

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[3] See Appendix A for a demographic profile of the participants.

2. Methodology

The survey had three phases. Initially, a one-page questionnaire was distributed at the 2010 annual meeting of the State Bar. 314 attorneys responded. Later, experienced mediators conducted interviews with 70 lawyers to probe their views in depth.[4] Finally, an online survey was sent to members of the City Bar who identify themselves as litigators. 125 responded.

Different questions were asked in each part of the survey, although the subject-matter of some overlapped. Certain questions, such as "Have you participated in mediation as an attorney representing a client?" could be answered "yes" or "no." The majority of questions were open-ended, e.g., "What do you like about mediation?" and "What do you dislike?"

The answers were recorded in "Survey Monkey," a Web-based tool for designing questionnaires, recording responses and analyzing the results. The responses to the State Bar questionnaire and interview reports were entered manually; responses to the online survey were recorded automatically. The Survey Monkey program tallied the number of persons who answered each question, as well as straightforward answers, like "yes" or "no." To find patterns in the variety of answers given to open-ended questions, categories of answers were created, and the responses to open-ended questions were manually entered separately in Survey Monkey and off-line in the category that seemed most appropriate. For example, in the interviews, litigators were asked "When I say the word 'mediation,' what comes to your mind?" The 70 responses were categorized as positive, negative or descriptive of the process, and the number in each category counted.

Using meaningful numbers in this report was a challenge because the questions in each phase of the survey were different, not every respondent answered each question he or she was asked, and some people gave multiple answers to the same question, e.g. "What do you like about mediation?" Where percentages are used in the text, the pool on which they are based – State Bar, interviews or online participants - is identified. Where charts using numbers appear, the numbers represent either the total number of people who answered a particular question or the total number of answers. To differentiate them, the word "respondents" refers to the number of persons who answered a question, and the word "responses" means the number of answers to the question.

Litigators' comments appear throughout the report. They give life to the numbers and are particularly valuable because they reflect personal experiences that may resonate with readers.

The survey does not purport to be a scientific or statistically accurate picture of the views of all New York litigators. It simply reflects 485 lawyers' experiences with and perceptions about mediation.

[4] 24 of the interviewees had answered the State Bar questionnaire and stated their willingness to also be interviewed. Because the State Bar and interview questions were different, the responses of these lawyers are not duplicative.

3. What Do Litigators Like and Dislike About Mediation?

90% of the persons interviewed had a positive view of mediation.

The State Bar respondents said they liked mediation because it resolved the dispute (37.5% of the responses); it was faster than litigation (20%); the atmosphere promoted resolution (20%); it saved money (17.5%); it encouraged more realistic expectations (16.3%); it provided a forum that focused on resolution (15%); and it is confidential (6.3%.)

Their dislikes included: the process was flawed (too unstructured, passive, indirect) (28.4% of the responses); attorneys and/or parties were not committed to settlement (24.2%); it didn't work (18.9%); it delayed resolution (12.6%); it cost too much (9.5%) there was a mindset of giving everyone something, despite the merits (7.4%); and the mediator was overly aggressive (4.2%.)

The ability of the mediator was the factor that most affected the State Bar respondents' view of mediation. Asked what they liked about mediation, 40% of the responses said a skilled, effective mediator. Asked what they disliked, 47.4% said a poor mediator.

One attorney summarized his likes and dislikes succinctly: *"I have participated in many mediations. What I have liked have been mediators who are grounded in the facts, legal issues and possible damages, who can establish good rapport with all the participants and who push the parties in a firm but respectful way. What I have not liked are mediators who are too passive about encouraging compromise, who are dismissive of a party's interests and concerns, and who don't follow up after the mediation if the matter hasn't settled and the parties are willing to engage further."*

Another lawyer, in practice for 43 years, said: "*My view is that mediation done properly is a very useful process that has a positive result most of the time. My dislike is that some mediators allow the process to last too long, giving the other party the expectation that if they prolong it, the deal will get better.*"

Attorneys mentioned the "non-binding" nature of mediation as both a "like" and "dislike." Those who liked this aspect apparently meant that both the process and agreements are voluntary. Those who disliked this aspect focused on the fact that the mediation may not result in an agreement and, thus, be a "waste of time."

Some other likes and dislikes:

Likes:

"Mediation provided the attorneys and client with a more realistic view of the client's position, encouraging settlement."

"Very helpful for parties to see the strengths and weaknesses of their respective cases."

"Liked when third party worked each side to a resolution."

"Mediation gives clients the satisfaction of being heard by a responsible neutral party…It's a day in court."

"Excellent method of adjusting client's expectations to reality."

"I liked that the client had the opportunity to speak openly, narratively, without being confined by the rules of evidence, and he got the 'respect' from the mediator that he wanted."

"Mediation can diffuse emotional impediments to amicable resolution. If it occurs at the right time, i.e. after sufficient but not exhaustive exchange of information, it is economical for both sides and avoids transaction costs and delay."

"A client will accept hearing about the weaknesses in their case if they hear it from a third party."

"When you get to a point in a negotiation that you can't bridge the middle ground, mediation is very helpful. It is another voice to get the client or the adversary to be more flexible. It gives me the opportunity to talk to the other side's client directly. It lets you listen, acknowledge what parties are feeling and facilitates creative thinking."

Dislikes:

"*Mediator who only deals with numbers, not merits."*

"*Mediators who act as messengers and simply relay proposals."*

"Assumption that every case is worth some amount of money."

"The adversary was incapable of letting go of the 'adversarial' process."

"Didn't like the 'split the baby' philosophy."

"Tendency of mediators to halve damages and ignore application of law."

"Many parties are not sincere about resolving the matter. Rather, they use the process as a form of discovery, which wastes time and adds substantial cost."

"The unwillingness of defense counsel to have a case they can bill heavily resolve until the last minute."

"Too much variation in mediator skills and qualifications."

Among the benefits of mediation mentioned by interviewees, 60.7% said mediation resulted in settlements with greater frequency than direct negotiation by counsel, and 65.5% said it produced settlements at earlier points in the litigation.

However, 25 interviewees said they had participated in mediations that made things worse. 10 blamed misconduct by a party or attorney, e.g. wild venting, verbal attacks on opponent. 10 cited poor mediator conduct, e.g. excessive arm-twisting, passivity and inappropriate comments. For instance, "*One mediator was very evaluative and told the client they had a horrible case, and they should take whatever they could get."* In another case, *"Plaintiff's lawyer demanded $10 million. When the plaintiff heard his lawyer's arguments on what a terrible situation this was, settlement became impossible."* The remaining comments involved other conduct, such as a party who used mediation solely to get information for a future lawsuit.

Many of the likes and dislikes seem based on whether the process resulted in settlement during the mediation. However, 86.4% of the interviewees stated that even when settlement was not achieved, there were other beneficial effects that made mediation worthwhile. These included:

Opportunity to understand and assess adversary's case and witnesses
Opportunity to assess strengths and weaknesses of your case
Starts process that may lead to later settlement
Exchange of information without discovery
Often makes parties more realistic
Narrows/clarifies issues
Opportunity to explain your case/vent
Can lower the emotional temperature
Impartial assessment of case
Improves attorney communication
Forces attorneys to consider each party's needs and interests
Focuses parties on damages

The General Counsel of a prominent corporation summed up this point succinctly: "*Even unsuccessful mediations help you understand the passion and determination of each side, give you the opinion of a neutral on the merits of your case and keep the settlement channels open for future discussions."*

4. Do Litigators Personally Prefer To Litigate or Mediate?

The online respondents were asked if they personally prefer to litigate or mediate. 38% said they prefer litigation, 19% prefer mediation, and 43% said the processes are not mutually exclusive.

The respondents who prefer litigation said it has a firm structure, while mediation is amorphous; litigation provides better fact-gathering and issue resolution; discovery leads to truth and settlement; counsel should be able to negotiate a settlement themselves; litigation is a better hammer when representing plaintiffs; mediation adds cost, the outcome is uncertain, is used as a stalling tactic and is effective only if the parties act in good faith. Several lawyers preferred litigation because *"It's all I've ever done."*

Those who prefer mediation cited many of the reasons given in Section 3 above.

"*They go hand-in-hand"* said one litigator who viewed mediation and litigation as not mutually exclusive. Litigation, said another, "*provides the framework and the leverage with which negotiation and mediation have a chance to succeed.*" Similarly, a third attorney said "*After litigation gives clients an opportunity to assess their case and adjust their expectations, they may be more amenable to settlement and incurring mediation costs."*

5. What Do Litigators Tell Their Clients About Mediation and How Do Clients Respond?

75.4% of the litigators who answered the State Bar questionnaire reported telling their clients that mediation is an option for resolving disputes. 58% of the lawyers interviewed said they always tell their clients; 39% said they sometimes tell their clients, and 3% said they never tell their clients.

When attorneys told their clients about mediation, they generally presented it as an option for resolving disputes. They described the process, explained its benefits and examined the risks and downsides. Many said that whether to tell clients about mediation is not the issue; it's when and how to tell them. The predominant reason given for not telling clients about mediation was that mediation is not used in their practice area.

Here is a sampling of what some attorneys say to their clients about mediation:

*"I tell clients they have several options. I explain the litigation process, including e-discovery, and conclude that it is not a happy prospect. I depict litigation as an awful system, emphasizing the cost – there are no cheap cases because the process has overtaken the merits and the machinery is broken. Clients are often not happy to hear what I have to say, but they are then open to the proposal of mediation." (*from a lawyer in practice 57 years with a large firm*)*

"I tell individuals and small companies that they cannot afford to litigate."

"I raise the issue carefully because I do not want the client or the adversary to perceive the suggestion as a weakness."

"I say it's optional; voluntary; 80% settle; saves time and money; opportunity to talk to defendant, who has to listen."

"I make sure they understand it's not arbitration."

"I say that mediators can take the temperature down; a neutral can translate without the emotional vinegar."

"I say it brings everyone to the table, is cathartic, confidential, and there's no harm in trying it because it's non-binding. Even if it doesn't settle the litigation, it provides a road map for the litigation because it gives a more in-depth understanding of the case and sometimes raises new issues I was not aware of"

"Everything in life is a negotiation. There is an opportunity to be efficacious and to get a desired result. With both opposing counsel and clients, it is important to do a little dance, to look for opportunities to move toward mediation without looking weak."

"Most cases eventually settle after parties have spent lots of money."

"I remind them that going to court is always a crap shoot."

"It's a way not to have your life stuck in the case."

"I listen to clients and ask them about their ultimate goal. If it's 'winning,' I ask about costs and time. Sometimes I even ask them about the emotional effects the case may be having on them and whether mediation can help them reach their goals."

How do clients respond when their lawyers suggest mediation? The interviewed lawyers reported that 70.3% of their clients responded positively, 17.2% responded negatively; and 12.5% said it depends on factors like timing, the nature of the case and cost.

Clients who did not want to mediate often said they preferred to fight and would not pay claims they regarded as meritless. Some were concerned that suggesting mediation would be seen as a sign of weakness. Others doubted that the adversary would participate in good faith. A number expressed concern about cost, and a few said they did not want to be in the same room as the adversary.

The litigators described these responses:

"Clients are usually receptive, but when they feel the plaintiff is lying and trying to extort them, it becomes a non-business decision; they want to win and refuse to pay one cent."

"Sophisticated clients are usually receptive."

"Once I talk clients through the process, they almost always accept it."

"Some are concerned that suggesting mediation too early may create high and unreal expectations by plaintiff. They often will not mediate until a client puts a reasonable number on the table."

"Some employment plaintiffs have a sense of indignation and victimization about what happened and want a public forum in which the employer will be held accountable."

"*I do not let clients object. I've practiced 40 years and lay down the seeds early in discussions with my clients about the value of mediation. You have to be a salesman and tell your clients that an informal resolution makes sense and is often in the client's best interest."*

"Clients respond like a light bulb went on. They never thought about it."

"Usually clients are receptive because they trust me, and I explain all the benefits. If a client refuses to consider mediation, I wonder about the client."

"95% agree, although some people by personality type are just not interested – they've bought into LA Law as if it were real."

6. How Do Opposing Counsel React to Suggestions of Mediation?

87.5% of the litigators who were interviewed said they have suggested mediation to opposing counsel. The few who have not said they do not think mediation is helpful, they are concerned about appearing weak, or the other attorney has suggested it first.

The interviewed litigators said opposing counsel have reacted favorably 62% of the time. 8.9% responded negatively, and the remaining responses were mixed. Sometimes opposing counsel said "yes" but then imposed conditions or changed their minds. Others rejected mediation initially and later agreed.

Here is a sampling of opposing counsels' responses to suggestions of mediation:

"I have never had anyone take offense. The response depends on opposing counsel's assessment of whether mediation might help settle the case."

"They always say 'yes' initially; no one wants to say 'no', but they may then try to sabotage it by insisting on conditions."

"Always love the idea because they believe there is money to be paid."

"Usually positively, but they may first put up faux objections, such as it's a waste of time, or it's never going to settle."

"Mixed responses. Firms that were true 'trial counsel' wanted to express the bravado of not considering mediation until the parties were on the courthouse steps or the case was before

the jury. They also felt it was a sign a weakness. Non-litigious firms were much more willing to accept mediation as an economical, prudent alternative."

"Some say the time isn't ripe or their client is not interested."

"Who's going to pay?"

"Their objections are never clear. There is a general mistrust and misunderstanding of mediation. Most litigators are distrustful of mediation because they don't understand it and don't know what a mediator actually does."

"With opposing counsel, I would maybe raise the suggestion at an early phase, but not in every case. I tell them sometimes that it might help them avoid negative publicity and unnecessary expense. As an attorney, you're being paid for your judgment, so I use my judgment in deciding when to raise the option with my adversary. Your job is to ultimately resolve the dispute, though, and to use the tools available to you. Mediation is one of those tools."

7. How Did Litigators Respond to the Concerns Expressed By Other Litigators?

Aspects of mediation that concerned some litigators did not concern others. What some saw as negative, others considered positive. Here are some examples:

- Many plaintiffs' counsel believe that defense lawyers are not keen to mediate or negotiate until trial looms because they want to bill as many hours as possible, which one respondent termed *"churn and earn."*

But a highly-respected employment defense lawyer said that while some lawyers are more concerned about their finances than client's interests, he has found that resolving cases through ADR brings more clients through the door. Another said that *"a happy client comes back and refers other clients to you. If you overbill, they won't do that."*

- Some defense lawyers felt that the plaintiffs' bar promises clients that "*litigation will result in a jackpot and success is a sure thing."* As a result, plaintiffs make unrealistic demands that render mediation a waste of time. To avoid this, some attorneys request a pre-mediation demand and often refuse to mediate if they think the demand is *"not in the ballpark."*

However, a number of respondents said that even when a plaintiff's initial demand was unrealistic, many plaintiffs became more reasonable when they heard the other side's evidence and the neutral's assessment of a case. Some never request a pre-mediation demand because they assume it will be high but know from experience that the initial demand will probably not affect the success of the mediation. They realize that both parties often start out with extreme positions and eventually find common ground. As discussed in the next section, litigators said "Knowing adversary's demand in advance" was the least important factor in the outcome of a mediation.

- Many lawyers expressed the concern that suggesting mediation to opposing counsel would be seen as a sign that they think their case is weak.

Others were not concerned about this. They say weaknesses will be exposed at trial anyway, and if a case has weaknesses, mediation is a face-saving way of settling and avoiding trial. One respondent said *"I am more anxious to mediate a weak case and bring it to a potential resolution favorable to my client as opposed to losing the case."* If there are not significant weaknesses, mediation is an opportunity to educate the adversary about the strengths of your case.

Two litigators offered their strategies for avoiding the appearance of weakness. One said: *"To opposing counsel, I always raise the possibility, but I do it as if the client hasn't given me authority to propose it, even if they have. Example: 'Do you suggest I recommend it to the client?' Sometimes I tell the adversary 'I think I can sell it to my client.' These tactics give the adversary a stake in the decision and help promote the decision to use mediation."* The other said: *"I don't see suggesting mediation as a sign of weakness, although if I'm in court, I will try to get the judge or magistrate to suggest it to both sides."*

- Some lawyers were concerned about disclosing their evidence, theories and strategies in a mediation that does not result in settlement and similarly, about the adversary using mediation for free discovery.

"Too much disclosure" does not bother other respondents, who said that mediation provides a more realistic view of the case - an opportunity to explore the strengths and weaknesses of their own case and their adversary's – and then to adjust their client's expectations. One very experienced attorney said, *"I do not have any concerns about the adversary using mediation as free discovery. I would not disclose anything in mediation that I do not want to or that would not be turned over in litigation."* Another pointed out that this concern can be allayed by providing sensitive information in caucus: *"Some lawyers are concerned about disclosing things in mediation that will compromise them later. I tell them that information the mediator hears in caucus will not be disclosed to the adversary without their consent."*

- Some respondents said their clients reject mediation because they want to fight and insist on having their day in court.

But other respondents pointed out that such clients are probably not aware that very few cases go to trial. In New York State courts, 3% of the cases are tried; in New York City courts, 3.75%; in the Southern and Eastern District Federal courts, fewer than 2% of the cases go to trial.[5] So, if a case is not dismissed, it will probably settle before trial after substantial sums have been spent. In these circumstances, mediation serves a valuable function by providing clients with "*a day in court without a day in court."*

[5] New York State Unified Court System, Report of Civil Case Activity, Dump Reports for Total State and New York City for Full Years 2008 and 2009. Administrative Office of U.S. Courts, Federal Judicial Caseload Statistics, Table C-5 for periods ending 3/31/08, 9/30/08, 3/31/09, 9/30/09 and C-4A for period ending 9/30/09, available at www.uscourts.gov/Statistics/FederalJudicialCaseloadStatistics.aspx.

8. What Factors Most Affect the Success of a Mediation?

Online respondents were asked to rank specific factors that affect the success of a mediation on a 1-5 scale. The results were tabulated using a procedure called "Rank Order Analysis, " in which the 1's, 2's, 3's, 4's and 5's for each factor were added up, with the factor having the lowest total number being the most significant:

1. Skill and preparation of the mediator	148
2. Good faith and reasonableness of the participants	154
3. Reality of parties' expectations	170
4. Presence of persons with full settlement authority	174
5. Timing of the mediation within the litigation process	177
6. Strength or weakness of your case and/or adversary's case	230
7. Amount at issue	278
8. Knowing adversary's demand in advance	281

Respondents considered the skill and preparation of the mediator and the good faith and reasonableness of the participants the most important factors. The reality of parties' expectations, the presence of persons with full settlement authority and the timing of the mediation were somewhat less critical. The final three factors were the least significant.

9. How Do Litigators Decide Whether To Mediate A Case?

The litigators who were interviewed were asked what factors they considered when deciding whether to mediate a case. Each listed several factors, aggregated as follows:

Factors involving own client:

Cost (compared to cost of litigation and considering client's resources)	19
Client's wishes/commitment/attitude/goals	14
Strengths and weaknesses of own case	12
Whether there is evidence and strategy desired to be kept private	4
Benefit of client hearing assessment/risks from mediator	3
Whether there are external factors that militate against litigation	2

Factors involving adversary:

Willingness to participate in good faith	8
Merits of claim	2
Reasonableness of demand	2
Benefit of opposing party hearing assessment/risks from mediator	2

Factors involving both parties:

Whether demand/willingness to pay in ballpark	5
Willingness to participate in good faith	4
Emotional level of parties	3
Whether parties have ongoing relationship	3
Parties' awareness of their underlying needs and interests	1

Case characteristics:

Timing of mediation	9
Likelihood of mediation succeeding	8
Whether there is a strong motion to dismiss	4
Whether negotiation should be tried first	4
Likelihood of success at trial	3
Amount at issue	3
Whether there is a principle at issue	2
Whether there is an issue a judge must resolve	1

Specific comments, some quoted and some paraphrased (no quotation marks used) are as follows:

Is the time right?

"Does the case need more discovery or discussion first?"

"Can counsel settle the case without mediation?"

"Do the damages justify mediation fees?"

"How close are the parties in dollar terms? I'm less likely to mediate if I think plaintiff's demand is wildly excessive."

"How cost and litigation adverse is my client?"

Many - timing, relative cost, willingness of both sides to participate actively. Mediation works better later in the process. By that time, both attorneys know the facts, and the client has spent a lot of money, is tired and not as gung ho.

"Whether the defendant is willing to put up enough money to settle this case."

"Strength of the case; quality of my witnesses; how witness will hold up under cross; backbone of the client; client's willingness to invest the time and money in a full blown trial."

"The more emotionally fraught the case, the more I recommend mediation. Feelings can not be expressed in court. The parties do not have a day in court, but they do in mediation. Mediation gives parties the satisfaction of being heard by a responsible neutral party."

Only recommends it when she feels it will help push a reluctant client to settle or will help the other side's reluctant client to settle.

If she knows that a client doesn't want to mediate, she won't push it. If the case is a real "shakedown" and not that valuable, and there is a repeat plaintiff, she may prefer to litigate. She feels it is her duty, however, to always at least inform her client that mediation may be one option if the other side agrees to it.

Whether plaintiff's attorney is reputable and takes only good cases.

Cost, including the cost of taking people out of production to participate in discovery, trial preparation and trial.

"The usual cost/benefit analysis; the complexity of the facts/legal arguments and their impact on the projected litigation budget (discovery, experts, etc.); the client's liability exposure; the non-binding nature of the process (risk of non-finality.)"

10. Why Aren't More Cases Mediated?

91% of the attorneys who answered the State Bar questionnaire believed that more cases could be mediated. They are not, according to these attorneys, because of unfamiliarity and lack of knowledge of the process, resistance from lawyers and clients and concerns about the process.

27% of the State Bar respondents said that some lawyers and the public were not aware of mediation and were not familiar with the process or its benefits. 10% said mediation is not encouraged by lawyers and judges.

34% said many lawyers resist mediation because of attorney economics, habit and a litigation mindset. Some attorneys were wary of mediation because, unlike litigation, it does not have a defined structure. Many also believe that certain categories of cases, as well as particular cases, are not amenable to mediation. And several expressed concern that suggesting mediation would be seen as a sign of weakness.

15% expressed concerns about the process, mediator quality, the belief that the outcome of mediation is not final or binding and the feeling that the adversary will not participate in good faith. Some had bad experiences with mediators who wanted to talk numbers, not merits, were more concerned with equities than law, and tried to get parties to "split the difference."

Lawyers reported that when clients resist mediation, it is generally because of their unwillingness to compromise or give up "rights." Clients are also concerned about the cost of mediation. Some fear that settling will encourage more claims; others want to use their superior resources to wear down the adversary. Many defendants are reluctant to mediate when they believe their own case is weak or that plaintiff's case is not meritorious. One litigator observed: "*In some cases the parties dislike each other so much that they are intent on using the court system to punish each other. There is sometimes more of a desire to keep a dispute going than to reach a mutually acceptable consensual solution."*

In summary, the leading reasons given by State Bar respondents for why more cases are not mediated and the number of respondents who cited each reason were:

Unfamiliarity/lack of knowledge	37
Attorney economics	21
Mediator quality	17
Attorney mindset/habit	16
Not encouraged by Judges	12
Cost	11
Case not amenable to mediation	10
Bad mediation experience	9
Belief that outcome not final or binding	9
Client unwillingness to compromise/want to fight	9
Sign of weakness	5

11. What Suggestions Do Litigators Have For Encouraging More Attorneys and Clients to Try Mediation?

The lawyers who were interviewed suggested a number of ways in which people could be encouraged to try mediation. The most cited were:

Educate lawyers about the mediation process and benefits	30
More court-mandated mediation	17
Improve mediator quality	12
Educate clients and the public	12
Make accessible information about a mediator's style, experience, expertise and human skills so parties can select the best mediator for their cases	8
Require/encourage lawyers to tell clients about mediation option	7
Lawyers should give clients realistic assessment of case/ temper their expectations	6

Respondents said it would be useful to have CLE programs that present concrete examples, address lawyer's concerns and negative perceptions about mediation, tell how to select mediators and be effective advocates in mediation, outline the benefits of mediation for clients and, especially, distinguish mediation from arbitration.

A substantial number of respondents said that exposing more lawyers and clients to mediation through court-mandated programs would be beneficial. However, in response to a separate question asking whether court-mandated mediation is worthwhile, 40.3% of the respondents who have participated in court-mandated mediation answered "no." They felt that courts order parties to mediation too early in the litigation process, before they have sufficient information and are not emotionally ready to settle on realistic terms. Many said the mediators on court panels were not always skilled and/or committed. Several suggested that judges should encourage rather than force parties to mediate and should solicit their views on the timing of mediation in particular cases.

Suggestions for educating the public and clients about mediation included using television, the internet and bar association outreach to provide the public with a realistic view of the litigation process, costs and outcomes and to explain mediation and its benefits.

The respondents felt that mediator quality could be improved with more training, especially in human skills. Some felt that less skilled mediators should be dropped from court panels and that mediators should be industry specific. Several suggested that more retired judges should mediate, although one litigator expressed the contrary view that *"former judges are not always the best mediators because they are often inflexible."*

12. Summary

The range of litigators' views of mediation ranged from "love it" to "hate it." But a substantial number of the survey respondents think it is a useful tool for resolving disputes as long as it is used in the right circumstances. Those circumstances include realistic parties who are committed to settlement, a skilled and effective mediator and holding the mediation after some discovery has occurred.

When it works, they say, the parties save time and money and achieve a certain outcome. Even when it does not result in a settlement, they recognize that it often provides worthwhile benefits, especially assessing the strengths and weaknesses of both sides' cases and opening the door for later resolution.

Litigators who are skeptical about mediation mention shortcomings in the process, such as its lack of a formal structure; attorneys and clients who abuse the process and are not committed to settlement; mediators who are not skilled and sometimes make the situation worse; its cost; the delay in litigation it sometimes causes; the expectation that money will be paid even for non-meritorious cases; and, in their experience, that it often doesn't work.

In deciding whether to mediate a particular case, the principal factors the litigators consider are timing, cost, strengths and weaknesses of each case, both sides' willingness to mediate in good faith, the benefit of hearing an impartial assessment of the case and its risks and the likelihood of success.

A substantial majority of the respondents believe that more cases could be mediated. Why aren't they? Because, according to a number of respondents, many lawyers do not understand mediation; it is too expensive; it might be perceived as a sign of weakness to suggest it; the adversary won't participate in good faith; the client wants his or her day in court; and the client refuses to pay anything because he or she is right. Many lawyers believe that they are and their clients expect them to be warriors. *("I thought you were going to be my pit bull,"* one client told his attorney.) Some feel that litigation is superior to mediation and/or that good lawyers can negotiate settlements without mediators. Others have had bad mediation experiences, or are simply more comfortable and familiar with litigation. Another factor, cited

by Kenneth Feinberg,[6] is that "our litigation culture is an inherent limitation on the spread of mediation."

Many respondents opined that educating lawyers, clients and the public about the mediation process and its benefits would help promote its greater use and acceptance.

The Committees that sponsored this survey hope this report advances that effort: that it has value for litigators who are curious or skeptical about mediation, for clients who are open to alternatives to litigation, for courts that are shaping ADR programs and for mediators who want to improve the quality of their services.

[6] Speech by Mr. Feinberg at the meeting of the State Bar Dispute Resolution Section, January 28, 2010.

APPENDIX A
Profile of Participants in the Survey

Gender

men	175
women	83

Note: 227 of the State Bar respondents did not include this information.

Practice areas:

ADR	61
Business	190
Education	6
Family/Matrimonial	14
Government	10
Labor and Employment	109
Litigation	197
Real Estate	106
Torts	13
Trusts and Estates	15
Other	15

Note: Some respondents listed more than one practice area.

Years in practice:

1-4	40
5-10	37
11-20	91
21-30	143
31-40	103
Over 40	61

Size of firm: (New York office only)

1	118
2-10	113
11-25	67
25-45	43
46-75	22
76-150	54

No. of mediations in which participated as attorney:

0	88
1-5	41
6-10	41
11-20	34
21-30	13
31-40	8
Over 40	21

Determining whether these demographic factors affect litigators' views of mediation would require a detailed analysis that is beyond the scope of this report. It would also be difficult to use the Survey Monkey program to apply the demographic factors because of the large number of open-ended questions. However, to get an idea of the effect of demographics on litigators' views of mediation, the demographic data was selectively cross-referenced with the responses to segments of particular questions.

Question: Do you personally prefer to engage in litigation or mediation?

Overall response:		62.4 % prefer litigation.
Gender response:		65% men, 64% women prefer litig.
Years in practice response:	1-4 years	50% prefer litigation
	5-10 years	60% prefer litigation
	21-30 years	72% prefer litigation
	31-40 years	75% prefer litigation
	Over 40 years	50% prefer litigation
Type of practice response:	Business	66% prefer litigation
	Employment	30% prefer litigation
	Real Estate	70% prefer litigation
Size of firm response:	1	53% prefer litigation
	11-25	36% prefer litigation
	26-45	90% prefer litigation
	46-75	60% prefer litigation
	76-150	60% prefer litigation

Question: Do you think court-mandated mediation is worthwhile?

Overall response:		62% said yes
Gender response:		60% men, 65% women said yes.
Years in practice response:	1-4 years	73% said yes
	5-10 years**	73% said yes
	21-30 years	54% said yes
	31-40 years	57% said yes
	Over 40 years	70% said yes
Type of practice response:	Business	62% said yes
	Employment	68% said yes
	Real Estate	50% said yes
Size of firm response:	1**	47% said yes
	11-25	67% said yes
	26-45	50% said yes
	46-75	80% said yes
	76-150	57% said yes

** The Survey Monkey program only permitted 5 categories for this particular analysis, called "Crosstab Responses." The years in practice question had 6 categories, so "11-20" was not used. The size of firm question had 7 categories, so "2-10" and "over 150" were not used.

Question: How often do you tell clients that mediation is an option for resolving a dispute?

Overall response:		57.9% said always
Gender response:		56% men, 61% women said always
Years in practice response:	1-4 years	0 (no responses)
	5-10 years	100% said always
	21-30 years	43% said always
	31-40 years	65% said always
	Over 40 years	67% said always
Type of practice response:	Business	42% said always
	Employment	43% said always
	Real Estate	20% said always
Size of firm response:	1	25% said always
	11-25	78% said always
	26-45	50% said always
	46-75	100% said always
	76-150	33% said always

Question: Have you suggested mediation to opposing counsel?

Overall response:		87.5% said always
Gender response:		90% men, 82% women said yes
Years in practice response:	1-4 years	0 (no responses)
	5-10 years	100% said always
	21-30 years	86% said always
	31-40 years	85% said always
	Over 40 years	100% said always
Type of practice response:	Business	79% said always
	Employment	93% said always
	Real Estate	60% said always
Size of firm response:	1	75% said always
	11-25	100% said always
	26-45	80% said always
	46-75	100% said always
	76-150	83% said always