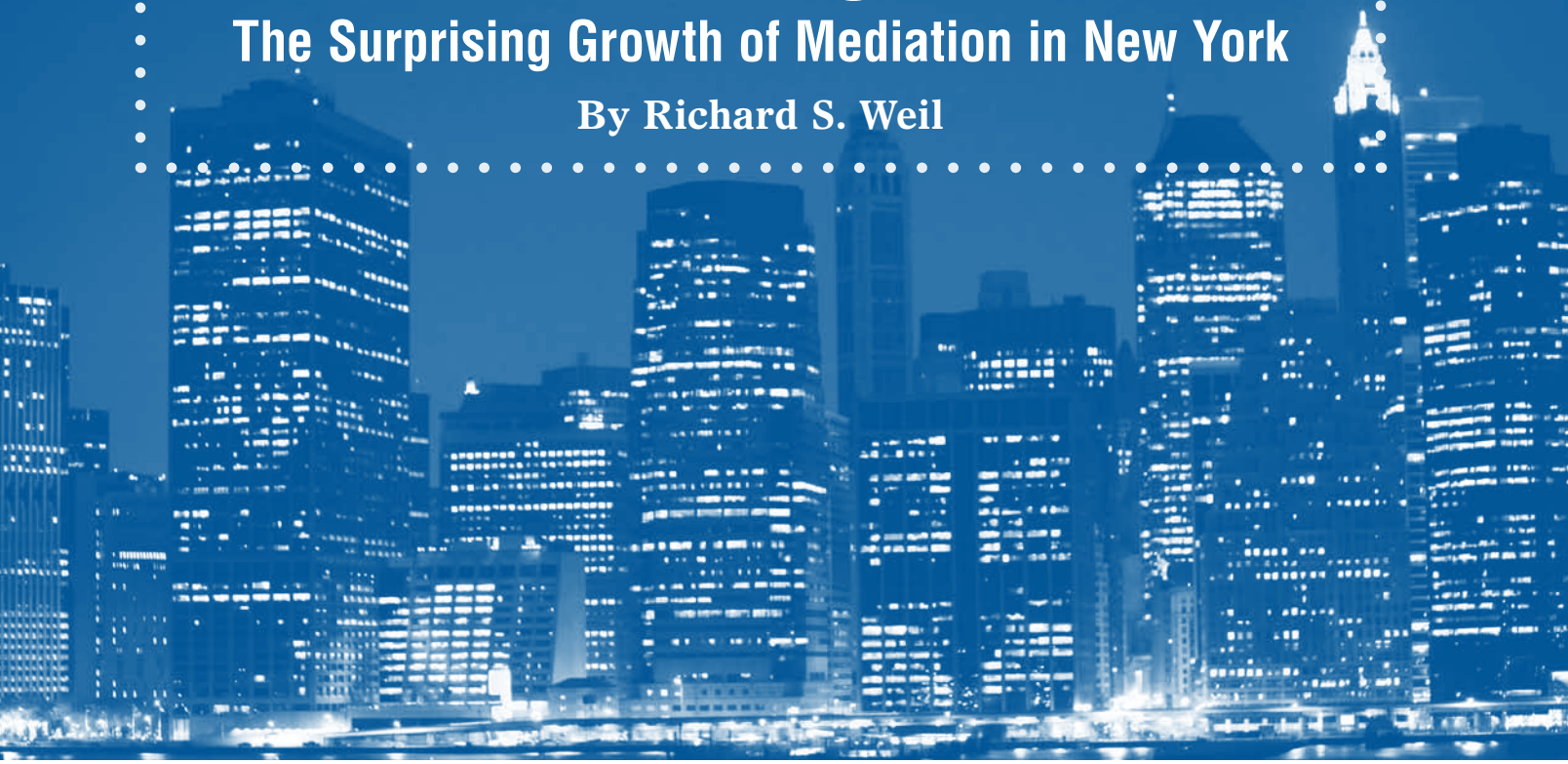
Mediation in a Litigation Culture

The Surprising Growth of Mediation in New York

By Richard S. Weil



Start spreadin' the news. A recent survey of New York lawyers sponsored by the state and city bar associations suggests that even in the tough, competitive world of New York law, mediation is picking up steam. And, as Frank Sinatra might have sung, "If it can make it there, it can make it anywhere."

Only a decade ago, a New York State Bar Association Task Force reported that "despite its many benefits, ADR has not yet received the level of widespread acceptance in New York that is required for it to move into the mainstream of the legal practice."[1]

While mediation still may not be as popular in New York as it is in some other places, the survey of 485 litigators shows its increasing acceptance. Among lawyers who were interviewed in depth, 90 percent expressed a positive view of mediation, and 97 percent reported that they always or sometimes discuss mediation with their clients.[2]

The survey explored litigators' views of mediation. While not designed to meet academic standards, it captures the experiences and perceptions of a wide range of litigators and offers insights into—and an illuminating snapshot of—the current state of mediation in an environment known for its robust litigation culture.[3]

Two themes that help explain the lawyers' growing acceptance of mediation emerge from the survey data: conventional litigation has become an inefficient way to resolve most disputes, and mediation offers an effective alternative that allows disputants to address personal and emotional barriers to settlement. While the survey data make it clear that New York lawyers place high value on the analytical and informational benefits of evaluative approaches to mediation, the data also reveal that the bar in New York appreciates other, less direct ways mediation can improve the quality of the parties' experience.

Not surprisingly, many lawyers observed that litigation has become expensive and time-consuming. Individuals and small companies cannot afford to litigate, and ediscovery has made litigation more burdensome for everyone. Extensive discovery and motions are often unnecessary, as some lawyers observed, because very few cases proceed to trial. In New York City, about two percent of federal civil lawsuits and three percent of state civil suits are tried.[4] For cases that make it to court, the results are difficult to predict, even for experienced litigators. Going to court, one lawyer said, is a "crapshoot." This combination of circumstances (cost, delay, and uncertainty) means that most cases eventually settle but often (according to many respondents) not until after the parties have spent lots of money and devoted substantial amounts of valuable time to litigation-related tasks.

In contrast, many lawyers have turned to mediation because they have learned from experience that it can resolve cases more efficiently. More than 60 percent of the litigators interviewed said that, in their experience,

mediation produced settlements with greater frequency than negotiation by counsel, and more than 65 percent said it produced settlements at earlier points in the litigation.

Respondents cited several related features of mediation that combine to make it especially effective in promoting settlement:

- In mediation, unlike litigation, the focus is on resolution; the goal is to identify as reliably as possible the best terms that might be accessible through settlement, and then to encourage each party to compare those terms, realistically, to the litigation alternative.
- Parties and counsel have an opportunity to explain their view of the case directly to the other side, and clients can speak narratively without being confined by the rules of evidence. This direct communication enhances each party's understanding of the other's position and can help remove emotional barriers to settlement.
- A mediator's unbiased evaluation can give lawyers and clients more realistic views of the case—more nuanced views in which risks and uncertainties are more squarely acknowledged. This point was especially important to lawyers whose clients had unrealistic expectations but might accept hearing about the weaknesses in their case from a third party.

Securing a settlement earlier and at less cost are not the only benefits that New York litigators ascribe to mediation. The in-depth interviews revealed the many ways that mediation is integrated into and enhances the broader litigation process. Litigation, said one attorney, "provides the framework and the leverage with which negotiation and mediation have a chance to succeed." And more than 86 percent of the lawyers who were interviewed opined that mediation delivered real benefits even when it did not yield a settlement on the spot: exchanging information without formal discovery; assessing the strengths and weaknesses of each side's position; narrowing and clarifying issues; improving attorney communication; obtaining an impartial assessment of the case; giving each litigant a "day in court"; encouraging adversaries to consider the others' needs and interests; and, quite often, beginning a process that leads later to settlement. The general counsel of a prominent corporation summed up these perspectives 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."

In short, many of the survey respondents have made mediation part of their practice because, in the words of one, it is often in the client's best interest. Clients seem to agree. Among lawyers who were interviewed for the survey, 82 percent said their clients have responded positively when mediation was suggested.

Mediation Allows Litigators to Be Problem Solvers

Some lawyers and clients consider litigation the modern version of trial by combat. While the "warrior" mentality still exists, an important element in many New York litigators' adoption of mediation is that it allows them to be problem solvers. A lawyer's job, said one lawyer in a survey interview, "is to ultimately resolve the dispute, and to use the tools available to you. Mediation is one of those tools."

In problem-solving mode, lawyers are analytical, and they appreciate mediators who take an analytical approach. One attorney said he liked 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." Another said, "I like a mediator who actively pushes the parties toward resolution, is familiar with the facts and the law, and candidly tells the parties the weaknesses in their case."

This suggests that, at least in some cases, a mediator's subject-matter knowledge is a plus. It enables mediators to understand a case and to provide a reasoned, impartial analysis, which often gives parties a more realistic view of the disagreement, leading to settlement.

Respondents' preference for analytical approaches was accompanied, not surprisingly, by dislike of mediators who dealt only in numbers or urged parties to "split the baby" without regard to the merits of the case. Survey participants did not like mediators who were passive and acted only as messengers, nor those who resorted to heavy-handed pressure or arm-twisting or were dismissive of a party's positions or concerns. One lawyer complained about a mediator who told his clients, apparently without sensitivity or well-reasoned explanation, that they had a horrible case and should take whatever they could get. The clear preference was for mediators who work up from the evidence and law, not down from an overbearing emphasis on just getting a deal.

Concerns Expressed About Mediation

The survey data suggest that some of the familiar sources of resistance to mediation are losing force, but obstacles to its expanded use remain.

One concern that, in years past, seemed to deter litigators from turning more often to mediation was a fear

Richard S. Weil *mediates business, employment, and real estate disputes in New York City. He can be contacted at www.weilmediation.com.*

that suggesting mediation to clients and opposing counsel might be interpreted as a sign of weakness. But this concern seems to be declining. Of the 156 respondents who were asked why more cases are not mediated, only five mentioned that suggesting mediation might be considered a sign of weakness. Moreover, 87.5 percent of the litigators who were interviewed reported that they had suggested mediation to opposing counsel, receiving clearly negative responses less than nine percent of the time.

Many litigators said 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, another lawyer said, mediation is an opportunity to educate the adversary about the strengths of your case.

Another source of reluctance to use mediation that was voiced with some frequency in the past was fear that the process would require counsel to overdisclose evidence, lines of argument, or litigation strategies. This concern, too, seems to have waned. Modern pretrial practices require extensive disclosure, making it unlikely that attorneys can wait until trial to disclose key evidence. And, as mentioned, the likelihood that any given case will end up in trial is incredibly small, so holding back evidence or argument for use during an event that will rarely happen makes no sense. Respondents pointed out that mediation is valuable precisely because it 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 only to the mediator, in caucus, and securing the mediator's promise not to disclose the information to opposing counsel without prior consent.

Yet another long-standing concern among litigators has been that the spread of mediation would threaten their income. That this concern has not vaporized is evidenced by the fact that some of the lawyers interviewed reported that "other attorneys" were concerned about losing income if they mediated. The survey also provides evidence, however, that this concern may be losing some of its potency. A number of litigators feel strongly that mediation often is in their clients' best interests and believe that resolving cases by ADR brings more clients through the door. One litigator noted, for example, that "a happy client comes back and refers other clients to you. If you overbill, they won't do that."

The survey yielded two additional sets of data that warrant further attention from policymakers and the mediation community. The first is that 38 percent of the lawyers who responded to the online questionnaire said that as a general proposition, they preferred litigation to mediation. Several said they like litigation better because it has a defined, known structure but are uncomfortable with mediations that feel formless. They believe that formal discovery provides better fact gathering and issue resolution. Some feel that mediation too often adds net costs to the process and sometimes delays resolution. Some plaintiffs' lawyers feel that defendants sometimes use mediation as a stalling tactic—and that litigation provides plaintiffs with a more effective "hammer." Some defense lawyers complained that simply scheduling a mediation encourages unfounded expectations that money will be paid, even for nonmeritorious cases.

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These comments suggest that, at least in the context of a lawsuit that is under way, many lawyers will feel more comfortable with a clearly structured and analytically careful process. In order to give their clients good advice, lawyers want a reliable understanding of what the relevant evidence and law are, or are likely to be. The survey demonstrated that good lawyers will respond well to mediators who understand this need and who work with counsel to develop, in systematic and careful ways, as solid a foundation as possible for assessing how cases seem likely to play out on the merits. Good lawyers also have a need to strike a wise balance between knowledge and expense. Good mediators can help lawyers convey this balance to their clients.

The second set of survey responses that warrant

particular attention were generated by a question posed to the online respondents. Asked whether court-mandated mediation is worthwhile, an unnerving 40 percent of the 77 respondents who had participated in a court-mandated mediation answered "no." Many felt that courts too often order parties to mediation too soon in the litigation process, before they have sufficient information and before the litigants are emotionally ready to consider settlement on realistic terms. Many also said that the mediators on court panels are not always skilled or committed. This point takes on added significance in light of the fact that in our survey, as in many other studies, the factor most often cited as determinative of the value of a mediation is the quality of the mediator. To remedy these concerns, some respondents suggested that judges might encourage rather than compel parties to mediate and might solicit counsel's views about the most propitious timing of the session.

Suggestions for Promoting the Further Growth of Mediation

A surprising 91 percent of the 314 attorneys who answered the state bar questionnaire believed that more cases could be mediated. When asked why more cases do not go to mediation, the respondents offered numerous explanations, but the factor cited most often was lack of knowledge about the process. According to one attorney, "Most litigators are distrustful of mediation because they don't understand it and don't know what a mediator actually does."

To educate lawyers, respondents said, it would be useful if more CLE programs presented concrete examples of how mediation has worked, directly addressed lawyers' concerns, explained how to select mediators whose approaches and skills would best meet the needs of particular cases and the preferences of particular counsel, illustrated how mediation advocacy differs from litigation advocacy, and, especially, taught how mediation differs from arbitration.

Lawyers who participated in the survey also suggested ways to reach businesses and the wider public. Some suggested that businesses be introduced to mediation and its benefits through presentations and mock mediations before groups like the Chamber of Commerce and at industry conferences. Others suggested reaching out through interactive and informative websites, and even through television programs.

The Establishment of Mediation

Mediation, it seems, is succeeding in establishing itself as an important part of New York civil practice, particularly for commercial and employment cases. It will gain even wider use and acceptance, according to many of those who participated in the survey, if more lawyers, clients, and the public are educated about the workings of the process and its benefits for litigants and lawyers. ◆

Endnotes

1. Bringing ADR Into the New Millennium—Report on the Current and Future Direction of ADR in New York (Feb. 1999).

2. The survey that generated the data described in this essay was sponsored jointly by the Mediation Committee of the Dispute Resolution Section of the New York State Bar Association and the Alternative Dispute Resolution Committee of the New York City Bar Association. The survey captured the views of 314 litigators through a short written questionnaire distributed at the 2010 Annual Meeting of the State Bar, 125 litigators who responded to questions posed online, and 70 lawyers who were interviewed, in depth, by experienced mediators. A small number of lawyers shared their views both through the written questionnaire and through a subsequent interview.

3. The survey report, Mediation: Through the Eyes of New York Litigators, is available at www.nycbar.org/pdf/report/uploads/20072046-MediationThroughtheEyesofNYLitigators.pdf. The author of this article conceived and directed the survey and wrote the report. The analysis and opinions in this article are his alone and do not necessarily reflect the views of the New York State and City Bar Associations.

4. 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 Mar. 31, 2008, Sept. 30, 2008, Mar. 31, 2009, Sept. 30, 2009, and C-4A for period ending Sept. 30, 2009, *available at* www.uscourts.gov/Statistics/FederalJudicialCaseloadStatistics.aspx.

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