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VOLUME III - MEDIATION – IS IT GOOD OR BAD FOR YOU?
ADVANTAGES

In Volumes I and II we discussed some of the advantages and disadvantage of arbitration. In this article we will address the advantages of Mediation.

WHAT IS MEDIATION?

It is certainly understandable how the layman can become easily confused by and between litigation, arbitration and Mediation. I believe that it is perfectly normal for the average reasonable person to shun the three "tions" litigation, arbitration and Mediation. With the exception of legal counsel and risk management professionals who are directly responsible for the resolution of disputes, I cannot tell how many times I have heard some of my sophisticated client's use the terms litigation, arbitration and Mediation interchangeably. Why does this occur? For the most part it is all the same nonsense to them. Just a bunch of legal mumbo jumbo that only benefits the lawyers at the expense of the average reasonable business person! Often those that seek the resolution are the one's stuck with the old guilt by association and end up with the reputation that they caused the dispute in the first instance! It becomes their failure even though they had nothing to do with the dispute, other than inheriting it from one of their colleagues or predecessors. The generally accepted view is that no good thing can happen from your involvement in a dispute of any significant magnitude. Disputes are often avoided like the plague. One of my client's recently exclaimed "Why can't we just go to Court and get this over with!" I then spent sometime patiently explaining the process to my client, who listened attentively, respectfully and then exclaimed: "Let's see if I understand this, first we are sued and this is called litigation, but pursuant to the contract we must attend a Mediation. If we do not settle at the Mediation then the litigation continues but during the litigation the Judge will schedule a mandatory settlement conference, which may or may not produce a settlement. If the mandatory settlement conference fails to produce a settlement the Judge may order us to attend a non-binding arbitration. Whether we win or lose in this non-binding arbitration either side can ask for a new trial and such request is routinely granted? On the date the trial is scheduled we are all required to appear in the assigned Court and if a Judge and courtroom are available we may start the trial then or be put on call (sent home subject to being called in when a courtroom is available). I only have one suggestion, can we hire the Dali Lama to conduct a pre-mediation meditation, the Pope to perform the benediction, that way the Mediation might work and we can avoid all this other nonsense!" She then proceeded to further clarify her point; basically advising in clear and certain terms that she thought the entire legal process strongly resembled the waste product of the male bovine species. I think I can say without too much controversy that 99% of clients would be happy to shun the "tions" or for that matter any dispute resolution process.

Understandable as that position may be, it is rare that any business person will enjoy a career void of any legal dispute. If legal disputes are more or less inevitable, then it just seems to make sense that as an astute counsel or business person you become familiar with the tools available to you for their prompt and efficient resolution. Once you have obtained a working knowledge of the dispute resolution tools available, you will be in a much better position to manage any dispute that may come your way.

Mediation is an alternative dispute tool that is well established in practice and in the law. "Alternative dispute resolution process" or as it is more commonly referred to "ADR process" as a general rule means a process in which parties meet with a third party who is a private **neutral** (not an advocate and without any conflict of interest) to assist them in settling (mediation) or otherwise ruling (arbitration) on their dispute **outside of formal litigation** (i.e., a public neutral known as "the - mean - old – judge"). Mediation is considered by most as an alternative dispute resolution process. Some argue that Mediation is not a true dispute resolution process since the Mediator does not possess the power to issue a ruling. I believe the better view is that Mediation is an alternative dispute resolution process after all; technically the only final ruling in some disputes is a judgement by the Supreme Court of the United States. Unlike litigation and arbitration where the Judge or Arbitrator has the power to judge or rule, a **Mediator only has the power to facilitate, persuade or proctor**. In order to understand Mediation one must first briefly touch upon negotiation. Negotiation is by far the most prevalent tool used in life. Each day we negotiate whether we want to or not. We negotiate with ourselves, spouses, bosses, children, assistants, colleagues, friends etc. Negotiation can be generally

defined as the give and take dialogue by and between two entities (sometimes your own ego, "do I buy the Mercedes or the Honda?") necessary to come to an agreement. Sometimes we enter into transactions where the main negotiation is internal (with one-self or spouse). Should we buy a new computer or refrigerator? It is also internal when you are shopping amongst the various providers of goods or services. Once the provider of a good or service is identified you may or may not enter into external negotiations. Some purchases are for what is generally considered a non-negotiable commodity (can of soup, deodorant, toothpaste, etc.). Even for those items that are generally negotiated some people simply prefer to pay the "list price" (car, boats, house etc.). At the same time, others will seek to obtain some sort of discount no matter what they are buying! We all have a friend or two that has never paid retail for anything! Whether you are negotiating with yourself or your spouse (internal), or a third party (external), in each event you are seeking a mutually acceptable deal. In its most simplistic terms **Mediation is nothing more than a "proctored" external negotiation whereby a highly skilled negotiator moves and prods the parties toward settlement of an existing dispute.** The main difference by and between negotiation and Mediation is the insertion of a third party neutral for the purpose of moving the parties towards settlement.

It is technically incorrect to say that the Mediator has absolutely no **power** to force a settlement upon the parties to a dispute! A more accurate statement would be that the Mediator has absolutely no **authority** to force a settlement upon the parties to a dispute! The Mediator always has the power of persuasion and the better the Mediator the stronger the power. Mediation is informal and intended to be non-adversarial in nature. Its main objective is to help the parties involved in a dispute achieve a mutually acceptable agreement. Although the requirement to mediate may be mandatory, there is **no requirement to reach a settlement**. As a result, the entire decision-making process and authority rest with the parties. Any settlement to be had will be made voluntarily by the parties to the dispute.

What rules apply? Although the law forbids illegal and those agreements that are deemed to be contrary to public policy, for the most part the law strongly favors the parties' rights to agree on any form of Mediation that they desire. Unless the actual mechanism for the Mediation is illegal or against public policy the agreement to mediate is generally enforced by the Courts. The parties can set the timing and the rules or submit to an organization like the American Arbitration Association, subject to their time tested rules and procedures. One word of caution, if your counsel is highly familiar with Mediation and a good draftsmen then and only then should he/she attempt to draft a Mediation provision/agreement. The last thing the parties' desire to Mediate are the terms, covenants and conditions of the Mediation provision or agreement! If the parties are relatively unfamiliar with the Mediation process it is best to submit to the time tested provisions, rules and procedures of a well established entity like the American Arbitration Association.

What is it used for? Mediation is used to resolve all types of disputes by and between parties. It can be used to resolve only one question (e.g., what is the fair market value of a product or land) or it can be used to resolve an entire dispute (e.g., personal injury, liability and damages).

When is it used? Mediation should be used when traditional negotiations have failed to reach settlement or when the party's have failed to enter into any true negotiations. This is especially true on occasions when traditional negotiations have not been fairly used, (i.e., the parties have refused to talk with one another). Mediation will serve the purpose of bringing the parties together and at least force them to listen to one another. They may not agree but they will be forced to listen!

How does Mediation differ from litigation or arbitration? In both litigation and arbitration the Judge or the Arbitrator will issue a ruling. In Mediation the parties are the one's that accomplish a settlement and the Mediator has absolutely no authority to issue a ruling or a judgment! Also, an arbitration or litigation can be conducted by a panel of Judges or Arbitrators whereas there is generally **only one Mediator**. Another word of caution here, some Mediation services will attempt to memorialize the settlement in broad terms. In the more complex cases this in all likelihood is a waste of time and can only lead to frustration and cause problems. Most agreements are similar to a spider's web and a modification in section X can lead to modifications in ten other sections. To specifically set forth each and every modification necessary to effectuate the settlement of a truly complex matter normally takes more than the 5-15 minutes allocated to do so at the Mediation. Often these summaries are greatly lacking and then the old issue arises as to what is the deal. If the settlement is simple no problem, but if complex, necessitating the revision of numerous transaction documents then I would suggest a bullet point listing of the "major deal points". All the major terms, covenants and conditions should be listed if known and the concept of the deal clearly stated. A catch-all phrase should be included so the parties will continue to cooperate in the preparation of any and all documents that may be reasonably necessary to effectuate the settlement. In order for a Mediation to be successful, it is absolutely essential that all "major deal points" and the concepts are addressed at the Mediation. Failure to address all major deal points and the concept may leave you without a true settlement. Most of the experienced Mediators have a draft settlement agreement form well suited for this purpose.

Should you be represented and if so by whom? There are several schools of thought. If this is a relatively minor dispute perhaps the best way to handle the matter is to represent yourself. Fortunately, most disputes of a minor nature do not go full term and some settlement is reached before they reach the alternative dispute resolution process. As a result, most of the disputes subject to Mediation involve attorneys. Most parties involved in a Mediation believe that the attorney who will conduct the arbitration and or litigation should be the representative. This seems to be the most cost effective approach to Mediation but not necessarily the most cost efficient approach to resolution. Another school of thought is that the representative at the Mediation should be a different lawyer. Why a different lawyer? A different lawyer will bring to the table a highly skilled and trained negotiator with absolutely no interest in seeing this matter proceed to litigation or arbitration. Obviously, this second approach has the disadvantage of added cost if the matter does not settle. As a result, of this added cost a new attorney retained solely for the Mediation is rarely used. When should it be considered? First, when the dispute is of a magnitude that mandates early settlement and the budget allows for the employment of another attorney (caution, not another attorney in the same law firm, a truly independent new face and perspective). Secondly, in those cases where the diatribe by and between the lawyers has been particularly vicious and non-productive. The further apart the parties, the more advantageous

to introduce a new face(s). In either event, the additional dollars spent on the Mediation may prove to be an effective cost reduction tool, especially in those cases where a rapid settlement is highly desirable and the matter is of significant magnitude.

WHY USE, WHAT ADVANTAGES?

The peaceful resolution of disputes in a fair, timely, appropriate, efficient and cost-effective manner is essential to the function of businesses and the judicial system. Some of the perceived advantages of Mediation are set forth below:

- **Flexible**: Can be voluntary, involuntary, but does require a meeting by and between the parties. It can be ordered by a Court or agreed to by the parties. The parties can specify a process for the meeting, the qualifications of the Mediator, the locale and time of the actual meeting. It can be part of a dispute resolution process which can include mandatory negotiation sessions, arbitration and or litigation. When the Mediation is Court annexed many of the advantages are lost, since in most circumstances the Mediator will be selected or appointed by the Court. I believe this is rare but I have heard some Mediators attempt to conduct a Mediation via telephone. For the many reasons stated below I would not recommend this except for very minor matters and even then I would say the odds of reaching settlement during a telephonic Mediation are low (see below "High Success Rate").
- **Time**: In most circumstances, but certainly not all, Mediation is perceived as a much more efficient method of resolving disputes. Most litigations and arbitrations take a lot more time and work than Mediation. Mediation can occur before or after a hearing (especially if the arbitration is non-binding). In other words, there is nothing that prohibits the parties from entering into Mediation, even after one of the parties has received an award or judgment. Even if and when you win, you still have to enforce your judgement. The issuance of an award or ruling is never final until your judgement is fully and finally enforced and until that time many possible legal maneuvers remain.
  The second part of the timing issue is when? As a general rule, as soon as possible, the earlier the better. The longer the conflict exists the more likely each side will become increasingly convinced in the righteousness of their cause. The longer the conflict exists the greater the expenditure of costs and fees. Although the general rule is the earlier the better there is one caveat, sufficient formal or informal discovery must be accomplished prior to the Mediation otherwise the parties may not be able to enter into fruitful negotiations. I follow one simple rule here; you cannot effectively negotiate what you do not understand.
- **Direct Communications:** It is my personal opinion that the most profound advantage of Mediation is the fostering of direct communication by and between the parties. Notwithstanding that both parties are represented by sophisticated, deal oriented, skilled legal counsel and both parties desire to settle this matter, there is simply no substitute for a face to face meeting. When the parties are face to face much is conveyed in the form of non-verbal communications that cannot be otherwise perceived. If you make an offer and your opponents expression appears as if you have just placed a dog turd under his/her nose it is unlikely that you will receive an acceptance. Those of us that are particularly glib and able to think on our feet will do one of two things, stop and make inquiry as to his/her displeasure (could be something misunderstood or minor) or immediately change the premise(s) of the offer until we see a little more receptive expression. The most effective form of communication is face to face dialogue and when parties sit across the table from one another communication is greatly enhanced. For example; years ago I faced an opponent that was just plain old nasty on the phone. I literally abhorred speaking with this individual; he was rude, arrogant and possessed a whiny high voice that resembled nails on a chalkboard. The more I tried to speak calmly and civilly the more bizarre and outrageous his behavior became. The contract governing the matter contained a mandatory Mediation and arbitration provision. As the Mediation date approached, I prepared for the worst and advised my client that I was very sure that we would have to arbitrate this matter. I just could not envision this individual being reasonable. As with all predictions they are speculative at best and the much anticipated arrival of the evil Mr. Hyde never occurred. Most unexpected his alter ego the erudite, reasonable, scholarly, jovial, glib Dr. Jekyll did. If not for the distinctive voice, I could not believe that this was the same individual! I had prepared my client for the worst and she gave me more than a few "snake eye looks" during the Mediation (and for good reason), he was polite, considerate and attentively listened to the Mediator and me as we outlined our perspectives. To my pleasant surprise a reasonable settlement was quickly reached. After the Mediation, I wasn't sure what to expect since this settlement was complex and required the preparation of several complex documents to memorialize the deal. Dr. Jekyll remained in good form and the settlement documents were quickly and accurately prepared, reviewed, revised and completed. To further illustrate this point; I was part of another Mediation where opposing counsel and I would have wagered good money that the Mediation would not result in a settlement. My learned colleague and I had faithfully, to the best of our abilities tendered each offer and counter-offer with the hope that a settlement could be reached. We each had used our extensive skills of persuasion with little result. Instead of bridging the gap and reaching settlement it appeared that the parties were becoming further apart and more entrenched in their respective positions. Fifteen minutes into the Mediation it was clear that one of my client's previous offers was misunderstood by our opponent. This could have occurred for several reasons, lack of communications by the parties and their counsel, lack of listening, or simply that our offer sounded better when delivered in person, etc. One thing that was clear, once the parties faced each other what was previously thought of as totally unacceptable and rejected was indeed the very foundation for a reasonable settlement. Maybe this occurred since the parties had time to reconsider their respective positions, perhaps it is simply more difficult to be obstinate in person or perhaps the parties were able to communicate their respective concerns and finally understood each other? One thing for certain a matter previously believed to be headed for trial settled in a peaceful manner. You never know what is going to happen until the Mediation occurs.
- **Cost**: Even though you will have all parties present at the Mediation, it is clearly less formal and time consuming than litigation or arbitration. The Mediation meeting requires a lot less time to prepare for and attend. In any business − but particularly the legal business − time is money! Mediation

is clearly the less costly of the dispute resolution processes involving a third party neutral. If the parties are interested in settlement the earlier the Mediation in the process the better.

- **Initiate Settlement Discussions**: When the parties have commenced arbitration and or litigation and have not engaged in fruitful negotiation discussions Mediation can be a very effective way to get the parties to the table. If nothing else this will allow the parties to identify the major obstacles to settlement. Even if the Mediation does not settle the matter it may initiate a dialogue by and between the parties that could foster a settlement.
- **End Stalemates**: Mediation can be an effective means to identify the "real" obstacles to a deal. Often negotiations can become "emotional" (the parties are upset at each other and have lost the trust necessary to amicably settle their dispute). It is in this regard that Mediation can be very useful in putting an end to a stalemate. A Mediator's role is to engage in a process whereby he/she facilitates communication between disputants to assist them in reaching a mutually acceptable agreement. The key here is "assist them in reaching a mutually acceptable agreement." It is in this regard that the Mediator acts as a facilitator, proctor, guide, and motivator by assisting the parties in the identification of the real issues, stimulating the problem-solving process, gathering information and sharing it to the extent it fosters a settlement. A skilled Mediator will continue to present and explore alternative resolutions until it appears that he/she has found the path of least resistance. An example of this occurred many years ago. Two top level executives signed a letter of intent that was high in spirit and concept but sparse on detail. When one CEO interpreted the broad non-specific language in one light the other CEO flew off - the - handle and unadvisedly used the words "bad faith." These words were not well received and a significant verbal battle ensued that had nothing to do with the deal but everything to do with the insinuation. The "accusing party" did not fully realize the significance of his faux pas until the first day of the Mediation. Once my client understood what he had done, he gracefully and circumspectly apologized to his opponent. His apology was gracefully accepted and the parties quickly focused on the deal at hand. Fruitful negotiations immediately commenced and the matter was amicably resolved. After the Mediation the offending CEO told me; "I just didn't realize how much I had upset him by the use of the words "bad faith," you could really see that he took those words literally, to heart and personal. I just didn't mean it that way, I just meant that his interpretation just wasn't reasonable or what I had intended."
- **Non-responsive Parties or Opponent:** In those circumstances when your opponent is non-responsive either independently or through its counsel, Mediation can be a very effective way to commence communications by and between the parties. Sometimes you will be faced with situations where you are highly confident that if you could only get the other party to listen your matter would settle. Often parties and their lawyers are extremely busy and simply will not or cannot pay any attention to a matter until they are forced to do so. We have all had experience with non-responsive parties and one thing for sure you will have their attention at the Mediation! Often all that is necessary is forcing the parties to focus on the matter at hand. Once they are focused, the issues can be narrowed and fruitful settlements can be reached.
- **Ongoing Relationship**: Often parties with ongoing relationships will have a significant disagreement. Sometimes these disagreements are of a material nature and these parties just need some independent third party help. Under these circumstances, Mediation can be an ideal vehicle to accomplish a peaceful, less adversarial settlement to the dispute. When this occurs, the parties are more likely to leave the Mediation with dignity intact and able to maintain an ongoing working relationship. Mediation is not focused on the finding of fault or the placing of blame, but on the reaching of a new agreement! After all no settlement can be imposed on them, the combatants must choose to settle! In my opinion Mediation should be written in to most real estate leases of commercial property and other long term contracts. Why do I say this? Commercial real estate leases tend to be long term relationships and in all long term relationships the parties will in many circumstances continue to conduct business with one another after the resolution of the dispute. The more amicable the resolution the better chance future disputes can be avoided. Often the rights in the long term contracts favor one party or the other and as time goes by the parties bump their heads over numerous issues. When one party feels that they have been treated unfairly that party tends to lay in wait looking for the ideal opportunity to get even. On one occasion, I specifically remember a tenant that successfully defended its position in Court never forgiving the landlord for putting him/her through a hard fought litigation! In this instance the landlord initiated the litigation, lost the litigation, lost the appeal and continued to lose in the aftermath. Five years later this tenant was still extracting vengeance in a very effective fashion!
- **Let's Get Real**: Sophisticated legal counsel know better than to predict an outcome of litigation or arbitration but they generally have a hunch or intuition where a matter will end up. At other times, the parties themselves have a strong sense what is a fair settlement but they are being counseled against settlement either by their lawyers or superiors. In either of those cases, Mediation is the first and best opportunity for each party to display their case to an independent knowledgeable third party and get their feedback. In this regard Mediation can serve as the first "**reality check**" for the parties and their counsel.
- **Easily Initiated**: Mediation can be initiated in one of two ways: (a) voluntarily; or (b) involuntarily. My definitions differ slightly from most. Most would opine that Mediations are voluntary when they are entered into via a contractual provision, since not Court ordered, it is considered voluntary. In my mind this may not be truly voluntary since: (a) you have no choice to Mediate; and (b) the decision to Mediate may have been made by parties that no longer represent their respective companies. My sense is that to be truly voluntarily, the agreement to Mediate must be entered into after the actual dispute has arisen. In other words, the parties to the dispute have made a knowing and free choice to use Mediation to resolve this particular dispute, after the dispute has arisen. In these circumstances, settlement is highly likely. The more voluntary the Mediation the more likely it will result in settlement. I personally cannot recall where the parties truly entered into a Mediation after the dispute arose on a totally voluntary basis and the matter failed to settle.
- **Hearing vs. Meeting**: Although I have often heard parties and their counsel refer to Mediation as a "hearing" it is more akin to a "meeting." The actual meeting is very

informal and more fluid than litigation or arbitration. Different Mediators have different styles and use numerous methodologies to induce the combatants into settlement.

- **Motions; Discovery**: Often litigation is an art form that some think is beautiful but others are repulsed thereby. I generally classify litigation into three global categories: First Category, make it go away quick; Second Category, engage in the good fight but do not lose sight of the goal; and Third Category, the scorched earth policy approach. The First Category is generally reserved for low value nuisance type matters and for matters of a highly damaging nature from a publicity perspective. This category either has a case that doesn't make sense to fight about or even if you win you lose. The Second Category is how the vast majority of litigated matters are conducted. This category is dominated by courtesy, fairness and a resolve to represent each client to the fullest extent without compromise or the use of unfair tactics. The Third Category is marked by lack of courtesy, make this litigation hell and make nothing easy or fair for your opponent. Although the Second Category is predominant the Third Category is unfortunately alive and well. Upon the commencement of litigation I have heard some frustrated clients and lawyers say, "let the games begin!" Often the shear volume of the paper war by and between lawyers is overwhelming to the parties and at an **enormous cost (legal fees, related costs, operational disruption costs and time)**. This is especially true when one side of the litigation has an unlimited war chest and the other side is of limited means. As stated earlier, it is not uncommon for the cost of prosecuting or defending a claim to exceed the allegation of damages or a reasonable settlement amount for the issue at hand. Motions are seldom used or allowed in arbitrations and if you Mediate early enough in the process many of these costs can be avoided. Although legal motions are a time-honored process of civil procedure, they are also costly and time consuming. Those that can afford to institute extensive pleadings often do so at the expense of their opponent. **In these circumstances the earlier the Mediation the better!**
- **Convenience of Schedule**: A Judge's Courtroom is the last vestige of American aristocracy and the Judge is definitely the king/queen of his/her Courtroom. Often matters set for trials do not start as anticipated and certainly do not conclude when hoped for. Although the Courts endeavor, they are just too busy to accommodate everybody's schedule. Arbitrations are more convenient than litigation and Mediations are the most convenient of them all! Yes, in this regard Mediation is the Snow White of the ADR processes. Mediations for the most part are scheduled to the mutual convenience of the parties and since they require less time to prepare for and conduct they are easier to schedule.
- **Comfort**: As a general rule, a Judge's Courtroom is dark, dreary and for the most part not a place where well adjusted human beings like spending time. Although arbitrations are less formal it is still a hearing and certain decorum and process must be adhered to. Mediation is very informal and the goal is to reach a settlement. In this forum the parties often will speak directly to one another without interference or assistance from their counsel or the Mediator. **This is one of the starkest differences by and between litigation, arbitration and Mediation.** During the hearing for litigation and arbitration the parties can only speak to each other through the Judge, Arbitrator or their attorneys. In Mediation the **parties** will be able to **speak directly with each other, through their counsel or the Mediator**.
- **Planting of a Seed**: Even in those Mediations that do not result in a settlement sometimes the seeds of settlement are planted. Often parties that do not settle at the Mediation will reconsider and settle later, close to the lines discussed at the Mediation.
- **Confidentiality and Openness:** The discussions and disclosures in Mediation are confidential and cannot be used later in an arbitration or litigation. Now that I have said that, could a disclosure in Mediation lead to admissible evidence? The answer to that is yes and way beyond the scope of this article. The important point here is to realize notwithstanding the confidentiality of Mediation it is important to discuss disclosures with your counsel to ensure that the proper overall settlement strategy is employed.
- **Control**: Often it is stated that "litigation has a life of its own." What I understand this to mean is that no one person is in control. Once litigation is commenced the control moves from the parties of the dispute to the lawyers, Court rules, civil procedure and the Judge. Since for the most part, Mediation can be a "design to suit," the parties have the ability to build in any controls they so desire. Assuming that the parties have taken the time to design their own process they have maintained the desired control. Mediation provides the ultimate in control since nothing forces you to settle! The parties will get out of Mediation what they mutually put into it!
- **Talent to the Table**: In most circumstances, especially in business to business Mediation, the parties that have the requisite authority to settle are senior members of their company. This being the case, often they possess some very sophisticated negotiating skills of their own, on many occasions superior to their legal representatives. One common skill amongst top notch business people is their understanding of human nature and negotiation techniques. It is my supposition that just about every business person has read at least one book and attended at least one seminar on negotiation. Additionally, many business matters are complex from several respects. The larger companies may be able to send to the Mediation a "Mediation Team," each with their own skill or expertise (e.g., financial, human resources, public relations, legal, accounting etc.). If the matter is complex all these skills may be helpful or necessary in the creation of a settlement. The Mediation Team concept is rarely used to its full extent because of the cost. However, when this concept is used the Mediation becomes more like a brain storming session in search of resolution, each team member vying to add to the success formula. This is a unique feature of Mediation and simply cannot be utilized to its fullest extent in arbitration or litigation.
- **Avoidance of Publicity**: Litigation is a matter of public record. Often in high profile matters the publicity of the filing is more important than the fact that the case was proved meritless. Often the public will remember the claim and not recall that it was proved meritless. This being the case potentially harmful publicity can be avoided if the matter is settled pursuant to Mediation. What does that mean? Other than mandatory legal disclosures no one else will need to know that the dispute ever existed in the first instance. Litigation is for the most part a public hearing and does produce a public record. Arbitration and Mediation are non-public and private.

- **High Success Rate**: The odds at arriving at a "yes" increase with the direct personal touch. Email and written correspondence serve their place but the easiest to avoid or to remain non-responsive. Telephone enhances your chances but still a "no" is easier to give on the phone than in person. Whether voluntary or involuntary, Mediation results in a strikingly high settlement rate. When involuntarily entered into, Mediation is either mandated by Court or pursuant to a pre-existing agreement by and between the parties (or inherited via an assignment of contract). The American Arbitration Association achieves an 80-90% settlement rate for matters submitted to Mediation (depends on the character of the dispute, voluntary submittals having a higher rate than involuntary). I recently attended a Mediator's breakfast when one arbitrator exclaimed that the first question in her questionnaire to the parties was whether or not the parties had Mediated the matter? If not, she strongly suggested that they do so before the date of arbitration. As a result, 80% of the matters sent to her for arbitration, she never saw again. Her supposition is that either they settled on their own or settled at a Mediation. A colleague of mine recently asked why do you think this is the case? My theory is simple; it is much easier to be stubborn, intransient, ruthless, and unreasonable through a third party, in letters or over the phone. It is more difficult to be hard on someone who is sitting directly across the table from you! As a general rule, most people like to be liked and they are just more reasonable when they sit across a table from another human being! The second factor is that Americans love time and they hate to waste it! Most Americans are by their very nature resolution oriented; they want to come away with a settlement! They have a strong desire to achieve and that can only be fulfilled by reaching a settlement! Lastly, even with those of us that are not results oriented are forced to focus on the matter at hand. Many of us are pulled in a hundred different directions each and everyday and as a result the matter at hand may have received little to no attention prior to the Mediation. This focus and allocation of time may be all that is necessary for the parties to reach an amicable settlement.

CONCLUSION

Mediation or any ADR procedure is not a panacea for the resolution of disputes. Properly crafted Mediation provisions can reduce cost and lead to a more rapid settlement of most disputes. In order for Mediation to be of any use, it should not be entered into lightly. In certain circumstances, Mediation may not be conducive to you or your business objectives. In Volume IV we will discuss some of the Disadvantages of Mediation.