Mastering Your Own Legal Destiny

[The following is the third installment of a four-part series examining alternatives to traditional civil litigation in the American courts.]

One of the most effective, though commonly misunderstood, alternatives to traditional civil litigation is mediation. Often confused with the related process of legal negotiation, mediation has been defined as "facilitated negotiation." Under the direction of a neutral third party – the mediator – disputants voice differences and advance their respective interests.

Mediation is a generally voluntary process to which the parties must consent. A notable exception is the court-annexed variety, where a judge orders the parties to attempt settlement of their dispute. Generally, such mediation will span an entire day. If no resolution is achieved, the parties return to the courtroom and entrust their fates to the subjective determination of a judge or jury.

Unlike legal negotiation, mediation introduces a new constituency to the process: the disputants themselves. Although there is no requirement that a party hire an attorney, individuals are most commonly represented by legal counsel. The respective roles of attorney and client are often complementary. Lawyers will situate the dispute against the applicable legal backdrop, while the clients explain their points of view. While it is frequently observed that all negotiation takes place "in the shadow of the law," mediation suspends legal posturing so that those most deeply invested can explore possible resolution.

There are two competing models of mediation: that which employs a caucus and that which does not. Simply stated, a caucus is a meeting between one of the parties, her or his counsel, and the mediator. By meeting outside the other side's presence, a disputant can share information or proposals in strict confidence. The mediator can make disclosures only as authorized by the revealing party. These meetings within a meeting can occur as often as needed and may be initiated either by a party's request or at the suggestion of the mediator. Such "time-outs" can be an effective way to de-escalate emotions across the table. In a pure caucus model mediation, the disputants are never in the same room at the same time. The mediator acts as a go-between to convey information. Former United States Secretary of State Henry Kissinger gained notoriety for his use of such "shuttle diplomacy" in international conflict. The non-caucus model, by contrast, permits no private conversations with the mediator. Proponents of this model believe that full disclosure is cathartic for the parties, as they are able to vent frustrations and more fully comprehend their adversary's mindset.

The chief benefit of mediation is that the parties own the process. Rather than entrust their fates to a jury of 6 or 12 strangers, mediation participants are empowered to craft creative solutions to their conflict. In contrast to a jury verdict or judicial decision, the mediator's recommendation is non-binding on the parties. At the end of the session, the disputants can accept the mediator's recommendation as presented, modify the recommendation or entirely disregard the proposal.

The process has proven to be invaluable in divorce and custody proceedings, landlord/tenant disputes and disagreements between neighbors. In short, mediation can be the preferred means of conflict resolution wherever the preservation or restoration of relations between the parties is either desirable or necessary. By involving individuals most familiar with the underlying circumstances, a skillful mediator can diffuse animosity and guide productive discussion.

Mediation is not a panacea for all interpersonal conflict. But undeniably, this avenue of dispute resolution affords parties a voice in the settlement process and an unparalleled measure of self-determination. In the end, disputants often value such autonomy greater than the cold comfort of a courtroom monetary award.

Elena V. Moldovan, Esq., a former Romanian judge, is Counsel to White & Associates, P.C., a New York law firm specializing in Immigration and Dispute Resolution. Ms. Moldovan can be reached via e-mail (evm@dmwlawfirm.com) or telephone (212-233-0060).