ALTERNATIVE DISPUTE RESOLUTION:
MEDIATION AND ARBITRATION: WHAT'S THE DIFFERENCE?

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With the recent passage of the Supreme Judicial Court Uniform Rules on Dispute Resolution, attorneys will now have to advise clients about the use of Alternative Dispute Resolution ("ADR") and may also find themselves representing clients in this unfamiliar process. The purpose of this three-part series is to give practitioners guidelines for working their way through the ADR process. The first part describes the differences between the two most prevalent forms of ADR - mediation and arbitration; the second part explores the issues and factors to consider in selecting an arbitrator or mediator; and the third part suggests ways to provide your client with effective advocacy during the ADR process.

PART ONE: THE DIFFERENCE BETWEEN MEDIATION AND ARBITRATION

Mediation and arbitration differ markedly. Both are methods of alternative dispute resolution that use a neutral. But, they differ in terms of the process, control of the outcome and suitability for a particular case or client.

MEDIATION

Mediation is a form of ADR in which the parties engage a neutral to help them resolve their dispute in a spirit of conciliation and compromise. The mediator meets with the parties - both together and individually - and hashes out the issues in the hopes that the parties will reach a resolution to their dispute. The mediator controls the process, but the parties control the outcome. To control the process, the mediator may use a wide variety of negotiating techniques depending on the mediator's style, the nature and

complexity of the issues in dispute, and the relationship, sophistication and temperament of the parties. Through the mediation process, parties may resolve their dispute entirely, narrow the issues, or open a dialogue that leads to eventual resolution of the conflict in another forum.

Agreement to Mediate

To begin the process, the parties typically enter into a Mediation Agreement: a formal, written document that describes the framework for the mediation. It usually sets forth the parties, the issues in dispute, a stipulation about confidentiality, any understanding concerning the use of attorneys, the mediator's fees, and the process that will be used.

Confidentiality

The mediation process and/or its outcome may, by agreement of the parties, remain confidential. The confidentiality provision usually circumscribes the limited circumstances in which the outcome of the mediation may be revealed. It is not unusual for the confidentiality provision to permit disclosure to a spouse or, as required by law, to governmental taxing authorities and courts.

Use of Attorneys

The use of attorneys runs the gamut. The parties may wish to be represented by counsel and may choose to have counsel present during some or all of the mediation sessions. Alternatively, the parties may choose to retain attorneys, but not have them present during sessions, using them exclusively as side-line coaches.

Some mediators refuse to mediate if the parties insist on having attorneys present, because they feel that it is disruptive to the process and runs counter to the conciliatory and compromising spirit of mediation; others insist that the parties have independent counsel at least to review any final agreement. The latter is particularly the case with divorce mediation, where the Probate Court must approve the Separation Agreement.

The judge will want to be reassured that although the agreement was mediated, the parties either had individual attorneys or explicitly understand that they declined that right.

Mediator's Fees

The Mediation Agreement also sets forth the mediator's fees and the agreement of the parties concerning payment of those fees. While the mediator sets the fees, the parties control who will pay for the mediation: the parties may split the fees fifty-fifty; one party may bear all the costs (this often occurs in employment situations where an employment contract requires the employee to mediate any employment dispute, but also provides that the company will bear the cost of the mediation); or the parties may divide the costs in any other way that serves their purposes.

Ex Parte Communications

Because the mediator does not determine the outcome of the dispute, ex parte communications are permitted and are, in fact, an important mediation tool. It is often through these private sessions (also called "break-out sessions" or "caucuses") that parties are able to vent and be heard in a non-threatening setting. In the follow-up private session with the other party, the mediator is able to convey - - in neutral, more palatable language - - the concerns, positions, interests, and demands of the other side. It is often through this mini-shuttle diplomacy that mediation works its magic.

Since the mediator will have engaged in ex parte communications, if the parties become deadlocked, it is inadvisable for the mediator - even at the urging of the parties - to decide the case. The practice is known as "med/arb" and is frowned upon. Many mediators categorically refuse to render a decision under any circumstances.

That said, it is possible for a mediator to go on to decide a case, but this should be done only with the express written permission and agreement of the parties. The agreement to turn a mediation into an arbitration should contain the parties' specific

written acknowledgment that the process began as a mediation, the neutral engaged in extensive ex parte communications with both parties, and both parties agree to have the neutral decide their case.

Length of Mediation and Cost

The length of the mediation depends on the number and complexity of issues, the recalcitrance of the parties and the skill of the mediator. An individual mediation session may run anywhere from two to eight hours. Simple issues may be resolved completely in a single session (often the case at small claims court), or may take weekly or bi-weekly sessions for a year or two (not uncommon with complex and contentious divorce mediation).

Mediation, nonetheless, may be faster than traditional litigation. Sessions can be scheduled at the convenience of the parties and the mediator. A mediation can move along rapidly because it does not involve discovery, witnesses, motions, evidence and court calendars, all of which prolong resolution.

Concomitantly, a mediated settlement should cost the parties less than a litigated outcome. Even when the parties are represented by counsel, there is no trial preparation and costs are limited. Although the parties do have to pay the mediator's fees, if the parties are splitting the cost of the mediation, that cost should be more than offset by the savings in attorneys' fees. Although there may be some additional costs (for instance, divorcing parties may agree to retain experts to evaluate a business, the marital home or other assets), the cost of mediation rarely approaches the cost of litigation. In fact, some court-connected mediation programs (such as those in small claims court) are provided at no charge to the parties.

Suitability of Mediation

Mediation is particularly desirable if the parties will have an on-going relationship after the dispute is settled. Because the parties control the outcome and fashion the resolution themselves, they are more likely to embrace it. This enables them to put the

resolved dispute behind them and continue the relationship. This is essential with, for example, a divorce where there are children and the parties will have to deal with each other for years to come; with employment disputes where the employee will continue to work for the company after settlement of the dispute; or with commercial disputes where the entities will continue to do business with each other after the conflict is resolved. (One mediation technique is called the "transformative" model. This method seeks to transform the parties during the mediation, so that they gain insights, break old behavioral patterns, and learn new ways of relating to each other in order to avoid or manage conflict in future interactions.)

Mediation is also desirable where there is some need for an apology, admission of liability or other palliative remedy. A party may be more likely to apologize during the non-threatening mediation process than during either litigation or arbitration where a third party is in control of the outcome.

Mediation may not be suitable for your client if the client has an unwavering, entrenched position concerning the outcome and/or is clinging to unrealistic goals. Knowing whether mediation is suitable may only come with experience. The power of mediation is that it works - even on initially intractable parties. Nonetheless, be wary of clients who claim, "It's not the money, it's the principle…."

Mediation is also not suitable when there is a marked power imbalance between the parties. If there has been a pattern of abuse or intimidation, for instance domestic violence, mediation may be contraindicated. The intimidation and abuse may carry over into the mediation creating an unfair playing field which is anathema to the mediation process.

ARBITRATION

Arbitration is a form of ADR in which the parties hire a neutral to adjudicate their dispute. The arbitrator, like a judge, controls the process and decides the outcome. The arbitrator's decision is binding (except for the rare instance where the parties agree to submit only to non-binding arbitration).

To control the process, the arbitrator sets the hearing dates and times, administers the oaths before hearing testimony, rules on the admissibility of evidence, proscribes the conduct of the participants, rules on the attendance or sequestration of witnesses, and maintains the general decorum of the proceedings.

Agreement to Arbitrate

Arbitration may be initiated either by agreement of the parties or by a stipulation contained in a prior contractual agreement that requires the parties to arbitrate any disputes arising from that contract. The arbitration clause in the original contract may set forth the arbitration provider that will be used, the rules under which the arbitration will proceed, the geographic location of the arbitration, the responsibility for payment of fees and the composition of the panel (usually a single arbitrator or a three-member panel). The nature of the dispute or the amount in controversy may determine the size of the panel. For example, an employment contract may contain the following arbitration clause:

> Any disputes arising out of the employment relationship will be settled through an arbitration proceeding before the American Arbitration Association and conducted in accordance with its National Rules for Resolution of Employment Disputes. The arbitration shall take place in Boston, Massachusetts before a three-member panel. Each party shall bear its own costs and fees including an equal share of the arbitrators' fees."

Confidentiality

The parties may agree to keep the arbitration decision confidential. Often the confidentiality provision includes exceptions for disclosure to a spouse or as required by law to a court or taxing authority.

Use of Attorneys

Parties to an arbitration may choose to be represented during the proceedings or appear on their own behalf. As the law currently stands, they may be represented by an attorney or anyone else. One need not have been admitted to the bar to represent a party at an arbitration proceeding. The advocate's role in an arbitration proceeding is quite similar a lawyer's role in litigation, although the Rules of Evidence are relaxed.

Fees

Responsibility for fees may be set forth in the prior contractual agreement that requires the parties to arbitrate their dispute. If there is no such provision, the parties may determine how to split the arbitrator's fees. If there is disagreement, the arbitrator may rule on payment of his or her fee, the cost of the arbitration, and the award of attorney's fees and costs.

Ex Parte Communications

Since the arbitrator, like a judge, will decide the case, ex parte communications are prohibited. Arbitrators must avoid even the appearance of bias. Therefore, arbitrators take great care to avoid even casual greetings with parties in hallways at the arbitration site and refrain from any talk at all until all parties are present in the hearing room.

Length of the Arbitration and Cost

An arbitration will generally take less time than a trial of the same matter for several reasons.

First, with arbitration there is no "down time," i.e. time spent waiting around the courthouse for some other matter to finish or for other motions to be heard. Unless the parties agree otherwise, hearings start when they are scheduled to start and end when they are scheduled to end.

Second, in an arbitration the rules of evidence are relaxed, so less time is spent arguing evidentiary issues and procedural motions. Note, however, that although the

number of hours may be fewer, the case may have longer days and/or a longer total time frame. For example, the parties may request, or the arbitrator may order, lengthy hearing days that proceed well into the evening. Similarly, if the parties have underestimated the hearing time, the process may have to be adjourned and reconvened at a later date when all are available. So, although an arbitration may take fewer total hours than a trial, those hours may be spread out over a longer period of time.

Third, most arbitrations require the arbitrator to render a decision within a limited time - typically somewhere between fourteen and thirty days after the close of the hearing. This may be shorter than the wait for a decision from a judge who is not bound by any time limitation.

Fourth, the parties may agree, or the arbitration agreement may provide, that the arbitrator is not required to render a "reasoned" opinion. Because there is no elucidation of the findings of fact or conclusions of law, the decision may be immediately forthcoming after the conclusion of the arbitration.

Fifth, the limited grounds for appeal of an arbitration decision also help circumscribe the process.

For all these reasons, arbitrations are faster and usually less costly than litigation.

Suitability of Arbitration

As noted above, your client may be required to arbitrate a dispute because of an arbitration clause contained in a prior contract. But in the instances where arbitration is an option, how can you determine if the process is suitable for your client?

If the case is suitable to be adjudicated in the courts, it is suitable for arbitration - the latter being a privately paid adjudicative forum. But, there are several factors that may make arbitration preferable to litigation:

Ability to Select the Arbitrator

With voluntary arbitration, the parties usually may choose the arbitrator(s) whom they wish to hear their case. Although the parties have to agree on the selection (which may occur only after several rounds of vetoes), the ability to have some say in the selection of the neutral is an advantage over the court system in which attorneys have no say in the assignment of the presiding judge. This ability to select the neutral allows the parties to select an arbitrator with expertise in the subject matter of the dispute.

No Jury

In arbitration there is no jury option. Arbitration, then, may be the forum of choice if the attorney believes the case has a better chance before a judge than a jury.

Confidentiality of the Outcome

Arbitrations are not held in a public forum, decisions are not a matter of public record, and the parties may agree on the extent to which they wish the decision to remain confidential. Confidentiality may be particularly attractive to parties who do not wish the decision to have any precedential value.

Evidentiary Rules Are Relaxed

Attorneys who have little or limited experience with evidentiary issues may prefer arbitration where evidentiary rules are relaxed.

Speedy Resolution

Arbitration may also be preferable where there is a need for a speedy resolution. The arbitration can be scheduled at the convenience of the parties, and does not depend on the intricacies and vagaries of court dockets.

Limited Grounds For Appeal

Arbitration awards are binding and final, and the grounds for appeal are severely limited. Neither errors in findings of fact or conclusions of law constitute grounds for appeal. The only grounds for appeal are 1) arbitrator partiality or misconduct; 2) prejudicial conduct of the hearing; 3) imperfections, ambiguities, or mistakes on the face

of the award; 4) corruption or fraud by the arbitrator; 5) unreasonable refusal to hear evidence or postpone the hearing; or 6) a manifest disregard for the law. These limited grounds plus the fact that successful appeals are rare, severely constrain the filing of appeals.

CONCLUSION

Although there are distinct differences between Mediation and Arbitration, each offers an attractive alternative to the litigation process. The savvy practitioner should assess the client and the dispute to determine whether either of these methods is suited to a particular case.

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