ALTERNATIVE DISPUTE RESOLUTION: WHAT IT IS AND WHY YOU SHOULD CONSIDER USING IT

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Litigation in our court system has become an expensive, time-consuming, and frustrating process which often yields undesired results. Nevertheless, a trial may be necessary to vindicate certain fundamental rights. For many disputes, however, there are alternatives to trial.

This article addresses some of the alternatives, known collectively as "Alternative Dispute Resolution ('ADR')," and their potential benefit.

ADR

ADR is the use of alternatives to the judicial system to resolve disputes. The most common forms of ADR are mediation and arbitration. Familiar uses of these forms of ADR include labor strike mediation and baseball salary arbitration.
ADR is not new. For instance, George Washington's will provided that any disputes were to be resolved by arbitration. Further, the American Arbitration Association, one of the largest groups providing a forum for mediations and arbitrations, was founded in New York City in the 1700's.

The two best-known and most used forms of ADR are mediation and arbitration. In addition, there is med/arb, "settlement conferences," mini-trials, and the use of "renta-judges."

Mediation

Mediation is the use of a neutral third party, known as the mediator, who serves as a facilitator to allow parties to a dispute to reach a resolution on their own. Unlike arbitration (which is discussed below), the mediator does not make judgments about either side's position. Rather, he/she listens to both sides in an attempt to find common ground upon which a solution can be reached.
A mediator is also often able to work with the parties to reduce their animosity so that they can reach the point of getting down to the basics, namely, determining each

party's desires to settle this dispute. By using this non-judgmental approach, the mediator is often able to allow the parties to fashion, in almost any manner whatsoever, a settlement that would satisfy them both. Thus, rather than having a winner and a loser, as is often the case in arbitration or a trial, mediation can provide a "win-win" solution.

Arbitration

Arbitration is the process of using a neutral third party to act as a fact-finder and decision-maker. As in a trial, the arbitrator serves as judge and jury, as he is the factfinder. All parties to the arbitration are generally represented by counsel, and evidence is submitted to the arbitrator along with legal authorities. Following the arbitration, the arbitrator, like a judge, issues a decision.

Unlike trials, arbitrations are not conducted in a courtroom. They are less formal proceedings in which the rules of evidence need not be strictly followed. Thus, unlike a judge, who is duty-bound to stick to the letter of the law, an arbitrator may award what he thinks is fair, not just what is legally appropriate.

Because of its flexibility, arbitration has many advantages. The parties are free to hire whoever they desire as the arbitrator. This has particular advantages where the dispute involves a specialized field which may require an arbitrator with a similar background. You may choose more than one arbitrator to hear the dispute or elect a three arbitrator panel.

Another advantage is that discovery (the process of obtaining information from the other side) may be limited by agreement of the parties. Since discovery is often the most expensive and time-consuming aspect of litigation, there is significant time and expense savings to both parties. Since discovery takes less time, an arbitration can usually be completed in much less time than if the dispute were resolved in court.

The parties can also fashion how the award is to be given. For example, the parties to a dispute may agree that one of the parties caused the accident or did breach the contract, but cannot agree to the amount of damages to be paid to the other; they agree to a minimum and a maximum amount of damages, but cannot agree on a middle ground. In this regard, the parties can either use what is known as "high/low arbitration" or "baseball arbitration." In high/low arbitration, the parties agree to a

minimum and maximum that can be awarded by an arbitration, but do not disclose the amounts to the arbitrator. The arbitrator is free to award whatever is appropriate, though in actuality the award cannot exceed the maximum or be less than the minimum agreed to by the parties. The parties are then in a position of "guaranteeing" their minimum and maximum exposure before going into the arbitration.

In "baseball arbitration," the parties each determine what they believe to be the correct award. The amounts are then either given to the arbitrator or kept secret, depending on the parties' choice. Evidence is then presented to the arbitrator, who comes to a decision. If the amounts are disclosed to the arbitrator, he or she awards either the high or the low amount; no award is given for an amount in between. If the amounts are not made known to the arbitrator, the arbitrator can award any amount, but the parties agree that the actual award will be the amount selected by the parties that is closest to the arbitrator's award. It is known as baseball arbitration because it is often used by Major League Baseball in salary arbitrations.

Arbitration awards are generally not appealable. If one party feels that the arbitrator misapplied the law, or did not grant an award in a sufficient amount based on the evidence, the "losing" party generally does not have the right to appeal. This is an obvious disadvantage to the losing party, but is one of the features which keep the costs of litigation down.

Other ADR Techniques

ADR can be as flexible as the parties wish to make it. For example, there have been some hybrid techniques that have been developed, such as "Med/Arb," a combination of mediation and arbitration, in which a neutral third party is designated to serve as a mediator, with the understanding that if for some reason the mediator feels that the parties cannot come to an agreement, the mediator will either serve as an arbitrator or the parties will select an arbitrator to arbitrate their dispute. Some ADR providers, such as Judicial Arbitration Mediation Services (JAMS) call this "binding mediation."
JAMS also provides a service known as a settlement conference. JAMS, which is staffed solely by retired judges, will make such a judge available to the party to sit as a mediator. Unlike most mediations, in which the mediator will not express an opinion, the mediators in the settlement conference format will, if and when asked, express an opinion to the party in an effort to help move the case along. This often helps to settle disputes when one party hears what an experienced judge believes would happen if

the matter proceeded to trial.

Mini-trials are also gaining favor as a way to resolve disputes. In a mini-trial, the parties present evidence and argument to businesspersons rather than to legal professionals. Rather than providing live evidence, summaries of the evidence are provided for consideration and the "arbitrators" then retire to fashion what they feel is a fair result. Rather than providing a strictly legal result, as is provided in an arbitration or trial, the "arbitrators" in a mini-trial can work to mold a creative business solution that will meet the needs of both parties. Thus, a mini-trial contains the elements of mediation and arbitration to reach a "win-win" solution for the parties.

Parties may also avoid the court system by hiring a private judge known by some as a "rent-a-judge." California law provides that parties may privately refer all aspects of litigation to a private judge, who has the same duties and ethical obligations of a public judge. A court or jury trial can be held before such a rent-a-judge, and the decisions of the judge or jury is appealable.

While private judges are costly (they are paid by the parties on an hourly fee basis), this often forces the parties to avoid unnecessary motions and focus on the issues at hand, resulting in a time savings. The proceedings are also private, unlike court trials, which are generally public.

Conclusion

The beauty of ADR is privacy, flexibility and its participatory nature. Generally, ADR is not mandatory, though it is becoming mandatory with greater frequency. Kaiser Permanente's subscription agreements specify that all disputes, even those involving the alleged malpractice of its physicians, will be resolved by way of arbitration. Similarly, the National Association of Security Dealers and the Securities and Exchange Commission provide for arbitration of disputes where broker/dealers are involved. Courts are also looking to arbitration as a way to reduce congested court calendars. In superior court, disputes involving less than $50,000.00 generally first proceed to court-supervised arbitration before the parties can proceed to trial. Mandatory arbitration is also becoming more common in federal court.

Whether ADR is right for you can be decided only after an evaluation of all the facts. It

should, however, be discussed at the earliest opportunity with your counsel, who should be well versed in all forms of ADR.

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