

WHY CONSIDER ALTERNATIVE DISPUTE RESOLUTION?

Introduction

Anyone involved in a conflict will need to consider alternative dispute resolution, or “ADR.”

Litigation in the real world is no cakewalk. Unlike the stereotypical personal injury or malpractice lawsuit that’s portrayed in the media, the typical litigant is not someone who wins the lottery every time he goes to court. The concept of a runaway jury system that rewards unwitting or undeserving plaintiffs is a myth. Many juries are unable or unwilling to grasp the complexities that are often presented by what one might think is the simplest of suits. In sum, litigation in the real world can be very expensive, unpredictable, time-wasting, and thus financially and emotionally stressful.

To minimize this stress, ADR is worth considering. There are three generally recognized forms of ADR: negotiation, arbitration, and mediation. Each form may have certain advantages and disadvantages depending on the particular case. Importantly, no form of ADR is mutually exclusive. Before litigating, it is not uncommon for parties to try negotiation, mediation, and non-binding arbitration, or combinations thereof. The following is a brief description of the three major forms of ADR.

Negotiation

Negotiation means what it says. Parties to a dispute attempt to resolve it informally through direct discussions with each other. They may do it face to face. Or, they may do it through agents and/or attorneys. The problem with negotiation is that parties (and even their attorneys) will often be so emotionally involved in a case that they reach an impasse. It is very common for a party to have difficulty putting him- or herself in the “shoes” of the other party. Plus, the average person who is either unschooled in the law or who doesn’t grasp all of the facts related to the dispute will often take a position that might make sense to him or her— but that in the eyes of the law is not necessarily valid. Sadly, attorneys often fall into this trap because they may not fully appreciate all of the facts related to the particular case or because they do not understand the often complex rules of law that apply. The complexity and lack of clarity of the law is often the cause of these impasses.

Mediation

Mediation is a process in which a trained neutral person, a “mediator,” helps parties in a dispute speak for themselves and make their own decisions. More often than not the parties to a mediation will also be represented or assisted by attorneys. Agreements made in mediation come from the participants, and are not imposed by the mediator. If the parties do not reach an agreement or develop a solution that works for everyone, they can always have their case handled by the court or resolved in some other way.

Mediators will not make decisions for the parties. But, they may recommend means of resolving disputes. Mediators should give the parties to a dispute a “reality check” so that the parties can obtain a broader perspective on their case that they may not have appreciated beforehand. A good mediator may attempt to point out the weaknesses and strengths of the positions of each party.

If the parties do not sign a written agreement in mediation, and decide to take their dispute to court, neither the mediator nor the participants can testify in court about what happened during the mediation. This encourages parties to be frank and honest in their discussions in their attempts to resolve their cases.

Mediation can save a lot of time, money and aggravation. The cost of retaining an attorney to arbitrate or litigate a case to the “hilt” is not cost effective for most disputes. If a relatively inexpensive

mediation procedure has a reasonable chance of avoiding onerous litigation, then under a cost-benefit analysis mediation is virtually always worth trying.

Importantly, mediation provides an opportunity for parties to express what's important to them and to hear other parties' perspectives. Mediation may help a party to figure out how to get his or her needs and the other person's needs met by reaching creative, customized solutions that work for everyone. Mediation can also help protect parties' privacy since, unlike courtroom proceedings which are open to the public, mediation is a confidential process.

Arbitration

Arbitration is a private and informal adjudicatory process similar to a court trial, but usually with fewer of the formalities and expenses associated with courtroom litigation. In a binding arbitration process, the Arbitrator makes a decision that is legally binding and enforceable upon the parties. Even though the arbitration hearing is much less formal in procedure than a court trial, each party still has the right to present proofs and arguments as in a court of law. In arbitration the disputants do give up the power to create their own solution and place resolution of their problem in the hands of the arbitrator (or a panel of arbitrators).

A big concern with arbitration is the fact that the discovery procedures available to litigants are not usually available to disputants in an arbitration. This can be a very serious consideration in complex cases where conducting court-mandated depositions and document requests may be important to one side or the other.

Arbitration can also help protect parties' privacy since, like mediation, it is generally a confidential process.

Many courts offer what is called "non-binding" arbitration. Typically this involves an arbitration hearing in which the parties are allowed to try their cases as they see fit. The arbitrator(s) will render a decision. If each party agrees with the decision, then the arbitration award will become final and therefore dispositive of the dispute. However, if just one party disagrees with the award he or she can appeal the award and go to court and have a formal trial. The arbitration award will not be enforced. But, in light of the arbitration award, the parties will often have a pretty good idea of how a formal trial might end up for them. Because of this, the vast majority of non-binding arbitration awards are not appealed.

Conclusion

An attorney can best inform the client of what might be the best ADR procedure to incorporate into the client's overall dispute resolution strategy before the client goes to court, if indeed an ADR procedure is even worth pursuing. Sometimes it may be cheaper and easier to just litigate a dispute because the time and resources required for ADR might be comparable to those that would be expended in an actual trial. With a formal trial some degree of finality will be achieved—assuming no mistrial is declared or appeal is filed. It is wise to inform oneself of all available ADR options before consulting with an attorney so that the client goes into the initial interview able to ask the attorney the right questions from a more informed perspective.