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## LITIGATION NEWSLETTER

### ALTERNATIVE DISPUTE DESOLUTION

#### Arbitration v. Mediation

People often use “arbitration” and “mediation” interchangeably. They are not the same.

In, mediation, the parties meet with a mediator who tries to get the parties to settle their dispute. The mediator does not have the authority to force a settlement. As a result, the process is non-binding.

Arbitration is actually litigation in front of one or more arbitrators. The arbitrator(s) have the authority to make an award (which may or may not be binding depending on how the arbitration was set up).

#### Pro's and Con's

Alternative Dispute Resolution (ADR) is quickly becoming a popular way of resolving disputes. There are several reasons for this: In many cases, arbitration or mediation is part of a contract. Many clients also believe that ADR – usually mediation or arbitration – are a cost-effective alternatives to our court system.

Legislatures and judges across the country have also implemented mandatory ADR programs that redirect certain types of cases into alternative dispute programs.

ADR's “claimed” benefits are:

- Low cost
- Speed and efficiency
- Privacy/Confidentiality
- Ease of access/Informality
- Non-precedent-setting judgments

This may or may not be true.

- Arbitration filing fees can be significant. For example, we recently arbitrated a case where the filing fee alone was \$5,000 (as opposed to \$185 to file in Court). Additional fees exceeded \$40,000 - and this was just the fees!
- Speed and efficiency are, admittedly, problems with the Court system. This is mainly the result of overcrowding caused by the large number of criminal (mainly drug) cases. So, in general, arbitration is faster. But faster is not always better. Often additional time is necessary to fully develop the evidence in the case. Arbitration hamstrings this effort.
- Privacy is greater in Arbitrations. But privacy can also be achieved in Court cases where the judge can “seal” the proceedings. Arbitration proceedings typically do not have confidentiality orders and this allows the free exchange of information – even among non-parties.

- Arbitration is less formal. But if you have a serious case, sometimes it is better to behave in a formal manner so as to convey that seriousness to the person(s) deciding the case. Not wearing a tie can undercut your credibility which is why most attorneys wear one, even if not required to do so.
- The argument that arbitration results in non-precedent setting judgments is really an oversimplification. To enforce an arbitration award, (i.e. the losing party typically does not just write a check) the award must be entered in Court, where it is often subject to challenge (another round of litigation).

### **Practice Tips**

- Mediation is best done early in the dispute, before the parties harden their positions, and before anger and the expenditure of large sums in litigation have poisoned the atmosphere. Mediation is often very helpful in situations where the parties have ongoing personal or business relationships.
- Mediation may also be appropriate when strong emotions are involved – mediating often allows parties to vent their negative feelings.

- Mediation may not work if one party is far more powerful than the other, when one party's position is frivolous and easily disposed of in court, or when one party has a vested interest in delay.
- Do not agree to binding arbitration through the American Arbitration Association in any contract you sign. You can always agree to mediate or arbitrate later.
- If you are going to agree to arbitrate, use 1-3 local attorneys or professionals who know the subject matter. The fees will usually be less than through the AAA.
- Once you agree to arbitrate (or mediate), have the parameters of the agreement put into a formal agreement, setting deadlines, etc.
- Use an attorney. People may think they can arbitrate or mediate without an attorney. While possible, this is courting disaster. Better to pay an attorney a reasonable fee at the outset, than to have to pay him much more later to get you out of trouble.

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