Alternative Dispute Resolution ("ADR") – Is It Right For You?

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Parties to a legal dispute often bemoan the costs. The expense of hiring a lawyer, the business disruption caused by management's focus on the legal problem at hand, the time away from work spent by employees who have to respond to discovery or meet with lawyers and other professionals to prepare for trial, the cost of filing fees and trial preparation – these lead not just to economic concerns but also to emotional stress. ADR was introduced as one way to control the time and expense of litigation. Neutrals are compensated by the parties.

Three basic types of ADR are available: early neutral evaluation ("ENE"), mediation and arbitration. In all forms of ADR, basic requirements exist for any person who wants to serve as the neutral. That person must have no interest in the outcome of the dispute and have the training and temperament to listen and facilitate communication.

ENE is a process utilized soon after a case is filed. The neutral is charged with evaluating the positions of the parties to provide information about the strengths and weaknesses of the prosecution and defense of the case. Courts that authorize ENE generally require the evaluator to have a minimum level of experience in terms of the number of years in legal practice, familiarity with civil litigation and expertise in the subject matter of the case assigned.

Mediation is a confidential process that can be invoked at any time. A neutral is retained to assist the parties in resolving their dispute through a cooperatively negotiated settlement. The mediator is a facilitator, not a decision-maker. In some areas of the country, the custom is to keep the parties together during the entire discussion. In other areas, after a short, general session in which the mediator ascertains that all parties understand the process and the objective, the mediator separates the groups and then shuttles back and forth to relay offers and counteroffers. The term "shuttle diplomacy" is sometimes used to describe the latter form of mediation. Mediators may ask the parties to submit mediation statements or to produce some documentation in support of a position. However, in an effort to control costs and as an incentive to come to an early resolution, discovery is often stayed during the mediation. Confidentiality is taken seriously. Rule 408 of the Federal Rules of Evidence provides that the content of settlement discussions may not be used as evidence of the claim. Thus, mediators try to end each session with at least a term sheet signed by the parties to reflect whatever agreement was reached and to eliminate any last-minute changes of heart.

There are model standards of conduct for mediators proposed by the American Arbitration Association, the American Bar Association's Section of Dispute Resolution and the Association for Conflict Resolution. Many courts that authorize ADR require the neutral to adhere to the model standards of conduct. Generally, the standards provide guidance on what mediators should disclose to establish their neutrality regarding the parties and their counsel. Most courts that utilize mediation as a means to help the parties settle also protect the mediator's confidentiality and non-disclosure obligation by refusing to allow mediators to be called as witnesses should a dispute arise as to anything that happened during the mediation.

Arbitration can take several different forms. Customarily, either one arbitrator is chosen based on mutual agreement of the parties or three arbitrators are used. In the latter situation, typically one is chosen by each side and the two together then select the third. Arbitration is usually a more formal process that involves discovery and the presentation of evidence. Arbitrators are chosen to decide the issues, either in a fashion similar to what a judge would use after trial or as a "baseball arbitration" in which the arbitrators have no discretion other than to choose one of the settlement offers made

by a party. The usual effect is that arbitration awards provide parties with limited ability to appeal the decision and can be enforced in court.

Because they are decision-makers, arbitrators must disclose all of their connections with the parties and their counsel. Failure to do so can lead to one of the few bases by which an arbitration award will be set aside by a court. If an award is set aside because an arbitrator had a conflict, the arbitration must begin all over again, with different arbitrators serving as the decision makers. In the rare circumstance where a repeat arbitration occurs, the costs obviously increase, negating some of the benefit of this form of ADR.

Although we associate ADR with litigation, many people and companies choose ADR even when no law suit is pending. The United States Government and its agencies sometimes adopt mediation protocols to resolve concerns without the need for filing suit.

If the cost of litigation or the intransigence of an opponent is problematic, perhaps one of the forms of ADR would assist in resolving a matter before, during or after litigation. Certainly, ADR is worthy of consideration.

Attorneys at Tucker Arensberg are skilled at conducting neutral evaluations, mediation and arbitration. Call on us when you have a question or need to choose an independent, trained ADR professional who can assist in resolving your dispute.

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