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Resolve Your Disputes Out Of Court

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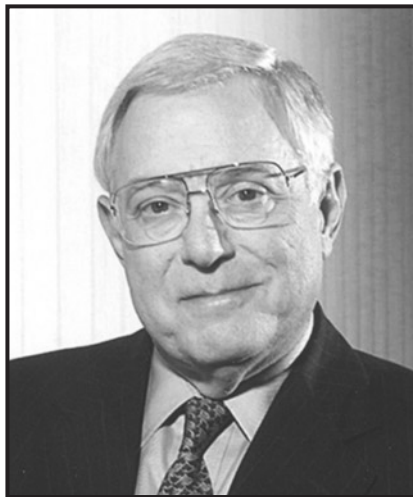
To the Corporate Attorney: *Little has been written for the corporate attorney to have basic ADR information to provide to their business clients. The following article can serve as an introduction of ADR to your clients. Feel free to copy it, or contact the author for a disk of an expanded form of this article suitable for client distribution.*

A. Overview

Litigation, with all its attendant costs and headaches, is not the only way to resolve your business disputes. There is a parallel system of mediation, evaluation and arbitration, commonly called Alternative Dispute Resolution ("ADR"). ADR provides businesses with a faster, less expensive solution. Trained professionals can aid you and your attorneys to solve disputes with suppliers, customers, professionals, business advisors or other third-party claimants – in short, any of the myriad of problems faced in the business world that often end up in time-consuming and expensive litigation.

ADR can take three forms, depending

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upon the nature of the case and what the parties want. The first is binding arbitration which can determine all or part of the case. The second, non-binding arbitration, evaluates the parties' positions, but either party can reject the results. The third type of process is mediation, where a trained neutral, through joint and private sessions during the mediation proceeding, brings the parties together and aids them to settle their case. These types of proceedings are not mutually exclusive, and where the case warrants it, a trained arbitrator and mediator can bring different processes to bear in order to help the parties to end their dispute.

There are seven principal benefits to Alternative Dispute Resolution:

1. The parties choose their neutral

judge/arbitrator/mediator with full knowledge of his or her background, training, experience, and proven track record.

2. The parties can also pick the place where the matter will be heard.

3. The proceedings are flexible. The process may take a few hours, a few days or even weeks for a complicated arbitration, but the parties' and attorneys' important other matters, vacations, family duties, and other salient issues are considered in determining where and when the hearings will be held.

4. Speed of resolution far surpasses that available in the courts. If needed, cases can be heard or resolved in days or weeks, rather than months or years.

5. Lower costs are a hallmark of ADR. Although the arbitrator/mediator fees must be paid, the savings in attorneys' fees, discovery costs, and other litigation expenses far outweighs the cost of the mediator/arbitrator.

6. Confidentiality is also a prime benefit of ADR. The papers filed in a court proceeding are usually public, as is the trial. The parties often receive adverse publicity. Arbitrations and mediations are closed to the public. Even if the mediation is unsuccessful, no matters discussed at the mediation proceedings can later be disclosed if the case then proceeds to litigation.

7. Lastly, the parties can achieve a better assessment of their exposure and the value of the case in an ADR proceeding. The parties can bind themselves to a "high-low" range in arbitration, and the parties have complete control over the amount of any settlement in mediation.

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B. Arbitration

Arbitration is governed by the parties' agreement. In an arbitration proceeding, the scope of the issues to be presented to the arbitrator is defined either by the parties' original contract or by a new specific agreement to arbitrate. Often, an arbitration organization such as the American Arbitration Association ("AAA"), the CPR Institute for Dispute Resolution ("CPR"), JAMS/Endispute, Judicate, or some other group will be employed by the parties to administer the proceedings, but this is not mandatory. Your choice, unless specifically modified in the agreement, defines some of your rights of discovery and review.

The benefits are listed above. There are some downsides to arbitration, but each of these can be the subject of the parties' agreement. Your attorney will assist you in this regard. First, there is a loss of jury, but the parties can agree to use a private arbitration jury and can even specify the background of the jurors. Second, there is usually the loss of appellate control over a possibly unreasonable decision. But even in arbitration, the parties can provide for judicial review or a private appellate panel. Third, there is no mandatory discovery. Fourth, there are some limitations on party joinder. But these issues can also be covered by contract.

Your choice of arbitrator is vitally important. You may choose an expert in the field, a retired judge, someone chosen from a private pre-screened referral list or the "luck of the draw" by a court appointment or that of the administrative organization. When you have a choice, be sure you know the arbitrator's background and experience with the particular type of controversy, and his or her reputation for fairness, procedural flexibility, and prompt decisions.

C. Non-Binding Arbitration

Non-binding arbitration serves as a "reality check." This is often used in court-annexed arbitration programs where parties are required to arbitrate, but either side can still seek a trial by applying to the court. This arbitration, which too often is done with insufficient preparation, can bring one side or the other to its senses when there are unreasonable expectations. Other programs use a "mini-trial" where one or two witnesses are presented, video tapes used, or the like. Alternatively, a

neutral fact-finder can be given the authority to investigate and analyze complex or technical issues with non-binding findings and recommendations. Remember, even in non-binding arbitration, the results are only as good as your arbitrator, the efforts both sides put into presenting their cases, and the open-mindedness of the parties when viewing the results.

D. Mediation

Mediation is a highly effective but under-utilized form of Alternative Dispute Resolution. It achieves settlement of disputes or a narrowing of issues through discussion, reasoned appraisal, and, in the end, hard-headed business sense. Mediations can also act as a type of informal discovery process, so the parties can focus on additional information that they truly need, rather than the more expensive shotgun approach of extensive interrogatories and numerous depositions.

Most cases are resolved after one or two mediation sessions. The parties control the result, but there are no run-away verdicts against a defendant or "no cause" endings for a claimant. The parties' decision-makers are actively involved in the proceedings so that they can fully appreciate the give-and-take process, the adversary's positions, and the risks and benefits of any settlement proposals. Unlike litigation, mediation permits "outside-the-box" elements to be part of the settlement through additional business or "sweeteners" that one side or the other can add to the mix. An experienced mediator can bring reality home to both sides to find a solution based upon mutual self-interest.

The mediation session usually involves both joint discussions where all parties and their attorneys are present with the mediator, and individual sessions where the mediator meets privately with each party and its attorney. Through a series of these meetings, an effective mediator will help the parties frame various elements of their demands and offers for acceptance by the adversary party. Although the mediator's role is largely facilitative – that is, to help the parties reach their own conclusions – I and other mediators often lend a measure of evaluation action to help the parties focus on the world of reality rather than merely presenting a "wish list."

Often, one side or the other will base its position on a view of the law which may be somewhat inaccurate. I help the attor-

neys with their positions so that they may better advise their clients of the reasonable possibility of success. It does little good to try to bring parties together when their view of the law is based on an inaccurate premise. Two (or more) experienced attorneys with reasonable clients should, at the end of the day, be reasonably close in their evaluation of the governing law, the damages actually suffered or other legal rights of the parties. What is then needed is some innovative approach to closing the last gap between the positions.

When choosing a mediator, you should be sure to check (1) the mediator's background for the type of case; (2) his or her training and style of mediation; (3) personal reputation for impartiality, patience, flexibility, creativity, optimism and respect for attorneys and clients; (4) experience and track record for achieving results; and (5) cost. Whatever the charge may be, realize that the amount charged, shared by both sides, is usually based upon the mediator's ability and experience and the size of the case usually handled. An analysis of these factors will permit you to assure yourself that your money is well-spent.

At the mediation, work with your attorney to evaluate the case from both sides. Focus on current and future interests of you and your company, not any past wrongs. Identify any non-negotiable or "deal breaker" issues, but be reasonable in your expectations. If there are non-economic requests or offers, be prepared to discuss them. In short, be creative.

When the parties have reached a settlement, all key points relating to their decision to settle are summarized in a Settlement Agreement which should be signed at that time, even if a more formal document is needed in the future. There is then no question concerning the points of agreement.

I have participated actively in this process from all sides as a trial and appellate judge for over twenty-five years. I sent parties to arbitration and mediation, and I enforced arbitration awards and mediation settlements. I now represent parties in arbitrations and mediations, and I often serve as neutral mediator and arbitrator. For me, there is no question that in the vast majority of cases, private arbitration and mediation serves the community far more inexpensively and efficiently than the litigation process. I wholeheartedly recommend it.