ALTERNATIVE DISPUTE RESOLUTION

Alternative dispute resolution (commonly referred to by the acronym ADR) is a term used in the legal system for different methods of resolving disputes and conflicts *without* litigation and trial. Many disputes result in lawsuits, and there are significant reasons to resolve a claim or lawsuit without going to trial. Statistically, less than 5% of all cases are actually resolved by jury trial or by a judge, and thus well over 95% of all civil lawsuits for damages are resolved by compromise and, more specifically, settlement. Today, seeking alternative ways to settle claims and lawsuits is even more important and desired because the judicial system is overburdened and sometimes ineffective. Lawsuits can take years to resolve and require a great time commitment from all parties and lawyers. In addition, there are significant costs and expenses necessary to prepare and present a case through trial. Alternative dispute resolution offers options other than litigation and court.

Mediation

The most common and frequently utilized tool to explore and achieve settlement is mediation. It has become the fastest growing of all methods of alternative dispute resolution, and nearly every court now requires that the parties mediate or strongly encourages the parties to voluntarily entertain the idea of mediation. With the help of a neutral mediator who is experienced in litigation and negotiation, the parties may be able to resolve their conflicts and settle disputes. The most important benefit of mediation is the opportunity to settle upon terms which are certain and within a degree of control, avoiding the unpredictability and risk associated with court and a jury trial.

What is a mediation and who is the mediator? The term mediation is quite simply a structured meeting in which a third party assists two or more parties attempt to reach a resolution and settlement of disputes and conflicts. The third party mediator is completely neutral and is there to facilitate discussions and negotiations between the parties in a legal dispute. Most mediators have extensive experience with the legal system and litigation in general as well as experience in the art of negotiation. Mediators are certified by the state and/or federal courts and required to have certain experience, qualifications and training to become certified. Mediators are typically lawyers, but some jurisdictions do not necessarily require the mediator to be an attorney at law. Most mediators maintain websites which disclose their qualifications and practice. On most occasions, the mediator has been selected and agreed upon by all parties' attorneys involved. In situations where the mediator cannot be agreed upon, the court/judge can appoint a mediator. The mediator is seeking to motivate the parties, moderate and control the mediation process, explore issues, propose solutions, and help the parties achieve objectives.

Who attends the mediation and why? The mediator acts as the moderator of the process. Also present at the mediation are the parties, both plaintiff(s) and defendant(s), as well as the parties' attorneys. On very rare occasions a party may be allowed to participate without a

lawyer, but the vast majority of mediations are conducted by lawyers representing their clients. Mediations are also attended by "interested parties" which may be insurance company representatives and risk management personnel. Insurance company representatives attend because the insurance company has contractually agreed to defend claims and "cover" the defendant. Interested parties on the plaintiff's side could be a spouse, parents of a minor child, and even an adult child acting on behalf of an elderly parent. The rules generally require that the parties and only those with some legal interest be allowed to attend the mediation. Generally speaking, no one other than the parties is permitted to attend the mediation although if agreed upon by all parties and lawyers special circumstances may allow a non-party to attend the mediation.

Because a mediation is an informal conference attended by only the parties and their lawyers, it is typically not conducted in a courtroom setting and is therefore not as formal as court. The mediation is conducted in an almost conversational way. It typically occurs in a private office suitable for large joint conferences and separate, private meetings. It may take place at a lawyer's or mediator's office. The private meetings are generally referred to as caucuses, and these allow parties to privately discuss the case with their attorney and mediator. Often times the defendant and the defendant's insurance carrier will be present along with defendant's counsel. Many times the insurance representative may be seeing you for the first time. While the mediation is informal, keep in mind that you are being judged by your appearance, demeanor, and mannerism. As such, dress and act appropriately. Lawyers commonly instruct clients to "dress and act as if you were in church." Throughout the process, be respectful, attentive and polite. No matter how frustrated or even angry you may become, keep your cool and remain composed and patient. Remember, you are being judged as to what type of an impression you would make on a jury, and this can affect the settlement value of your case.

When does a mediation take place? There is a delicate balance in selecting the timing of the mediation. Since your case is being evaluated, it is desirous to make sure that all information and documentation is available to the other side for review and consideration. For example, it would be premature to conduct a mediation before a doctor has completed treatment and, most importantly, rendered final opinions as to your diagnosis and prognosis. On the other hand, litigation can be very time consuming and expensive, so you do not want the mediation to occur too late in the litigation process. Many times extensive costs, particularly those associated with expert witness testimony, can make the case more difficult to settle since costs are deducted from any settlement amount. Your lawyer will know the appropriate time to undertake mediation. Just keep in mind that you must be patient to allow your case to be developed and presented as favorably as possible.

How does the mediation process work? Initially, the mediator will take some time prior to the commencement of the mediation to explain to all parties and their attorneys the "rules" and to explain the process and purpose of mediation (much of which is contained in this article will be the subject of the typical mediator introduction). Each mediator is different and may employ a

different style, but the basic mediation process is the same. The mediation procedure is then usually followed with each lawyer giving an informal presentation of their respective clients' case or side of the story. This evidence is generally presented in a summary, conversational method. Most lawyers will share what they perceive to be important pieces of evidence and discuss arguments they intend to present should the case go to trial. As an informal proceeding, witnesses are not called and evidence is not formally presented. In most circumstances, you as the party will not be asked to comment or testify, and most certainly you will not be the subject of any questioning by the other side. In other words, listen while your lawyer tells your side of the story, but keep in mind that it is the side most favorable to your case. The opposing lawyer will also present their side of the story, and undoubtedly you will take issue and disagree. As stated before, simply listen and be respectful. Every story has two sides, and every case has different issues, problems, and consequences. No case is perfect. By listening and understanding the presentations made by the lawyers, the parties will gain a better understanding of the strengths and weaknesses of their case and, hopefully, a more enlightened perspective on the benefits of compromise and settlement. After the presentations by the lawyers, mediators generally split the parties up into separate rooms, and at that point negotiations begin. Keep in mind, "It is not where you start; it is where you finish." Many times mediations start with unrealistic demands and offers. The negotiations are a process, and you should be patient and keep an open mind.

What is the purpose of the mediation and why is it so important? Of course, the purpose is to achieve a settlement and resolve the case. The importance is much more than that. The mediation allows an informal exchange of information, thoughts, evaluations, opinions, and negotiations in the form of offers and demands. It is a process which values the involvement of all parties as well as the lawyers and allows a degree of input, control, and a forum to voice opinions. You are given the ability to make choices and avoid risk, therefore insuring certainty of the outcome of the case and ultimate closure. In virtually every other aspect of litigation, legal decisions are made by a judge and the case is ultimately decided by a jury. Jury verdicts are extremely unpredictable and uncertain. Think of it this way: Human nature is such that we want to solve our own problems rather than let a judge and six strangers on a jury resolve our problems *for* us. If trial is the most important day in litigation, then the second most important day may very well be the day of mediation.

There are several other very important aspects of mediation which form the foundation of the process. The entire process is confidential and privileged. In other words, none of what is done or spoken in the mediation can be used for any other purpose outside of the mediation. This confidentiality promotes an open discussion and encourages the parties to exchange ideas and positions for the sake of compromise. This cloak of privacy and confidentiality is almost never violated; what happens in the mediation stays in the mediation. Most often, the settlement agreement will be reduced to writing and signed by all parties at the mediation. If the case is settled, it is *only* by mutual agreement of the parties. It becomes a legally enforceable contract.

In other words, once the case is settled and you sign the mediation settlement agreement, you cannot change your mind or back out. When the proposed settlement is reduced to writing you will be permitted and encouraged to read the settlement document before signing. It is most often not filed with the court unless some issue requiring court intervention is necessary.

What is your role during mediation negotiations? Ultimately, the decision to settle or not to settle is that of the parties. The greatest strength of mediation is input and control. In a court case, there are resolutions of issues by a judge or jury, *not you*. Mediations can result in a solution not likely in a jury trial. A mediation is much more likely to produce a mutually agreeable solution and allows choices rather than "taking your chances" at a trial. Of course, you will look to your lawyer for advice and direction, but ultimately the decision to settle is yours as a party. Ask questions and discuss the issues with both the mediator and your lawyer in private. A mediation is a great forum to express your feelings and discuss the pros and cons of settlement. In today's world of the internet, emails, texts and much less interpersonal relationships, a mediation brings all the important parties in one place to discuss the issues and possible case resolution. Theoretically, "all the moving parts" are present at a mediation. There are many things to consider beyond just monetary compensation. There is a "human toll" involved with litigation. There are headaches, heartaches, time, and costs associated with litigation and a trial. These should be taken into consideration in addition to the <u>risk</u> of taking your chances at trial. Litigation often takes *years* to resolve and thousands of dollars in costs to prepare the case and ultimately present it to a jury. A mediation can take *hours* and result in a satisfactory compromise with minimal expense and inconvenience.

<u>Arbitration</u>

Arbitration is a more direct substitute for the formal process of court. Arbitration is typically conducted before one or three arbitrators, not a judge or jury. Most jurisdictions require that arbitrators maintain a certification which insures a certain amount of experience, qualification and training. Many arbitrators are lawyers and are selected by the parties and judge, if necessary. The process is very much like a miniature, abbreviated trial with relaxed rules of evidence and procedure. Evidence is presented and lawyers argue the case, but it is much less formal than court. It is significantly less costly and typically proceeds much faster than court and trial. Most often, arbitration is binding which means that a decision or award is final and fully enforceable as if a court judgment. Appeals and attacks on the merits of the award are rarely successful.

Perhaps the most valuable legal right is the right to trial by a jury of one's peers. Often times, arbitrations are disfavored because the case is not heard by a jury of peers but rather is heard by professional arbitrators. Even though an arbitration can be much more expeditious and substantially save costs, parties in litigation (particularly plaintiffs) often prefer a jury trial.

Traditionally, arbitrations have been a form of dispute resolution agreed to by lawyers for unique circumstances. Today arbitration is often invoked for alternative dispute resolution because it is a *condition* to a contract or agreement. More and more, commercial contracts and even contracts for medical care mandate arbitration as the sole means of conflict resolution. While waiver of one's right to jury trial is often disfavored, arbitration agreements are usually enforceable in contracts which have been agreed to and executed by all parties.

Unlike mediations, the arbitrator's award is final and there is very little control in the outcome. Trials and arbitrations are conflict resolution as determined by a jury or panel of arbitrators, very much the opposite of a negotiated, compromised settlement which is the focus of mediation.

The two most prevalent forms of Alternative Dispute Resolution are mediation and arbitration. The laws of every jurisdiction can involve some variations in process and procedure, but this overview gives a good backdrop for a better understanding of ADR as it may apply to your case.

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