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"In the Alternative"
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Attorneys, and sometimes judges, often use the terms "mediation" and "arbitration" interchangeably, perhaps because the two processes are often lumped together under the rubric "alternative dispute resolution." Both are alternative methods for avoiding a court trial and the attendant publication of a potentially adverse decision. Both are also speedy, cost-effective, private proceedings in which the parties have considerable control over the selection of the neutral and, in all mediations and some arbitrations, over the rules governing the process. And both processes have the potential to significantly reduce discovery expenses. Although both have many advantages over litigation, it is critically important for the practitioner to select the appropriate ADR process on a case-by-case basis.

Arbitration is a simplified, fairly informal, speedy and arguably economical for of trial. The parties present their case to a neutral who is empowered to make a binding award (except in non-binding judicially mandated arbitration, where the award is advisory). As at trial, one side wins and the other loses. When one party would probably prevail on a motion for summary judgment, arbitration is the method of choice. Insurance carriers insist on arbitration when they suspect plaintiff's claim to be fraudulent.

Arbitration is the forum of choice when any party wants or needs a neutral determination of culpability. Deborah Koeffer, chair of Mitchell, Silberberg and Knupp's employment and labor department, recommends arbitration over mediation when the client wishes to obtain a personal vindication or needs to establish a precedent. "Mediation rarely concludes with a declaration of right or wrong, but rather a mutual decision that whatever the original merits, the negotiated solution is the best way to bring closure. Implicit in mediation is that there is no determination of facts or law.

But counsel should be aware that there are numerous disadvantages to arbitration. For one thing, discovery interrogatories are virtually never used in arbitration, and the right to depose witnesses and preview documents is not generally guaranteed. Although mediation has no provision for discovery either, the mediator is empowered to render an award if counsel cannot negotiate informal discovery to facilitate a settlement, and if the case cannot be settled in the absence of discovery, an impasse is declared and neither side is prejudiced.

The neutral's award is rarely appealable, regardless of how unfounded it may be, and arbitrators are not generally required to state the basis for their awards. A frequent charge is that arbitrators "split the baby" rather than declare an outright victor. Part of the reason

for this may be the arbitrator's perhaps unconscious desire not to alienate future sources of business.

If the arbitrator chooses to provide the reasoning behind the award in order to be helpful to counsel, the likelihood of an appeal by the losing party increases. The safer course is simply to set forth the relief granted and the party charged with complying, and let counsel wonder. Consequently, the value of an arbitration award often derives more from the closure it brings a particular dispute than from the guidance it offers for future action.

In arbitration, one party wins at the expense of the other. This sometimes destroys beneficial relationships, whether business or social. Mediation effectively knits frayed relationships, while providing a framework for future conduct.

When arbitration clauses are contained in standardized contracts between institutions and their customers, the arbitration provision often specifies the arbitration provider. When one has an ongoing contractual relationship with the specified provider, a disparity is created between the parties to an arbitration. The arbitrators cannot help but know that their awards, in the aggregate, must keep the institutional client happy.

Other potential problems with the contractual provisions for arbitration include losses of the rights to a jury, choice of law, class-action status, punitive damages and choice of venue.

Mediation is an informal, flexible process in which a professionally trained neutral facilitates an interactive communication among the parties allowing the parties themselves to settle the dispute. The parties are not limited to their remedies at law. The extent of the remedies available in mediation is limited only by the creativity of the participants.

The role of the neutral is less evaluative in mediation than in arbitration. Since the mediator has no power to make an award, he or she focuses entirely on getting the parties and their counsel to communicate about the strengths, weaknesses and non-legal concerns of the case. Unlike a settlement-conference judge, the neutral does not decide the fair or reasonable value of the case and try to "sell" it to the parties. Many professional mediators do not communicate their opinion of the case's value unless all other settlement avenues have been unsuccessfully explored.

A mediation can begin sooner than an arbitration because less discovery is needed before mediation. Since both parties' purpose in mediation is to settle a case--unlike arbitration where the goal is to win--if one party has undisclosed evidence supporting its position, the mediator can often persuade the party to identify and divulge the evidence, thus persuading the other side of its probative value. Even when mediation does not result in a complete resolution of the conflict, it is frequently helpful in streamlining future discovery in the case. A joint decision to submit a factual or technical dispute to a specified expert, whose decision on this limited issue will be dispositive, is another way to streamline the dispute resolution process.

Mediation allows the client to evaluate the strengths and weakness of the case and to fully explore the other side's settlement position before being subjected to the risk of defeat in arbitration.

Although both sides to an arbitration are theoretically prepared to win or lose, the truth is that most clients often are not truly aware of the likelihood and costs of defeat. In mediation, the neutral can relieve counsel of the task of educating the client to the risks of submitting the case for adjudication. In contrast to arbitration, parties in mediation, familiar with the facts and the weight they place on the interest and emotions surrounding them, retain control of the outcome. It is up to each side, with the assistance of the mediator, to persuasively present his version of the facts and the legal and nonlegal arguments. The parties retain control of the session's length and whether there will be future sessions.

Another advantage to mediation is the creativity of solutions available and the parties' opportunity to include nonlegal bases for settling the case. In a mediated settlement of a business dispute, for example, a creative remedy could be an apology. Also, a contract can be renegotiated to the mutual benefit of both signatories, a remedy not available in arbitration. An employer and employee can agree to changes of sexual harassment policy in the workplace.

An agreement to cooperate in the prosecution of one of the parties' claims against a third party, and perhaps to share in any recovery is another creative remedy. Perhaps the establishment of a tribute in honor of one of the parties--a donation to a favorite charity, the erection of a monument or and ad in Variety--could be the creative resolution necessary to end the dispute.

Mediation is often the procedure of choice for an emotional dispute between parties who have an ongoing relationship such as a personal service contract that could give rise to similar disputes in the future. The theory is that mediation provides the parties the opportunity to review their conduct and decide which modifications they wish to make to preserve the relationship without the polarization that takes place in an adversarial proceeding.

There is almost no downside to mediation. It provides the parties with opportunities to re-evaluate the costs, risks and benefits to litigation after the opposing party has disclosed its legal arguments, settlement posture and nonlegal considerations. If, after mediation, the parties remain too far apart, arbitration is always available. Many practitioners are increasingly using a two-step mediation-then-binding-arbitration process to resolve disputes in lieu of trial.

by: Deborah Rothman