

Why Litigate When You Can Mediate? – An Introduction to ADR

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I. INTRODUCTION

Over the past decade, we have all seen statistics, which indicate that approximately 90% of all lawsuits settle before the parties ever reach the courtroom. Given this scenario, the ever-increasing cost of litigation and the court system's priority to address criminal matters before civil matters, a need has arisen to try to resolve cases outside the court system. Alternative Dispute Resolution (ADR) is a response to that need. Our clients have long clamored for a quicker and less expensive method for resolving disputes [see Deloitte & Touche Litigation Services 1993 Survey of General and Outside Counsels] and ADR provides that opportunity. When used correctly, ADR can be a very effective means to settle cases early, effectively and efficiently.

II. WHAT IS ADR?

ADR has no set definition. It is simply a means to resolve disputes. We use it constantly in our everyday lives. For example, we use it when we "negotiate" over which movie to see or where to eat dinner.

In the context of the court system, ADR has developed into a mechanism consisting principally of mediation or arbitration of disputes by consenting parties. The consent to submit to ADR can occur any time during the dispute. Some companies have contractual clauses requiring all disputes be submitted to some type of ADR. Otherwise, the parties can initiate the submission of a case to ADR at any time. Brown, Harold, "Alternative Dispute Resolution Realities & Remedies," 30 Suffolk U.L.Rev. 743, Fall 1997

ADR has been readily available, but really became an important factor in dispute resolution after Chief Justice Warren E. Burger's speech at the American Bar Association's annual meeting in August 1985. In that speech, Chief Justice Burger stated, "(t)here is some

form of mass neurosis that leads many people to think courts were created to solve all the problems of mankind.” He endorsed the idea of using ADR to curb the increase in civil litigation that overwhelmed the judicial system. Response to Chief Justice Burger’s speech was immediate: One year later American Arbitration Association commercial arbitrations soared from 6,000 to 53,000. Ibid.

Perhaps, the greatest resistance to ADR has come from lawyers. We have all been trained to use our skills in the context of presenting a case in court. With the advent of liberal discovery, lawyers focus upon creating a complete and thorough factual record for presentation before a judge or jury. We have been indoctrinated with the idea that judges and jurors will decide each dispute fairly without assessing whether this process is serving our client’s needs. Kichaven, Jeffrey G., “Using Alternative Dispute Resolution” ALI-ABA Course of Study Materials Alternative Dispute Resolution: How to Use it to Your Advantage, March 19-20, 1998. ADR presents a reasonable alternative to the traditional courtroom “battles.” With a little innovation, lawyers can create a forum that roughly simulates the courtroom experience while reducing the wait and costs for our clients. Since only 10% of cases are tried, choosing different methods of resolving cases, should certainly be on everyone’s radar screen.

III. WHAT ARE THE DIFFERENT FORMS OF ADR

Just like ADR escapes any set definition, there is no one definite forum for ADR. Lawyers and clients can fashion whatever mechanism they want to insure fairness and satisfy the need to resolve disputes. Even though there is no set format, there are several types of ADR that are frequently used. The following is a brief description of the most popular forms of ADR.

A. Mediation

Mediation has traditionally been a private process. Because mediation is private, the procedural and evidentiary rules are decided by the parties or by the mediator. It can be utilized at any time before or during litigation. Fray, Martin A., "Symposium: Alternative Dispute Resolution in the Twenty-First Century: Does ADR Offer Second Class Justice?" 36 Tulsa L.J. 727, Summer 2001

First, the parties must decide upon a mediator or mediators. The mediator facilitates the discussion between the parties in an attempt to help the parties resolve their disputes. Like a judge, the mediator controls the process, and the parties normally negotiate through the mediator. Unlike a judge, who ultimately may have the power to resolve a dispute, a mediator does not possess this power. The mediator can suggest solutions, but it is the parties who ultimately resolve their dispute. Ibid.

Before a typical mediation, the parties may submit written memorandum. At the beginning of the mediation, the mediator will usually allow the lawyers to make "opening statements." These statements are used to allow the parties to state their versions of the dispute, much like a lawyer in court might do. At that point, the mediator could ask for the clients' involvement. Regardless, the mediator functions as the neutral facilitator in the negotiation process.

Unlike a judicially supervised settlement conference, the lawyers and parties actively participate. Typically, the mediator will spend time with both the lawyers and the lawyers and their clients. Most negotiation will take place through the mediator.

However, the mediator lacks any authority to enforce a settlement. The mediator cannot make binding decisions and therefore, the primary focus of any mediation is to have the parties persuade each other, regarding the best way to resolve the dispute.

Although the mediator does not have the binding authority of a judge or a jury, the parties can ask the mediator to provide his or her opinion as to the value and strength of argument. An independent third party's view of a dispute can often lead to its resolution.

B. Binding Arbitration

Arbitration may be binding or non-binding. If non-binding, it essentially functions like a mediation. If binding, the decision of the arbitrator or arbitrators is substantially insulated from judicial review. On petition to confirm an arbitrator's award, the available grounds for challenge are extremely limited, making an arbitrator's decision almost certainly final. When choosing binding arbitration, lawyers and clients should be aware of this potential pitfall.

In arbitration, the roles of the attorney and client are roughly the same as they are in court. The attorney presents the case and the client is generally heard from only when testifying. The hearing can proceed in any manner that the parties determine. For example, the parties can agree to submit testimony by deposition, report or live testimony. Arbitrations can take many forms. The following are some of the most popular arbitration formats. Kichaven, Jeffrey G., "Using Alternative Dispute Resolution" ALI-ABA Course of Study Materials Alternative Dispute Resolution: How to Use it to Your Advantage, March 19-20, 1998.

1. High-Low

In a "high-low" arbitration, the parties negotiate a range of possible outcomes and then submit the dispute to the arbitrator. This method benefits the claimant by guaranteeing a minimum amount and reduces the respondent's risk by eliminating the chance of a runaway

verdict. For example, the claimant might agree that, in the worst case, the arbitrator will award no less than a specified amount (i.e. \$50,000) in the claimant's favor. The respondent might agree that, in the worst case, the arbitrator will award no more than a specified amount (i.e. \$250,000) against the respondent. By setting these boundaries, the parties limit the arbitrator's discretion. The arbitrator can still award any amount in between those two figures. However, the arbitrator cannot award anything less than the minimum and anything more than the maximum figures regardless of what he or she would have awarded without those limits. Ibid.

The "high-low" technique and others are usually proposed to draw an otherwise recalcitrant party into the arbitration program. These techniques are designed, among other things, to increase the predictability of outcomes in the arbitration system.

2. Baseball

In a "baseball" arbitration, the arbitrator's discretion is limited in the way major league baseball limits the discretion of an arbitrator in player's salary disputes. It is very similar to the "high-low" arbitration. Each side submits a maximum and minimum value. In this case, the claimant submits a maximum value and respondent a minimum value. Unlike "high-low" arbitration, the arbitrator cannot award any amount in between the minimum and maximum values. The arbitrator is limited to only awarding either the minimum or the maximum. Predictability of the outcome is therefore enhanced even further. In addition, the process encourages the parties to set the numbers at realistic levels. The process of submitting values encourages negotiation, which often results in settlement, eliminating the need for a hearing. Ibid.

3. Night baseball

In “night baseball,” the arbitrator does not know the figures, which the parties have selected. The ultimate award will be that number selected by either the claimant or the respondent, which is closest to the number, which the arbitrator, working “in the dark” selects. This technique is designed to allow the parties to select values with which they feel comfortable and eliminates the risk that an arbitrator will view a party’s submission as unreasonable. The downside to this technique is that it diminishes the potential for negotiation to resolve the case before the arbitration. Ibid.

IV. WHAT CASES SHOULD BE PLACED IN ADR?

Just as ADR has no set definition, there is no hard-and-fast rule concerning which cases should be submitted to an ADR forum. The relevant considerations are saving expense and indemnity (or claim payment) dollars, and avoiding the uncertainties associated with placing the fate of the case in the hands of an unpredictable jury. Because of the costs and unpredictability of a trial, it is almost incumbent upon counsel to at least suggest the ADR option to his or her clients in virtually every matter.

To a great degree, selecting a case to proceed to ADR depends upon the nature of the dispute, the claimed damages, issues of negligence, the stage of maturity of the case, the trial venue, the level of the respective parties’ desire to resolve the case outside of the courtroom setting and the perceived likelihood of succeeding at ADR. Of course, these variables also depend upon the type of ADR which is contemplated (or which is mandated.)

Generally, there is a stage of every case when ADR should be seriously considered. It may be that a conscious decision is made to proceed to trial without ADR, but the effort should

be made to objectively review each case for ADR possibilities before reaching the steps of the courthouse.

The optimal timing for ADR will vary by case. And, unlike trial where there is usually only “one bite of the apple”, there may be more than one opportunity for ADR with some cases.

Whether arbitration or mediation is the preferable means of ADR depends on each particular situation. However, mediation does not preclude a subsequent arbitration, although binding arbitration obviously precludes mediation. In many instances arbitration should be considered as potential next step following an unsuccessful mediation.

Mediation, with its non-binding character, is appropriate for virtually any controversy. It is not a question of whether mediation should be considered, but a question of when, who the mediator should be, and what conditions create the best scenario for success.

The following discussion deals with general types of cases. It is not meant to be an exhaustive exploration into every possible scenario, but rather it is intended to give some guidance to those who are deciding whether a particular matter belongs in ADR.

A. Contract Cases

More than most businesses, trucking companies use contracts in their daily operations. These contracts include freight brokerage, interlining, equipment leasing, labor leasing and DOT permanent leasing. Even freight bills and other contracts for carriage are contracts. Due to the varied types of contracts associated with trucking, there is great potential for contractual disputes.

In many boilerplate contracts, there is a provision for arbitration. Usually, the contract term requires binding arbitration. In those cases, both the timing and the method for ADR are determined by the contract itself. Then, when dealing with a contractual dispute, since ADR

may be determined by the terms of the contract, it is important to read the contract and, if ADR is mandatory, make an early selection of arbitrator.

However, the run-of-the mill contractual dispute that simply demands money is well suited to ADR. In the absence of a contractual provision which mandates ADR, the decision to place a contractual dispute into ADR should focus on the amount of the damages claimed and the likelihood that a judge sitting in equity would issue a favorable ruling.

B. Negligence Claims With Serious Injuries And Disputed Negligence

When someone sustains a serious injury, there is every likelihood that she will seek the advice and counsel of an attorney. And, it seems, that likelihood increases with the severity of the injury. In fact, the injuries can be so catastrophic that neither the claimant (plaintiff) nor her attorney has anything to lose (and much to gain) by bringing suit.

The problem is this: It does not matter, under these circumstances, that the trucker did not contribute to the happening of the accident. The plaintiff is making an economic decision. Both she and her lawyer are willing to go to trial to obtain a favorable, high-dollar verdict. What to do?

These cases are always candidates for ADR. The motor carrier or its insurer has the certainty of discovery and trial expense. The risk of a plaintiff's jury verdict that arises, in whole or in part, from sympathy is real. Yet there are substantial risks for the plaintiff and her counsel. The plaintiff risks taking nothing. Her lawyer risks losing his significant fee, and possibly, discovery and trial expenses.

Timing is essential when deciding when to submit these types of cases to ADR. The venue may be conservative and rural, where there is a greater opportunity for narrowing the issues, or completely escaping, at summary judgment prior to submitting to ADR. When

reviewing these cases, a consideration is how much of the plaintiff's case might be eliminated at summary judgment (or limine). Conversely, if the case is venued in a liberal, metropolitan jurisdiction that rarely grants summary judgment, an early submission to ADR may be well advised. It should be done as soon as enough is known about the claimant (or plaintiff) and her injuries so that a reasonable evaluation can be made before spending vast resources on experts and legal fees.

C. Clear Negligence With Minor Or Exaggerated Injuries

When someone sustains a minor injury or when an injury is being exaggerated, but negligence is clearly adverse, the case can be difficult to voluntarily settle without intervention. Both the claimant and the motor carrier (or its insurer) may develop unrealistic expectations concerning the value of the claim. Claimants (plaintiffs) understand that there is every likelihood of a verdict, because they will likely prevail on negligence.

The issue, then, becomes one of value. These claims are not generally ones where the claimant and his attorney have nothing to lose by bringing suit. Rather, they involve matters where a legitimate offer is made by the motor carrier (or its insurer) and the claimant has decided to reject it.

These cases are always candidates for ADR. The claimant's risk is that a jury will return less, or that he will ultimately realize less money from a verdict due to trial expenses and, possibly, because his retainer agreement with counsel permits counsel a larger percentage if the case goes to trial.

A mediator or arbitrator will hone in on these issues in a non-confrontational environment. The ADR process assists both the claims handler and, especially, the claimant (or plaintiff) and his counsel by dispassionately evaluating the claim.

Again, timing is a consideration when deciding when to submit these types of cases to ADR. Before submitting these types of cases to ADR, enough information concerning the claimant's (or plaintiff's) damages must be developed. Yet, these cases should be submitted before the plaintiff has devoted significant resources to trial experts and other trial witnesses.

D. "Fuzzy" Claims

This is certainly not a term that will be found in any manual for claims handling or any literature concerning the advantages of ADR. It is the author's personal "catch-all" category for other claim situations that are suited for ADR.

One type of fuzzy claim involves a claimant that is out of control. The claim handler and her counsel can agree on the value of the claim, but she does not heed her counsel's recommendation. ADR provides a forum for an independent evaluation and permits her lawyer to recommend a fair settlement.

Another type of fuzzy claim deals with the case that is languishing on a court's calendar. The state of the docket is such that, despite vigilant preparation by both sides, the case will not be tried for an unacceptably long period of time. Usually, at least one of the parties (though not necessarily counsel) insists on his "day in court". Submitting the case to ADR, in a formal setting, can provide the "day in court" while significantly expediting the resolution of the case.

A third type of fuzzy claim is the "stand-off" of the parties. The plaintiff and the motor carrier both have strong legal issues which will be decided at trial and which will significantly impact the verdict. Both parties agree that it would be wise to pursue negotiations, but neither wants to concede any legal issue prior to trial, as both believe that the trial judge's rulings will be favorable to their respective positions. Mediation or arbitration conducted by one who is knowledgeable about the parties' legal issues is an excellent means to resolve this type of case.

Certainly, there are additional types of fuzzy cases which are, or which become, ripe for ADR. No two claims or suits are identical, but many fit into the general categories outlined above. Quite simply, ADR, if appropriately tailored to a particular case or claim, provides an economical, expedient manner in which to resolve cases and claims.

V. SELECTING AN ARBITRATOR OR MEDIATOR

Absent a preexisting arbitration agreement which dictates the manner in which an arbitrator is selected, and the manner in which arbitration is to proceed, the parties typically agree on an arbitration service which would then select the arbitrator subject to typical conflict considerations, or the parties must agree upon an arbitrator. Absent agreement, the parties could request the court to select an arbitrator.

In some instances, the use of multiple arbitrators which form an arbitration panel may be appropriate. Such a panel can consist of one arbitrator selected by each side as party advocates, who in turn select a neutral arbitrator who will be chair the panel. In this type of arbitration, the majority decision will prevail.

The considerations for selecting an arbitrator or mediator involve the type of case, the nature of the claim, and the experience of the arbitrator or mediator. Of these considerations, the most important is experience. The person selected for arbitration or mediation is preferably someone with a proven and established track record for successfully resolving cases. Many attorneys' prefer retired Judges as arbitrators or mediators because clients often pay more attention to their advice and counsel. Nonetheless, there will be many attorneys, active and retired, as well as retired Judges who are available as arbitrators and mediators.

If the case is one which is highly technical or complex, consideration should be given to selecting an arbitrator or mediator with the same background, although this consideration rarely outweighs overlooking an experienced mediator or arbitrator.

VI. THE TIMING OF MEDIATION OR ARBITRATION PRE-LITIGATION ADR

ADR should be considered prior to initiating litigation. There is no reason why ADR cannot be considered as a viable alternation to resolve a dispute prior to litigation provided that all the potential parties are aware of the essential facts surrounding the controversy. ADR is often best entered into early in the dispute before the parties have spent vast sums of money on positions and created a feeling of ill will. Assuming the controversy is ripe, i.e. formal discovery is not necessary to determine the facts or evaluate the controversy, ADR can save the parities the cost of initiating litigation. Pre-litigation ADR is particularly appropriate in controversies between a vendor and a client in which there is a mutual desire to maintain a future relationshp, or in controversies in which the cost of litigation outweighs the claimed damages. Pre-litigation ADR may not be appropriate where a claim or defense is patently frivolous and can be summarily disposed of in court, or one of the parities simply wants to delay resolution of the claim. However, pre-litigation ADR should be considered as a potential option to recommend to your clients in every controversy.

A. After Litigation Commences But Before Discovery Is Complete

ADR should be considered at the earliest possible time in a controversy or in litigation, even before discovery is complete, unless full discovery is required before the case can be evaluated for ADR purposes. Obviously, all the parties to the controversy must have an appreciation of the basic facts, issues, and damages before ADR is likely to be successful. Nonetheless, in some instances, a mediator may be able to facilitate an informal exchange of

information between the parties as well as facilitate the dialogue between the parties in an effort of resolve the matter. Such facilitation may involve more than one mediation session but can be successful if there is a willingness by all parties to fully and openly participate in the process.

B. ADR Following Discovery Prior To Trial

Following the development of all the contested legal and factual issues through discovery, which, prior to discovery precluded ADR as a viable option, ADR should again be considered as a viable option. Even in those cases where the parties' positions seem irreconcilable, an experienced mediator can often facilitate or temper the parties' position and achieve a satisfactory solution.

C. Non-Traditional ADR Options

ADR is not limited to arbitration or mediation. Other options are also available to facilitate the resolution of a controversy without a full trial. These options include Early Neutral Evaluation, Mini-Trial, Private Judging, Neutral Fact Finding, and a Summary Jury Trial.

1. Early Neutral Evaluation

Early neutral evaluation is a process that may take place soon after a case has been filed in court. The case is referred to an expert, usually an attorney, who is asked to provide a balanced and unbiased evaluation of the dispute. The parties either submit written comments or meet in person with the expert. The expert identified each side's strengths and weaknesses and provides an evaluation of the likely outcome of a trial. This evaluation can assist the parties in assessing their case and may propel them towards a settlement.

2. Mini-Trial

A mini-trial is a private, consensual process where the attorneys for each party make a brief presentation of the case as if at a trial. The presentations are observed by a neutral advisor

and by representatives (usually high-level business executives) from each side who have authority to settle the dispute. At the end of the presentations, the representatives attempt to settle the dispute. If the representatives fail to settle the dispute, the neutral advisor, at the request of the parties, may serve as a mediator or may issue a non-binding opinion as to the likely outcome in court.

3. Neutral Fact-Finding

Neutral fact-finding is a voluntary process where a neutral third party, selected either by the disputing parties or by the court, investigates an issue and reports or testified in court. The neutral fact-finding process is particularly useful for resolving complex scientific and factual disputes.

4. Private Judging

Private judging is a process where the disputing parties agree to remain a neutral person as a private judge. The private judge, who is often a former judge with expertise the area of the dispute, hears the case and makes a decision in a manner similar to a judge. The Judges decision may assist the parties in resolving the dispute.

5. Summary Jury Trial

In a Summary Jury Trial, attorneys for each party make abbreviated case presentations to a mock six-member jury (drawn from a pool of real jurors), the party representatives and a presiding judge or magistrate. The mock jury renders an advisory verdict. The verdict is frequently helpful in getting a settlement, particularly where one of the parties has an unrealistic assessment of their case.

VII. THE FORMAT FOR ARBITRATION OR MEDIATION

Absent an agreement, which governs the format, procedurally and substantially, of arbitration or requires arbitration pursuant to established arbitration rules, the parties must agree upon the procedural and substantive format for arbitration. The arbitration agreement must provide for the number of arbitrators, their selection, discovery procedures, how the expenses of arbitration are to be paid, how the arbitrator's decision is to be issued, and whether the arbitration is binding, or non-binding.

The format for mediation differs between mediators. Typically however, the mediator will request confidential pre-mediation submissions from the parties setting forth the issues and the parties respective positions. At the mediation, the parties, attorneys, and the persons with authority to resolve the matter should be in attendance. After the mediator concludes opening remarks concerning the mediation process, a brief opening statement by counsel for the parties is often requested by the mediator. However, some mediators believe that opening statements are not beneficial in many cases as such statements only serve to antagonize the parties and do not foster the mediation process. Following the opening statements, if any, the mediator will typically caucus in private with each of the parties in an effort to resolve the controversy.

In order to resolve the controversy, each party must recognize that the other parties have sincerely held and valid arguments and all parties must be willing to compromise. More than one mediating session may be necessary. However, once the mediation has been successfully resolved, the settlement agreement should be reduced to writing and signed by the parties.

VIII. CONCLUSION

ADR provides its participants an option to resolve their differences outside the courtroom. Its flexibility allows the participants to tailor the process to their needs and interests.

Although it is not a substitute for the courtroom and the safeguards to which litigants are entitled, it certainly is an attractive alternative. In contrast to the cost and unpredictability of a trial, the ADR alternative, when carefully selected, can reduce costs and restore some predictability to resolving disputes.