ADR = CHOICES

Alternatives For Resolving Cases By Trial

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INTRODUCTION

Dispute resolution takes many forms. Alternative Dispute Resolution (ADR) typically refers to various creative methods of resolving disputes, which can be selected by the parties as alternatives to trial.

Dissatisfaction with judicial dispute resolution has grown. Reasons include: overload of the criminal justice system which leaves less time for civil cases; increased domestic relations filings which leaves less time for other civil cases; budgetary constraints which have reduced and strained the entire judicial system and its availability to civil litigants; and, the increasing cost of litigation. Increased use of ADR has been one result of these developments.

Courts now encourage parties to utilize ADR at various stages of litigation. Judges usually are available to conduct judicial settlement conferences, in effect acting as mediators. County and district mediation programs have been implemented on pilot program and permanent bases. The number of licensed attorneys trained as mediators is growing.

In litigation, advocacy is the primary role of lawyers. In ADR, the role of lawyers is more hybrid, if not complex. It can include various combinations of advocacy, counseling, objective evaluation, participatory decision-making, cooperation and neutrality at the same time.

ADR methods vary, but they can be compared in two important ways: (1) whether the process is facilitative or evaluative; and (2) whether the process is binding or non-binding. Facilitative process involves the parties reaching an acceptable result themselves. Evaluative process involves dispute evaluation by a neutral.

For additional information about ADR choices, see *Alternative Dispute Resolution, The Litigator's Handbook*, which is available from the American Bar Association.

MEDIATION

Mediation is a non-binding, neutral-facilitated negotiation process. In this process, individuals trained in techniques of negotiation and facilitation are used. Mediator training includes analysis of not only why *cases* settle, but also why *people* settle.

In mediation, parties with authority to settle are present. Mediation typically begins in a joint session with short presentations by the parties. The parties then separate and the mediator conducts "shuttle diplomacy" among them. Occasionally, the parties reassemble to address particular items.

Mediation settlements result from the parties' conclusion that a negotiated settlement is preferable to a continuing dispute, and that being able to participate in the outcome is preferable to having the outcome determined by someone else.

The mediator does not give legal advice or evaluate the case.

Ex parte communications are acceptable.

The parties are encouraged to listen carefully to each other, and truly evaluate both the strengths and weaknesses of their positions.

Mediation can be conducted before an action is filed. However, mediation should await sufficient fact development to be able to accurately evaluate the dispute. If mediation is delayed too long, most trial preparation costs will have been incurred and the parties may be less inclined to settle.

Mediation is not well suited to disputes in which a party wishes to establish legal precedent, or disputes with firmly held, widely differing views of the facts or law.

EARLY NEUTRAL EVALUATION

Early Neutral Evaluation (ENE) is a process through which parties to a dispute make presentations to a neutral who renders a non-binding opinion. ENE does not involve independent investigation. The parties themselves need not be involved in the presentation to the neutral.

ENE is suited for disputes involving little fact controversy, where significant discovery is not necessary. Even fact disputes, however, sometimes can benefit from an independent assessment of relative merits by a neutral.

A key difference from mediation is the non-binding opinion of the neutral.

ARBITRATION

Arbitration is a process that involves a hearing by a one- or three-arbitrator panel that makes a decision that is binding on the parties. When a three-arbitrator panel is used, typically one arbitrator is selected by each party, and one arbitrator is neutral. The panel hears evidence at a hearing and renders a decision.

Rules governing the procedure are set by the parties in advance by agreement, or by appointment of an arbitration organization, such as the American Arbitration Association, Duke University School of Law Private Adjudication Center, the Center for Public Resources or qualified individuals available locally and regionally. Arbitration procedures may be customized for each case, and range from simple to those used in judicial proceedings. Procedural alternatives typically involve method of selecting the arbitrator(s), methods and duration of discovery, presenting evidence and limiting or structuring the award.

Ex parte communications are prohibited.

Arbitration sometimes works best when the arbitrator(s) has expertise in the subject matter of the dispute.

Generally, arbitration awards are not appealable, except in cases of fraud, illegality or corruption. Arbitration awards are judicially enforceable.

Key differences from mediation are discovery procedures and a decision binding on the parties.

See Iowa Code Chapter 679.A, which contains Iowa's arbitration act.

SUMMARY JURY TRIAL

Summary jury trial is a non-binding exploratory "trial" before a jury, with a judge presiding. The "evidence" typically consists of arguments of counsel rather than witness presentation. The "verdict" is presented to the parties with the idea it should encourage settlement. Often, parties discuss with jurors their thoughts about various matters presented.

Summary jury trials can be effective "reality checks." A summary jury trial is a way to obtain independent value assessment, and can help flush out unrealistic case evaluation.

Key differences from mediation are formal presentation of evidence and non-binding decision by a jury.

MINI-TRIAL

A mini-trial is an evaluative, non-binding process utilizing a neutral. Mini-trials have features in common with both Mediation and Summary Jury Trial. Mini-trials typically involve abbreviated presentations by lawyers, with parties present.

The neutral has a more active role than in a Summary Jury Trial, and sometimes facilitates communications like a mediator. Neutrals ask questions, can guide discussion and render non-binding decisions. After mini-trials, neutrals can attempt to assist the parties in settlement based upon the neutral's evaluation of the case.

Key differences from mediation are more formal presentation of "evidence" and case evaluation by the neutral.