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ADR: The Wave of the Future

By The Hon. Paul A. Dorf

The criminal law revolution of the 1960s and the intricacies of domestic and civil practice have created courts. Pre-trial maneuvering, motions for new trials and post-conviction statutes have congested the most types of litigation can be arbitrated or mediated, saving substantial time and money and avoiding discovery, protracted trials and adverse publicity for all involved.

Alternative dispute resolution (ADR) is the only situation in the legal system where one can pick the time and the forum to resolve a dispute. Below is an overview of the two forms of ADR: arbitration and

Arbitration

- In open-end arbitration, the arbitrator acts as a judge, hearing a case without a jury. The party for a decision which can relate to liability or damages. The arbitrator's decision is binding on appeal.
- Often known as "baseball arbitration," this procedure calls for both parties to present a realistic purpose of convincing the arbitrator that his or her position is the correct one. The arbitrator picks the proposed amounts and cannot use any figure in between.
- The most effective type of arbitration, and the one that most parties prefer (because they are unusual awards) is the high/low arbitration. Both parties agree to limit their risks by setting in minimum ranges within which the final award must fall. A plaintiff agrees to accept a minimum amount and the defendant agrees to pay a maximum amount. Any figure that is awarded between those amounts

If the arbitrator goes over the maximum, the defendant is protected and is required to pay or the plaintiff's figure. Even if the arbitrator goes below the minimum, the plaintiff receives the minimum amount and the defendant's agreement. The parameters of the award are not revealed to the arbitrator before considering the award.

- In mediation-arbitration the parties first agree to have their dispute mediated. After a certain period of time, if the parties cannot agree to allow the arbitrator to arbitrate any unresolved issues. The parties can agree in advance that if they cannot mediate the dispute within a certain period of time, it will be submitted to a different arbitrator and reach a binding arbitration.

Sometimes, the parties can agree that if they cannot reach a decision through mediation they will disagree to use the same mediator and allow him/her, based on the testimony and documents, to make a final decision as an arbitrator.

Because arbitration is generally voluntary, the parties are free in the absence of statutory authority to decide on variations of the rules and procedures prior to submitting to arbitration. Arbitration is the most popular choice among the various forms of ADR.

Mediation

Mediation is a process whereby litigants appoint a neutral third party to act as an adviser in settlement negotiations. Unlike arbitration and other means of adjudication, the parties retain complete control over the mediation process.

Typically, the parties do not submit evidence or provide witnesses; instead, they exchange information and often make witnesses available to each other. The mediator does not make findings of fact or law, but works jointly with the parties to get them to resolve their disputes.

ADR IS THE ONLY

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The mediator usually does not decide issues, define and redefine issues. If the mediator mediates the parties' disputes, they are free to litigate or attempt a different ADR method.

Mediation can be especially helpful in cases where it becomes difficult for the parties to separate the emotions of their case. In these situations, nothing is lost by submitting to mediation

effect unless a mutually agreed upon settlement is reached.

Alternative methods of dispute resolution work and are clearly the waves of the future. Apparently, with the horrendous increase in criminal case loads, the only way to resolve the civil litigation backlog is to use alternative methods. In fact, the success of the ADR system has led the American Bar Association to suggest that it is ethically required to advise clients about arbitration and mediation.

A former Circuit Court judge, the Hon. Paul A. Dorf is a member of the law firm of Adelberg, Rudolph & Hirsch LLC (ARD&H). He devotes his practice to family law, litigation and alternate dispute resolution, arbitrations and mediations in both civil and domestic disputes.

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