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Beneficial Use of Alternative Dispute Resolution Procedures

I. Introduction

In recent years Alternative Dispute Resolution (ADR) proceedings have become increasingly prevalent as an alternative or adjunct to traditional judicial litigation. This paper examines the benefits of ADR, and methods for promoting successful use of ADR.

II. What Is ADR?

Generally ADR refers to a miriad of alternatives to a traditional trial in a court of law. Some of the more popular forms of ADR include arbitration, mediation and neutral evaluation. In addition, there are a virtually infinite number of hybrids of these approaches.

A. Arbitration

According to Black’s Law Dictionary, arbitration is “[t]he submission for determination of a disputed matter to private unofficial persons selected in manner provided by law or agreement.” Traditionally, arbitration resulted in a “final binding decision.” In recent history, however, a non-binding form of arbitration has developed, whereby a party to the arbitration can reject the arbitrator’s determination, and seek to litigate the matter further. A prime example of this non-binding form of arbitration is the judicial arbitration available to litigants in the California Court system.

B. Mediation/Facilitated Settlement Conference

Mediation is a process in which “the parties discuss their disputes with an impartial person who assists them in reaching a settlement.” While a mediator may suggest ways of resolving a dispute, the mediator has no power to impose a settlement on the parties. While there are some technical differences between strict mediation and a facilitated settlement conference, those differences have been largely blurred in common practice, and for purposes of this paper, they will be treated as identical.

C. Neutral Evaluation

Neutral Evaluation is a process specifically designed by lawyers to “overcome” some of the shortcomings of litigation. In neutral evaluation, “the parties and their attorneys attend an informal, confidential conference hosted by a neutral lawyer,” who has expertise and experience in litigating similar cases. The evaluator prepares a detailed
evaluation of the case, and may also assist in settlement discussions, or help narrow the
issues and plan the extent and timing of remaining motions and discovery.viii

D. Hybrids

While the foregoing types of ADR are perhaps the most prevalent,
there are a virtually unlimited number of variations and combinations of ADR available.
These hybrids are limited only by the needs and creativity of the parties involved. For
instance, an arbitration could be preceded by a mediation session, or a mediation session
could be interjected between an arbitration and the rendering of the decision. These
hybrids are often referred to as mediation/arbitration (med/arb) or arbitration/mediation
(arb/med) respectively.ix Additionally, the parties to a mediation can always incorporate
some aspects of neutral evaluation into a mediation session.

III. Evolution of ADR

A. Early Development

The roots of what is now ADR can be traced back at least as far as medieval
England. There, arbitration was used extensively by craft guilds and merchants to resolve
commercial disputes.x Later, mediation and arbitration were embraced in Colonial
America, and were the primary forms of dispute resolution until the various colonies began
to trade with one another.xi

Up until very recent times, however, the courts have been less than sympathetic to
the use of ADR. In the 1700's, the English Courts developed the “ouster doctrine” which
postulated that arbitration agreements wrongly ousted the courts of their proper
jurisdiction.xii In America, the courts adopted the ouster doctrine, xiii which was formally
adopted by the United States Supreme Court in 1874.xiv It was not until the 1920's that
state and Federal legislation gave legitimacy to arbitration.xv Even then, though, “judicial
acceptance of arbitration agreements was, for the most part, grudging.”xvi

B. Changing Attitude To ADR

Judicial disdain of ADR remained the norm until the 1980's. Then, in the face of
increasing case loads and concerns about the quality of justice dispensed by the over taxed
courts, a marked shift began in the judicial attitude toward ADR.xvii In 1984, for instance,
the United States Supreme Court enunciated a “national policy favoring arbitration.”xviii

Even more recently, this policy shift heralded by the Supreme Court has been
reflected in legislative enactments designed at fostering judicial reform and efficiency.
Under the Civil Justice Reform Act of 1990, for example, six Federal Court Districts were
designated as demonstration districts to test various ADR approaches. One of these districts was the Northern District of California, which was a pioneer in the development of neutral evaluation.\textsuperscript{xix}

Similarly, California opened the door to greater use of ADR in the State Courts with the adoption of 1986 Trial Court Delay Reduction Act and the establishment of non-binding judicial arbitration.\textsuperscript{xx} In keeping with this trend, California Rule of Court 212(b)(7)(h) now requires all attorneys to confer on, among other things, suitable forms of ADR. In light of this trend, it is clear that ADR is becoming less of an “alternative” and more a part of the routine litigation process.

IV. Benefits of Effective Use of ADR

A. Introduction

While ADR may not be beneficial in a small number of cases (such as major impact litigation or matters requiring emergency relief), the vast majority of cases can benefit from the proper and intelligent use of ADR. In a survey of California Judges, judges familiar with ADR had high praise for use of alternative dispute resolution processes. These same judges “had no doubts that ADR could significantly help to bring more, quicker, and fairer settlements.”\textsuperscript{xxi}

Consistent with the perceptions expressed by the judges, California Courts with active ADR programs have seen positive results. Both the Santa Clara County Courts and the San Mateo County Courts, for instance, offer multiple forms of ADR to litigants. In both Counties, survey results have indicated that at least seventy-three percent (73%) of all cases employing ADR settled as a direct result of the ADR process. Cost reductions were attributed to the use of ADR in seventy-eight (78%) of cases in San Mateo County and over eighty-four percent (84%) of cases in Santa Clara County. Perhaps most significantly, the evaluations noted that at least ninety-five percent (95%) of the participants would use ADR again.\textsuperscript{xxii}

The results reported by the foregoing State Courts are in keeping with those reported by the American Arbitration Association. With respect to mediation, the American Arbitration Association has reported an eighty-five percent (85%) settlement rate.\textsuperscript{xxiii} Similarly, a study of Early Neutral Evaluation in the United States District Courts for the Northern District of California also reported two-thirds of those who participated in the program were satisfied with the process.\textsuperscript{xxiv} The general theme of the foregoing case studies is that ADR approached correctly can resolve cases more expeditiously than traditional litigation alone, at a significant cost savings. Consequently, the relevant issue is generally not whether you should employ ADR, but how to best employ ADR for your particular case.
B. Choosing the Right Form of ADR

1. Introduction

Although some form of ADR, properly utilized, can save time and money in almost every case, not all forms of ADR are equally well suited to each matter. Each form of ADR has certain characteristics that must be carefully considered in selecting the appropriate ADR option.

2. Arbitration

a. Binding Arbitration

In general, binding arbitration can be cheaper and faster than litigation. It can afford more flexibility regarding the scheduling and location of hearings; and it can provide an opportunity to have the matter heard by an arbitrator who is particularly well versed in the relevant area of law. However, these benefits are by and large the product of restrictions on certain procedural rights enjoyed in the court process. In the context of contractual arbitration, these restrictions include limitations on discovery and appeal rights.

Although the foregoing restrictions can be modified or eliminated by a carefully drafted arbitration agreement (see Section III. C.), doing so can significantly reduce the savings and efficiency that is the hallmark of binding arbitration. Consequently, binding arbitration is best suited to situations where (1) the saving of time and expenses greatly exceeds the value of disputed matter; (2) a potential jury trial would be highly disadvantageous; and/or (3) the matter requires specialized knowledge that is not readily available on the court bench.

b. Non-Binding Arbitration

While non-binding arbitration does not provide the certainty of a definite resolution, it does allow the parties to test their case before a neutral third party. This gives the parties a chance to reevaluate the strengths and weaknesses of their case, as well as to receive feedback from a disinterested party about the merits of the case. Perhaps equally important, the non-binding arbitration can afford clients a chance to have their say, and obtain a sounding board for their position. As a consequence, non-binding arbitration can be a useful tool for an attorney faced with client control problems.
Furthermore, the “judicial” non-binding arbitration offered through the State Courts is generally provided free of charge. Therefore, it offers a low cost form of ADR for cases concerning relatively small monetary disputes.

3. **Mediation**

As noted previously, mediation has a very high success rate (see section III.A.). Mediations are informal and non-confrontational in nature. The parties can share information in confidence with the mediator without fear of “giving away” their game plan. This process allows the mediator to see the whole picture, and work toward a creative resolution of the parties’ dispute. In so doing, a good mediator can often get beyond the parties’ positions, and help craft a settlement that serves their true interests.

Mediation typically works best when there is a relatively high degree of trust between the respective attorneys and their clients; and it is particularly effective if there is some benefit to a continuing relationship between parties.

4. **Neutral Evaluation**

Neutral evaluation allows the parties and their counsel to obtain an assessment of their case from an experienced neutral attorney. An experienced evaluator can also help narrow the issues in the case, and focus discovery and necessary motions. This procedure provides a helpful “reality check” in cases where the parties have vastly different assessments of the case. Furthermore, depending on the evaluator and his assessment, neutral evaluation can also bolster an attorney’s credibility with his or her client.

5. **Hybrids**

One of the best features of ADR is the ability of the parties to tailor the process to suit their needs. In order to foster a successful resolution, the parties should always take advantage of this flexibility.

For example, while pure mediation may be beneficial prior to filing a law suit, in the author’s experience, pure mediation without some aspect of neutral evaluation is rarely helpful once litigation has already commenced. Usually, if the parties are not able to resolve a matter by direct negotiation between their respective attorneys, it is because the attorneys or their clients have differing views on the
merits of the case. Therefore, it is normally advisable to incorporate some neutral case evaluation as part of a mediation session.

Similarly, if you merely have a neutral evaluation without some attempt at mediation, you have probably lost a golden opportunity to resolve the case.

Ultimately, the goal is resolution. Rather than be locked into a single unvarying approach, counsel should ask themselves two questions:

(1) What are the obstacles to resolution?

(2) How can I tailor a process to best deal with those obstacles?

The end result of this inquiry will usually provide a constructive framework for resolving the case.

C. Effective Use of Certain Forms of ADR

1. Introduction

Naturally, as with any process, the results you obtain from ADR depend in good part on how effectively you use the chosen process. Consequently, once you decide upon a particular form of ADR, you must take steps to see that the process is implemented to its greatest advantage. What these steps are will vary depending on the process chosen.

2. Use of Binding Arbitration

   a. Special Issues

      As noted in section III.B.2.a, binding arbitration presents a host of issues that require special attention. These issues include: (1) the selection of the arbitrator; (2) the timing of the hearing; (3) discovery rights of the parties; (4) applicable law; and (5) availability of judicial review. In the absence of a written agreement on these points, the issues in contractual binding arbitration are generally governed by California Code of Civil Procedures sections 1280 et.seq.

   b. Statutory Procedures

      (1) Selection
Sections 1281.6 of the Code of Civil Procedures govern the selection of the arbitrator in the absence of (or failure of) an agreement between the parties for selecting the arbitrator. Section 1281.6 provides a procedure for the Court to appoint the arbitrator if the parties cannot reach agreement.

Once an arbitrator is selected, he must disclose certain specified information intended to reveal any potential biases or conflicts. Following the disclosure, each party may disqualify the arbitrator without cause by serving a “notice of disqualification” within fifteen (15) days after service of the arbitrator’s “disclosure statement.” Each party can disqualify an arbitrator once without cause, and may petition the court to disqualify an arbitrator upon showing cause.xxxi

(2) Timing

Pursuant to Section 1282.2 of the Code of Civil Procedure, the arbitrator designates the time and place for the arbitration hearing. However, no minimum or maximum time limit is set forth, except that if the matter involves a wrongful death or personal injury case exceeding $50,000.00 in controversy, a preliminary hearing must be scheduled at least sixty (60) days before the arbitration hearing.

(3) Discovery

The Code of Civil Procedure accords full discovery rights to personal injury or wrongful death cases, except that no deposition can be taken for discovery purposes without first obtaining leave from the arbitrator. In all other cases, the Code does not provide for discovery absent an agreement between the parties to so permit.xxxii Nevertheless, in personal injury cases involving more than $50,000.00, the parties have a right to request a list of witnesses and documents to be introduced at the arbitration.xxxiii

(4) Applicable Law

Unless clearly provided by the parties, an arbitrator is not bound by applicable law. Instead, “arbitrators are not bound to
award on principles of dry law, but may decide on principles of equity and good conscience.
(5) Review

Under the Code of Civil Procedure, an arbitration award can be vacated only if:

a. The award was procured by corruption, fraud or other undue means;

b. There was corruption in any of the arbitrators;

c. The rights of a party were substantially prejudiced by misconduct of a neutral arbitrator;

d. The arbitrators exceeded their powers and the award cannot be corrected without affecting the merits of the decision upon the controversy submitted;

e. The rights of a party were substantially prejudiced by the refusal of the arbitrators to postpone the hearing upon sufficient cause being shown therefor or by the refusal of the arbitrators to hear evidence material to the controversy or by other conduct of the arbitrators contrary to the provisions of the applicable Code of Civil Procedure sections; or

f. The arbitrator making the award was subject to disqualification, but failed to disqualify himself or herself after a timely demand.\textsuperscript{xxxv}

While an award can also be corrected for clerical errors, or awards in excess of the arbitrator’s power,\textsuperscript{xxxvi} the award cannot be vacated or corrected for errors of law or fact.\textsuperscript{xxxvii}

c. Addressing the Issues

In order to make the best use of binding arbitration, counsel must address the foregoing issues, and tailor the arbitration to the needs of his or her client. This process requires careful attention to the agreement or stipulation to the binding arbitration, as well as vigilance in carrying out the process. As a point of reference, the author has attached a sample
arbitration agreement as Appendix A to the paper. The sample is directed at disputes arising before the agreement to arbitrate, though, some of its provisions can be incorporated into a broader pre-dispute contract. Of course, this Sample Agreement is not ideally suited to every case, and counsel should be prepared to substantially revise any arbitration agreement to reflect the best interests of his or her clients or legal requirements that may apply to special cases.

(1) Selection of Arbitrator

The selection of an appropriate arbitrator is critical to a successful arbitration. Given that binding arbitration is a final, adversarial process (unlike other forms of ADR), ideally you want an arbitrator who will identify with your clients’ position. However, assuming your opponent is reasonably astute, it is doubtful you will have your way on this point. At a minimum, though, you want to make sure that the arbitrator will at least be open to your position. Additionally, if the matter to be arbitrated involves a discreet area of the law, you may want someone with expertise in that area (assuming the law is on your side).

In making your final selection, it is best to chose someone that you know. In any event, you need to thoroughly research every selection. It is generally not advisable to rely exclusively on published biographies or the arbitrator’s own disclosures. You should check references and inquire into the arbitrator’s relationship with the parties and opposing counsel, if any.

The procedures used to select the arbitrator should take into consideration whether the decision to arbitrate arises before or after the existence of the dispute. If the arbitration arises after the dispute, it is generally not advisable to agree to arbitration unless you have reached agreement on the identity of the arbitrator. If the arbitration agreement predates the dispute, you should set forth some selection procedure.

One alternative selection procedure is a process whereby the parties select the arbitrator from a prequalified list. If the parties are unable to agree on one of the arbitrator’s from the list, each side alternately strikes a name until only one name is left. This process can be set up so that your client gets the final say. While the opposing counsel, if awake, should object to this provision, the
author has been amazed how often this procedure has gone unchallenged.

(2) **Timing**

One of the potential benefits of arbitration is speedy resolution. To ensure this benefit, the arbitration agreement should set forth a time frame for the arbitration hearing. The sample in the Appendix sets forth a window of between ninety (90) to one hundred and eighty (180) days. However, this time frame should be adjusted to meet the demands of each particular case.

(3) **Discovery**

The sample agreement permits discovery to the same extent as discovery would be available in court. However, counsel may wish to restrict or eliminate discovery in cases where: (1) the amount in controversy is nominal and/or (2) the opposition has the burden of proof on an issue where your client has exclusive possession of the evidence.

(4) **Applicable Law**

As previously mentioned, an arbitrator is generally not bound by the law absent an express provision in the arbitration agreement. The sample Agreement requires the arbitrator to apply California law. Naturally, if the law does not favor your client, you probably will want to exclude this provision.

(5) **Judicial Review**

Similarly, an arbitration award is generally not reviewable for errors of law. Unless (1) the law is contrary to your client’s interests, and/or (2) the amount in controversy is nominal, the arbitration agreement should provide for vacation of an award that is contrary to the law. The sample Agreement contains such a provision, as well as provisions for creating a record from which the error can be ascertained.

(6) **Limitations of Awards**
The arbitration agreement should set forth any limitations on the award. These limitations can include such things as minimum and maximum award amounts, or limitations on the arbitrator’s ability to award equitable relief.

(7) Allocation of Costs

Finally, the arbitration agreement should set forth how costs are to be allocated between the parties.

3. Mediation/Neutral Evaluation/and Other Non-Binding Processes

While non-binding forms of ADR are certainly more forgiving that binding arbitration, special attention still needs to be paid to selection of the neutral, and preparation for the session.

a. Selection of the Neutral

Probably the most important aspect of selecting an effective neutral is to select a neutral that everyone respects. While it is always nice to have a neutral that shares your point of view, that point of view is meaningless if the other parties and their counsel lend it little credence. Consequently, you should select someone who has recognized experience litigating similar issues, and is accepted by everyone involved as fair and honest.

In addition, the neutral should be an effective communicator, and a creative thinker. He or she needs to be able to identify and articulate the true interests of the parties, and suggest alternative methods of satisfying those interests.

b. Preparation

Although your preparation will vary somewhat depending upon the type of process, in every case, you want to make sure that the neutral is well briefed on the relevant issues prior to the hearing or session. This briefing usually entails advance submission of written briefs and relevant documents. In addition, a conference call between the neutral and the attorneys can sometimes be useful.

Furthermore, you should prepare your client for the session. You should review your position, and make sure your client is comfortable answering questions and explaining the events that created the dispute, and how your client would like to see the matter resolved. In non-adversary
processes, you should also spend some time considering the other side’s position, and developing potential responses to likely proposals.35 This approach will allow you to anticipate the process, and be prepared for a productive session.

IV. Conclusion

ADR is increasingly becoming a regular part of the litigation process. When used effectively, it can be a successful tool for case resolution; and attorneys practicing in the current litigation environment cannot ignore the potential benefits to their clients.
End Notes


iv. Friedman, supra, 19 COMM/ENT 695, 698

v. See C.C.P. §§ 1141.10 et. Seq.; Cal. Rules of Ct., Rules 1600 et. seq

vi. Friedman, supra, 19 COMM/ENT 695, 698, also see Arfin, “The Benefits of Alternative Dispute Resolution in Intellectual Property Disputes,” 17 COMM/ENT 893, 903 (Summer 1995)

vii. See Arfin, supra, 17 COMM/ENT 839, 904


ix. Friedman, supra 19 COMM/ENT 695, 698-699

x. Reuben, supra, 85 Cal R 577, 599.

xii. Reuben, supra, 85 Cal R 577, 599.

xiii. Id., 600-601

xiv. Id.; Insurance Company v. Morse 87 U.S. 445 (1874)


xvi. Id.

xvii. Id., 602-605


xix. Rosenberg, supra, 46 STN L R 1487, 1488.

xx. Folberg, supra, 26 USF L. R. 343, 353-354; CCP §§68600-68620; Cal Rules of Ct., Rule 1912 (d)(3); CCP §§1141.10 - 1141.32.

21. Folberg, supra, 26 USF L. R. 343, 365


23. See Friedman, supra, 19 COMM/ENT 695, 698, fn 6.


26. CCP §§1283.05(e); 1283.1


29. Id., 903-904; Folberg, supra 26 USF L.R. 343, 365.
30. Arfin, supra, 17 COMM/ENT 893, 906.

31. CCP §1281.9; also see CCP§1281.95, (governing disclosure in residential construction cases).

32. CCP§§1283.1; 1283.05 (a) & (e).

33. CCP§1282.2(a)(2)(A).

34. Muldrow v. Norris (1852) 2 Cal. 74

35. CCP §1286.2

36. CCP§1286.6


38. See Arfin, supra, 17 COMM/ENT 893, 911-912