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By: Bill Kamejarin, Esq.

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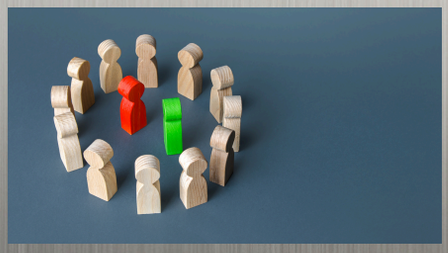
THE BENEFITS OF ALTERNATE DISPUTE RESOLUTION

By: Donald F. Armento, Esq. (Ret. Comm.) and Douglas Barker, Esq.

Civil disputes, by their very nature, present an opportunity for a business negotiation. A party has a claim, and that claim is for "sale." The opposing party is a potential buyer of that claim. Just as in everyday business negotiations, legal disputes usually focus on money as the central issue. Sometimes, performance is also at issue.

Taking a civil dispute from inception straight through to trial without attempting alternative dispute resolution (ADR) is a mistake. The principal reason for engaging in Alternative Dispute Resolution is the likelihood that the parties will settle their dispute. However, even when ADR does not result in settling a case, both the party and the party's counsel benefit significantly from participation in the process, as discussed below.



When a new or returning client meets with you for the first time to discuss his or her current dispute, you listen closely to learn the underlying facts of the dispute, to learn which documents and witnesses are going to be important, and to begin forming a discovery plan for your client's case. Your client will certainly want to know the chances of 'success,' that is, of prevailing in court. But shouldn't you also discuss with your client the available avenues of Alternative Dispute Resolution, as an alternative to traditional (and more costly) litigation?

Perhaps your client has heard of Arbitration, Mediation, and even, perhaps Settlement Conferences, perhaps not. How best to explain the differences between these modes of ADR, and the advantages of each? This article explains why virtually all civil disputes should employ Alternative Dispute Resolution and explores some of the differences between modes of ADR and may help in creating an "ADR Plan" for your client's case.

MEDIATIONS

Mediations are the most favored mode of Alternative Dispute Resolution. For several years, San Diego's local rules required the parties to every civil case to mediate their case before a trial date would be assigned. To support this mandate, the court paid for the first two hours of the mediator's time (at a discounted rate). Published statistics revealed that the settlement rates of these mediations were quite impressive.

Notwithstanding, for budgetary reasons, the program ended, and mediations were no longer required prerequisites to obtaining trial dates. Mediating a civil case involves the parties meeting with an agreed mediator in a conference room or via Zoom (in virtual mediations) outside of court to attempt to resolve their dispute. The parties meet separately with the mediator to exchange offers, demands and proposals for settlement.

Most mediations last for one half-day, or for a whole day. The parties may, but are not required to submit mediation briefs with exhibits. These briefs may be either shared or confidential.

EDITORS NOTE: See Insider Perspective: Making the Most of Mediation by Bill Kamenjarin, Esq., page 7

Despite the sunset of mandatory mediations, the mediation 'culture' in San Diego and elsewhere continues to thrive. Through the court, parties may stipulate to mediation and, in turn, be assigned to mediation at a discounted rate set by the court; or parties may schedule mediations privately. Among the reasons mediations thrive are:

- Parties and their lawyers invariably learn more about the other side's evidence and arguments because of participating in mediation; and knowledge is power. What is learned during a mediation promotes good choices by parties as to whether to settle or proceed to trial. Even if the case does not settle at mediation, mediation discussions often continue between lawyers after the mediation session is over, and settlement is achieved because of those discussions. And, even if a case does not settle during mediation or thereafter, the lawyers use that which was learned during mediation to do focused preparation for trial. So, in a sense, regardless of whether a case settles in mediation, there really is no such thing as a "failed" mediation. Benefit always comes out of the process.

- Unlike almost every other facet of litigation, the parties are an integral part of the mediation process. Once litigation is initiated, the lawyers manage all the discovery and motion practice, periodically reporting to their clients about how the case is progressing. By contrast, in mediations, the parties are integral to the process. Mediation is the one event in the litigation process where the parties are present from start to finish and have the power to determine the outcome.

- If a party chooses not to settle at mediation, that party will have an understanding about why further litigation and expense is necessary.

- If, during a mediation, a joint session is convened, opposing parties/counsel can be subjectively evaluated as to their presentation and how they will probably relate to the trier of fact. Joint sessions are especially beneficial when the mediation is being convened before litigation has been filed and before discovery has been completed.

- If mediation results in settlement, risk is eliminated, litigation-related anxieties are relieved, and significant future expenses can be avoided

- Of all civil cases filed, an overwhelming percentage of those cases - 90-95% or more–end up settling before trial. If a given case is almost certain to settle, it is better for everyone to cause that resolution to happen during mediation.

To maximize chances of settlement through mediation, the following issues should be taken into consideration:

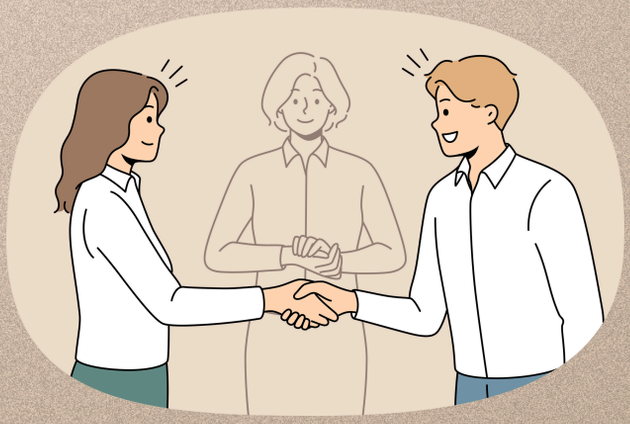
- Timing

- In some cases, as a practical matter, mediations must convene before suit can be filed, e.g., California Association of Realtors forms typically require mediation before filing suit as a condition of requesting an award of attorneys' fees; homeowner association disputes require mediation before suit as a condition for later seeking a post-judgment award of attorneys' fees; and some private contracts require mediation before filing suit.

- In cases where mediation is not mandated, mediation should occur early in the case if not very much money and/or performance is sought by the complaining party. Conversely, it is often better to complete most or all discovery before mediation in "high stakes" and/or complex cases.

- Cases will not settle at mediation if either side plays "hide the ball." Plaintiffs reduce their demands and defendants increase their offers only when they are shown evidence and hear arguments that may weaken their cases. Parties to mediations must be willing to reveal their positions and strengths to the other side if settlement is to result.

- Briefs should be exchanged well in advance of mediation. Those briefs, prepared for purposes of mediation only, cannot be used for any purpose by the other side; thus, sharing briefs is done without jeopardy. Defendants need to see briefs before the mediation because, often, the ultimate decision maker (e.g., claims supervisor, risk management supervisor, or Board of Directors) does not actually attend the mediation but, rather, gives the defense "authority" to settle for a given sum (or performance). If that authority person does not have the benefit of seeing plaintiff's brief, the defense authority may be relatively low. Conversely, plaintiffs often attend mediations with high expectations and insufficient understanding of the defense evidence and arguments. If plaintiffs are provided with the defense brief days before the mediation, they have time to consider the defense's evidence, and consider adjusting their expectations before they begin mediation. Such adjustments are more difficult for plaintiffs to process if the defense's position is revealed for the first time during the mediation.



One great advantage of mediation is that it offers flexibility to the parties in exploring possible avenues of settlement. Unlike other ADR modes, mediations, even if already begun, may be continued to a later date to allow the parties time to obtain documents, photographs, or other persuasive evidence. Another advantage is that the parties may choose when the mediation will occur. In some cases, it may be advantageous to mediate before discovery is completed (or even started); in other cases, it may be best to mediate before experts are retained or designated, thus saving your client's time and money. One disadvantage of mediation is that it is nonbinding, so that either party may reject settlement proposals, even ones that may appear to be reasonable.

In some cases, where the parties have made progress but have been unable to agree on a resolution, the mediator may draft and distribute a "Mediator's Proposal," which is often the mediator's take on the case's strengths and weaknesses, and the best estimate of where the parties have a chance to resolve their case before going to trial.

SETTLEMENT CONFERENCES

For many years, California courts have offered, and occasionally required, settlement conferences for parties in civil cases. Either a judge or a 'settlement panel' (comprised of volunteer attorneys) meets with the parties in the courthouse, to resolve the parties' case. No evidence is presented to the judge/panel, no witnesses testify, and no documents are admitted. There is no award or judgment rendered at the conference. Participation is most often voluntary.

One advantage of settlement conferences is that they do not require the parties to pay fees for the judge or settlement panel. Thus, they are cost effective. A distinct disadvantage of settlement conferences is that they are usually time-limited (one to two hours), due to the court's busy calendar or the time limits of the attorney volunteers on the settlement panel. Thus, this mode is often viewed as less flexible and less accessible than other modes of ADR.

Settlement conferences are in some ways very similar to mediations, but with a few common differences:

- **Often, settlement conferences are scheduled back-to-back and afford limited time. Parties need time to process new information and proposals; and processing time may not be available at a settlement conference.**

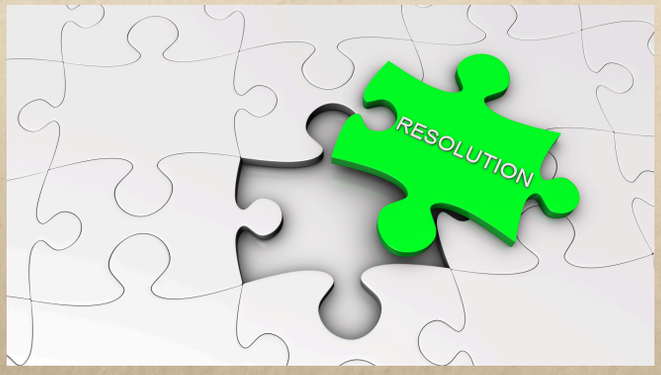
- **Depending upon the judge, parties are often not involved in the process. Some judges speak to the lawyers in chambers, only, and then send the lawyers out to meet with their clients about the judge's thoughts and recommendations.**

- **On the positive side, in some cases, a judge telling parties how the case should resolve could be more effective than a negotiation during a mediation. As for some parties, the opinion of a sitting judge may be given great weight.**

ARBITRATIONS

Several decades ago, during the implementation of "Fast Track" rules for civil cases in California courts, many courts (including San Diego Superior Court) required the parties to arbitrate their case before the court would assign them a trial date. Arbitration involves the parties and their attorneys presenting the evidence to an appointed arbitrator, who then weighs the evidence and arrives at a decision (called an "award"). This decision may be either binding (Binding Arbitration) or nonbinding. Witnesses are sworn, examined and cross-examined. The parties may offer documents into evidence, object to the opponent's documents, and require the arbitrator to rule on admissibility of the documents. Once the arbitrator's decision is distributed, it can be accepted, or either party may request a Trial De Novo. The latter results in the court's assigning a trial date.

One advantage of arbitration is that the parties may learn how a neutral arbitrator "sees" the evidence in their case, and how the arbitrator weighs the evidence in arriving at the decision. One disadvantage is that most arbitrations are nonbinding, so that if one party does not like the arbitrator's decision, that party can reject the award and request a trial de novo.



It should be noted that despite arbitration's having fallen out of favor in recent years as a mode of ADR, it is still contractually required in certain cases, such as consumer, construction, and real estate contract disputes. Unlike mediations and settlement conferences, arbitrations essentially assure finality between the parties. Short of fraud, arbitration awards cannot be appealed. Moreover, arbitrations are typically scheduled and completed sooner than cases that meander down a trial calendar, so dispute resolution is both final and can be more expeditious. With respect to many disputes, arbitration is mandated by a contract between the parties. In other cases, parties may stipulate to proceed through arbitration under circumstances such as these:

- When the subject matter of a case is technical and might be seen as too complicated for a jury to follow, the parties may agree that presenting the case (1) to a lawyer or (2) to a panel of three lawyers or (3) to one or more industry experts may be a better approach than presenting to a lay jury. Patent cases, intellectual property cases, complex accounting cases, and engineering cases are examples of matters that might best be arbitrated rather than tried to a jury.
- It is not uncommon for parties to be concerned about a "rogue" arbitrator returning a result that, as noted above, would not be appealable. To control risk, the parties may agree before arbitration to an award bracket (sometimes referred to as a "mini/maxi"). Pre-arbitration, the parties negotiate a value range within the award shall be result. For example, the parties–without informing the arbitrator–may agree that the ultimate arbitration award shall not be any greater than $250,000 nor less than $100,000.

The case is then presented to the arbitrator, again without disclosing the "mini/maxi" numbers to that arbitrator. If the arbitration award falls between $100,000 and $250,000, then the arbitrator's award shall be the final award. However, if the arbitrator returns an award of over $250,000, then the final award shall be reduced to $250,000; and, if the arbitrator award is less than $100,000, then the final award shall be increased to $100,000.

Other Tools for Case Resolution

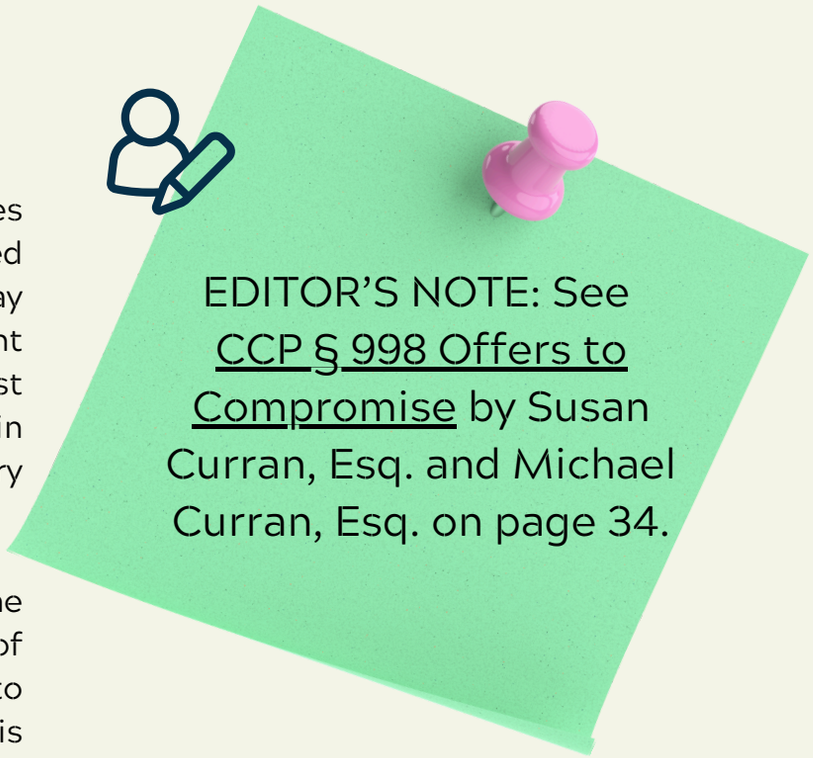
After you have reviewed the different modes of ADR with your client and recommended using a certain 'mode' of ADR, your client may opt not to pursue arbitration, settlement conference, or mediation. The client may insist on his/her 'day in court," no matter the delay in time or increased costs inherent in discovery and trial preparation. What then?!?

You may wish to discuss with your client the possibility of creating and serving a Code of Civil Procedure Section 998 Offer to Compromise. The Offer to Compromise is most often used in civil cases in which the dispute revolves around money to be paid by one party to another party.

By the terms of CCP Section 998, once a party serves a valid Offer to Compromise, the opposing party has 30 days to accept or reject the Offer. If accepted, the opposing party then pays the offering party, and the case is dismissed without a judgment having been entered.

If rejected, and the offering party 'beats' the offer at trial, the opposing party must then pay the offering party's costs, including expert witness costs and certain other costs. These costs may be quite substantial.

It is noted that if a CCP 998 Offer to Compromise is served and the opposing party does not respond within thirty days, the offer is deemed withdrawn, and may not be introduced into evidence or referred to at trial.



One advantage of the Offer to Compromise is that it places your client's opponent on the horns of a dilemma - whether to accept the offer and pay, or to reject the offer and risk getting beat (and owing costs) at trial. One disadvantage of the Offer to Compromise is that you still may have to try your client's case and beat the offer, before you collect on costs from the opposing party.

CONCLUSION

Cases usually take a long time to get to trial. During that time, attorneys' fees and other expenses grow to amounts that often stagger the average client. Then, of course, there is the risk associated with taking any case to trial.

It is in the best interests of all concerned to explore alternative dispute resolution. By way of mediation or settlement conference, clients should be given the chance to resolve their dispute without the delay, expense, and risk of trial.

Further, arbitration should be at least considered if settlement cannot otherwise be achieved. It is recommended that attorneys review the various modes of ADR with their clients early in the life of the case, and to agree on a viable "ADR Plan" about how to seek resolution of the client's case through arbitration, settlement conference, or mediation. The failure to review ADR options with the client and to arrive at an agreed ADR plan may subject the client to unnecessary costs and fees and may result in a missed opportunity to resolve the dispute without prolonged litigation.

The authors are Mediators and Neutrals with West Coast Resolution Group, a part of National Conflict Resolution Center, San Diego, California.

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He served in the United States Marine Corps Reserve from 1982 to 2009, retiring as a Colonel. During his service, he was mobilized to active duty three times and deployed to Kuwait and Iraq. He was also deployed in 2020 to Monterey County to assist with disaster relief during the wildfires. Col. Armento was recognized as the 2020 Veteran of the Year – Excellence in Advocacy for the California 76th Assembly District.

Retired Commissioner Armento is proud to be an active member of Mama's Kitchen, the San Diego Blood Bank, Veterans of Foreign Wars, and the American Legion.

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Doug currently serves as a Mediator and Neutral with West Coast Resolution Group, a part of National Conflict Resolution Center, San Diego, California.