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Alternative Dispute Resolution

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ALTERNATIVE DISPUTE RESOLUTION

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The time, expense, frustration and uncertainty of traditional litigation processes (i.e., jury and bench trials) has led to the development of alternative ways of resolving civil disputes. Backlogs of cases in metropolitan court systems have led to delays of years from the time of the filing of an action to trial and/or final resolution upon appeal. Courts, attorneys, parties and legislators have looked for alternatives to avoid the effects of the time and expense involved in getting a case resolved through the court system.

Statistics show that these alternative processes have been significantly successful in resolving cases as the number of cases that actually reach the trial stage has declined dramatically over the past several decades. "In the federal courts, the percentage of civil cases reaching trial has fallen from 11 percent in 1962, to 1.8 percent in 2002. Despite a five-fold increase in the number of cases filed.... Over a 25-year period with data from 22 states, the number of jury trials shows an absolute decline of more than 25 percent. Jury trials account for the disposition of less than 1 percent of filed cases." Some Questions About "The Vanishing Trial", McGuire and Sander, Dispute Resolution Magazine, Winter, 2004. "There were only 5,500 federal civil trials across the U.S. last year, down sharply from 14,300 in 1984. State civil jury trials dropped 34% between 1976 and 2003, even as the volume of civil cases disposed of during the period rose 165%." Trial-less Lawyers; As More Cases Settle, Firms Seek Pro Bono Work to Hone Associates' Courtroom Skills, The Wall Street Journal, December 1, 2005, p. B1.

In several states, courts have been ordering parties to alternative processes, primarily mediation, since the mid-1980's. Such ability to order parties to processes such as mediation, takes either contractual agreement by the parties or legislative implementation. Since 1995, Arkansas has had legislation encouraging the use of alternatives to the traditional litigation process. (A.C.A. §1-6-7-101 et seq) Such legislation identified a number of ADR processes which the courts were "encouraged" to utilize including negotiation, mediation, conciliation, arbitration, private judging, moderated settlement conferences, med-arb, fact finding, mini-trials, and summary jury trials. A.C.A. §16-7-201. That initial piece of legislation was amended in 2003 to give "...each circuit and appellate court of this state...the authority to order any civil, juvenile, probate, or domestic relations case or controversy pending before it to mediation." A.C.A. §16-7-202.

Out of the identified processes, mediation and arbitration have grown to be the most utilized procedures for attempting to resolve cases outside the court system.

MEDIATION

Whether it is court-ordered or entered into by agreement, mediation is a voluntary process. Perhaps not as to its initiation, but certainly as to its outcome. Mediation can best be defined as a meeting between the parties to a dispute in which a third party neutral (the mediator) assists those parties in reaching an agreeable resolution to the dispute. While the style of mediators may vary, ultimately their function is the same - to help the parties find a way to compromise and settle their dispute without resorting to a binding determination by a judge or jury. The mediator cannot impose his/her will on the parties and should not offer his/her opinion as to the relative merits of the parties' positions.

He/she is there to help the parties evaluate the pros and cons of their cases as expressed by the parties themselves or their attorneys, evaluate the risks inherent in proceeding to a trial on the merits and explore possible solutions to the dispute. However, it is up to the parties to determine whether or not to settle the dispute and on what terms. The mediator facilitates the negotiations.

Typically, the structure of a mediation involves a general session with all of the parties and their representatives in attendance and caucuses in which the mediator meets privately with the parties and their attorneys. There may also be involved meetings between the attorneys themselves, with or without the mediator and/or meetings between the mediator and a party without his/her attorney or with the attorney with or without the party present. Mediators may hold a closing session in which the parties get back together to either confirm the terms of their negotiated agreement or to acknowledge that the mediation has not produced such agreement. In the event a mediation session does not produce an agreement, it may be followed up by informal discussions between the mediator and the attorneys or one of them and perhaps a "mediator's proposal" in which the mediator suggests a compromise which the parties might be able to agree to.

General Session.

Typically, the opening or general session has two primary purposes. The first is to acquaint the participants with the mediator and the process. During the mediator's opening remarks, he/she should introduce himself/herself, give everyone an idea of his/her background, describe what the participants should expect during the mediation and make sure that everyone involved understands what to expect and what is expected of them.

The second aspect of the opening session is to allow the parties and their attorneys

to set out the issues as each sees them. Generally, the mediator will ask the attorney for the complaining party to give an "opening statement", outlining the issues as he/she sees them and will then ask the parties to describe the dispute from their standpoint. The mediator may ask questions during this part of the process to either clear up some issues or to emphasize certain things. If the mediator has been provided mediation statements prior to the mediation, he/she may ask questions which those statements may have raised, keeping in mind that most mediation statements are submitted to the mediator as confidential communications. The mediator may want to know about any prior negotiations that have taken place. I personally like to have the parties describe any prior negotiations while in the same room so that everyone is in agreement as to what has taken place before the mediation.

There has recently been some inclination by regular mediation participants, particularly attorneys, to attempt to skip that part of the general session in which the attorneys and parties make these presentations. However, absent very unusual circumstances, these opening remarks should not be eliminated. Surveys of the satisfaction of parties with the mediation process indicate that parties are the most satisfied when they feel like they've been heard or had their "day in court". The mediation is much more difficult and the success rate much lower in those mediations in which the parties do not talk to each other in an opening session across a mediation table.

The opening session is also the time that a mediator will have the parties sign a mediation agreement, if it has not been signed prior to the mediation, and, perhaps, a confidentiality agreement. All aspects of a mediation are confidential by operation of law (A.C.A. §16-7-206) but many mediators have the parties sign a confidentiality agreement

so that the parties are bound to confidentiality by agreement also.

Caucuses

After the participants have concluded the general session, it is customary for the parties to retire to separate rooms to meet privately with the mediator. While there are various types of disputes and some of them may not require individual caucus sessions, in my experience, it is the unusual case that does not involve private sessions.

These sessions typically involve a more in-depth analysis of the facts of the case and an exploration of the legitimacy of the parties' positions. A mediator may ask the attorney for a party for an honest evaluation of that party's chances for success in the litigation. Sometimes those chances are expressed in percentages. Hopefully, the attorney will give an honest evaluation and not try to convince the mediator of the merits of his client's case. An honest evaluation of the case is essential to an ultimate decision as to how to best resolve it.

At the end of the opening caucus session, it is typical for a party to authorize the mediator to convey certain information to the other side which may not have been disclosed in the general session and to convey a settlement proposal. The mediator will then meet with the other side, communicating the allowed information and settlement position. The same thing will normally happen in the other caucus and the mediator may spend the rest of the mediation going back and forth between the private sessions, carrying information and settlement positions until the parties have either reached a compromise position or have decided that they will not be able to resolve the case.

Closing

Depending on the situation, the mediator may have the parties get back together to go over the terms of the settlement agreed to or to confirm that the parties have reached a stalemate. In the event of a settlement, the terms of the settlement should be reduced to writing and committed to by each authorized party and attorney by the signing of a settlement agreement. In the event a settlement has not been reached, this may be a time for discussing how to proceed further to try to get the case resolved. Perhaps the scheduling of an additional mediation session is appropriate. On the other hand, the mediator may ask the permission of the parties to make a mediator's proposal which may be made at the mediation itself or by written communication to the attorneys following the mediation. Many times, the suggestion of a compromise position that is not reflective of an evaluation of the merits of anyone's position but simply a middle ground that represents a "stretch point" for both parties will result in an agreement following an unsuccessful mediation.

ARBITRATION

Binding arbitration may arise either in a contractual context or by reason of a voluntary agreement of the parties. It cannot arise by mandated court order without a contractual agreement because of the constitutional right to trial by jury. Therefore, while mediation may be ordered pursuant to legislative authority because of its voluntary nature with respect to reaching an agreement and thereby obviating a jury trial, there is a constitutional right to a trial by jury which, while it can be waived, cannot be involuntarily

eliminated. United State Constitution, Amendment VII; Arkansas Constitution. Art. 2, §7.

Binding arbitration can be best defined as the submitting of the determination of a dispute to a third party neutral for a decision which binds the parties. Not only does that decision have the same effect as a jury verdict, but it is even more binding because absent evidence of specific misconduct by the arbitrator justifying the vacation of the arbitrator's award, there is no right of appeal on the merits. Such misconduct may include: corruption, fraud or other undue means; evident partiality; the arbitrator exceeding his/her powers; the refusal to postpone a hearing upon sufficient cause; and, the manifest disregard of the law or facts. A.C.A. §16-108-212.

Typically, the rules of evidence are somewhat relaxed in an arbitration proceeding and there is no official record of the proceedings unless the parties choose to have one and pay for it. Usually, an arbitrator will allow the attorneys to make opening and closing statements and to submit post-hearing briefs if desired. Testimony is introduced in the same manner as in a trial, with witnesses being under oath. The powers of an arbitrator include the administration of oaths, the issuance of subpoenas, the conducting of the hearing including the receiving of testamentary and documentary evidence and the issuance of a final binding award. A.C.A. §16-108-103.

Historically, arbitration has arisen as a result of a provision in a contract between two parties in which they have agreed to submit any dispute arising out of the agreement to arbitration. The parties may choose to submit such a dispute to a specific arbitrator or arbitration service or may agree that the arbitration will be governed by the rules of a particular arbitration organization. It is not unusual for an agreement to provide that a dispute will be submitted to the American Arbitration Association for determination because

historically AAA has been the most prominent organization providing arbitration services. However, in recent years, other organizations have begun providing such services and may also be identified in contracts. It is also not unusual for the contract to provide that the arbitration will be governed by the rules of AAA while leaving to the parties who the arbitrator will actually be. Or the parties may choose not to use AAA but to be governed by its rules.

Contractual provisions requiring arbitration have generally been held to be enforceable by the courts of Arkansas as a matter of public policy because arbitration is favored by the courts of Arkansas. Hart v. McChristian, 344 Ark. 656 (2001); Wessell Bros. Foundation Drilling Co. V. Crossett Public School Dist. No. 52, 287 Ark. 415 (1985). There are exceptions which generally involve the attempt by one of the parties to obligate the other to engage in arbitration while leaving itself free to choose whether or not to submit the dispute to arbitration. This lack of mutuality is one of the primary reasons that a court might not enforce a contractual provision requiring arbitration. The Money Place, LLC v. Barnes, 349 Ark. 411 (2002).

If the parties to a contract have not identified what rules shall govern the arbitration, or if the parties agree to submit a controversy to arbitration without a provision in a contract, the proceedings will be governed by the general provisions relating to arbitration as enacted by the Arkansas legislature (A.C.A. §16-108-101 et seq) and the Uniform Arbitration Act as adopted in Arkansas (A.C.A. §16-108-201 et seq).

Should one party or another refuse to submit to arbitration in the face of a contractual provision requiring same, the moving party may apply to a court of competent jurisdiction to compel arbitration. Once parties have agreed in writing to submit a matter

to arbitration, such an agreement is irrevocable. However, there are certain types of claims that are not permitted to be the subject of an arbitration agreement (personal injury claims, tort claims in general, employer-employee disputes and claims by an insured or beneficiary under an insurance policy or annuity contract) and, therefore, the Arkansas courts have held that an agreement to submit such claims to arbitration is unenforceable. Hawks Enterprises. Inc. v. Andrews, 75 Ark App 372 (2001). The Arkansas court has also held that where the issue of punitive damages sounds in tort, an arbitration award including punitive damages is invalid on its face. McLeroy v. Waller, 21 Ark App 292 (1987) (vacating that portion of the decision awarding punitive damages). The decision in McLeroy raises the issue as to whether or not a party to a tort action who agrees to arbitration and goes through an arbitration proceeding to final award, may thereafter petition a court to vacate the award because the arbitrator lacked authority to arbitrate a tort matter. While McLeroy would suggest that such an award would be vacated, see Davis v. Little Rock School District, CA04-987 (Ark App 8/31/05) in which an "employer-employee" dispute was voluntarily arbitrated and the arbitration award was upheld as res judicata, barring a subsequent legal action by the employee. The court affirmed that "Except in certain limited situations, a valid and final award by an arbitrator has the same effect under the rules of res judicata as the judgment of a court." Riverdale Dev. Co. LLC v. Ruffin Bldg. Sys., Inc., 356 Ark 90 (2004).

The advantages of arbitration include the timeliness of a decision, in that generally a hearing can be held rather quickly and a decision should be made relatively soon following the hearing, and the fact that generally, arbitrators are familiar with the law as it relates to the dispute he/she is arbitrating and, therefore, the parties may get a more

informed decision than they might get from a jury. There can also be cost advantages in that there is usually very limited, if any, discovery allowed in arbitration, but this cost saving may be outweighed or offset by the fees charged by the arbitrator. This is especially a consideration if a panel of arbitrators is chosen rather than just one arbitrator.

Over the past several years, in the personal injury litigation field, the use of what is called "Hi-Lo Arbitration" has emerged. For whatever reasons that are peculiar to their particular dispute, the parties agree to submit the matter to arbitration and agree to a maximum award and a minimum award. They do not tell the arbitrator what their "Hi-Lo" figures are and, in fact, may not tell the arbitrator that they have agreed to a maximum and minimum. If the arbitrator's award exceeds the "Hi" then the plaintiff recovers the agreed-to maximum. Likewise, if the award is less than the agreed-to "Lo", the plaintiff recovers the agreed-to minimum.

OTHER ADR PROCESSES

A.C.A. §16-7-201 lists ten separate alternative dispute resolution processes which the legislature intends to encourage the use of in the enactment of the laws relating to alternative dispute resolution. While mediation and arbitration are the most widely used, other of the processes also see use around the state. Negotiation, of course, takes place to some extent in almost every dispute where the parties or their attorneys themselves attempt to resolve a case by settlement. Negotiation is also an integral part of mediation. Private judging is basically the same as arbitration and moderated settlement conferences are used in the federal court system by the magistrates. Med-arb is a process whereby the

parties agree that if they are unable to settle their case through mediation, the mediator will become an arbitrator and make a binding decision. Such a process has, inherent in its concept, the issue of what information (particularly negative information) the parties are willing to disclose to the neutral as a mediator when he/she may become the decision maker at the end of the process. Fact finding, mini-trials and summary jury trials do not appear to be in much use in the state, However, focus groups, used by one party or the other in preparation for trial, do appear to be regularly used to help a party evaluate their case and thereby encourage an objective evaluation. A process known as "Early Neutral Evaluation" while not specifically spelled out in the code, is in limited use. It is simply a means for a party to have their case evaluated by a neutral for the purpose of determining what the strong and weak points of their case are and to get an independent idea of valuation.

ARKANSAS' ADR COMMISSION

The Arkansas Alternative Dispute Resolution Commission was created by A.C.A. §16-7-101, et seq in 1995. It consists of seven members appointed by the Chief Justice of the Arkansas Supreme Court (3), the Speaker of the House of Representatives (1), the President Pro Tempore of the Senate (1) and the Governor (2). Each member serves for a six year term and may be re-appointed. It holds regular quarterly meetings. The Commission employs and executive director and assistant. It maintains a permanent office in the Justice Building in Little Rock.

The activities of the ADR Commission have included the maintenance of a roster of certified mediators to be made available to anyone who asks. The Commission

monitors the certification of mediators for civil and family mediations in the courts of Arkansas. As part of that monitoring, the Commission has established certain requirements for mediators to maintain their certification, including the attendance at a certain number of Continuing Mediation Education hours. The Commission has also adopted a Code of Ethics for mediators and holds disciplinary hearings on complaints made against mediators.

The Commission sponsors basic and advanced mediation training as well as CME seminars and courses throughout the state. It engages in several other activities designed to meet its statutory charge to "Promote in a systematic manner the appropriate use of alternative dispute resolution (and)... Provide education to the courts, other government agencies, and the public on the methods, advantages, and applications of alternative dispute resolution." A.C.A. §16-7-104. These activities include the making of grants to certain entities who apply for monetary grants to support ADR processes.