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Steering ADR
Into the Future—
*Discussions and Updates on
Alternative Dispute Resolution*

Alternative Methods of Dispute Resolution Committee



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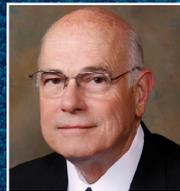
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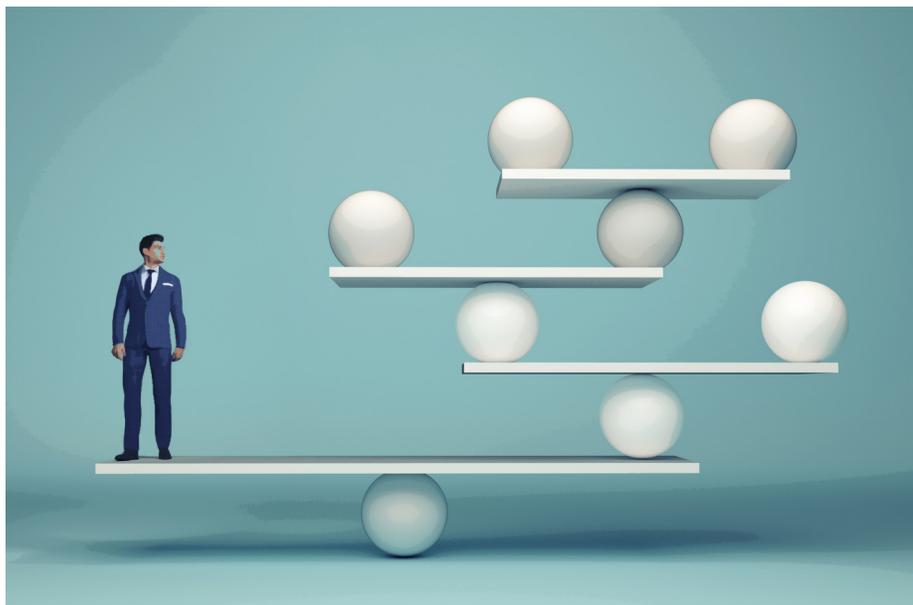
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Classical, Advocate, and Organizational: An Overview of Ombuds from Scandinavian Origins to the Governments, Corporations, and Universities of America

by Jon Lee



In 2017, the American Bar Association House of Delegates unanimously passed the following resolution:

“RESOLVED that the American Bar Association encourages greater use and development of ombuds programs...as an effective means of preventing, managing, and resolving individual and systemic conflicts and disputes.”

The term *ombud* (or *ombudsman*, *ombudsperson*) refers to an individual who offers conflict management resources as an alternative to formal channels, reports misconduct, or investigates allegations of malfeasance. The profession has evolved into three major distinctions: Classical, Advocate, and Organizational.

The Origins and Spread of Ombuds
King Charles XII of Sweden appointed the first ombud in 1713. The role was codified in the Swedish Constitution of 1809 under the term *Justitieombudsman*, or “the agent of justice” for the common man. The concept of ombuds spread throughout Europe with Finland establishing a similar role in 1919, Denmark in 1954, and Norway in 1963. Canada and the United

“The classical ombud has investigative authority and may issue subpoenas and public reports on investigative findings, and push for systemic change internally and publicly.”

Kingdom established ombuds in the 1960s, and the United States created its first ombud in 1966.

The first United States academic institution to create an ombuds program was Eastern Montana College in 1966. Hawaii was the first government to create an office in 1969, and the Nursing Home Ombudsman Project in 1972 was precursor to long-term care ombudsmen established by the Older Americans Act. By the end of the 1970s, an estimated 190 universities employed ombuds, and in 1987 roughly 200 corporations maintained ombuds offices. During the same time, ombuds programs opened in the U.S. Department of Health, Education & Welfare, the Smithsonian Institute, and the U.S. Secret Service.

Formal Definitions

The American Bar Association defines ombuds as those who:

“...receive complaints and questions from individuals concerning people within an entity or the functioning of an entity. They work for the resolution of particular issues and, where appropriate, make recommendations for the improvement of the general administration of the entities they serve.”

The United States Ombudsman Association describes the classical ombud as:

“...an independent, nonpartisan officer of the legislative branch. This enables the Ombudsman to be independent of the executive agencies under his or her jurisdiction and identifies the Ombudsman’s investigative role as an extension of the power of legislative oversight.”

The International Ombudsman Association describes an organizational ombud as:

“...a designated neutral who is appointed or employed by an organization to facilitate the informal resolution of concerns of employees, managers, students, and, sometimes, external clients of the organization.”

Classical Ombuds

The primary duty of a classical ombud is to receive complaints from government workers and the general public about the actions of government officials and public employees. The classical ombud has investigative authority and may issue subpoenas and public reports on investigative findings, and push for systemic change internally and publicly.

“At the conclusion of an investigation, the Ombudsman may make findings and recommendations for corrective action, as appropriate. However,

the Ombudsman has no power to enforce these recommendations or to compel an agency to take any corrective action, and instead, must rely on reasoned persuasion. Therefore, the findings, conclusions, and recommendations the Ombudsman makes must be fair and reasonable, firmly grounded in fact, administratively sound, and in accordance with law.”

As an example, the King County Ombuds Office in the state of Washington opened 665 cases and inquiries from residents and county employees between September 1, 2017 and February 28, 2018. Twenty-six of those cases were classified as investigations, and the “allegations that initiated these investigations related to potential improper administrative conduct, as well as violations of the county’s ethics and whistleblower codes, including allegations of conflicts of interest, retaliation, and improper governmental action.”

Organizational Ombuds

According to the International Ombudsman Association, organizational ombuds “facilitate fair and equitable resolutions of concerns held by members within an organization.” They do not advocate for any particular individual, group, or the organization itself, and they function informally as complements to formal processes. Unlike classical and advocate ombuds who have authority to investigate or provide assistance, the organizational ombud provides neutral and impartial services such as one-on-one visits, mediations, group facilitations, training, resource referrals, and trend reporting.

At the University of New Mexico, the Ombuds Services for Staff Program provided 288 one-on-one visits and 15 two-party mediations in 2017 supporting employees of the university with “building communication and collaboration to reduce the human and organizational costs of conflict.” The program identified Respect/Treatment, Communication, and Supervisory Effectiveness under the category of Evaluative Relationships as the top three conflict trends reported by visitors that responded to an anonymous feedback survey. When asked what they would have done without Ombuds Services, 28.4 percent of respondents indicated that they would have left UNM

and 29 percent would have changed positions within the University.

Advocate Ombuds

Advocate ombuds work on behalf of specific populations designated in their establishing charters. They have authority to represent the interests of the populations they serve, and they provide individual complaint assistance while simultaneously pursuing opportunities to affect systems change. Advocate ombuds have the authority to provide information, advice, and assistance to their constituents and initiate judicial or administrative actions on behalf of individuals.

One example is the United States Long-Term Care Ombuds Program. In 2015, the 53 State ombuds in the program provided information regarding long-term care to 398,057 individuals. The program resolved or partially resolved 74 percent of all complaints to the satisfaction of the complainants and worked to resolve 199,238 complaints

“Ombuds of all kinds give individuals the opportunity to speak openly and honestly about issues they identify and a place to find resources and assistance when navigating through those issues.”

initiated by residents, their families, and other concerned individuals. The three most frequent nursing facility complaints handled by ombuds were improper eviction or inadequate discharge/planning, unanswered requests for assistance, and lack of respect for residents/poor staff attitudes.

Conclusion: The Benefits of Ombuds Services

Ombuds of all kinds give individuals the opportunity to speak openly and honestly about issues they identify and a place to find resources and assistance when navigating through those issues. They can also provide “upward feedback” by communicating with leadership of organizations and governments regarding risks and trends.

The economic benefits of ombuds come in the form of preventative risk management,

expanded productivity, reduced turnover, and preserved management time. The organizational benefits include heightened accountability and increased ethical behaviors. Lastly, the humanitarian benefits are expanded fairness, improved and preserved working relationships, reduced incivility, and greater professional satisfaction. ■

Endnotes

¹ See Resolution 103 (2017 Resolution), ABA Resolutions with Reports to the House of Delegates, available at: https://www.americanbar.org/content/dam/aba/administrative/house_of_delegates/2017_hod_annual_electronic_report_book.authcheckdam.pdf (last accessed May 21, 2018).

² Janzen, Fred G. (1971). A Historical Study of the Campus Ombudsman in United States Higher Education (Doctoral Dissertation). Retrieved from <https://ttu-ir.tdl.org/ttu-ir/bitstream/handle/2346/15381/31295002233558.pdf> (last accessed May 21, 2018).

³ “The Organizational Ombudsman: Origins, Roles, and Operations: A Legal Guide,” Charles L. Howard, ABA Section of Dispute Resolution, 2010. pp. 6-9.

⁴ “What is an Organizational Ombudsman,” International Ombudsman Association, available at: <https://www.ombudsassociation.org/Resources/Frequently-Asked-Questions/What-is-an-Organizational-Ombudsman.aspx> (last accessed May 21, 2018).

⁵ Semi-Annual Report, King County Ombuds Office, available at <https://www.kingcounty.gov/~media/independent/ombuds/documents/2018/KCOmbudsSemi-AnnualReport-Sept2017-Feb2018.ashx?la=en> (last accessed June 30, 2018)

⁶ 2017 Annual Report, UNM Ombuds Services for Staff, available at <http://ombudsforstaff.unm.edu/common/images/documents/2017annualreport.pdf> (last accessed June 30, 2018)

⁷ See Long-Term Care Ombudsman Program, Administration for Community Living, available at <https://www.acl.gov/programs/protecting-rights-and-preventing-abuse/long-term-care-ombudsman-program> (last accessed June 30, 2018)

Jon Lee is the ombuds facilitator at the University of New Mexico Ombuds Services. He is board certified by the Certified Organizational Ombudsman Practitioners.

The Next Generation of Court Connected Mediation

By Beth Williams

Nationally, courts continue to develop and support court connected mediation programs because mediation programs reduce court caseloads, increase parties' satisfaction, and reduce costs. Typically, programs focus on the benefits of reaching the "win-win" solution by using BATNA focused (Best Alternative to a Negotiated Agreement) compromise. A recent commentator, however, suggests that litigants often do not want self-determination with the aid of a neutral. The "win-win" theory does not fit their end-goal in their dispute. Instead, litigants prefer validation of their perspective. Where ADR professionals see self-determination, litigants believe courts are forcing them to assume responsibility of potentially "bad" decision making. Mayer proposes that ADR professionals reconsider the traditional notion of complete neutrality in mediation and recognize that litigants want someone to take their side. It is considerably odd that litigants really want someone to make the decision for them. If they prevail, their cause has been validated. If they fail, they can simply blame it on the judge or the hearing officer.

Court-connected programs must keep pace with the way litigants communicate and the type of relief they are seeking. In the post-Freudian, texting, tweeting, social media, selfie-taking world, the new generation of litigants communicate only with those "friends" who validate every decision. Parties text, tweet and snapchat rather than engage in face-to-face communication. This matters because as mediators, we ask parties to engage in a process that takes time, emotional energy and meaningful communication skills, most importantly, listening. Moreover, in a majority of our domestic relations cases, the parties have been married or together for five years or less. We are no longer unravelling lengthy, fully comingled couples, but processing short term relationship break-up packets. This is not to say that traditional mediation is valueless. The 13th Judicial District Court's court-connected mediation



"In the post-Freudian, texting, tweeting, social media, selfie-taking world, the new generation of litigants communicate only with those "friends" who validate every decision."

program routinely sees litigants reach that so-called a-ha moment where parties can style a satisfactory agreement. It does mean that mediators need some different tools in their toolbox.

Mayer suggests that mediators can no longer remain neutral, but become more-than-neutral to meet parties' needs. California has adopted this approach in their court connected program for domestic relations. The mediator program takes the med-arb approach where if the parties cannot agree, the mediator trades in one hat for that of an arbitrator and decides for them. While this may meet parties' need to have a quick decision made by someone else, this approach flies in the face of New Mexico's basic philosophy about mediation as a vocation.

In adopting another approach, some European countries are using online dispute resolution in domestic relations

cases to reflect the increasing use of technology. The Netherlands uses a platform that involves a multi-step process: "...Intake, Negotiation and Review, with optional mediation and arbitration services..." The procedure uses online input by the parties, mediation at various parts in the process and a dialogue phase based on model solutions. It also involves a mandatory legal review. (Einhorn). Such a model incorporates digital interface with the art of mediation for those who are *pro se*.

It is a modern DIY approach to litigation that provides a minimum of physical meeting, online communication along with a divorce wizard, of sorts, that allows the parties to get help only when they need it.

Traditionalists will balk at this type of mediation, and it may not be appropriate for every type of case. However, even traditionalists recognize that technology has a place in mediation by virtue of calendaring appointments, emailing drafts, and so on.

Current literature on ODR makes clear that ODR and e-mediation differ. ODR was originally designed to handle commercial, online disputes. Later it became useful for small claims and other commercial disputes. While e-mediation is a *form* of ODR, it is primarily used in instances where the parties know each other well and emotions tend to run high. Aside from a better cultural fit, particularly among millennials, asynchronous e-mediation has the advantage of parties participating as they can. Litigants in rural areas do not have to travel as far. Parties can participate in their own time, gather information and report it later without having to reschedule another mediation session. In addition, ODR literature suggests that mediators have advantages by adding e-mediation to their tool-box as well. Mediators have time to reframe issues. The progress made during mediation is preserved prior to reducing it to writing. In addition, it prevents 'good talkers' from gaining the upper hand or dominant personalities from, in effect, running over the other party in mediation.

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Binding Mediation —

An ADR Process Whose Time Has Come

By Peter G. Merrill

Binding mediation is a simple alternative dispute resolution process that allows the parties the opportunity to attempt to settle their dispute first through the use of the standard mediation process with a mediator's guidance. The mediator conducts a standard mediation session with the parties. If the parties reach impasse and can't come to an agreement on how to settle their dispute, the mediator is then charged with rendering a decision on how the dispute will be settled. The mediator does not become an arbitrator. The mediator is not governed by the Federal Arbitration Act, state arbitration acts, state arbitration Codes of Civil Procedures, etc. The mediator is free to follow whatever process he/she chooses to be able to render a decision on how the dispute will be settled. The decision is then written as a binding mediation settlement agreement just as a normal mediation settlement agreement would be written if the parties had come to their own agreement on how to settle their dispute.

"Med-Arb", or "Mediation-Arbitration", is often confused with a relative newcomer to the ADR process spectrum—"binding mediation". Insurance companies and plaintiffs' lawyers in search of finality in smaller-damage personal injury cases are turning to binding mediation routinely to avoid the disadvantages of arbitral or court adjudication—namely the substantial delay and costs associated with discovery, trial preparation, trial and possibly appeal. Although arbitration is generally less expensive and should be handled more expeditiously than the litigation process, the arbitration process can become very costly and time consuming especially if one or more of the parties decides to pursue extensive discovery including interrogatories, exchanges of documents, depositions, the issuance of subpoenas and the like.

Prior to commencing the binding mediation session, the parties should have signed a binding mediation agreement or addendum including two very important points: (1) during the mediation process, the mediator,



during the private caucus sessions, may be provided with certain personal, private and confidential information by the parties which may be taken into consideration by the mediator in rendering a decision; and (2) if either or both of the parties fails or refuses to sign the binding mediation settlement agreement (written by the mediator), the binding mediation settlement agreement shall be binding on the parties as a result of the parties signing the binding mediation agreement or addendum prior to the binding mediation session. The decision of the Mediator is similar to an arbitration award, in that the parties have pre-agreed that the decision maker will render his/her "final and binding" decision that will not require the written signatures or agreement of the parties.

How many times have you conducted a mediation where the parties were close to an agreement but would not budge any further? With a binding mediation addendum, the parties could elect to have the mediator make the decision for them thus avoiding any further involvement with litigation or arbitration. It would save them the extra costs, time and the rigors and discomfort of proceeding through the litigation or arbitration process. Another advantage is flexibility. Many contracts have graduated dispute resolution mechanisms, and binding mediation can add a layer of options that can save time and money. For example, a graduated resolution process can have a requirement that any dispute under \$25,000 shall be settled through binding mediation, any dispute between \$25,000 and \$250,000 shall be settled through binding arbitration utilizing a single arbitrator, and any dispute

over \$250,000 shall be settled through binding arbitration utilizing a panel of three arbitrators.

There is no limit on the size of the case that can be settled through binding mediation. For example, in *Bowers v Raymond J. Lucia*, 12 C.D.O.S 5876, 206 Cal. App. 4th 724 (2012), the ultimate decision from a mediator was \$5,000,000 which was affirmed by the California Court of Appeals. It must be remembered that courts

follow and enforce contracts. If binding mediation is specified in the contract and both parties were fully aware of and agreed to utilize the process, courts should "enforce the provisions of a contract" including the ADR methodology agreed to and specified by the parties.

Although there are some disadvantages to utilizing binding mediation in place of binding arbitration to settle a dispute, in certain cases; it can be the simplest, least expensive and the most expeditious ADR process that the parties can select to settle a dispute.

Prior to selecting binding mediation, the parties should have a full understanding of the advantages, disadvantages and enforcement differences of binding mediation as opposed to binding arbitration. It is difficult to specify if something is an advantage or a disadvantage as some people may view the same issue differently. Understanding key differences will help the practitioner advise clients on the best choice. Binding mediation is a more unstructured process without specific rules to follow, and some clients would find this advantageous while others would prefer a more structured ADR process such as binding arbitration with its specific rules and procedures.

Binding Mediation is a Simplified ADR Process

Many arbitrations are conducted according to the Federal Arbitration Act and follow its rules and procedures, along with the possible use of state arbitration acts, uniform arbitration acts, rules of civil procedures,

international arbitration treaties, etc. An arbitrator may use a specified set of arbitration rules and procedures that is provided by an arbitration provider such as Construction Resolution Dispute Services, the American Arbitration Association, or the Judicial Arbitration and Mediation Services, etc. In utilizing binding mediation, there are generally few to no specific binding mediation rules and procedures. There is generally no formal discovery (including depositions, subpoenas, etc.), unlike arbitration. With binding mediation, therefore, there should be no need for pre-arbitration conference calls where the arbitrator is required to oversee the establishment and development of a discovery schedule or to handle other discovery disputes. The mediator may use rules and procedures of an ADR provider but generally the mediator may establish the binding mediation process appropriate for each case. Certainly, the parties can establish some rules and procedures with the mediator prior to commencing the binding mediation process, however, in the interest of keeping the process to be simple, expeditious and cost effective, the parties should keep the process as informal as possible.

Binding Mediation is Less Costly

The cost of the binding mediation process is less than that of arbitration, and as a result, the parties' legal costs should be greatly reduced. Preparation time for counsel is generally lower as compared with the costs of preparing for and participating in an arbitration proceeding. In binding mediation, there are generally very few, if any, pre-mediation submissions or exhibits sent to the mediator to review prior to the binding mediation session. It can be a good choice for lesser value disputes, while

reserving binding arbitration for greater monetary disputes.

Binding Mediation is Faster

Without a formal discovery process, binding mediation sessions can be promptly scheduled with the agreement of the parties, which can be within days of the dispute developing. In binding mediation, the mediator renders his or her decision at the conclusion of the binding mediation session and writes up the Mediation Settlement Agreement for the parties' signatures. Arbitration awards usually take longer as the arbitrator is allowed up to 30 days from the conclusion of the arbitration process to render the award.

Binding Mediation and Arbitration Enforcement

Should a party to an arbitration fail to comply with the terms of an arbitration award, the opposing party can request an enforcement order from the court. A binding mediation settlement agreement that is the result of the binding mediation process is a contract and is enforceable though a breach of contract action through the courts.

Other Considerations

The mediator usually does not have the same disclosure requirements as an arbitrator. The practitioner should keep in mind that in utilizing binding mediation, the ability to subpoena will likely not exist. Ex parte discussions with the parties are not allowed in the arbitration process; however, it is allowed in binding mediation as the mediator deems it appropriate. It is recommended that only those who are trained in both mediation and arbitration should conduct binding mediations and that mediators have immunity provisions in the Binding Mediation Agreements similar

to those in arbitration agreements. If you are serving as the mediator in a binding mediation, rendering a final and binding decision, you should specify in your Binding Mediation contract or addendum that the parties sign prior thereto, that the mediator shall have the same immunity from legal actions as is generally afforded to arbitrators.

Summary

Binding mediation has advantages over the arbitration process; however, it should only be specified in a contract when the parties are fully aware of the advantages and disadvantages of selecting binding mediation over arbitration to settle a dispute. Parties can specify the use of binding mediation for lesser value disputes and binding arbitration for disputes above that specified value. If litigation or arbitration is specified in a contract, after a dispute develops, the parties can mutually agree to switch their dispute resolution process to binding mediation, especially if the parties wish to utilize a less costly, more expeditious and simpler ADR process to settle their dispute. Parties specify arbitration to avoid the more costly and lengthy litigation process. Likewise, parties can specify binding mediation to avoid the more costly and lengthy arbitration process. ■

Endnotes

¹ Cooley, J., *Arbitration Advocacy* (2d Ed. 1997).

Peter G Merrill is the president and CEO of Construction Dispute Resolution Services, LLC. Merrill serves on the Steering Committee of the State Bar of New Mexico Alternative Dispute Resolution Committee and chairs the Arbitration Subcommittee. He also currently serves as the chairman of the American Bar Association Arbitration Rules Subcommittee.

The Next Generation of Court Connected Mediation *continued from page 5*

Both mediators and courts would benefit by allowing mediators to e-file documents that have been electronically signed by the parties. For all the benefits, mediators and courts would need to resolve the issue of assuring the identity of the participant during mediation. Additionally, confidentiality is compromised when information is shared electronically; and of course, textual communication lacks the benefit of non-verbal cues and other context obtained in face-to-face

communication. However, some of these issues may be resolved by using a mixed media approach that allows for on-line communication, video or interpersonal communication depending on the parties, their resources and their situation. ■

Endnotes

¹ *Beyond Neutrality: Confronting the Crisis in Conflict Resolution*, Mayer, Bernard S., 2004

² See Standards of Practice for mediators

³ Online Dispute Resolution, "The New Normal" <https://www.mediate.com/articles/einhornm4.cfm#bio>

⁴ Noam Ebner E-mediation

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ADR from an Insurance Coverage Perspective

By Philip Thompson

Alternative Dispute Resolution is a key set of tools in the insurance coverage lawyer's toolkit. This article will explore how ADR can help the coverage lawyer achieve the best, most inexpensive result for the client—which should be every lawyers goal in every case.

ADR refers to the tools available to parties to resolve legal disputes without a judge or jury deciding the factual and legal issues. It usually has the advantage of speed and—its cousin—reduced legal fees. Because the clear majority of legal disputes are resolved using one of the ADR tools, judges prefer that one or more of these tools be used as early as possible in the legal process, preferably before suit is filed. The ADR toolkit includes negotiation, mediation, neutral evaluation, arbitration, mock trials and summary jury trial, or some combination of the above.

Negotiation

Unique to insurance coverage, which primarily involves legal issues, negotiations begin at first contact between counsel and continue throughout the pendency of the dispute, usually over the legal meaning of the language of an insurance policy. The lawyers typically make their arguments in an exchange of letters about the meaning of disputed language with legal citation, which hopefully exposes the strengths and weaknesses of each sides case. To be effective, this exchange should be academic, not adversarial. Like most things in life, it makes no sense to start off fighting if the goal is to resolve the dispute at this early state. Hopefully a meeting of the minds can occur with an agreement or understanding to either resolve or defer the dispute, with the hope it never has to resolve.

Mediation

If negotiation does not resolve the coverage dispute, mediation may be required. This is the most commonly used ADR tool. There are three types of mediation: facilitative, evaluative and transformative. In facilitative mediation the mediator listens and asks questions of the parties about the dispute without judgment. The mediator is a guide in charge of the process; but the parties oversee the outcome. In evaluative mediation a retired judge or experienced lawyer explain the weaknesses in each party's coverage position and usually predict what a judge or jury is likely to decide. In this way, the

"The ADR toolkit includes negotiation, mediation, neutral evaluation, arbitration, mock trials and summary jury trial, or some combination of the above."

parties can evaluate the risks of litigation and decide if going forward is worth the expense. Transformative mediation is like facilitative mediation and involves recognition by each party of the other party's needs, interests, values and points of view. In this type of mediation, the parties decide both the process and the outcome.

While all three types of mediation are valuable, and parties and lawyers should understand all three, by far the most commonly used type of mediation in the insurance coverage context is evaluative. By far the most important ingredient in an insurance coverage mediation is the coverage expertise of the mediator. It is critical that the mediator understand and speak the language of coverage and has experience with the type of coverage at issue in the dispute. It is a waste of time and money to mediate unless the mediator has the required expertise. The opposite is true if the right mediator is used. While some

areas of the law involve common sense and are susceptible to resolution by an appeal to same, insurance coverage is governed by the policy language and the rules and case law that govern interpretation of that language. The lesson to be learned is to pick a mediator with care.

Neutral Evaluation

In the alternative, the parties can seek an opinion and guidance of an expert neutral on the merits of each party's position. This is usually done in writing, is less time consuming and less expensive than a mediation. It is also usually far less successful because the parties are not forced to appear and exchange thoughts on the disputed coverage issues exposing the flaws in their argument. In an insurance coverage context involving sophisticated parties, however, it can be a valuable tool in the early stages of a dispute to get a sense of what a trial court will do, especially if the legal issues are well developed and discreet.

Arbitration

Arbitration is like a bench trial with the arbitrator acting as the trial judge. Arbitrations can be faster and less cumbersome than a trial because it is more informal, and the rules of evidence are streamlined, and therefore less expensive. Its disadvantages are that usually there are no appeals and the decision is final. If arbitration is used in the coverage context, the selection of the arbitrator, like the selection of the mediator, is the most critical decision the parties will make. The arbitrator should be an expert on the type of insurance policy at issue in the dispute and the coverage issues related to that policy. Using arbitration involving small dollar coverage disputes makes sense. The loss of the right to appeal and loss of an experienced trial judge makes arbitration less attractive in large dollar coverage disputes.

Mock Jury Trial

This involves a neutral jury that produces a verdict that allows a party to evaluate its

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Mandatory Arbitration:

How the Fine Print Deprives Ordinary People of Their Day in Court

By Nicholas Mattison

This issue of the *New Mexico Lawyer* explores the diverse ways that people and businesses voluntarily use alternative dispute resolution to settle controversies without litigation. However useful ADR may be when it is truly voluntary, these methods of resolving disputes, primarily arbitration, are often used in a way that runs contrary to ADR's founding principle of empowering people to choose to work together creatively to resolve conflicts. Increasingly, business interests use mandatory, binding arbitration agreements to deprive people who have little or no bargaining power—and no true choice when it comes to agreeing to ADR—of their day in court.



Everyone reading this article has signed contracts that contain mandatory arbitration agreements. Nursing home admission agreements, credit card agreements, car loans, employment agreements and many other consumer contracts are contracts of adhesion, meaning they are offered on a “take it or leave it” basis in which the consumer has no option to negotiate any of the terms. The businesses that draft these contracts often include in the fine print, in language most non-lawyers would not understand, arbitration “agreements.” By agreeing to a contract containing such a provision, the consumer purportedly gives up the right to take disputes to court and instead is obligated to submit all disputes arising under the contract to arbitration.

Arbitration is a private proceeding, held outside of the court system, in which the arbitrator, or panel of arbitrators, has the authority to make a binding ruling on anything from the merits of a dispute to the issue of whether the arbitrator has the authority to arbitrate the dispute in question. Arbitrators often favor the businesses that created and sustain the arbitration industry

by continuously referring their disputes to arbitration. There is usually no meaningful right to appeal the decisions of an arbitrator. The proceedings are frequently kept secret altogether because of confidentiality clauses contained in the arbitration agreement. Procedural rules applicable to civil cases in court are truncated or eliminated, evidentiary rules may not apply, and the right to discovery is limited or eliminated.

There is no question that arbitration benefits businesses as a cost-saving tool by shielding the business from being held responsible for wrongdoing. While arbitration has benefits from the perspective of big businesses, these same aspects of arbitration place the consumer at a severe disadvantage. For example, in most cases, a consumer may obtain very little or none of the evidence needed for successful prosecution of a claim without the discovery to which they would be entitled if they litigated the same dispute in court. Unlike in cases that go to court, consumers bound to arbitration usually have no way to combine their resources and knowledge with similarly situated consumers to increase their leverage against

the business that harmed them. Moreover, arbitration often involves prohibitive fees that discourage many people from even attempting to seek remedies for their injuries.

Arbitration, except in those cases where it is truly a voluntary proceeding between litigants who prefer it to court proceedings, causes unsuspecting people to give up their constitutional right of access to the courts. Businesses include arbitration agreements in their contracts because they know that avoiding litigation in court reduces the cost of any potential wrongdoing, but in so doing, it eliminates or reduces the business's motivation to do right by the consumer. The result is more

defrauded consumers, more senior citizens injured in nursing homes, and more victims of workplace harassment.

Big businesses have also used arbitration agreements to impose a private ban on class action lawsuits. Nearly all arbitration agreements state that disputes can only be decided on an individual basis. This effectively immunizes many wrongdoers, such as banks, from liability for fraud committed against thousands of individuals with smaller claims in which the potential damages are eclipsed by the cost of arbitration. Without a class action, the incentive to hold an offending business accountable for wrongdoing may be eliminated.

Industry groups insist that arbitration agreements benefit consumers. The U.S. Chamber of Commerce, for one, argues that the existence of mandatory arbitration ensures “that consumers can continue settling disputes without incurring staggering court expenses and wading through the overburdened court system.” The premise of the Chamber's argument is that

mandatory arbitration increases consumer choice, but the opposite is true. If people have the option of going to court or voluntarily entering into arbitration or any other ADR arrangement once a dispute arises, then consumer choice is maximized. When people unwittingly give up their day in court before a dispute arises, consumer choice is all but nonexistent.

Many of the same businesses that favor mandatory arbitration for consumers actually recognize the drawbacks of mandatory arbitration, as they often strenuously oppose it for themselves. For example, car dealers frequently include arbitration agreements in the fine print of their contracts with consumers, but these same car dealers successfully lobbied Congress to prevent auto manufacturers from forcing them into arbitration unless “after such controversy arises all parties to such controversy consent in writing to use arbitration.”

Supporters of mandatory arbitration attempt to sway public opinion by trading in negative stereotypes of lawyers. In an editorial, the Albuquerque Journal claimed that if mandatory arbitration of class actions were banned, “the real beneficiaries would be trial lawyers.” This tired attack on the legal profession is both untrue and irrelevant. Class action lawsuits often involve substantial payments or other benefits to class members. In cases involving smaller payments for smaller injuries, the class action lawsuit is a crucial

tool to prevent businesses from reaping windfall profits by stealing a little bit from a lot of people.

The United States Supreme Court has facilitated the proliferation of arbitration with its increasingly broad readings of the Federal Arbitration Act. Originally enacted in 1925 and geared toward commercial disputes, the FAA has been reinvented over the past 20 years to keep people out of court. Continuing this pattern, on May 21, 2018, the Supreme Court ruled that employers may require workers to waive their rights to participate in class action lawsuits as a condition of employment. The dissent warned that this “egregiously wrong” decision will result in “the underenforcement of federal and state statutes designed to advance the well-being of vulnerable workers.”

The Consumer Financial Protection Bureau commissioned a study concluding that arbitration agreements unfairly limit justice for consumers. Among other things, the CFPB found that arbitration agreements are highly common in consumer financial products, but that consumers are rarely aware of them. The CFPB concluded that arbitration agreements limited relief for consumers.

Based on its findings, the CFPB issued a rule that would have prevented financial services companies from banning class actions in arbitration agreements. In the fall of 2017, Congress and President

Trump prevented the implementation of this rule.

Despite these setbacks, consumers and their advocates are not powerless to fight mandatory arbitration. The Supreme Court’s jurisprudence is based on the FAA, which can be repealed or amended by Congress. Those who believe ADR should be voluntary and empowering should continue to remind politicians that the right to a day in court is a founding principle of America’s democracy. ■

Endnotes

¹ <https://www.uschamber.com/series/your-corner/protecting-consumers-right-arbitration>

² 15 U.S.C. §1226(a)(2).

³ 9 U.S.C. §1 *et seq.*

⁴ *Epic Systems Corp. v. Lewis*, No. 16-285 (U.S., filed May 21, 2018).

⁵ https://files.consumerfinance.gov/f/201503_cfpb_arbitration-study-report-to-congress-2015.pdf

⁶ <https://www.federalregister.gov/documents/2017/07/19/2017-14225/arbitration-agreements>

⁷ <https://www.federalregister.gov/documents/2017/11/22/2017-25324/arbitration-agreements>

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ADR from an Insurance Coverage Perspective *continued from page 8*

chances of success in a “real” jury trial. In the insurance coverage context, a mock jury trial makes little sense when most of the issues are legal to be decided by a court, not a jury. However, in a high exposure “bad faith” case against an insurer that involves coverage issues it makes sense for the insurer to consider this option.

Summary Jury Trial

This is another form of a mock trial with a neutral jury that produces a verdict, but it is ordered by a court rather than being stipulated to by the parties. After hearing the verdict, the court usually requires parties to

attempt settling their case before litigating in court. In the insurance coverage context, a summary jury trial makes little sense when most of the issues are legal to be decided by a court.

Conclusion

Because most civil cases are resolved without trial using ADR tools, a thorough understanding of alternative dispute resolution is far more important to practicing civil litigation lawyers and their clients than an understanding of trials. Civil litigators rarely try cases. Coverage lawyers try even fewer because coverage cases usually

involve fewer or no questions of fact, and therefore are susceptible to being resolved by motion practice. It is therefore incumbent upon every practicing civil litigator and insurance coverage lawyer to have a thorough understanding of the various ADR tools available and become an expert at using those tools, which saves time and money. ■

Philip H. Thompson has almost 35 years’ experience in litigation, insurance coverage, and subrogation matters, including numerous trials, arbitrations, mediations and appeals. He practices with Pegue & Thompson in Santa Fe.

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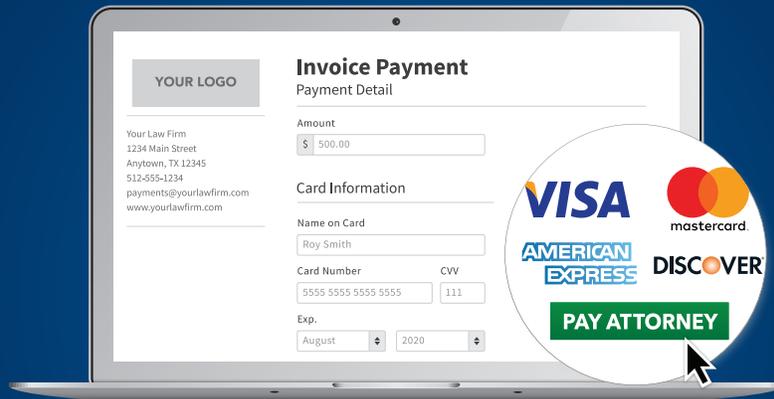
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