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Creating an Environment that Encourages Resolution

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Alternative dispute resolution (ADR) means different things to different people, but the two principal areas most people think of in terms of ADR, and those addressed in this chapter, are arbitration and mediation—two very different and distinct processes.

Arbitration is essentially a private trial where the disputing parties agree that an arbitrator will render a decision to end their dispute—and the parties must abide by that decision, for better or worse. Mediation is essentially a negotiation process where a neutral party is hired to help facilitate that negotiation—and the potential exists that nothing will be accomplished unless the parties actually reach an agreement. Simply put, while there are different kinds of arbitration and different kinds of mediation, the big distinction between these forms of ADR is that arbitrations are trials and mediations are negotiations.

ADR is a label that is used to define dispute resolution procedures outside the judicial system. Most parties encounter ADR by one of three routes:

1. They have a contract that says they must try to resolve their disputes using some type of ADR process.
2. Once a dispute arises, one party or the other suggests ADR.
3. A court requires the parties in dispute to engage in some kind of mediation, early evaluation, or settlement conference.

One of the keys to a successful ADR process is a party’s ability to control the process, the venue, or the location of any ADR proceeding. Indeed, one key to success in ADR proceedings is to negotiate and select an ADR process prior to any dispute. Once a dispute arises, the parties are posturing for position and there is a significant risk that the opportunity to maintain the confidentiality and privacy ADR provides will be lost.

**Benefits of ADR**

The biggest benefit of ADR, in most cases, is privacy and confidentiality—and that, in many circumstances, will outweigh any risks or expenses. Mediation can also lead to resolution, saving a great deal of attorneys’ fees if the parties can reach a resolution early in a case rather than attempting to settle on the courthouse steps or during the middle of a trial.
Another major benefit of ADR is adaptability. Mediators are very adaptable. They want to work with the parties and the lawyers to achieve a resolution without going through the expense and time of a trial. Thus, they are often very willing to meet in unusual locations or conduct meetings over the telephone, by fax, or via e-mail—whatever it takes to get the parties involved and invested in the process of dispute resolution.

Arbitration also provides more flexibility than court proceedings. In a court proceeding, the parties have to follow the rules of the court, and a court order may be required to change any of the scheduled proceedings. The court may not be inclined to agree to any of the party’s requests because of time considerations. On the other hand, in arbitration, most arbitrators require an agreement of the parties as to the scope of discovery, how motions are filed and handled, and whether the hearings will be conducted by phone or in person. The arbitrators are usually willing to adapt and make scheduling changes to convenience the parties and witnesses.

**Arbitration**

Arbitrations can be divided into several subgroups. For example, most common and, usually, the most efficient is one arbitrator acting as the exclusive decision-maker. Frequently, however, contracts will provide for a three-member panel. Requiring a three-member panel may actually deter formal “legal” disputes, as the costs of retaining three neutrals is much higher than one. Even less frequent in today’s business world are “party panel” arbitrations, where each party to the dispute appoints one member to the panel and each of those members agrees to a third neutral party. In party panel arbitrations, the party can generally rely on the member it selects to see things its way and even to advocate on its behalf.

The format of the arbitration can be manipulated to reduce the risk to one or both parties. For example, the parties may agree to a floor and/or ceiling on any amount the plaintiff will win no matter what the outcome. In other words, if one of the parties is demanding $10 million to resolve the case, the parties might agree to have the case arbitrated in private with a floor and a ceiling. The parties might decide the damages will be limited to $5.5 million, but that the plaintiff is guaranteed $500,000, even if the defendant prevails in its entirety. This type of agreement limits risk to both
sides, eliminates the potential of a pie-in-the-sky verdict against the defendants, and ensures that the plaintiff will not walk away empty-handed.

By contrast, “baseball arbitration” is almost the opposite. In baseball arbitration, the parties agree in advance that the arbitrator does not have discretion to determine the award. The arbitrator must decide which side is “right” and then award the amount claimed by that party. It is an all-or-nothing type of proposition where an arbitrator cannot “split the baby.”

**Unique Aspects of Arbitration**

The biggest difference between arbitration and other forms of litigation is that arbitrators have much more leeway in adjudicating a case than a sitting judge. Therefore, the law becomes less important than the arbitrator’s view of the facts, the equities, and the veracity of the witnesses (i.e., are they being truthful or not?). Therefore, it is especially important to be able to present not only good facts, but good witnesses, during the presentation of evidence in arbitration. Arbitrators do not expect polished lay witnesses. Indeed, an overly polished/practiced witness is likely to give an impression of being untruthful and rehearsed. However, arbitrators greatly value expert witnesses’ ability to explain complicated notions to them with demonstrable evidence, PowerPoint presentations, and charts.

Another major distinction from court proceedings is a party’s ability or inability to obtain summary judgment. While a defendant can win a summary judgment motion in the arbitration context, it has been my experience that arbitrators are much less willing to grant such judgments than courts are. Courts are much more willing to award summary adjudication based on deposition testimony and transcripts, compared to the arbitration context where arbitrators are more likely to require an evidentiary hearing so they can consider all of the relevant evidence a plaintiff might wish to put on the record. The reason behind this rationale is probably linked to the scope of appeal from the decision. If a court errs, an appellate process is in place to review and correct any error. To the contrary, generally, an arbitrator’s decision will be upheld by a court unless an arbitrator fails to consider all of the relevant evidence. Thus, arbitrators are less likely to dispose of cases by early summary judgment motion and if a party asserts that additional evidence must be discerned at the evidentiary hearing.
California provides special protection for employees before the courts will enforce mandatory arbitration agreements between an employer and its employees. California requires that employees are allowed to have the scope of discovery that would ordinarily accompany a court trial and the full range of remedies that might be available in a court. In addition, the employer is responsible for paying all of the arbitrators’ fees and costs that would exceed a trial court’s filing fee. As those costs typically exceed the costs associated with federal or state court, it is very important to consider the benefits of privacy before an employer requires arbitration of all disputes. The agreement must also be mutual. In other words, the employer must agree to arbitrate all disputes and will not have the leeway to resort to the courts. Finally, any agreement must provide for the arbitrator to issue a written decision with the essential findings and conclusions.

**Successful Strategies**

The winning strategy for arbitration is just like going to trial: preparation and more preparation. This part of the chapter addresses three key areas of preparation: (1) no surprises, (2) organization, and (3) developing the arbitrator’s trust.

*No Surprises*

In arbitration, a lawyer does not want to encounter surprises. Therefore, it is very important for the client to be forthcoming with their lawyer, and for the discovery process to reveal as much information as possible. If there are “bad facts” about my clients, I want to be the one who presents that information to the arbitrator and simultaneously explain why those facts are not important. I want the arbitrator to know about any problem areas or frailties in my case and how to deal with them. By revealing bad facts in this manner, it diffuses their impact and they become part of the framework of the case instead of presenting the opposition with an “ah ha” Perry Mason moment. Essentially, it is vital to not only present any bad facts up front, but also to show why they are not relevant to the issue and why your client still prevails.

One time in a complicated arbitration involving multiple contracts and multiple claims of breach of contract, during discovery a disgruntled former
employee told the other side he had overheard two salespeople admitting to intentionally reporting inaccurate credit information. Instead of allowing the other side to create an atmosphere of runaway-fraud, my client testified to the affirmative steps it took to ensure that all information was accurate and to its fastidious investigations of the allegations and the complete lack of corroboration. Not only was the “adverse” testimony defeated, but the arbitrator was impressed with the safeguards my client had in place, a fact that may not have surfaced without the bad fact that needed to be quelled.

Organization

Most trials are presented in a tightly organized sequence of witnesses and evidence, as the courtroom time provided is usually sequential until the trial is completed. Arbitrations, on the other hand, are usually scheduled in blocks of time that fit the attorneys’, arbitrators’, and witnesses’ schedules. So, a “two-week” arbitration might be conducted over two or more months and “closing arguments” will most likely follow several months later after closing briefs are filed. Therefore, it is incredibly important that a lawyer maintains organization over the facts, witnesses, claims, and arguments so evidence and materials are not left outside of the arbitration. The effective lawyer will be able to tell the arbitrator what to expect during the arbitration, will put that evidence on, and will conclude by telling the arbitrator that what was promised was presented.

Developing the Arbitrator’s Trust

By preventing surprises, admitting errors, and following a cohesive organizational structure, a lawyer will go a long way toward developing an arbitrator’s trust and confidence. In addition, it is equally important to utilize every opportunity to talk to or brief the arbitrator and develop as much of a relationship as you possibly can. Understanding the arbitrator’s personality, personal likes and dislikes, and style will go a long way to tweaking presentations in a manner where the arbitrator will be receptive to your arguments, especially as most of the arbitration associations do not allow ex parte communications with arbitrators. An ex parte contact is a discussion or letter with the arbitrator that is secret or kept from the other side of the dispute. Therefore, I always make sure I have telephone conferences with the arbitrator and that I can accommodate their schedule
or other requests. This helps the arbitrator understand that I am being reasonable and diligent, as well as zealous, on behalf of my client.

**When to Use Arbitration**

I highly recommend arbitration in any situation where the parties do not want their dispute or any future disputes publicized. Those cases and contractual relationships should be governed by a definitive arbitration clause so any disagreements that arise are kept private. Employers frequently include arbitration in their employment contracts to prevent employment disputes from becoming public knowledge. Keeping disputes private may prevent additional claims from being filed, especially claims centering on a supervisor’s or co-worker’s alleged inappropriate behavior. Likewise, trade secret issues may be better protected from the public eye by remaining cloaked in an arbitration proceeding.

Class actions are increasingly arbitrated these days because courts are enforcing arbitration agreements that include class disputes. Arbitrators are especially useful in this context, because they will reach a decision without the inflamed passion of many juries.

Other cases that are conducive to arbitration are those that are reliant on highly technical expert testimony, such as cases in the complex commercial or intellectual property area. Indeed, any case involving highly complicated accounting, revenue, or profit sharing formulas is well suited for arbitration. Juries have a tendency to get lost when dealing with highly technical expert testimony. Arbitrators, on the other hand, appreciate expert testimony because experts are able to hone in on key issues, summarize them succinctly, and prepare thorough presentations and reports arbitrators can utilize to aid in their decision-making.

**Risks of Arbitration**

The greatest risk in arbitration is that by agreeing to the process a party loses many rights to appeal. Therefore, if a client has an issue that relies on the application of a specific law, that client might be better positioned to be in court, because after an adverse judgment, the client will have retained full rights and remedies to go to a court of appeals or supreme court if
necessary. In arbitration, however, once an arbitrator makes a decision, the grounds for review are quite limited. Courts will only review whether the arbitrator failed to disclose previous relationships with either parties, some type of fraud by the arbitrator, if the arbitrator failed to consider all of the relevant and material evidence, or if the arbitration exceeded the scope of the parties’ arbitration agreement. As a practical matter, courts rarely reverse an arbitrator’s award. Even if the arbitrator does not follow established laws, the courts will not change that interpretation or misinterpretation of the law. The law of arbitration provides that the parties have agreed to live with the arbitrator’s interpretation or misinterpretation of the law and how it applies to the dispute.

Moreover, while traditionally arbitration is viewed as “efficient” and “expeditious,” there is a great risk that an arbitration might take longer and be more expensive than a judicial proceeding. As discussed above, because the arbitrator must consider all relevant and material evidence, he or she may not be willing to grant summary judgment. Further, as an evidentiary hearing may be divided up over many months, key witnesses may become unavailable or uncooperative.

Steps in the Arbitration Process

The first step in an arbitration process is usually that one party makes a demand for arbitration of a dispute based on a previous agreement that requires arbitration. Most agreements mandate that the parties agree to arbitrate utilizing the services of Judicial Arbitration and Mediation Services, the American Arbitration Association, or other widely used arbitration services.

Depending upon the rules of those services, the next steps are typically that (1) the responding party files an informal response denying the claim and, if appropriate, making its own claim; (2) a conference is usually conducted with the administrative agency to discuss the direction of the proceeding, including the type of expertise or experience desirable in an arbitrator, where the arbitration will take place, and any other procedures that need to be addressed at the outset; and (3) selection of the arbitrator.
Typically, the arbitration association provides lists of potential arbitrators to each party. Sometimes the parties can agree to a person to arbitrate the claim, and sometimes they cannot. If they cannot, they frequently utilize what is called a “strike list.” They will strike out any arbitrators they are not willing to live with, and the administrator will then appoint an arbitrator from the remaining pool. Alternatively, each party will rank-order the arbitrators and the agency will select the highest match. Finally, some arbitration association rules provide the association with complete discretion to appoint an arbitrator, subject to that arbitrator being stricken for cause by the parties.

Once appointed, the arbitrator usually schedules a conference call or meeting with the lawyers to discuss how that arbitrator likes to handle cases. Many dates may be set at that very preliminary meeting, including the initial arbitration hearing date and a timeline for discovery and briefing. Most of these decisions are agreed to at that preliminary case management conference with the arbitrator. Therefore, it is very important that a lawyer at that conference is prepared for all of that detail. The arbitrators expect the lawyers to be familiar with their client’s facts, the scope of the dispute, and the key witnesses’ schedules early on. I highly recommend that counsel request that the arbitrator provide an agenda in advance of the call so they are prepared for all subjects that might be raised during the call. This practice will greatly contribute to counsel’s client preparation, organization, and will gain the arbitrator’s respect.

Next, the discovery process, if any, is conducted. Either the parties have previously agreed to engage in discovery or they will agree to some discovery to prepare the case for “trial.” Frequently, an arbitrator will order the parties to exchange exhibits and stipulate to facts, which leads to an agreement about conduct of discovery. However, absent agreement of the parties or order of the arbitrator, a party is not required to respond to written discovery. When agreed or allowed, document requests, interrogatories, requests for admission, and even depositions may be taken during this time. Following any kind of discovery that is agreed to or allowed, motions may be brought to the arbitrator to allow further discovery or to close down the process. At this time, a motion might be made to have the case adjudicated based on law and evidence submitted under declaration, much like a summary
judgment motion. However, as noted above, many arbitrators are more reluctant than courts to grant such motions.

**Trial**

The initial schedule that is developed usually anticipates each party presenting a trial brief prior to any evidentiary hearing. Depending upon the parties’ agreement, a court reporter may transcribe the trial proceedings. Parties are usually given the option to give or waive opening arguments. A trial will occur where witness testimony, documents, and other evidence is presented to the arbitrator. The trial itself will take a few days to a few weeks, depending on witnesses or evidence to be submitted.

Following the formal presentation of evidence, the parties usually have an opportunity to provide closing briefs to the arbitrator, which are usually followed by closing arguments and sometimes another round of briefing. The closing briefs are very important to bring together important testimony, facts, and arguments that may be months or even years old so the arbitrator has what he or she needs to render an award.

An arbitrator may decide to conduct an evidentiary hearing on one issue, take briefing on that issue, and then turn to a second phase or allow discovery on different aspects of the case. Indeed, if the first phase does not completely resolve matters, the arbitrator will hold a hearing on the second issue. This arbitration process is very fluid and adaptable to the complexity of the matter.

Ultimately, the arbitrator makes a final decision. If it is adverse to one party, that party has a short period of time to go to court to ask to have the decision thrown out, but the grounds to do so are much more limited than a legal appeal in the court system. Similarly, if the other side is not willing to pay the arbitrator’s award, the prevailing party will need to go to court to get the order enforced.

**Mediation**

Mediations have differing styles, but they all generally follow a similar format. For example, there are mediators who prefer to have a more formal
presentation where the parties actually confront each other with their respective positions, contrasted with mediators who engage solely in shuttle diplomacy, keeping all parties separate and shuttling back and forth in an attempt to resolve the disputes.

A different type of mediation is called an early evaluation conference. Certain courts favor or require these conferences. The early evaluation conference ensures that all of the parties are aware of the claims, their monetary value (or a range of monetary values), and a neutral party’s view of the monetary cost and time needed to achieve resolution. Court’s believe an early evaluation conference that does not resolve all of the issues may help streamline some of the issues and create other efficiencies as the case moves forward. Each party submits a short brief stating their position regarding the major issues in the case. The conference may or may not involve an in-person presentation. A neutral party then provides feedback about the neutral’s perception of the value of the case, how much it will cost each side to resolve it, and some of the risks involved. While the early evaluation conference rarely resolves a dispute, they have some success in providing agreement on some issues, such as a discovery plan, to achieve a more efficient process than lawyers lobbing demands and deposition notices at each other.

**Risks of Mediation**

It must be pointed out to the client that mediation involves some, but not overwhelming, risk. The biggest risk of mediation is the costs that are involved. The client is paying the lawyer to prepare for and be at the mediation, and they are paying a share of the neutral mediator's fees. Fortunately, mediation usually lasts a day or so, depending on the issues and the number of parties involved in the case. Thus, there is the risk of paying for mediation without obtaining a resolution if both parties cannot come to an agreement. In addition, there is also a risk of revealing information a party may not otherwise want revealed. While the mediator is obligated to keep anything told to them confidential, there is some risk involved in revealing something early in a case or before a lawsuit is filed that a party would prefer not be revealed unless required by discovery. For example, an employer-defendant in an employment harassment case may know the alleged harasser has been the subject of other complaints. Revealing that
information to the mediator is important to getting the case resolved. However, if the plaintiff learns that information, they may become more entrenched in their position, making resolution less likely.

**Steps in the Mediation Process**

The mediation process has its own procedures. First, the parties must elect to attempt mediation and select a mediator. This process or the relevant rules may be mandated by a pre-existing agreement to attempt mediation before litigation, or the parties may agree that a neutral could help lead to resolution. Typically, shortly after a mediator is selected by the parties, he or she will hold a conference call to set a hearing date that works for everyone involved. Independent or *ex parte* calls or meetings with the mediator to talk about resolution can be very helpful.

Not only is it very important for the parties and their lawyers to be at the mediation session, but any decision-makers such as insurance company representatives who might be involved should be there as well. Therefore, any mediation date must work for all the key decision-makers.

About four to seven days before the mediation, each party provides the mediator with a brief identifying the key issues of the case, the money involved, and any potential areas for settlement. Mediators typically encourage the parties to exchange as much information before the mediation as possible. However, each party maintains the right to provide any information to the mediator in a confidential manner.

After the briefs are submitted to the mediator, mediation will be conducted at an office or in a courthouse. A room will often be provided for each of the parties so they can caucus and meet independently and with the mediator. It is also helpful to have a large conference room that can be used by the mediator to assemble all the parties, if only to give an overview of the case, describe to the parties how the mediator sees the day going forward, or come together to sign a final agreement.

Sometimes it is appropriate during mediation to have the parties “testify” or tell their story and what kind of resolution they are seeking. That is typically the case in an employment situation, because in a more complex business
matter both sides generally have a good understanding of their respective positions. As it is not always helpful to engage in emotional venting (in fact, it can be counterproductive), this has to be carefully handled.

If a resolution on some or all issues can be reached, it is very important that any resolution or partial resolution is written and signed by the parties at that mediation. People will often walk away from mediation thinking they settled a case, but unless an agreement is written down and signed, such agreements frequently fall apart and result in even more litigation.

**Successful Mediation Strategies**

Just like arbitrations, the key to a successful mediation is preparation and more preparation. I will discuss three key strategic areas: (1) preparing your case, (2) preparing your client, and (3) preparing your mediator.

*Preparing Your Case*

Well in advance of any mediation, your lawyer needs to talk to the mediator, develop a rapport with him or her, and explain your view of potential paths to resolution, including potential obstacles such as opposing counsel’s or the opposing party’s personality. Unlike trials and arbitrations, there is no constraint against making *ex parte* or one-sided contact with the mediator. In fact, most mediators prefer to have an opportunity to discuss the case with the lawyers “in confidence” so they can start getting a feel for pressure points that will help settle the dispute. Prior to the mediation, it is your lawyer’s job to fully understand how the mediator typically conducts a mediation, whether that will be conducive to your situation, and, if not, to arrange to have the mediation conducted in a helpful manner.

*Preparing Your Client*

Most clients do not understand that mediation is simply a type of negotiation. Because a mediator, frequently a retired judge, is involved, many clients expect to or want to “win” the mediation. To successfully resolve a case through mediation, a lawyer must make their client understand that success is defined by (1) certainty or risk avoidance, (2) diminished business interruption, and (3) monetary value. The most
frequent “winner” of unsuccessful mediation is the lawyers who will earn fees litigating the dispute. Indeed, resolution also saves time and reduces workplace distractions. Clients must understand those benefits.

In addition, a lawyer must prepare their client for the actual mediation session. The client must be prepared to spend a full day (or more) in mediation, and much of that time will be in a room with their lawyer while the mediator meets with the other party. You must identify a strategic approach to the mediation sessions when others are present. Will the lawyer do most of the talking? Will the client?

Finally, a client must come to a mediation with an open mindset. At the mediation, you and the client may learn new information that was not previously revealed or available. You must be able, and the client must be prepared, to evaluate such news and not discuss it in front of the mediator until you have time to discuss it privately and how it might affect your position.

Preparing Your Mediator

The client needs to appear sympathetic, truthful, and convincing so when the mediator discusses their position with the party on the other side of the case, the mediator will be able to convey that your client will make a highly credible witness if the dispute goes to trial or arbitration. A lawyer who goes into mediation with more facts and information and who has worked with their client and the mediator, will have greater likelihood of success.

It is also important to prepare a concise briefing for the mediator that focuses on three key issues: (1) the facts of the case, (2) equities involved, and (3) the money that is involved in the dispute. To do this, a lawyer must gather all of the facts that are available and quickly master them. It is not enough to listen to a client’s position, but the lawyer must critically review the documents that are gathered and examine the client, almost as if subjecting them to a cross-examination. In addition, the lawyer should learn as much as possible about the other party, its position in the dispute, its financial wherewithal, the experience (or lack thereof) of its lawyers, and the industry that is involved. Counsel must understand the law in the subject area, as the value of a case will vary greatly depending on whether summary
judgment is more or less likely. Finally, it is frequently helpful, especially where complex accounting issues are at stake, to engage an expert to prepare a report summarizing or analyzing the claim and providing that expert’s view of the potential damages. Not only will such an effort provide credibility to your client’s position, but it will demonstrate to the mediator that your client is invested in seeing the case through.

In my experience, it is not helpful to tell the mediator your client will not have to pay a penny because the law is on your side and the other side’s claims are useless. It is much more effective to tell the mediator that this is a business issue involving a certain range of potential damages, tell them what you understand the other side’s claim to be, and that you are willing to make some accommodation to avoid litigation and obtain certainty.

**When to Use Mediation**

Clients often ask me, “When should we attempt mediation to resolve a case?” There are three principle phases of a dispute best suited to attempt to utilize mediation for resolution:

1. Prior to formal litigation
2. After initial discovery and depositions
3. Immediately before trial

Many times, a business dispute arises but neither party wants the publicity or expense of a court proceeding. In those cases, the parties frequently want a neutral party to evaluate the situation and provide guidance to help them resolve their issues. Moreover, many contracts require that the parties attempt to mediate any disputes before resorting to full-blown litigation.

A second time when mediation creates efficiencies in settling disputes is after a case has been filed in court and some discovery, and usually initial party depositions, has been taken. At this stage, both sides should have some understanding as to where the other party is going in the case, what kind of evidence they have, and what some witnesses will say, and a better idea about the additional expenses and risks of litigation. Compiling and summarizing that information for a mediator is a valuable exercise in itself. Then, utilizing a mediator to discuss the importance of those facts and their
intersection with the law, a mediator can analyze the case in terms of how they think it is likely to resolve and discuss resolution with the parties.

Finally, after all discovery is complete, any motions have been filed, but the additional costs and uncertainties of a trial lie ahead, a mediator can be very helpful to resolve disputes between parties that have been adversarial for a long time.

In addition, certain types of cases are well suited for mediation. In the employment area, for example, harassment and discrimination cases have a good settlement success rate in mediation. For example, the plaintiff may have been wronged or harmed, but they may learn in mediation that the upper levels of management may not have known what was going on. The harassment victim needs an opportunity to vent, but they do not necessarily want to relive their experiences by going through a trial. The employer in that situation must be willing to make a reasonable settlement and must value the confidentiality it can obtain. A mediator is very helpful to helping the parties identify what is reasonable.

Likewise, a business dispute that is strictly financial in nature is also conducive to mediation. The parties may be involved in a contract or an accounting dispute. They are not emotionally invested in the case. They just want it resolved. They understand each other’s positions and they just want someone to help them bridge the gap. In both the business dispute and the employment situation, mediators also bring a fresh set of eyes, ears, and experience. Ideally, the mediator will be able to identify a creative solution the parties cannot identify. However, ultimately a successful mediation relies upon the parties agreeing to a resolution.

In the mediation context, however, the Ninth Circuit courts in California offer a very useful service. They provide very highly trained professional mediators for cases on appeal. Therefore, if I am appealing a district court’s decision in the Ninth Circuit, I will encourage my clients to make use of these mediators to get their problems resolved. Frequently, when one side wins at trial or wins a summary judgment motion at the trial level, they become very invested in their position because they have spent a lot of money and time on the case. But if the other party appeals that decision, they are faced with uncertainty. In other words, there is no certainty that
the court is not going to overturn a previous decision. I have found that the mediators in the Ninth Circuit mediators’ office are highly resourceful in getting cases settled and resolved, even after an adverse outcome for one of the parties at the district court level.

The Role of the Attorney in ADR

The attorney plays an important role in the ADR process. During contract negotiations, counsel should always discuss with clients how the clients want to resolve disputes that may arise down the road. Does the client wish to utilize the publicly funded courts with all rights of appeal, or do they want to require mediation or arbitration in their business or employment contracts?

Once a dispute has arisen, it is important to provide the client with guidance and a roadmap as to their alternatives. For example, if a client is required to arbitrate, they should not file a lawsuit, because that would breach their arbitration agreement and a court order will send them back to arbitration. Counsel should provide the client with guidance during every step of the way, strategizing at the outset as to how to win that arbitration.

It is very important that counsel extracts all the relevant factual information from the client. Once counsel knows all the pertinent information, the good and the bad, they are able to strategize together to efficiently conduct what is essential to the litigation.

Experienced counsel brings to the table personal knowledge, relationships, and experiences with various neutral decision-makers and arbitrators. Unlike judges who get randomly assigned to cases, many arbitrators have expertise in specific practice areas and have frequently been in private practice in a specialty area. It is counsel’s job to ensure that any potential arbitrator has sufficient expertise to handle the dispute.

In the mediation context, counsel’s major role is to make sure the client is prepared for mediation. Mediation will only have a satisfactory result if the client comes away from it having resolved their dispute. The mediator cannot order a client to resolve their dispute. They have to reach an agreement with the other side. Therefore, the client must be prepared for
settlement. To that end, they need to give counsel the facts of the case so counsel can prepare a concise brief that highlights the issues and the financial positions of the parties. Counsel can then use that information to work with the mediator to bring the case to a resolution.

Misconceptions about ADR

Certain aspects of ADR can be confusing to those who lack experience with the processes. For example, many clients go to mediation without adequate preparation, assuming they have hired a judge or mediator who will decide the case, but that is not what mediation is about. Many people also believe any retired judge would be a good mediator, but in my experience that is not always the case. A retired judge is used to having the power of the bench, and even if they were previously involved in settlement conferences, they typically handled those conferences on a very compressed schedule while dealing with many other court-related matters, including the prospect of heading up a potential jury trial down the road.

The best mediators are those who have been trained in mediation techniques. They understand that nobody has to reach an agreement in mediation, but they also understand that the best result for all parties is usually to resolve the case, and they cannot rely on the parties ending with a resolution at some arbitrary midpoint between their initial positions.

Arbitration can be even more confusing because in many cases there is a lack of structure and precedent surrounding the process. While the major arbitration or ADR providers have certain rules and procedures, they are not as extensive or transparent as many of the established courtroom processes. Therefore, successful ADR is highly dependent upon the parties and the arbitrator working together to identify a good structure for each specific arbitration. Additionally, since arbitrators are not necessarily required to follow the law in terms of their decision-making, not as much weight can be put onto legal precedent in the decision-making process. Another common misconception about arbitration is that it is always less expensive, more efficient, and faster than litigation, but that is not always true, as it can get bogged down and very expensive.
Challenges of ADR

The biggest challenge faced by an ADR lawyer is making sure the client understands the process and has realistic expectations as to the costs, value, and outcome of their position. In any situation, there are many potential outcomes and many roads to achieving those outcomes. Each road has a cost associated with it, and the outcome is always uncertain. It is important to help a client—especially one who is emotionally invested in a particular position—to understand that while there may be a great deal of validity to their belief, the results of ADR may not be what they are hoping for. Many clients believe they are right and the validity of their position is obvious, but that may not be the case from the perspective of a neutral party.

The Value of the Attorney and the Value of ADR

The ADR attorney offers the greatest value to his or her clients during the pre-dispute negotiation phase in terms of helping clients think through their issues. In addition, after a dispute has erupted, an ADR attorney adds great value by educating the client as to proceedings (mediation or arbitration) that may be required by their agreement or may be available to resolve the dispute. There are many attorneys who simply advise their clients to add an arbitration clause in their contracts, but I believe that is usually a mistake. It is very important to think through what is going to best serve the client in terms of their ultimate needs or the risks that are involved in a particular transaction. In some situations, the client should have a pre-filing mediation agreement or an arbitrator’s requirement in their contracts. In others, strategically, the courts are better situated to resolve disputes.

The historical view that arbitration is a less expensive and more expeditious alternative to the judicial system is less and less accurate. One of the few instances where arbitrators’ decisions can be appealed and reversed is where an arbitrator fails to consider material, relevant evidence in the case. Therefore, arbitrators are increasingly inclined to allow a discovery process that offers an opportunity for a more complete presentation of the evidence. They want to give each party the opportunity to provide anything that might be relevant to the case at the
I have been involved in arbitrations that have lasted for years and required millions of dollars in attorneys’ fees, clearly not what usually comes to mind when people consider arbitration. Therefore, it is important that clients understand going into the process that getting involved in ADR is not the equivalent of waving a magic wand and having a dispute resolved instantaneously. It can, in fact, involve most or all of the aspects of a trial. Indeed, there may be even more information and evidence presented at an arbitration hearing than might be presented at trial, because an arbitrator is generally not bound by the rules of evidence that pertain to court litigation. In a trial context, the lawyer can keep a lot of irrelevant and hearsay evidence out of the record and the hearing of the jury by utilizing motions and objections, but in arbitration such objections are much more infrequent, as the scope of evidence the arbitrator gets to review is much broader. Further, most arbitrators believe they give appropriate weight to evidence that might otherwise taint a lay jury. For example, arbitrators will usually consider hearsay, but unless it is substantiated, they may not give great weight to it. The same evidence might be excluded in its entirety from a jury. The ADR attorney, therefore, will be instrumental in advising the client about whether to require an ADR process during the negotiation of contracts.

**Recent and Future ADR Trends**

Arbitrations have become increasingly formal over the past decade, which may not be a change for the better. Ten years ago, arbitration was a more efficient and less expensive way to resolve disputes, but arbitrators are now required to review a greater amount of relevant evidence. Thus, the proceedings have become more discovery-oriented and more akin to typical courtroom processes.

Over the same time period, there has been a tremendous increase in the use of mediation and the number of people who claim they are mediators. Therefore, there is more work involved in identifying a really good mediator. As more people perceive the advantages of using mediation as a way of resolving disputes, and as courts have increasingly
required disputing parties to go to mediation because of overcrowded dockets, the market for mediators has expanded greatly. Unfortunately, there are no statutory requirements or licensing involved in becoming a mediator, so essentially anyone who says they are a mediator is a mediator. Therefore, it is increasingly difficult to find good mediators, but they are out there.

Due to the substantial growth in the number of ADR providers, I believe there is going to be some fallout and consolidation in the industry. I think Judicial Arbitration and Mediation Services and the American Arbitration Association are well positioned to maintain their lead as industry model providers. They currently provide a number of support services to lawyers that many other ADR services do not. Other services are more focused on providing a lower-cost neutral party.

In the years to come, I believe the courts will continue to require mediations. Indeed, they may even require more mediations as a means of eliminating cases from their docket. They may require mediations early in a case, perhaps before any discovery has occurred, and then again one month prior to, or shortly after, the close of discovery as a way of forcing the lawyers and parties to confront their evidence in an attempt to resolve the dispute without the burden of a full trial.

**Keeping Your Edge**

To be successful in this practice area, lawyers must keep up on current developments and knowledge in the field. To that end, I regularly attend programs organized by minimum continuing legal education groups and the leading neutral organizations such as Judicial Arbitration and Mediation Services, the American Arbitration Association, Adjudicate West, and others. I receive many electronic newsletters from the ADR community, and I read and often write about new statutory and case law developments that pertain to ADR.

I also sit as a judge *pro tem* in Los Angeles Superior Court. A judge *pro tem* is a volunteer who sits temporarily as a judge in small claims, civil non-jury, and traffic courts and decides those cases. The court provides
training sessions about many important principles of a neutral’s decision-making process, all equally pertinent to ADR proceedings.

**Golden Rules of ADR**

The best advice I can give my clients about ADR is to emphasize that mediations are a very good way to resolve complex disputes efficiently, as long as they are willing to go to mediation adequately prepared and with a willingness to resolve a dispute. If they are unwilling to resolve matters other than on very favorable terms to themselves, mediations are not the way to go and would just be a waste of time and money. If privacy is important, I advise clients to be sure their disputes are arbitrated, not brought to court.

Preparation is the first golden rule for the arbitration process. The second golden rule is to use every opportunity for communicating with the arbitrator to develop a positive relationship and hopefully win sympathy for your position, whether this is done through a conference call, a written brief, or a post-hearing brief. The third golden rule is to be sure there are no surprises. Never let the other side put on negative evidence you have not presented first, and be sure to tell the arbitrator why that evidence is not important.

Preparation is also the first golden rule in the mediation context, in terms of knowing the facts and researching the case. The second golden rule is that the client has to be educated about the process and ready to reach a resolution. Otherwise, it is not worth going through the exercise and expense of mediation. Finally, you must work with the mediator. Do not be afraid to call the mediator in advance, and then work with them during mediation to understand how they feel resolution can be reached, and to let them know how you see resolution being reached. You need to let the mediator understand that you are invested in reaching a resolution and that you want to build up a positive relationship with that mediator.
Dan M. Forman is a partner of Manatt, Phelps & Phillips LLP’s Los Angeles office, an AV-rated trial attorney, and graduated cum laude from the Georgetown University Law Center in 1991, where he was one of the inaugural public interest law scholars. He is usually engaged in commercial litigation, employment counseling, and the arbitrations and mediations that relate to the same. He provides service to his community sitting as a judge pro tem in Los Angeles County. He makes his home with his wife, Adine, and his sports-loving kids, Aaron and Elyse, in Brentwood, California.

Mr. Forman possesses substantial experience with contract disputes, unfair business practice claims, malicious prosecution, fraud, confidentiality, covenants not to compete, trade secrets, putative class actions, wrongful termination, discrimination and harassment, and other disputes. He successfully handles litigation through arbitration, jury and bench trials, on appeal, and, where appropriate, utilizes mediation and other alternative dispute resolution techniques. In addition, he counsels employers on all aspects of employment relationships. He serves motion picture studios, entertainment companies, service providers, financial institutions, non-profit corporations, retail establishments, furniture manufacturers, high-tech companies, hospitals, partnerships, and individuals. In addition, he is proficient in French and has represented both French and French-Canadian concerns in litigation in California and federal courts.

Mr. Forman is admitted to practice in the courts of the state of California, before the U.S. District Courts of California for the Central, Northern, Eastern, and Southern Districts, and before the U.S. Federal Court of Claims.
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