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The Evolution Of ADR: 30 Years Of Change


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Law360, New York (October 29, 2014, 10:30 AM ET) -- At a recent conference attended by corporate counsel, a prominent employment lawyer sitting on a panel remarked that when he started out, the closest thing to mediation was when the judge brought the lawyers into chambers before picking a jury and said, "Can you guys settle this case?" By then, of course, the train had left the station, with each side fully invested in their respective version of events. Now, the lawyer went on to say, 70 percent of his cases are resolved through some type of alternative dispute resolution (ADR).

Few areas of the law have changed as much as ADR in the last 30 years. What was once an afterthought has become a key component of today's judicial system. While nothing can replace a trial, particularly a jury trial, it is clear more parties are choosing ADR to avoid the cost, aggravation and uncertainty that can come with litigation. This article explores some of the changes in the use of ADR over the past 30 years.

Mediation

Although most state and federal courts have excellent mediation and arbitration programs, private mediation might be considered. The major advantage of private mediation, aside from the important aspect of complete confidentiality, is that the parties and counsel have as much time as they need to present, discuss and resolve their cases. In order to derive the maximum benefits from that time, certain topics should be carefully considered.

First, selecting the right mediator is crucial. You want a mediator who is knowledgeable about the specific legal issues involved, willing to listen, who will give honest and objective feedback in private sessions, and one whom your clients will respect and appreciate. Above all, you want a person who has

the ability to make the process, and the participants, as comfortable as possible.

Second, mediation statements, usually not shared with the adversary, should provide a comprehensive view of the factual and legal issues involved, as well as a candid statement relating to past and present settlement positions. One might also keep in mind that a mediator may sometimes suggest that a mediation statement might later be shared, either in whole or in part, if it would aid the process.

Third, it is critical that the right clients be present at the mediation. Nothing will doom a mediation quite like the absence of real decision makers. Everyone should know which clients will be present before the day in question in order to give the mediation a decent chance to succeed.

Fourth, counsel and parties should consider in advance how they would like to see the mediation progress. Issues such as whether there should be opening statements by counsel, which party should make the first offer, and should there be meetings at some point with the mediator and the lawyers or with one of the lawyers should be discussed. There are many such issues that need to be discussed in a given case and those discussions should take place before the day of mediation.

Fifth, a private mediation permits lawyers and clients to accurately assess their own cases. Very often, a client's own case is viewed through the eyes of the beholder. Candid discussions in private with the mediator can provide a more realistic view of the case. In certain cases, only one side will retain an experienced mediator for a similar neutral evaluation. Such an evaluation may lead to a subsequent mediation with all parties.

Growth of Med-Arb

The goal of dispute resolution is just that — resolution. Sometimes mediation will not work. One party becomes fixed at a number and won't budge. An evolving option for addressing such situations is for parties to ask the mediator to become an arbitrator and decide the case. This option is called med-arb and has several benefits, including the fact that the mediator is already familiar with the case and a decision can conceivably be reached in a shorter time period. However, there are ethical issues since the mediator is no longer a neutral third party. Because of this, all ethical issues should be resolved prior to the first med-arb proceeding.

Special Masters

The courts are increasingly appointing ADR neutrals to serve as special masters in complex, multiparty litigation or matters that involve extensive discovery.

The New Jersey courts require a judge to obtain specific permission before a special master is appointed due to cost containment issues. However, the appointment can be extremely helpful in resolving matters, particularly where there is one complex issue that, when decided, will resolve the entire matter. The growth of e-discovery — and the ballooning associated costs — has further pushed the special-master trend. A neutral with e-discovery experience can be of great assistance to the courts by eliminating time-consuming e-discovery disputes.

Settlement Fund Administration

New Jersey has seen its share of natural disasters in recent years. These events have impacted members of our community, causing the loss of life, injury and property damage. As a result, these tragedies have

spawned the creation of funds for distribution to injured claimants. Neutrals have been engaged in the creation of the standards, guidelines and methodology used to assess claims and distribute awards.

There are some significant benefits to using ADR neutrals as special fund administrators. The courts are saved from expending resources on time-consuming litigation. Those contributing to the fund — charities, insurers, governments, corporations — also see cost savings. Because the fund is generally protected from the costs of litigation and attorneys' fees, more money can go to claimants. Claimants can generally apply without counsel and avoid the expense of individual lawsuits.

Case Management in Arbitration

One of the most important changes in arbitration over the past several years is the evolution of case management practices. In order to preserve arbitration as a true alternative to litigation in terms of cost savings and efficiency, cases must be managed closely. Most arbitration providers, including JAMS, have introduced new sets of rules that have gone a long way to streamlining the process. Like the Federal Rules of Civil Procedure govern courtroom processes, the rules provide mechanisms that help manage the arbitration from start to finish. They keep discovery to a minimum and ensure that the entire process flows smoothly for both the parties and the arbitrator.

Conclusion

As our legal system evolves and we understand more about how an effective court system should function, the role of ADR should also shift. Many options now exist for resolving disputes that function in tandem with the court system, and provide real alternatives to parties. In the end, what we all want is to see disputes resolved as efficiently and cost-effectively as possible. The myriad of new ways in which ADR can assist parties and their counsel can only make our judicial system more robust and effective.

—By Judge John J. Hughes and Judge Maria M. Sypek, JAMS

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