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Mediation/Arbitration: The Hybrid ADR Theory

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While the referral of cases to both arbitration and mediation is expected to continue, and indeed to grow, there exists today a relatively little-known hybrid process that combines the best attribute of mediation and arbitration, and that promises to become a new giant within the field of alternative dispute resolution. That process is mediation/arbitration.

To appreciate the advantages that med/arb has to offer to disputants over arbitration or mediation alone. It is essential to understand both the benefits and the perceived drawbacks of arbitration and mediation.

The best-known and most widely implemented system of ADR, both nationally and within New Jersey, is that of arbitration. In arbitration, the parties to an existing or potential dispute elect to have some or all of the issues in dispute presented, heard and decided by a privately selected, neutral decision-maker or panel of decision-makers in a confidential, out-of-court setting. The decision and award made by the arbitrator typically is final and binding on the parties, and not subject to judicial review, absent alleged fraud, undue influence or other serious misconduct by the arbitrator, or indication that the subject matter decided in arbitration exceeded the scope of the arbitrator's or the arbitration panel's authority. See, *Trentina Printing, Inc. v. Fitzpatrick & Associates, Inc.*, 135 N.J. 349 (1994), adopting the concurring opinion in *Pernini Crop. V. Grete Bay Hotel & Casino, Inc.*, 129 N.J. 479 (1992), as the legal standard of New Jersey on the scope of judicial review of arbitration decisions and awards.

The arbitration process generally involves more relaxed standards than litigation for the presentation of proof by the disputants or their counsel, and more limited discovery, usually consisting of pertinent documentary evidence and limited testimony from key witnesses, but with no written interrogatories or depositions. These relaxed standards, and the general unappealability of arbitration decisions and awards, usually yield with a result that is somewhat (albeit not always) faster, less expensive, more flexible, more private and less formal than litigation.

Arbitration's Drawbacks

When compared to mediation, however, a number of drawbacks of the arbitration process become apparent, including, significantly, the lack of control that disputants have

over the outcome of the dispute. Rather than retain such control for themselves, the disputants instead vest in the arbitrator all the authority to determine how dispute ultimately is resolved. Then, once the arbitrator renders a decision on behalf of the parties, that are bound by it and it generally is not subject to appeal, even if the arbitrator's decision is based on a mistake or misapplication of law or fact. *Id.* These factors have in recent years, caused a number of disputants to opt for mediation over arbitration as the preferred means for resolving their disputes.

Mediation, on the other hand, is a nonadversarial, nonbinding dispute resolution process in which the disputing parties, either with or without their attorney present, meet with a third neutral party (the mediator) in a good faith effort to achieve a prompt, economical, confidential, fair and mutually desirable resolution of some or all disputed issues. Through the intervention and supervision of a trained, professional mediator, who serves as a facilitator of communication between the parties and as a catalyst for reaching agreement between the opposing interests, the parties become active participants in the dispute resolution process, and help forge the terms and conditions of their own settlement. Thus, unlike litigation or arbitration, the mediation process encourages the parties to work together to reach, with assistance from the mediator, an amicable resolution of their disputes, and to determine for themselves –with the input and advice of counsel– the result or range of the results that the parties believe is fair and reasonable under the circumstances. The mediator, then, controls only the dispute resolution process; he or she renders no decision with the respect to the substance of the dispute. Instead, the parties themselves determine that result. And, once the parties reach agreement, the settlement terms are reviewed by independent counsel before they become final and binding upon the parties.

The voluntary, nonbinding nature of mediation is the target of one of the few criticisms leveled against the process by parties who seek the kind of finality of result that arbitration offers. Arbitration, while final and binding, also wrenches control over the outcome of the dispute away from the disputants, places it in the hands of a third party decision-maker and reduces the disputants to the role of observer rather than active participants in the process of resolving their own dispute.

Flexibility and Finality

Med/arb combines the best features of mediation and arbitration into a single, two-step hybrid process.

In med/arb, the disputing parties, either on their own or with the assistance of counsel. Agree in advance to resolve their differences through mediation. With the understanding that, if mediation proves wholly or partially unsuccessful, or if the mediation process extends beyond a predetermined deadline with no agreement on all or some of the issues, the parties will submit any and all unresolved issues to arbitration, the arbitration is performed by a pre-designated arbitrator or panel of arbitrator, or by the mediation now acting in the capacity of arbitrator. Any and all terms and conditions of settlement agreed to by the disputants in mediation are memorialized in a memorandum of agreement prepared by the mediator before commencement of the arbitration phase. Unlike the nonbinding memorandum of agreement prepared by the mediator in the traditional mediation process, the memorandum prepared by the mediator in med/arb

typically, is by prior agreement of the parties, binding upon them for the arbitration phase.

Accordingly, the med/arb process provides the disputants with the best that mediation and arbitration have to offer. It furnishes them with a clean incentive to resolve the disputed issues promptly, affordably, amicably and to their mutual satisfaction through mediation, by holding open the prospect of an adverse, nonappealable determination by the arbitrator if a mediated settlement is not reached. By the same token, med/arb promises the finality of a binding arbitrated result with respect to unresolved issues, thereby avoiding the necessity of a costly, protracted, appeal-ridden litigation. The hybrid approach thereby encourages maximum autonomy, participation and creative problem-solving by the disputants through mediation, while ensuring that, in any event, a final, binding resolution of all issues is near at hand.

Resolve Procedural Issues Early

In the view of the hybrid nature of the med/arb process, it is important for the disputant and their attorneys to consider and resolve certain procedural issues before commencing the mediation phase of med/arb, so as to avoid any question of the parties' intent once the process is underway. Parties should determine the following issues in advance:

Who will serve as the mediator. The statewide, nonprofit New Jersey association of Professional Mediators, founder by the author in 1992, makes available lists of professional mediators accredited by the association to perform mediation within various disciplines.

Whether the mediator or a different, third-party neutral will assume the role of arbitrator to resolve those issues not resolved by the parties in mediation. If this issue is not resolved before the mediation begins, it may become a major impediment afterward, once the parties have met with and perhaps formulated divergent opinions regarding the mediator (as potential arbitrator) and his or her proclivities and ideas concerning the issues in dispute

How will parties allocate the cost of the mediation phase and, if necessary, the arbitration phase of med/arb. This issue should be resolved upfront, so that funds are available for the mediator/arbitrator to resolve the issues without interruption or delay, and so the issues of payment for the neutral's own services rendered is not one of the issues that the third-party neutral needs to address. It should be noted that the mediator's and/or arbitrator's fee may be a flat fee, a fee based upon the amount of time expended by the mediator and/or arbitrator (that being the more common method), a combination of the above, or a fee calculated on some other basis.

The number of hours of mediation or other time commitment that the parties agree to undertake before submitting the unresolved issues to arbitration. The parties may, of course, leave the issue of when to conclude the mediation phase of the process to the sound discretion of the mediator.

Whether the parties' attorneys also will be present at the mediation session(s), or whether counsel instead will assume a strictly advisory role on behalf of their clients outside of the mediation phase of the process. Independent counsel generally are present at most business and commercial, employment, construction-related and other civil

mediations, but typically assist their clients from outside the mediation setting in divorce and family disputes.

As more and more attorneys and their clients experience the combined benefits that early mediation have to offer, med/arb could emerge as an alternative of choice for disputing parties.

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