L E G A L

Whose Side Are You on Anyway?

Amid the cry for judicial system reform, the business community has quietly developed an alternative to litigation — Alternative Dispute Resolution

BY JON PFEIFFER

Alternative dispute resolution — or ADR as it has come to be known — provides businesses with the necessary tools to avoid the devastating impact of prolonged litigation. ADR permits parties to circumvent the backlogged court system and resolve disputes faster than would be possible ordinarily.

In today's economic environment, effective incorporation of ADR is crucial to a company's survival. The use of ADR avoids years of legal fees and court costs. In a large case, the bottom line savings can be dramatic. What's more, it is particularly suited to disputes with a smaller amount of money at stake but potentially high legal expenses.

A neutral third party acting as an arbitrator, mediator or fact-finder facilitates this dispute resolution process. The ability to choose this person is a major advantage of ADR. You may retain a person with expertise in the relevant industry. No longer must you put the fortunes of your business in the hands of a jury whose members may or may not be qualified to render an informed decision. In a dispute between a manufacturing company and a supplier over language in a purchase order, a person who has spent his entire career handling similar problems may be brought in to mediate. Or, a retired industry executive may be retained to arbitrate a dispute to decide whether one party acted in a commercially reasonable manner.

ADR benefits the parties most in cases where they wish to preserve an existing business relationship. Relationships that took years to build are nearly guaranteed to be soured overnight by a hard-fought lawsuit. ADR helps to avoid that problem by bringing everyone together in a less adversarial setting and by fostering open communication.

It is also private. ADR allows a company to avoid an adverse precedent or unwanted publicity in high profile cases. On the other hand, in cases where a guiding precedent or publicity may be the goal of the lawsuit, ADR will not help.

A word of warning is in order. Watch out for companies that stand to benefit from drawing out the proceedings and delaying a resolution of the dispute. They may want to wear down the other side or simply delay an inevitable judgment. If they are merely paying lip service to ADR, they will torpedo the process and add to the ultimate cost.

Types of ADR

Hybrid forms of ADR are limited only by the imagination. Nonetheless, ADR typically falls into three broad categories:

Arbitration. The granddaddy of all ADR methods is arbitration. A growing number of states require non-binding arbitration of certain matters and, many businesses, such as brokerage houses or construction firms, routinely include an arbitration clause in their contracts.

Even without a prior agreement, parties often consent to submit their case to binding arbitration after a lawsuit has been filed. In these cases, a high/low agreement is common — the arbitrator cannot award less than an agreed amount nor more than an agreed amount.

What if the parties can't agree on an arbitrator? All is not lost. When this happens, one party picks an arbitrator, the other party picks a second arbitrator and the two arbitrators jointly pick a third arbitrator.

In arbitration, the emphasis is on letting a party "tell his side of the story." Each side presents their evidence to the arbitrator or panel of arbitrators. Technical objections are discouraged, leaving the parties free to present all the facts.

Mediation. The second type of dispute resolution, mediation, utilizes a neutral party or mediator to help the parties reach a compromise. The process is non-binding, akin to a settlement conference.

Like a settlement conference, the parties may submit mediation briefs outlining their position for the mediator's review. Recognizing that the forms of mediation are as diverse as the mediators who conduct them, certain stages are typical.

First, each party states their position. Next the mediator asks the parties questions to test for flexibility and to determine whether certain arguments are built on a foundation of solid facts. Gaps in the stories are explored. The hidden agendas of the parties are revealed. The mediator then speaks with each side individually. This process can take hours, days or even weeks.

When a settlement has been reached, it is wise to take the time to reduce the agreement in writing for the parties to sign. Without a signed agreement, the negotiation really hasn't ended. Human nature takes over as the parties continually try to get a better deal. Because Colorado courts encourage almost anything that helps resolve a lawsuit, statements made during settlement negotiations are considered privileged. Consequently, a settlement reached at mediation should contain a provision waiving the confidentiality of the proceeding to enforce the settlement.

Mini-trial. The mini-trial is the most recent ADR device to receive widespread acceptance. It functions exactly as its name implies — the parties present an abbreviated version of the case they would put on for a jury at trial. The presentations can include key documents, witnesses or simply argument. The process can last for several days or take as little time as a few hours.

Each side presents the heart of its case to a third party acting as a neutral advisor or directly to representatives of the other party who have authority to resolve the case. Unlike a formal trial, the parties are not bound by court rules of what may be presented. They are allowed to present anything they consider persuasive. After hearing all the evidence, the advisor may make findings and render an opinion about the likely outcome of the case should it go to trial.

The advantage of a mini-trial is that it involves the decision-makers, who, after hearing the evidence against their company, often begin settlement negotiations. The downside is that the element of surprise has been lost; you have educated your opponent. But, if everyone has been doing their jobs, there would be few surprises left anyway. ■