

Outside-the-Box ADR

By Paul M. Haire, Esq.

Alternative dispute resolution or ADR typically describes methods for resolving disputes without trial in court. Mediation and arbitration are the most common private ADR platforms. Lesser-known forms of neutral-based mediation and arbitration, including hybrids, offer creative alternatives within those standard platforms.

Co-Mediation

Co-mediation involves two or more mediators working together to resolve an oftentimes complex dispute. The combined expertise of the mediators assists the parties in better identifying issues and exploring a broad range of solutions. For example, a case might require the authoritative disposition of a former judge, but also the technical skill or subject matter expertise of an attorney mediator. Other cases might have gender sensitivities. Having male and female co-mediators in workplace harassment cases can offer significant value in elucidating interests and breaking impasse.

Mediation-Arbitration

In a Med-Arb, the parties agree in advance that if the dispute does not resolve through mediation, the dispute will proceed to binding arbitration. The parties typically determine in advance whether the same neutral will also serve as arbitrator if the dispute does not resolve at mediation. Although the use of the same neutral is more efficient, some neutrals are reluctant to serve as both mediator and arbitrator. Parties may also be reluctant to share confidential information with a mediator who may later provide a binding disposition.

If the parties are familiar with a mediator, they are usually comfortable entrusting the ultimate decision of the case to that same person as arbitrator.



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Arbitration-Mediation

Arb-Med is typically conducted by the same neutral with arbitration proceeding first. The neutral prepares a written arbitration award and seals it. Mediation of the dispute then proceeds. If successful, the arbitration award is never published. If mediation is unsuccessful, the award is published. A potential drawback to the process is the fear the neutral could coerce a settlement mirroring the sealed arbitration award. Trust in the neutral to adroitly promote a voluntary settlement at mediation is again central.

Binding Mediation

In advance of mediation, the parties agree that in the event of impasse in negotiations, the neutral will determine a final disposition that becomes an award or judgment. Typically, the neutral's disposition cannot be higher or lower than the parties' positions at the time of impasse. The procedure essentially involves a pre-determined agreement to accept a mediator's proposal if an impasse cannot be bridged.

High-Low Arbitration

High-low arbitration contemplates the parties agreeing before arbitration on the minimum and maximum award. The arbitrator is usually not told the limits. The arbitrator's award must fall between the high-low amounts. If not, the award is increased or decreased according to the parties' pre-determined parameters.

Baseball Arbitration/Mediation

Certain classes of professional baseball players are subject to salary arbitration. During the salary arbitration hearing, both the player and the team present their cases to a neutral panel. The panel chooses between the player's and the team's salary offers. Because the panel must choose one of the two offers, the player and team should both present reasonable offers since the panel will choose the offer it believes better represents the player's true value. This process can be utilized in litigation and pre-litigation matters. In baseball mediation, at impasse, each side submits its final position to the mediator who then decides for one or the other position. The mediator's decision then becomes a binding award or judgment.

Golf Arbitration/Mediation

Golf arbitration operates like baseball arbitration, except the arbitrator is not directly told the parties' positions. The party's position closest to the arbitrator's decision then becomes a binding award or judgment. In golf mediation, when impasse occurs, the mediator makes a final determination of a fair outcome and holds it confidential. The parties, in turn, submit their final positions. The party whose final position is closest to the mediator's determination becomes a binding award or judgment.

Early Neutral Evaluation

A primary reason cases do not settle sooner than later is because the parties, or their lawyers, have misapprehended the case. This leads to stubbornness about the probable case outcome, which leads to intractability in negotiations, and ultimately litigation. ENE is a process where a neutral assesses the evidence and listens to the parties' positions, and then gives the parties an evaluation of the case. This early reality check can avoid mistaken notions of value and viability of a case before they become a hindrance. **e**

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