DANNA MCKITRICK, P.C.
ATTORNEYS AT LAW

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Just as litigation is getting more complicated, so too are the most common alternatives to litigation, to wit, mediation and arbitration (or to use the vernacular – med-arb). But litigators and others involved in dispute resolution, by whatever process, seem to have less and less time to spend reading lengthy articles on the dispute resolution process. So I thought it valuable to occasionally, say, every two or three months, write a note about mediation or arbitration, short and to the point, about issues in the alternative dispute resolution arena.

In that vein, if you have any issue you particularly want addressed in such a note, let me know what it is, and I will try to cover it.

DESIGN AN ADR PROCESS AROUND *YOUR* CASE

In prior Med-Arb Memos, we have only discussed mediation and arbitration, implying they are the only aspects of alternate dispute resolution ("ADR"). (ADR means alternative to *litigation*. But ADR has grown. Litigation itself itself is coming to be recognized as just one method of dispute resolution ("DR"). There are numerous other aspects of ADR. For example, the agreements to mediate or arbitrate when the parties first enter a contractual or other relationship, are part of ADR themselves, sometimes called "preventive ADR", as they begin the effort to resolve future disputes *and* to avoid future litigation. There are also *other* ADR tools, such as neutral expert fact-finding, use of masters, early neutral evaluation ("ENE"), mini-trials, non-binding arbitration, collaborative practice, etc.

In the process of arriving at a resolution of a dispute, any one *or more* of these tools can be used. For example, an early neutral evaluator may be used alone, discussing all the facts and law, jointly with both sides, in giving an evaluation of the cases strengths and weaknesses to both sides. On the other hand, (s)he could be asked to advise on one or more issue on a multi-issue case or (s)he may be used by just one party, possibly without the other party's knowledge, before or during a recess in a formal mediation. (*See e.g.* Med-Arb Memo, June 2010.)

Another example: in larger multi-issue cases which can bear the expense, if during a mediation one issue (or fact question) is preventing the case from settling, the mediation could be adjourned and that issue could be arbitrated.

It is possible that by using multiple methods (and thus possibly multiple providers) of ADR, the ADR costs could rise significantly. But with some flexibility on the part of the parties (for example, by agreeing to adjourn the mediation session for further fact finding) and creativity (for example, by using one=s partner as a defacto early neutral evaluator, *see ibid*) the costs could be reduced and the advantages could outweigh any resulting adding costs.

An experienced mediator can help design a process to maximize the parties' probability and acceptance of final settlement. A neutral who is experienced in multiple ADR disciplines, such as all of mediation, arbitration, ENE and litigation, could be retained by the parties to put together a team to provide these varying services. For example, such a team could include an early neutral evaluator to be on-call, without cost unless used, immediately available to evaluate or arbitrate issues as they arise, during an ongoing multi-session formal mediation.

ADR, as it is now called, is not simply a single method. Rather, it is a concept with numerous aspects and methods, all of which can be brought to bear (in series or in parallel, to use language from my long ago electrical engineering course) by parties who sincerely desire a settlement and are flexible.

Questions? Call 314.726.1000

www.dannamckitrick.com

7701 Forsyth Blvd., Suite 800
St. Louis, MO 63105

Joe Soraghan has been an arbitrator since 1992 and a mediator since 1994. He is a mediator and arbitrator for the American Arbitration Association and the Financial Industry Regulatory Authority (FINRA, formerly the National Association of Securities Dealer). He is also a certified neutral for the federal and state courts in St. Louis.