ALTERNATIVE DISPUTE RESOLUTION . . . 101

ALTERNATIVE DISPUTE RESOLUTION: WHAT IS IT?

Primary Forms: Arbitration and Mediation

1. Authority for Mediation and Arbitration. [Focus herein is on Wisconsin law. Similar authority exists in the Federal system, pursuant to 28 U.S.C. 651].

a. Wis. Stats., § 802.12, Alternative dispute resolution (ADR).

b. Types of ADR:

1. Binding arbitration
2. Direct negotiation
3. Early neutral evaluating
4. Focus group
5. Mediation
6. Mini trial
7. Moderated settlement conference
8. Non-binding arbitration
9. Settlement alternative
10. Summary jury trial

c. Who exercises the authority under the statute?

1. The judge: limitations
2. The parties

d. Communications in mediation, Wis. Stats. § 904.085.

1. To encourage candor and cooperation
2. Confidentiality
3. Admissibility in subsequent proceedings is controlled by §§ 904.08 and 904.085.

Communications in mediation. (1) PURPOSE. The purpose of this section is to encourage the candor and cooperation of disputing parties, to the end that dispute may be quickly, fairly and voluntarily settled.

(2) INADMISSIBILITY. (a) Except as provided under sub. (4), no oral or written communication relating to a dispute in mediation made or presented in mediation by the mediator or a party is admissible in evidence or subject to discovery or compulsory process in any judicial or administrative proceeding. Any communication that is not admissible in evidence or not subject to discovery or compulsory process under this paragraph is not a public record under subch. II of ch. 19.

(b) Except as provided under sub. (4), no mediator may be subpoenaed or otherwise compelled to disclose any oral or written communication relating to a dispute in mediation made or presented in mediation by the mediator or a party or to render an opinion about the parties, the dispute whose resolution is attempted by mediation or any other aspect of the mediation.

(3) EXCEPTIONS. (a) Subsection (2) does not apply to any written agreement, stipulation or settlement made between 2 or more parties during or pursuant to mediation.

(b) Subsection (2) does not apply if the parties stipulate that the mediator may investigate the parties under 767.405(14)(c).

(c) Subsection (2)(a) does not prohibit the admission of evidence otherwise discovered, although the evidence was presented in the course of mediation.

(d) A mediator reporting child or unborn child abuse under § 48.981 or reporting non-identifying information for statistical, research or educational purposes does not violate this section.

2. How does ADR work?

a. Arbitration: In arbitration the final call is up to a third person or persons, as it is in a trial, court or jury.

An early example of the use of an alternative dispute procedure is found in George Washington's Last Will and Testament:

George Washington's Will

> But having endeavored to be plain and explicit in all the devises-even at the expense of prolixity, perhaps of tautology, I hope, and trust, that no disputes will arise concerning them; but if contrary to expectation the case should be otherwise from the want of legal expression, or the usual technical terms or because too much or too little; has been said on any of the devises to be consonant with law, my will and direction expressly is, that all disputes (if unhappily any should arise) shall be decided by three impartial and intelligent men, known for their probity and good understanding; two or to be chosen by the disputants, each having the choice of one, and the third by those two-which three men thus chosen, shall unfettered by Law, or legal constructions, declare their sense of the Testator's intention; and such decision is, to all intents and purposes to be as binding on the Parties as if it had been given in the

Supreme Court of the United States.

b. **Mediation:** The opportunity for litigants to become involved in a process that permits them to speak their opinions, to offer and consider and accept or reject propositions and offers; to become involved in creating solutions - all under guidance of their counsel and with the assistance of a mediator - to the end of hopefully arriving at a mutually acceptable solution.

c. **Difference Between Arbitration and Mediation:** There is an inherent conflict between litigation (i.e., add arbitration) and mediation. As Professor Leonard Riskin said:

> "The two assumptions of the lawyer's philosophical map (adversariness of parties and rule-solubility of dispute), along with the real demands of the adversary system and the expectations of many clients, tend to exclude mediation from most lawyer's repertoires." These assumptions by many attorneys "are polar opposites of those which underlie mediation:
>
> (1) That all parties can benefit through a creative solution to which each agrees; and
>
> (2) That the situation is unique and therefore not to be governed by any general principal except to the extent that the parties accept it."

Leonard L. Riskin, Mediation and Lawyers, 43 Ohio St., L.J. 29.
Despite the conflict it allows the client to be in charge of his, hers, its, own destiny.

Only mediation permits this result.

3. **What Kinds of Mediation?** There are two basic forms of mediation: Evaluative and Facilitative. The approach in the process is different in each.

a. In Evaluative, the mediator steps in with an evaluation, an opinion. That can be risky. For example, there is the Mediator's Soliloquy.

A MEDIATOR'S SOLILOQUY

To evaluate, nor not to evaluate: that is the question.
Whether 'tis wiser to let all hope of settlement sink,
Or to neutrally evaluate and change what the parties think,
Mediators who evaluate must be very cautious,
For it can alienate the parties and to the process be noxious.
Evaluation can turn them away and spur a court fight
To the detriment of all, no matter who is right.

On the other hand, evaluation can save the day,
Enlightening the partisan to what lies in the way.
Mediator evaluation can be a weapon of great might,
But it should be used last and it must be done right.
(Author Unknown)

b. In Facilitative, the litigants are encouraged by the mediator to work towards a mutually acceptable resolution. The mediator facilitates, doesn't evaluate.

4. What Mediation Gives Your Client: The 4 "C's" of Mediation:

Certainty
Containment
Control
Closure

5. Managing the Forces: Settlement and negotiation, as well as conflict and combat are part of our culture. Mediation is a means of managing those four forces.

In order to set the stage for management of issues in all mediation proceedings, the parties, the lawyers, the mediator must recognize that the decision on the conflicted issues will be made by someone else if they don't reach an acceptable (to the parties) accord. That understanding and commitment will be a motivating factor in helping the parties to manage as opposed to fueling the conflict.

6. Basic Suggestions: As counsel you can ask the mediator to align the interests and help to develop the goals of your client, without adopting them. The mediator needs to ask questions, possibly propose answers, elicit reactions, inquire about the acceptability of different conclusions, all or most of which can come from you.

To encourage an effective communication methodology to allow for assisted negotiations and conclusions:

a. Make sure your decision maker is present except in unusual circumstances.

b. The decision maker's counsel needs to be present and in control.

c. Pre-mediation preparation of the issues and of the client.

d. Risk analysis.

e. Statement of concerns rather than positions.

f. Identify proposed solutions.

g. Effective advocacy without grandstanding.

h. Reduce interruptions.

i. Set goals.

j. Work towards the recognized goals.

k. Be open to changes in the goals.

l. Economic trading.

m. Site and circumstances to be as neutral as possible.

n. Giving what is less valuable but more valuable to the other side in hopes of receiving what is more valuable to you and less valuable to the other.

7. Binding Mediation: Does it Work?

It is "risk" that should drive the parties to settle. If it doesn't, then the parties can, by agreement, invoke the process of Binding Mediation.

Binding mediation can be referred to as med-arb or mediated arbitration which begins as a mediation. If the parties don't reach a settlement, the process proceeds to arbitration. The issue then is the mediator to put on the hat of the arbitrator or does someone else become the arbitrator?

So often as the mediation process draws near to conclusion the mediator is asked; "What do you think is the right thing to do?" or "what do you think will happen in the court?" If the parties have agreed to a binding mediation, the mediator can answer with the certainty of an arbitrator, not simply an evaluative response but one in which the matter can be brought to resolution.

Binding mediation is a hybrid of mediation and arbitration designed to avoid cost and the time involved in litigating a matter in court. In doing so, the parties have replaced the uncertainty of the court process with the certainty of a decision reached by an independent neutral. Parties knowing in advance of the process are more likely than not to reach accord.

If the mediator is then to become the arbitrator, is that to be done immediately at the time the parties or the mediator declare the process at an impasse or does the process take on the mantle of an arbitration with testimony and briefs to supplement the process?

There may be concern that the knowledge of the mediator becoming an arbitrator might make the parties less candid in the mediation if they know the mediator has the

authority to resolved the dispute. Arguably that may be the case, but thorough preparation pre-mediation with the knowledge that the mediator can and will resolve the matter should encourage candor, and even in a traditional mediated settlement the definition of a good settlement is one in which both sides are unhappy with the result but find it acceptable.

Binding mediation can and does work well particularly in family cases relative to financial matters, as well as in construction cases where unresolved conflict can shut down a construction site. Binding mediation is tailor made to a fast resolution, or in a case where there is an ongoing commercial relationship such as a supplier or material man to manufacturer.

The key to successful binding mediation is to reach an agreement on who the mediator will be with the understanding that decision making skill is something important to your process.

The wording of the agreement becomes important to establish when mediation morphs into a binding process or an arbitration for lack of a better term.

The schedule for the process is important so that the parties can anticipate a swift resolution to their issues:

- What discovery is to be permitted?

- Can the mediator issue subpoenas?

- Is the decision to be made on the information previously provided to the mediator?

- Can the mediator be empowered to require additional information?

- What issues need to be outlined in an advance agreement including what information is to be exchanged and discovery such as expert reports and the form of the decision?

As discussed above, the terms of the agreement to embrace binding mediation is up to the parties, and the terms of that process are to be negotiated up front.

8. Final Thoughts.

The difference between winning and losing is subtle.

Mediation empowers the parties to make their own decisions.

You don't know what will solve the problem. It's all about looking for a key.

Suggested Texts:

1. *Getting to Yes, Negotiating Agreement Without Giving In,* Roger Fisher and William Urey.

2. *Mediation and Lawyers,* Leonard Riskin, 43 OHIO ST. L.J, 29.

3. *Understanding Mediators Orientations, Strategies and Techniques: A Grid for the Perplexed,* Leonard L. Riskin, HARVARD NEGOTIATION LAW REVIEW, Vol. 1.7, 1996.

4. *Should Lawyers-Mediators Be Prohibited from Providing Legal Advice or Evaluations?,* James Alfini and Gerald Clay, DISP. RESOL. MAG., Spring 1994.

5. American Bar Association, "Model Standards of Conduct for Mediators", *Dispute Resolution Magazine,* Winter, 2006.

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He began his legal career as an Assistant District Attorney in Milwaukee County. After two years, he left the District Attorney's office to establish the Public Defender program in the Children's Court of Milwaukee County, which he headed for over two years. Bill then won a contested election with a sitting judge and served twelve years on the bench in Milwaukee County, first as a County Court Judge then as a Circuit Court Judge. He left the bench for private practice in 1984.

Bill is a general practitioner with experience in Estate Planning and Probate, Family Law, White Collar Criminal Law in Federal and State Courts, Personal Injury/ Wrongful Death, Admiralty, Real Estate, Gaming, Dealership Law and Administrative Proceedings.

Bill is also a highly- regarded mediator and arbitrator, having mediated well over 1,000 matters during the past ten years. He has been recognized as a mediator/ arbitrator by the vote of his peers, including Best Mediator in Wisconsin, and named in the Best Lawyers in America and Wisconsin.

His status as a former judge provides instant credibility for litigants engaged in the alternative dispute resolution process and his unique ability to guide both attorneys and litigants to an understanding of their opponents' position often leads to successful resolutions of those disputes.

Bill received his undergraduate degree from the University of Wisconsin-Milwaukee and his Juris Doctor Law degree from Marquette University.