Trial Alternatives

Mediation and Arbitration

By Douglas Marcello, Marcello & Kivisto, LLC

Civil trials are an endangered species. "Days in Court" have become fewer and fewer. Today, 95% of lawsuits are settled short of trial.

Personally, I believe you should be prepared to go trial in every case. This gives you the strongest position for a favorable settlement. If a favorable settlement cannot be achieved, then you are ready to proceed to trial and present your case.

However, both plaintiff's attorneys and insurance companies frequently favor alternatives to trial. They often propose mediation or arbitration as an alternative. I have found that people have heard those terms, but often don't fully understand what is involved or the differences between them.

Generally, mediation is a nonbinding process of negotiation using a neutral third party to try to bring the parties to a settlement. An arbitration is a hearing that results in a decision in favor of one of the parties and/or the amount of damages.

You do not have to settle at a mediation. A winner and a loser will be decided in an arbitration.

These may be either required by the procedures of the court or voluntarily engaged by the agreement of the parties. For example, some courts require the parties to mediate prior to the case going to trial so that settlement efforts are exhausted. Other courts require arbitrations before you can have a jury trial. In both such instances, the mediator or the arbitrator(s) are designated by the court.

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Parties can also agree to mediate or arbitrate a case. In these instances, the parties may select the mediator or arbitrator(s) by agreement. They can also agree as to the procedures they will follow.

Let's examine what is involved with each and how they work.

Mediation is a focused, structured negotiation. The parties come together with a mediator in an effort to negotiate a settlement of the case.

The mediator is a neutral individual (i.e. has no dog in this fight) who facilitates the negotiations. The most effective mediators are those trained and experienced in helping the parties see the legal and factual weaknesses in their case and recognize the strengths in their opponent's case. They are able to employ techniques that provoke thought and move parties in a manner that closes the gap in valuation between theirs and their opponent.

There are times when the mediator's role is more specialized. I have had a number of cases where the plaintiff attorney needed the mediator to convince their own clients to be more realistic. In those cases, their clients may harbor unrealistic perspectives or expectations and won't listen to their attorney. These perspectives are often the product of influential friends or relatives with little or no basis for their advice or a desire to buy a specific item (new house, BMW...). In both instances, they are blind to the true value of their case and driven instead by the bad advice or price tag of their dream. The mediator provides a perspective with experience in the real world of litigation that through reason and empathy can help realism and reason prevail.

The conduct of a mediation varies at the choice of the participating parties. The normal course is to begin with an "opening session." Everyone gathers in one room. The mediator explains the process and benefits of mediation to those who have not had a prior experience.

Each side can then make their opening statements. The philosophies for doing so vary greatly between attorneys. Some attorneys will present elaborate PowerPoint presentations with photos of their injured clients and key evidence. They may even should videos

of the client in rehab or family members expressing their personal loss in cases of death.

I prefer to make a very brief statement of our willingness to engage in the process, but that our willingness is tempered by our experienced valuation of the case. If the plaintiff does not come to the range of our valuation, we respect their right to differ and will prepare for trial.

I don't engage in the large, showy openings at mediation for several reasons. First, I question whether they persuade the opposition. We should both know our cases at this point. Often, the show is more to impress their own clients rather than the opposition. An exception would be in a situation where I want to convey the strength of our case to the opposing party where their attorney may not have done so. Second, there is no reason to present all our cards at this stage. Remember—the ultimate test is trial, not mediation.

After the opening presentations, the parties will go to separate rooms. The mediator will then shuttle between the parties a la Henry Kissinger, communicating offers and counter offers. In addition, a good mediator will probe the strengths and weaknesses of each party's case during his time with them.

The ability to settle at mediation is a function of the valuation of a case. Many attorneys, and even mediators, base their valuation upon what similar cases (same injuries, jurisdiction…) have settled.

I think this is a false market value. The true value of a product in the market is what a willing buyer will pay. The true value in litigation is what a case is worth at trial, not in settlement.

What's the difference? Too often as I go around the country, I find that there has developed a collective mentality as to case values based upon what the amount they usually ("always"?) settled. "In this area, a herniated disc is a $____ case." The value is the product of a self-perpetuating collective agreement. It is akin to those in high school who determine who is or is not cool. The market is one determined by consensus, not reality.

If the ultimate test is to take a matter to trial, the ultimate value is what a jury would award. Our valuation at mediation is thus what we think would result at trial, not what this type of case usually settles for.

Ultimately, the parties will reach a tipping point where they will either reach a settlement or agree to disagree. Upon reaching this point, the mediation will conclude.

If there is no settlement, discussions can of course continue. Either or both of the parties may need time to reflect of the discussions and evaluation their positions. Frequently mediators will stay involved, contacting the parties by phone in an attempt to bridge the gap.

In sum, mediation is a facilitated process to reach a voluntary settlement.

Arbitrations are an adjudication, a decision. The specific procedures may vary depending on whether it is a procedure required by the court or agreed to by the parties. Court required arbitrations have their own procedural rules.

While mediations are informal discussions, arbitrations resemble a trial. Each party presents evidence. The case is heard by one or more arbitrators who are the judge and jury. They decide the issues of law and the ultimate facts. Who was at fault? Was there a violation of the law? How much are the damages?

One of the key questions about any arbitration is can you appeal. Some arbitrations are binding—no appeal. You are stuck with what the arbitrator decides.

You think that the arbitrator's decision wasn't fair? Doesn't matter. You are bound by the decision. Binding arbitration can be due to certain court rules or can be by agreement of the parties.

Some insurance companies favor this procedure as a means of avoiding the cost of trial. However, any such benefit is frequently offset and outweighed by the potential unfairness of the decision and having no recourse by appeal.

You can temper the impact of a binding decision by setting parameters such as by a "high/low" agreement. This means that the parties have agreed that the plaintiff will get at least a certain amount but not more than a ceiling amount. The purpose is to lessen the risk for both parties. The high and low amounts are the product of negotiation of the parties.

For example, a $100,000/$500,000 high/low would mean that the plaintiff would get what the arbitrator awards. However, she would get at least $100,000 (the low) even if the arbitrator awarded less. Conversely, she would not get more than $500,000 (the high) even if the arbitrator awarded more.

Nonbinding arbitrations may be appealed by either party. Examples of these include the mandatory arbitrations in Pennsylvania and New Jersey courts. You can be required to take your case to these proceedings prior to proceeding to trial. Your case is heard by attorneys (one or two in New Jersey, a panel of three in Pennsylvania). Upon getting the decision, you may appeal for a trial de novo (Latin for "from scratch") before a jury.

This is just a quick overview. It is intended to give you a working knowledge of the differences between the two procedures and what is involved.