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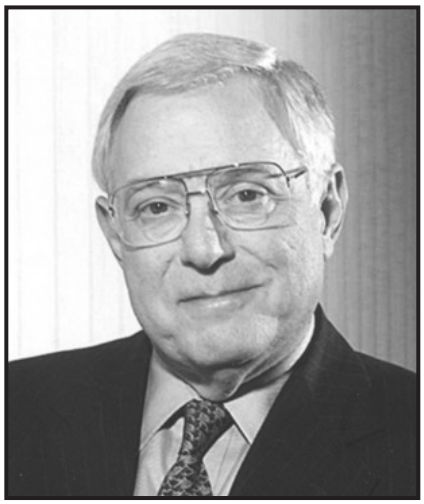
# Mediate, Arbitrate – Don't Litigate

**By The Honorable William A. Dreier**

It may appear strange for me, after sitting as a judge for over 25 years, to suggest referring cases to the courts' competition. However, after being back in private practice for nearly six years, I have come to realize that there is a more efficient, inexpensive and people-friendly system of resolving disputes than traditional litigation. As a trial judge, I too often saw only the failures in the dispute resolution process, mainly those cases that were forced to proceed to trial. Later in my 15 years as an appellate judge, I saw the further failures in the system of trials, where the parties were forced to resort to the appellate courts. The expense in this process is appalling – discovery costs, filing fees, reporters' fees, attorneys' fees, lost time by parties, witnesses, and support personnel awaiting trials and suffering through frequent adjournments, and then at the end, one party wins and the other loses, subject of course to appeals, with their resultant additional costs.

There had to be a better way of resolving disputes, and there is. After my return to the active practice of law, I have had the opportunity to view the mediation and arbitration processes through the eyes of an attorney representing clients by whom or against whom claims have been made, and also as an active mediator and arbitrator. I therefore not only serve as a neutral mediator or arbitrator, but also take clients through this process myself. In this article, I will try to describe the insights I have learned from working in both capacities. I will also draw parallels between the mediation and arbitration processes and what clients must face in litigation.



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First, it must be understood how mediation and arbitration have similar components and how they differ. Mediation and arbitration both give the parties control choosing the neutral professional who will either be assisting them to settle (mediation) or to adjudicate the issues (arbitration). Next, in both mediation and arbitration the parties control the process of pre-hearing discovery, with disputes easily brought before the neutral through a telephone call or e-mail, without the necessity of motions, briefs and formal hearings, as in a court. In both mediation and arbitration, the parties choose the time and place of the hearing and can arrange for accommodations to fit the parties', witnesses,' and attorneys' schedules. Although there are fees attendant to mediations and arbitrations (the mediator's or arbitrator's fees, and, if an administrating organization is used, the administrator's fees), relief from complex discovery motions and multiple preparation dates for adjourned court hearings will more than offset any additional cost of the alternative dispute resolution process.

Mediation differs from arbitration in that the mediator *facilitates* a settlement by bringing the parties together, rather than *adjudicating* the issues in the case. A trained, experienced mediator will employ techniques to aid each side to view the case realistically and will also bring the parties together to explore alternative, "outside-the-box" solutions unavailable in a court of law. Often, mediators act as a reality-check, causing the claimant and respondent to see their positions through neutral eyes. Reasonable parties with experienced attorneys usually find upon re-evaluation that the differences between them are far less than the transactional costs of continuing with litigation. They are therefore able to resolve their disputes with the aid of the mediator. My experience has been that well over 90 percent of the mediations that I have handled have settled, saving the parties vast amounts of attorney's fees, expert fees, witness fees, court costs and the like, as well as removing the uncertainty of a judicial proceeding.

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Arbitrations, on the other hand, are a direct substitute for a judicial trial, but with the benefits noted earlier. The parties pick the arbitrator rather than being assigned a judge. The parties control the discovery proceedings rather than being subject to court rules and court schedules. The parties choose the time and place of their hearing rather than being subjected to court schedules and repeated adjournment. In an arbitration, strict rules of evidence will not apply. The legal rules governing hearsay and the like give way to common sense. An arbitrator's rulings are given promptly. There is no need to wait for weeks, months or even years for a court decision. There is even a possibility, if the parties wish to do so, of having an appeal, although most want no part of this as they expect that the arbitration award will mark the end, not a continuation of a dispute.

These are real benefits. The ability to choose the arbitrator outweighs virtually any argument against arbitration. You can choose an arbitrator with particular expertise, including retired jurists with business experience who have handled your type of case while on the bench. You have the further ability to check references and compare one arbitrator with another before making your final selection. This is a tremendous improvement over the Courts, where you are assigned a judge by the "luck of the draw" and whose experience may be in juvenile, criminal or matrimonial law, and then have your fate determined by a jury drawn from the pool of voters and motor vehicle registrants. If you feel you do not want to place so much confidence in a single arbitrator and if the matter warrants the additional expense, parties can choose to have the matter heard by three arbitrators, either all picked by both parties for their neutral status, or one picked by each party who then choose the third. Remember, however, that in New Jersey once the arbitrator is designated by a party, that arbitrator must from that point on act as a neutral and may not have further contact with the party or attorney during the pendency of the case.

There is a caveat as to the selection of a mediator or arbitrator. There are literally hundreds of attorneys and private parties who have added their names to court rolls after a short course and who hold themselves out as mediators and arbitrators. Some are very good and some are very bad; most are in the middle. If you are already in litigation and you turn to the court for a mediator or arbitrator, names will be drawn from a revolving list unless you and your adversary can agree upon the neutral for your case. Court approved neutrals may not be the ones you would wish to have resolve a substantial matter for you.

Some experienced mediators are members of the New Jersey Association of Professional Mediators. Others are chosen as part of the Resolution Group, or certified as mediators by the United States District Court of the District of New Jersey. Some have been accepted by the AAA as arbitrators, designated by CPR as "distinguished neutrals," or work for JAMS/Endispute. These and other organizations have vetted experienced and successful neutrals. Others who work privately also have a substantial following. You should examine their credentials and cost before committing yourself.

Arbitration and litigation preparation have much in common in that there can be reasonable discovery, but in arbitration, the arbitrator will often require that necessity be demonstrated before the parties incur unwarranted expenses. Additionally, an arbitrator may hear dispositive motions which can cut short either the entire case or portions of the case by summary judgments or in limine rulings. As in courts, some cases take weeks to try, others take only an hour or two; some after substantial preparation, others after very little discovery. In short, virtually every civil case that could have been brought in a courtroom can be heard by an arbitrator, but in a much more user-friendly environment.

An arbitration award may be confirmed on motion of the prevailing party and then reduced to a judgment anywhere in the country, with very few possibilities of objection, limited to matters such as improprieties on the part of the arbitrator or the like. The parties can negotiate into their agreements additional standards such as "manifest disregard of the governing law," but this is unusual. The arbitration proceedings are subject to the Federal Arbitration Act if interstate commerce is involved in any way, or the New Jersey Arbitration Act, recently revised, if the proceeding is a New Jersey arbitration. The law governing the particular arbitration may be different from the substantive law governing the case, which may be either specified by the parties or determined by the arbitrator.

Where does the corporate counsel fit in this picture? With a litigated proceeding, in-house counsel often takes a back seat. A judge wants to deal with the attorney who will be trying the case, and the corporate attorney is correctly aware at the possible adverse effect of his or her presence at the counsel table or breaking the stride of the outside attorney as the jury observes the case in process. The arbitrator on the other hand usually will have no trouble with a shared workload between the in-house and outside counsel, especially if this is noted well in advance of the hearing. Although a jury might not understand it, the arbitrator can well appreciate that corporate counsel is in many respects the "client," subject only to final settlement approval or the like from the owners or management. Unlike in the judicial setting, arbitration permits the true nature of the attorneys' separate roles to be displayed without fear of adverse consequences. In many of the cases I have heard, corporate counsel fully participated in pre-trial conferences and the hearing.

In summary, I suggest to corporate counsel as well as outside counsel that they attempt early mediation. If mediation is unsuccessful, I further suggest that the parties consider arbitrating their dispute rather than pursuing a judicial remedy. Even if your case is already in litigation, a court will generally honor an arbitration agreement between the parties and refer the matter to arbitration. Any existing discovery or trial rulings can be carried into the arbitration proceeding. For someone who has extensive experience both in the litigation and the mediation/arbitration modes, I strongly suggest resorting to alternative dispute resolution when the occasion arises.