

DISPUTE RESOLUTION ALERT

ALTERNATIVE DISPUTE RESOLUTION: HERE TO STAY

by James C. Cunningham, Jr.

Increasingly, financial constraints are impacting the manner of resolving commercial disputes. Fewer judges are being taxed to resolve higher case filings. Therefore, courts and parties are turning to alternative dispute resolution mechanisms, primarily mediation and arbitration.

MEDIATION: In 1987, the legislature enacted the "Mediation Alternatives to Judicial Action" law. Mediation is "a process whereby a neutral third person called a mediator acts to encourage and facilitate the resolution of a dispute between two or more parties. It is an informal and nonadversarial process with the objective of helping the disputing parties reach a mutually acceptable and voluntary agreement." Except in limited cases, the law requires state courts to refer cases to mediation if the requesting party is willing and able to pay the mediation costs or if the costs can be equitably divided between the parties. Today, almost all Florida state and federal courts require cases to be mediated before trial with costs being divided equally between the parties.

The mediation procedure is controlled by a mediator selected by the parties or appointed by the court and varies from mediation to mediation. For example, variables such as the mediator's personal experiences, the intensity of emotions between the parties, and the urgency for resolution may influence how the mediation is conducted. Ultimately, as stated by the Mediation Alternatives to Judicial Action law, the mediator's role is "assisting the parties in identifying issues, fostering joint problem solving, and exploring settlement alternatives." Therefore, the mediation process tends to be very informal.

Prior to mediation, parties usually provide a written statement to the mediator describing the factual dispute between them and the legal issues. In these statements, parties often inform

the mediator of matters which might assist or impede their ability to settle the case.

At mediation, the plenary session sometimes begins with opening statements by the parties. This is also the time the mediator begins to put

"Mediation or arbitration may be less expensive and provide quicker dispute resolution tools!"

the parties at ease and sets the tone for discussion. After the plenary session, the parties retire to separate quarters and thereafter usually speak to one another through the mediator who shuttles between them obtaining information, relaying offers and attempting to build consensus. If lucky, the process may only last a short time. More difficult cases might require more than one mediation session. If the parties reach a settlement, the terms are reduced to writing and signed by the parties and their attorneys.

The Florida Dispute Resolution Center reports that during fiscal year 2003-04, 67.3% of cases mediated resulted in a settlement. Several reasons may account for this high settlement percentage. First, communications among the parties and the mediator during mediation are confidential, violation of which can result in damages being imposed on the violator. Second, in contrast to litigation which might result in ostensibly private business records becoming public records, one's business affairs remain private. Third, mediation permits parties to use creative mechanisms for resolving their disputes. Finally, a settlement reached through mediation can be judicially enforced with relative ease.

ARBITRATION: Prior to 1957, Florida courts refused to enforce agreements to arbitrate future disputes because, in the courts' judgment, arbitration agreements ousted courts of their jurisdiction. In 1957 however, Florida's legislature adopted the Florida Arbitration Code, which provides:

[T]wo or more parties may agree in writing to submit to arbitration any controversy existing between them at the time of the agreement, or they may include in a written contract a provision for the settlement by arbitration of any controversy thereafter arising between them relating to such contract or the failure or refusal to perform the whole or any part there.

Congress had adopted the Federal Arbitration Code ten years earlier. Now, under both federal and state law, parties can contract to arbitrate

future disputes which might arise between them.

Arbitration agreements generally provide for arbitrating before a particular arbitration body (e.g., the American Arbitration Association), set the number of arbitrators to be used and the method for selection, and establish the locale in which the arbitration will be held. The arbitration body chosen by the parties usually has its own rules governing the arbitration procedure. Like mediation, if the parties are unable to agree on an arbitrator, the arbitration body appoints one. Unlike mediation, arbitration tends to be a more formal process.

The arbitration process begins with the party demanding arbitration submitting to the arbitration body a statement of claim to which the other party then responds. Depending on the particularities of the case, the arbitrator and the parties may agree to dispense with discovery in arbitration; other times, discovery may be a useful tool to flesh out factual differences. Before the day of arbitration, the parties deliver to the arbitrator a summary of the evidence the party intends to use at the hearing and provide copies to the opposing side. At the arbitration, like a trial, evidence can be received by oral testimony and through documents, in which case the rules of evidence are very relaxed. Or, on the opposite end of the scale, the parties can agree to make all evidentiary submissions in writing. At the conclusion of arbitration, the arbitrator issues a written decision which decides all issues presented for decision.

Arbitration proceedings are often quicker and less expensive than litigation. An award in arbitration can be made a judgment of court in a rather short judicial process.

STRUCTURING FUTURE RELATIONS: Both Florida state and federal courts are almost universal in their requirement that parties engage in alternative dispute resolution before they are permitted to have a trial. Recognizing that fact, when structuring business relationships consideration should be given to agreeing to attempting to resolve future disputes by mediation or arbitration. Mediation often results in a settlement which achieves the goals and needs of all parties; arbitration usually provides a quicker and less expensive alternative to litigation. Whether achieved in mediation or arbitration, one can be assured that the resolution can be judicially enforced, if necessary. Mediation or arbitration should be considered as alternatives to saying, "I'll see you in court!" ■



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Mr. Cunningham is a native Floridian and a 1978 graduate of the University of Florida School of Law. From 1979 through 1981, he served as a law clerk to the Honorable James E. Alderman, Justice of the Supreme Court of Florida, was an instructor at St. Thomas University School of Law in 1986, and an adjunct instructor on St. Thomas' undergraduate faculty from 1981 to 1986. Mr. Cunningham has been in private practice as a litigator since 1981 and joined Berger Singerman's Dispute Resolution Team in 1998. Throughout his career, Mr. Cunningham has been in-

involved in significant litigation. In 2004 and 2005, he was selected by lawyers throughout Florida as one of the State's Legal Elite, recognizing the top 2% of Florida's attorneys. He has also devoted his time and energy to improving his community and has been involved in many civic organizations, including the Greater Miami Chamber of Commerce. Currently, he is a member of the Board of Directors of GableStage.

Mr. Cunningham is author of "The 2004 Wage and Hour Rules: Get Prepared Now," published by Berger Singerman.

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