Appropriate Dispute Resolution

[The following is the first installment of a four-part series examining alternatives to traditional civil litigation in the American courts.]

Conflict is a part of life. Every day, individuals have disagreements with their loved ones, neighbors, co-workers and business associates. A wife discovers that her husband has been unfaithful. The homeowners next door have built a fence which encroaches upon an unmarked property boundary. The boss makes unwanted flirtatious or sexual advances in the workplace. In each of these commonplace examples, someone has been wronged and may choose to seek legal redress.

Traditionally, an aggrieved party sued to right alleged wrongs. A civil lawsuit begins with the retention of an attorney, who in turn files a complaint in either a state or federal court. A judge is assigned to the matter and sets a discovery schedule during which the litigants will exchange documents and take the deposition of those with knowledge of the underlying facts. Depending upon the complexity of the litigation, the parties may retain experts who will render reports and be subject to deposition. After months (or years), the case will be ready for trial. In the interim, the plaintiff will be without relief for the perceived offense and acrimony may escalate between the parties. But must this be the way?

Alternative dispute resolution ("ADR") is the collective term for the non-litigious resolution of conflict. The most commonly known ADR processes include negotiation, mediation and arbitration. Each of those systems affords individuals the opportunity to bring more expeditious closure to their troubles. Often, settlement can be achieved without the involvement of a judge or, in rare instances, without the services of an attorney.

This article is the first in a four-part series that will introduce the principal ADR processes. While the overview cannot be understood to provide legal advice, the columns will provide information to assist in the decision to forego traditional litigation in favor of a more empowering process.

Negotiation is a familiar concept. Individuals bargain every day over matters ranging from the cost of a gift shop souvenir to decisions regarding restaurants and movie selections. Legal negotiation, by contrast, spans the spectrum from arriving at the purchase price of a home to finalizing terms of a plea bargain agreement with a prosecutor. One legal commentator has described negotiation as "the art of letting others have it your way."

Mediation has been defined as "facilitated negotiation." Although there need not be an attorney present, the disputants present their positions to a third party neutral. The mediator endeavors to bring the parties closer together through the use of active listening skills and high-gain, open-ended questioning. Mediation is a non-binding method of

dispute resolution in which the parties can accept or reject the mediator's recommendation.

Arbitration is the third major ADR process. Depending upon the complexity of the claim and the monetary value of the damages being sought, the dispute will be heard by either one individual or a panel of three individuals who serve in a quasi-judicial capacity. Unlike negotiation and mediation, the decisions of an arbitrator or arbitral panel are binding upon the parties.

Next week, we will explore legal negotiation and its advantages over the traditional courthouse law suit.

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