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CONFLICT RESOLVED

ALTERNATIVE DISPUTE RESOLUTION IN TEXAS: MEDIATION AND BEYOND

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I. INTRODUCTION

A. HISTORICAL REVIEW

As long as there have been disputes litigated in the civil courts, there have been attempts to resolve the disputes through settlement. Settlement continues to be the number one method for concluding civil disputes, as only a small fraction of cases are ever decided by trial, much less by jury trial. Alternative Dispute Resolution, or ADR, first came to prominence in the United States in the late nineteenth century. Early efforts arose as a way to resolve disputes between businesses such as the railways and steel companies and organized labor. Strikes caused by labor disputes were highly disruptive for the national economy, and congress acted to authorize mediation for such disputes. This lead to the creation of the Board of Mediation and Conciliation in 1913 and the Federal Mediation and Conciliation Service in 1947. The mediation process was seen as a way to resolve impasses between business and labor and avoid debilitating strikes.

By the early twentieth century, the concept of mediation for the resolution of civil disputes was also being developed in the courts. Unlike the process in the labor context, the focus in this instance was on the speed and cost effectiveness of resolution when compared with the courts. In the post war years of the twentieth century, the concept and practice of ADR spread widely throughout the United States. Currently, ADR in its various forms is used at both the state and federal level throughout the states.

B. ADR IN TEXAS

Although various forms of Alternative Dispute Resolution were already in use in Texas, the processes were first formalized with the passage of the Texas Alternative Dispute Resolution Procedures Act (the "Act") by the Texas legislature in 1987. This Act, now largely codified in Title 7 of the Texas Civil Practices and Remedies Code, outlines a comprehensive framework for the use of ADR in Texas. The Act states that "it is the policy of this state to encourage the peaceful resolution of disputes…and the early settlement of pending litigation through voluntary settlement procedures." Tex.Civ.Prac.& Rem. Code § 154.002. The Act outlines simple procedures and provides protections of the party's rights with an eye towards encouraging the settlement of civil disputes. The opinions presented under the Act provide for an alternative to, but not a substitute for, trial by jury. The options are all nonbinding (except by agreement otherwise), the proceedings are confidential and the parties themselves are expected to participate. These options allow the parties to speak with candor in a safe environment and negotiate towards a satisfactory resolution.

II. MEDIATION

A. STATUTORY BASIS

Of all forms of ADR, mediation is by far the most common and arguably most successful method used in Texas.

It is defined as "…as forum in which an impartial person, the mediator, facilitates communication between parties to promote reconciliation, settlement, or understanding among them." Tex.Civ.Prac.&Rem.Code § 154.023(a).

The statute specifically states that "a mediator may not impose his own judgment on the issues for that of the parties." *Id.* § 154.023(b). The mediator as a neutral party is a key player in the mediation process, and the Act thus imposes special qualifications and standards on mediators.

Absent a special order of a court, not just any person may serve as a mediator. At a minimum, mediators must have completed at least 40 classroom hours of training in dispute resolution techniques in a course conducted by an approved organization. *Id.* § 154.052(a). To serve as a mediator in a dispute involving the parent-child relationship, a mediator must have completed an additional 24 hours of training in the fields of family dynamics, child development, and family law. *Id.* § 154.052(b). Interestingly, there is no requirement in the statute that a mediator be trained or licensed as a lawyer. Nevertheless, a thorough knowledge and understanding of the law is often helpful in resolving conflicts, and almost all of the most prominent and successful mediators are lawyers.

Assuming that a mediator is technically qualified to mediate a case, he or she must also be neutral and impartial. The mediator is then required to "encourage and assist the parties in reaching a settlement of their dispute but may not compel or coerce the parties to enter into a settlement agreement." *Id.* § 154.053(a). The mediator is basically sworn to silence with respect to the mediation. This means that the mediator cannot disclose confidences given by one party to another party without the first party's express consent. Likewise, the mediator is forbidden from disclosing anything about the mediation, including the conduct of the parties or their counsel during the course of the mediation. This information cannot even be disclosed to the court appointing the mediator. *Id.* § 154.053(c).

If the parties are successful in reaching a settlement of their dispute at mediation they may enter into a written agreement reflecting same. Any such written agreement "is enforceable in the same manner as any other written contract." *Id.* § 154.071(a). In other words, the mere fact that the parties entered into a settlement contract at mediation does not prevent one or the other one from enforcing it in the courts if there is a breach. However, aside from written settlement agreements, all other records and communications created within the mediation process are strictly confidential. They are not subject to disclosure and they "may not be used as evidence against the participant in any judicial or administrative proceeding." *Id.* § 154.073(b). In certain limited circumstances, such records may be produced for *in camera* review by the court to determine whether disclosure, subject to protections consistent with the statute, may be necessary to comply with other legal requirements. *Id.* § 154.073(e).

B. MEDIATION AS PRACTICED IN TEXAS VENUES

All of the large urban counties in Texas, and many smaller venues as well, have active ADR programs. In fact, the Texas ADR Act allows specific counties to establish ADR systems for the "peaceable and expeditious resolution of citizen disputes." *Id.* § 152.002(a).

The commissioner's court of a county is allowed by statute to establish such a system, contract with non-profit corporations, public corporations or political subdivisions for administering such as a system, establish rules relating to a system, etc. *Id.* § 152.002(b).

Financing of the system may come through a fee not to exceed $15.00 to be taxed and collected as court costs in most civil cases pending in the county or district courts. *Id.* § 152.004(a).

Courts and their administrators are expected to follow the public policy of the states of Texas which promotes the resolution of disputes with the assistance of ADR.

Dallas County has established the Dallas County Alternative Dispute Resolution office for this purpose. This office educates the public, designs and implements the programs in the courts and creates opportunities for the management of conflict by the citizens of Dallas County. Dallas County has contracted with Dispute Mediation Service, Inc., a non-profit agency, which provides mediation and other ADR services at nominal cost. Additionally, the civil courts of Dallas County routinely refer practically all civil cases to mediation through either court appointed mediators or other mediators selected by the parties themselves. Absent very unusual circumstances, a case pending in the courts of Dallas County will not be tried unless and until it has been mediated.

This is basically the practice in all of the large urban counties (Dallas, Harris, Travis, Tarrant, etc.). In the larger counties, as well as some of the smaller ones, there is also a practice known as "settlement week." This process, also authorized by the Texas ADR statute, allows courts in a given county to select one or more weeks of the year as a "settlement week." Parties can apply for an opportunity to mediate, usually at some nominal cost, with a mediator. The mediators are often volunteers that provide their services at no cost to the county.

As a practical matter, many litigants prefer to select their own mediator by agreement. Although there are many qualified and successful mediators in the larger cities of Texas (and in some smaller towns as well), there are always some who are the most highly sought after and successful. Often, counsel select a particular mediator based on criteria such as the mediator's experience in a particular area of law, the mediator's track record in settling cases and various intangibles such as temperament and how the mediator might interact with a given party. A qualified and hard working mediator is often the difference between whether there is a settlement or not.

III. ARBITRATION

A. TYPES OF ARBITRATION

Arbitration is a non-judicial process where one or more independent arbitrators hear evidence presented by opposing parties and render a decision. Arbitration can be voluntary or mandatory, and can be binding or nonbinding, depending upon the agreement of the parties. However, barring some statute requiring arbitration, arbitration is usually only available if the parties have agreed to resolve their disputes in that manner.

Nonbinding arbitration in Texas is specifically allowed by the Texas ADR Act. Under the Act, if the parties stipulate in advance that the arbitrator's decision will be binding, it is given the same effect as a contract between the parties. *Id.* § 154.072(b). If the parties did not so stipulate in advance, the arbitrator's award is not binding and serves only as a basis for the parties' further settlement negotiations. *Id.*

Separate and apart from the Texas ADR Act, the Texas Arbitration Act found in Chapter 171 of the Texas Civil Practice and Remedies Code governs binding arbitrations.

The Texas Arbitration Act (TAA) basically governs and permits parties to agree in advance of any dispute that any dispute arising thereafter will be subject to binding arbitration.

Thus, parties to various types of contracts (construction contracts, leases, purchase contracts, etc.) in Texas routinely enter into these agreements. In some instances, it is fair to say that one party to the transaction (e.g. the home builder, the car dealer, the landlord) has greater negotiating power than the other party. Nevertheless, it is generally the public policy of the state to enforce such agreements absence fraud or certain exceptions. *Forest Oil Corp. v. McAllen*, 268 S.W.2d 51, 56 (Tex. 2008). If a court finds that a claim falls within the scope of a valid arbitration agreement, the "court has no discretion but to compel arbitration and stay its own proceedings." *Id.* at 56.

The TAA sets forth specific procedures for the handling of arbitrations. For the most part, the procedures to be followed are those that were specified by the parties themselves in their own agreement. Lacking the details in such an agreement, the court may appoint qualified arbitrators to proceed. Tex.Civ.Prac.&Rem.Code § 171.041. Under the TAA, duly appointed arbitrators may issue subpoenas, administer oaths, hear evidence and decide cases. Parties at arbitration have a right to be heard, present evidence and cross examine witnesses. *Id.* at § 171.047. An arbitration award must be in writing and signed by each arbitrator, and an award may be enforced by the courts.

Likewise, the Federal Arbitration Act (FAA) also recognizes the right of parties to agree to resolve their disputes by arbitration. In instances where there is some disagreement between the TAA and the FAA, the Federal Act prevails. It provides for procedures that are generally similar to those found in the TAA. The Federal Arbitration Act, found in Title 9 of the United States Code was first enacted in 1925 and has since been revised from time to time. The United States Supreme Court has repeatedly held that an agreement between parties pursuant to the FAA to arbitrate will be enforced even over objections or contrary provisions of state law. *See* e.g. *Preston v. Ferrer*, 522 U.S. 346 (2008).

B. ARBITRATION OPTIONS

There is an entire industry of non-profit and for profit organizations which provide arbitration services in Texas and throughout the United States. Among the most prominent are the American Arbitration Association (AAA) and JAMS (originally known as Judicial Arbitration and Mediation Services, Inc.). AAA is a non-profit group, while JAMS is a private, for profit enterprise. AAA provides a vast range of arbitration services and "neutrals" able to arbitrate commercial matters, consumer matters, employment and labor matters.

AAA has established procedural rules for these different topics which are widely used. Other privately operated arbitration groups and companies are often focused on specific fields such as consumer disputes, construction disputes, etc.

As originally conceived, arbitration was seen as a faster and less costly alternative to litigating cases through jury verdict.

Many companies dealing with consumers also were attracted to the fact that arbitration provisions and agreements often ruled out any award of exemplary damages and the like. Thus, practically every consumer who has ever signed up for a wireless telephone, cable television service, a credit card, etc. has probably entered into such an arrangement. In those instances involving fairly small disputes with small amounts in controversy, arbitrations have probably met their goals of speed and reduced costs.

In the context of larger disputes, parties have sometimes found that arbitrations can be almost as time consuming and just as expensive as litigation. This is because arbitration rules often allow extensive written discovery and depositions just as in a lawsuit. Once the case is worked up, it must still be tried before a panel of arbitrators, the same as if it were tried in front of a court. Depending upon the venue, many litigators would rather take their chances in front of a panel of 12 ordinary citizens rather than one or two or three retired judges or other neutrals. Thus, binding arbitration may be beneficial in some instances, but it is no substitute for our court system.

IV. LESSER KNOWN ADR OPTIONS

A. OPTIONS

Mediation is by far the most popular form of ADR used in the context of civil cases in Texas. Arbitration is also a well known option. However, various other forms of ADR are described in the Texas ADR Act. These include mini trials, moderated settlement conferences and summary jury trials. All of these processes, though lesser known and less popular than mediation, have the same goal: helping litigants settle their differences short of a trial at the courthouse.

B. MINI TRIAL

A mini trial is in many ways similar to a nonbinding arbitration. It is a process where each party and its counsel present their position before an impartial third party. After hearing each side's presentation, the neutral third party may issue a nonbinding advisory opinion. The thought is that hearing a neutral observer's opinions on the merits of each party's position may help the parties reach some settlement. This ADR option is one that is rarely used in the Texas courts in the experience of the author.

C. MODERATED SETTLEMENT CONFERENCES

A moderated settlement conference is not unlike a mini trial. The key difference is that, instead of presenting their cases to a single neutral and partial third party, the parties present their cases before a panel of impartial third parties. After hearing the position of each side, the panel may render a nonbinding advisory opinion.

Again, the thought is that hearing the opinion of a panel of neutral observers may help the parties reach resolution. In the experience of the author, this is not a widely used ADR procedure among Texas litigants.

D. SUMMARY JURY TRIAL

Although somewhat similar to a mini trial and a moderated settlement conference, a summary jury trial stands apart because the parties present their case before a panel of ordinary jurors (typically six in number). After hearing the presentations of each side, the jury may render a nonbinding advisory opinion on liability and/or damages.

The benefit of such a process over that of the mini trial or the moderated settlement conference is that the positions of the parties are heard by ordinary people that might be found on a real jury at the courthouse, as opposed to some neutral such as a mediator or retired judge. This like the two previous methods is not in wide spread use. However, the author does have the distinction of having been ordered by a Dallas County District Judge to conduct a summary jury trial after two previous mediations failed.

In that instance, a courtroom was set aside at the courthouse and a private mediator acting as a judge presided. A panel of potential jurors was brought up from the central jury room, and a jury of six was seated. Each side was given limited amount of time to present their case and arguments in a narrative fashion. Counsel gave closing arguments, and the case was given to the jury. The jury deliberated for a time, and came back with a verdict. The entire process took about one day.

Interestingly, the case did not settle and was eventually tried to a jury verdict in the courts. The findings of the real jury were very similar to those of the jury from the summary jury trial.

V. CONCLUSION

The concept of Alternative Dispute Resolution is now firmly rooted in Texas law, and enjoys wide spread support and use in the Texas legal system. With thousands of new civil lawsuits being filed throughout the state each year, the courts need a way to keep their dockets moving and have found success with ADR. Litigation is expensive and time consuming, so ADR appeals to litigants looking for some less expensive, less time consuming and less risky way to conclude disputes. Although mediation is the most popular and most well known of all the different ADR forms, other options are afforded the same protections of neutrality and confidentiality and may be appropriate under certain circumstances. Indications are that ADR will continue to be popular and widely used for the foreseeable future.

About The Author:

Paul W. Bennett - A Partner in the firm, is a trial lawyer who focuses on Complex Litigation, Professional Liability, Construction Litigation, Products Liability Defense and General Defense. He has practiced in the state and federal courts for over 20 years.