ADR's Scope in Litigation

BY DICK FINCHER

Effective compliance with Rule 16(g) by Arizona attorneys requires a basic knowledge of the various forms of ADR processes available to the parties. Here are several of the more common processes to be considered by counsel.

THE RANGE OF ADR PROCESSES

There is a continuum of ADR processes that involve the degree of control that the parties retain in the outcome. On one end of the continuum is negotiations and mediation, in which the parties retain total control and must voluntarily agree to the settlement. On the other end of the continuum is arbitration and litigation, in which the parties essentially give up control and request a third person (the arbitrator or judge) to impose a decision to resolve the dispute.

NON-BINDING PROCESSES

1. MEDIATION

Mediation is the process of facilitated communication between opposing parties by an impartial third party, known as the mediator. The objective of the mediator is to assist the parties in reaching a mutually acceptable agreement to end the litigation.

The mediator typically uses two core techniques to assist the parties. One technique is *reality testing*, which serves to challenge the party's current perspective on the case. The second technique is *probing for underlying interests*, which serves to open up a range of creative solutions to resolve the case. Nationally, more than 80 percent of commercial mediations reach an agreement.

The classic advantages of mediation are that:

- the parties retain control of the outcome
- the setting is informal
- the process is totally consensual
- the solutions can be very creative
- the process is inexpensive
- the process encourages personal

responsibility

Mediation is valuable for any type of civil litigation except where a judicial precedent is desired or where the case is connected to another case and settlement is premature.

2. FACT-FINDING

Fact-finding involves the selection of a neutral third party by opposing parties for the purpose of issuing a nonbinding recommendation to enable settlement. There are two kinds of fact finders. One type serves as a hearing officer in a formal setting. The second type serves as an investigator. If either party does not accept the recommendation, it is written to serve as a basis for further negotiations.

Fact-finding is commonly used to secure a technical opinion on a breach of contract dispute. For example, fact-finding could be used to evaluate the quality of a printing job that is being contested by the parties.

3. NEUTRAL EVALUATION

Neutral evaluation consists of the role of a third party (often a judge or substantive expert) to evaluate the case and make a nonbinding evaluation of the claims as an aid to negotiations. The neutral evaluator does not play an active role in attempting to persuade the parties to agree to a settlement.

Neutral evaluation is common in cases requiring interpretation of the law or where the parties will be influenced by the opinion of a retired judge or substantive expert.

Neutral evaluation is often used with mediation, with the evaluator asking the parties if they would like to mediate the case before seeing the written evaluation. In this type of process, the evaluator is also a trained mediator, and having heard the information about the case can assist the parties in finding a creative solution to their dispute. Should the parties refuse the offer of mediation or not reach a settlement, the written evaluation is provided to them.

4. SETTLEMENT CONFERENCE

The process occurs before a scheduled trial and involves the role of a judge or attorney sitting as a pro tem judge in attempting to persuade the parties to settle their litigation. The third party often plays the role of a mediator but relies on the authority of his experience or status to try to persuade the parties to accept a settlement. Many cases settle during settlement conferences, although the pressure to settle often outweighs creative solutions to the case.

5. MINI-TRIAL

The classic mini-trial is really not a trial but an articulated form of mediation. The process includes each party to the dispute presenting a summary of its case to the other side, with the neutral taking the role of the judge but not making any decisions. This process is voluntary, not binding and can be costly because of preparation time. The mini-trial occurs early in the case.

The key people on each side attend the mini-trial and listen to all the evidence and argument. Upon completion of the mini-trial, the parties enter facilitated negotiations, using the new perspective from the presentations.

6. SUMMARY JURY TRIAL

Summary jury trials (SJTs) are sponsored and managed by a court in which the dispute is pending. They result in an advisory "verdict" that may help the parties settle. To be most effective, summary jury trials are typically held when the parties and counsel are almost ready for trial and discovery has been completed.

Summary jury trials also can be binding on stipulation of the parties. In Arizona, a short trial (a form of SJT conducted in one day) is binding and often used as an alternative to mandatory arbitration in the court.

BINDING PROCESSES

1. ARBITRATION

The arbitrator is a person selected by the parties to hear evidence and to make a binding award to resolve the litigation. The arbitrator is a creature of contract between the parties. The parties voluntarily agree to use the arbitration process either by following an arbitration clause in a contract or agreeing to submit the existing dispute to arbitration instead of the judicial system. An arbitrator can be selected either directly by the parties, by a court or by an administrative agency such as the American Arbitration Association. There are very few grounds upon which to vacate an arbitration award. Most commercial cases can be heard in arbitration within 90 days.

2. MEDIATION—ARBITRATION

In this process, the roles of the mediator and arbitrator are combined for efficiency. Typically, the parties agree to allow the neutral to first mediate the dispute. If no agreement is reached, then the parties have already agreed in writing to allow the neutral to issue a binding decision, typically with more evidence. Some neutrals will not agree to such an arrangement because they view it as a conflict of interest.

SUMMARY

Effective compliance with Rule 16(g) requires Arizona attorneys to fully understand the range of ADR processes available to them. There should be a form of ADR appropriate for each type of litigation.

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answers to ADR challenge quiz

1. Within 90 days of a defendant's first appearance. Results of the conference must be reported to the court within 30 days thereafter.
2. No, but the courts are not restricted in awarding what may be deemed appropriate sanctions.
3. No. Parties must still comply with this rule and are free to choose an ADR procedure to resolve their dispute.
4. No. In a comment to the rule, it is clearly stated that time on the Inactive Calendar will not be extended as a result of reliance on an ADR procedure.
5. No. Either party may request that the court order a conference to discuss ADR, or the court may direct that the parties discuss the case with a court-ordered ADR specialist.