THE CHANGING FACE OF DISPUTE RESOLUTION

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> *"The reality of today's overcrowded, expensive system of justice has gradually worn down earlier resistance to [creative] dispute resolution. . . . Alternatives are not just more attractive, they look increasingly like the only way to help ensure a more efficient system of justice." Talbot D'Alemberte, Former American Bar Association President.*

Twenty years ago, law schools did not offer courses in alternative dispute resolution. Law professors, lawyers and litigants alike relied on the traditional adversarial system to resolve conflicts. Court calendar backlogs and skyrocketing costs, however, have made it painfully obvious that the system is not working the way it should and that there must be alternatives. Disputing parties are becoming increasingly aware of the perils of litigation. Courtroom battles are expensive, uncertain, public, and deny the parties any control in resolving their conflict. In 2001 the Arizona Supreme Court recognized that litigants must be offered alternatives to the traditional adversarial system.

RULE 16 (g)

On October 22, 2001, the Arizona Supreme Court approved new Rule 16(g)* of the Arizona Rules of Civil Procedure (ARCP), effective for actions filed after December 1, 2001. The Court also adopted Form 3, Joint Alternative Dispute Resolution Statement.

Section One of the rule allows the court upon motion of any party or on its own initiative after consultation with the parties, to direct them "to submit the dispute . . . to an alternative dispute resolution program created or authorized by appropriate local court rules." *See* Rule 16(g)(1), ARCP.

Section Two mandates that the parties, including unrepresented parties, consider ADR early in the case. *See* Rule 16(g)(2), ARCP. The rule creates a duty for the parties to confer, in person or by telephone, no later than 90 days after the defendant or respondent appears. It mandates that the parties make a *good faith* effort to settle the case promptly or agree on an ADR process.

Within 30 days after their conference, the parties must report whether they have agreed to an ADR process by submitting the Joint ADR Statement (Form 3). The parties must identify the ADR process and ADR provider they will use, and when they expect the ADR proceedings to be completed. The Form identifies six alternatives: mediation, binding arbitration, early neutral evaluation, short trial, summary jury trial, or judge pro tem. There is also a check box for "other." As will be discussed below, many other ADR options are available.

If the parties have not agreed to use a specific ADR process, each party must inform the court of the ADR process they believe is appropriate, or in the alternative, state why they believe ADR is not appropriate. Any party may request a conference with the judge to discuss ADR. Last, the court may direct the parties to discuss ADR with a court-appointed ADR specialist.

ADR OPTIONS

In Maricopa County, the court has instituted a structured settlement conference program. Volunteer attorneys who act as judges pro tem conduct settlement conferences at the court or in their offices. The settlement rate has helped to alleviate backlogs in the system. The court also provides an approved ADR provider list for Family Court cases so parties can be assured that capable private providers are available if they wish to seek out of court assistance.

Mediation is usually the ADR process of choice, in court as a settlement conference or out of court with a private provider. In mediation, the parties have control over the outcome, because they, and not a third party, decide whether there is an agreement and what the agreement is.

Mediation may be "facilitative" or "evaluative." In facilitative mediation, the mediator helps parties to communicate so they can fashion solutions to their dispute. In evaluative mediation (most used by former judges or in settlement conferences) the third party neutral evaluates the strengths and weaknesses of the case and thus helps the parties reach an agreement. Mediators may combine the techniques as the case dictates.

Rule 16(g) also contemplates that the parties may agree to arbitration. With binding arbitration, the parties stipulate pursuant to A.R.S. §12-1501 that a third party neutral will try the case. Arbitration awards are appealable only in limited areas. *See* A.R.S. §§12-1512-1513. In Maricopa County an approved Stipulation and Order for arbitration is available at the court's website.

Early neutral evaluation is an excellent cost saving option. In this process, a third party, usually an expert in the area, provides an evaluation of the case. When this evaluation occurs "early," and the parties reach an agreement, they save themselves and the courts time and money. Of course, the neutral evaluator's credibility is key and usually depends on his or her trial experience in the area.

Two other two options are listed on Form 3: summary jury trial and shortrial. This author contacted the experts in this area: Judges Schneider, Dunevant and Kaufman to

discuss the differences in the two processes. Judges Schneider and Dunevant got the summary jury trial process off the ground. When Judge Kaufman took over as Presiding Civil Judge, he "invented" the shortrial, tapping into the creative ideas of Judges Schneider. Dunevant, Baca and McVey, plaintiffs' and defense lawyers, and insurance claims people. He describes the two procedures as follows:

> "Originally, a summary jury trial was used as a settlement device for LARGE cases. A two week case might be presented to an advisory jury in two or three days. The parties would use the verdict and experience as an aid in settlement negotiations, but the verdict would not be binding. Of course, variations developed over time.
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> About 6 or maybe 7 years ago, some plaintiffs' lawyers complained about small cases, particularly low impact auto cases, that required them to go to both arbitration and trial. They said it was becoming uneconomic and plaintiffs would have trouble getting representation if two presentations were routinely required for a small recovery and thus a small fee. Insurers said that lawyer arbitrators were far more generous in these cases than jurors and they would continue to appeal and have jury trials de novo. I think that the overall appeal rate for arbitrations was then 20+ percent and the low impact cases were appealed more than 40% of the time. Shortrials were our idea for allowing an arbitration bypass. I suggested to both sides that they experiment with Shortrials. The rest of the history is well known. Rules changes now also permit other ADR methods to be used as bypasses.
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> Shortrials are always binding, and they are designed to produce a verdict in one day. Summary jury trials are not so restricted. Generally 4 jurors are used for Shortrials. (The venire or voir dire panel is 9 or 10). Summary jury trials usually have more jurors and may not be binding.
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> Most Shortrials now go to *pro tems*; they are used in more types of cases now and often occur after arbitration. Parties may or may not stipulate that there will be no appeal, clerk, reporter, etc. There are no rules on how to do them -- deliberately so to encourage innovation."

Indeed, innovation is the key to ADR. The discipline is evolving and many new techniques have arisen in the private sector to allow parties to decide how to bypass the stress and the

expense — both in dollars and time — of litigation.

Out of court options are available as follows:

Non-binding Arbitration

Med/Arb

Arb/Med

Bracketed or High Low Arbitration

Baseball or Final Offer Arbitration

Night Baseball Arbitration

Non-binding arbitration appears on its face to be a contradiction in terms. It is actually a neutral evaluation in which a hearing takes place before the arbitrator, but the parties are not bound to the arbitrator's decision. The process facilitates negotiation by allowing the parties to test the strengths and weaknesses of their case and to see what the outcome would be.

In Med/Arb (short for mediation/arbitration), the parties participate in a conference in which they agree to allow the mediation to progress with the hope that the entire case will be resolved. If, however, the parties reach an impasse, they understand that the mediation is then converted to an arbitration.

In Arb/Med, a relatively recent innovation in ADR process, the parties agree to allow the arbitrator to act as a mediator after he or she has heard the arbitration. The arbitrator renders a decision only if the parties fail to reach an agreement on their own.

Bracketed or High Low Arbitration limits risk by placing upper and lower limits on the arbitrator's discretion. The parties negotiate before the arbitration and agree on minimum and maximum payments. The arbitrator, after hearing the evidence, must choose a number within the bracketed range. The parties have the option of disclosing the bracketed range or not. When the arbitrator is not aware of the payment range or, in some cases, that a bracketed range has been agreed upon at all, the process is called "blind bracketed" arbitration.

Baseball or Final Offer Arbitration is modeled after the type of negotiations that occur in major league baseball. The arbitrator must choose an offer made by one party or the other after hearing evidence submitted at a hearing. The arbitrator can use only the two figures submitted.

Night Baseball Arbitration is the same process as Baseball Arbitration, but the parties do not reveal their positions to the arbitrator. The demand closer to the number the arbitrator

chooses becomes the arbitration award.

BENEFITS OF ADR

ADR gives parties the ability to resolve their disputes quickly, confidentially, and with considerable savings, without going to trial. It allows the parties to have control over the resolution because they, and not the court, can decide the time and place ADR will take place, as well as the method used. **Client satisfaction is greater, and because the resolution is out of court, solutions can be customized. An additional benefit of mediation and binding arbitration is finality: they eliminate the uncertainty of trial and appeal that can plague litigants. Last, when parties in the workplace mediate, they can preserve relationships if future interaction is expected.**

The courts are charged with providing "the just, speedy, and inexpensive determination of every action." *See* Rule 1, ARCP. They have wisely directed parties to turn to alternatives so that goal can be met. As parties and practioners choose ADR, hopefully they will find other creative options for resolving cases without protracted litigation.

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