



Feature

## There's Got to Be a Better Way: The Mediation Option

By Cary Griffith

Approximately a year ago, I overheard a conversation about a divorce. "Know any good divorce lawyers?" my friend Bill asked. Another friend, John, knew some good ones, but warned that Bill could expect to spend \$20,000-40,000 on attorneys' fees alone, not to mention costs for investigators and accountants. Worse, given courts' backlogs, the whole process would likely take more than a year.



It was a long lunch, and by its end, Bill appeared understandably crestfallen. His divorce would take more time and money than he'd anticipated. The unspoken question was "Isn't there a better way?"

A dispute by its very nature is cantankerous. Party A may have been wronged by Party B, and Party A wants relief. Unfortunately, Party B disagrees. Whether it's a dispute over property and child custody after 20 years of marriage, a competing claim on an estate, or a commercial complaint, litigation is often time-consuming and expensive. But an increasing number of potential litigants is beginning to realize that litigation is only one of its dispute resolution options. Today, more and more courts are turning their attention toward arbitration and mediation as viable alternatives to litigation.

Most state and federal courts are suffering from increasing caseloads, more complicated trials, and stagnant or diminishing staffs to deal with the rising workload. Federal and state governments, increasingly strapped for cash, are making cuts in every possible area, including the judicial system. And litigation continues to be as popular as apple pie, which may be one of the reasons the plaintiff and defendant costs associated with it are rising.

Is there any hope on the horizon?

"The primary solution is arbitration," notes Roger Haydock, Professor of Law at the William Mitchell College of Law. Haydock is a nationally recognized expert in alternative dispute resolution. The "combination of mediation and arbitration is helping reduce the workload of judges in civil cases," he explains. It's also reducing the time spent in conflict and the overall cost of that conflict.

The three most obvious dispute resolution options are litigation, arbitration, and mediation. Litigation is the traditional process of working through the American court system to resolve disputes. Usually it involves a judge, jury, and lawyers representing litigants.

According to Leonard P. Reina—a Florida attorney, mediator, and arbitrator for the last two decades—"arbitration and mediation are similar in that they are alternatives to litigation or are sometimes used in conjunction with litigation to attempt to avoid litigating a dispute to its conclusion." Since these alternatives often reduce the time spent in trial preparation, they also reduce dispute costs.

While arbitration and mediation are alternatives to litigation, they are somewhat different in their approaches to resolving disputes. Arbitration involves appointing an arbitrator to hear the facts of a case and render a decision, usually in writing. Arbitration can be binding or non-binding.

Mediation involves hiring a mediator to help two parties reach a mutually agreeable solution to their problem. A mediator doesn't judge a case, but rather facilitates a discussion between two parties and, hopefully, helps them mutually resolve their dispute.

The three forms of dispute resolution are very different. According to Reina, "Mediation requires a different mindset and approach than does a trial. Instead of the prevailing party 'besting' the opponent through research, knowledge, discovery, testimony, presentation, and persuasiveness, the parties participate in a forum under the guidance of the mediator, where they attempt to negotiate a settlement based on what they can accept... whether or not they may be entitled to more or could have gotten more in a court of law."

In the face of mounting public pressure over clogged American courts, alternative forms of dispute resolution are continuing to gain in popularity. A cursory review of recent press on the



## Feature

subject of state laws and ADR illustrates the trend. According to ADRWorld.com, recent articles on state efforts to create alternatives to litigation include *Medical Malpractice ADR Plan Advances in New Hampshire*, *Kentucky Circuit Plans Mediation for Criminal Cases*, *Arbitration for Medical Negligence Debated in Ohio*, and *Missouri Senate Approves Construction Mediation Proposal*.

States look toward litigation alternatives for a few reasons. As previously noted, alternatives often require less time and money and are simply easier to pursue. But perhaps just as important, arbitration and mediation—for many types of disputes—can be much more common sense ways to resolve disputes.

“If you think about it from the perspective a judge,” comments Haydock, “how is a judge going to determine what’s best for the children?” Isn’t it better, Haydock suggests, for the parties with the most familial knowledge to resolve the issues?

Perhaps that is one of the reasons Minnesota state courts, in 1994, created Rule 114, which, according to Haydock, “requires parties to avail themselves of some form of ADR. The vast majority of states don’t have a comparable rule, but there are a growing number of states following the Minnesota model.”

Reina agrees. “Mediation has most recently been rediscovered across the country, and in particular in Florida, a leader in the implementation of mediation, where almost all lawsuits are required to be mediated before a court will allow them to be put on the trial calendar. Mediation has been found to be effective in resolving approximately 75% of all cases and greatly reduces the trial docket of courts throughout Florida.”

There are, of course, many instances when mediation is not the best form of dispute resolution. Experts disagree, but no one believes mediation is always the best choice. According

to the American Medical Association (AMA), mediation in a managed care setting “is of very little practical utility with respect to disputes involving physicians.” In an AMA document entitled *Dispute Resolution: Litigation vs. Arbitration*, the AMA cites a variety of reasons why mediation may not be a good alternative dispute process for doctors having disputes with managed care organizations (MCO).

- Most MCOs have internal procedures that utilize some form of mediation. If the internal process didn’t work, the AMA reasons, a second mediation is also likely to fail.
- Mediation is non-binding. One possible outcome of mediation is to require a physician to spend scarce time and energy in pursuit of a mediated agreement that “will not create a binding result.” In the end, both parties may turn their efforts toward litigation.

In the end, my friend Bill’s divorce was not as difficult as everyone expected, in part because he and his spouse settled some of their disputes using alternative methods. Because it occurred in Minnesota, he was forced to avail himself of an effort to arbitrate, though it was non-binding. While he agreed with the arbitrator’s findings, his spouse didn’t, at least initially. The litigation process, as expected, dragged out—but for roughly six months, rather than one year.

Instead of engaging in a protracted legal battle, they renegotiated some of the arbitrator’s findings. One last sticking point required them to hire a mediator. Both of them were less than satisfied with the mediator’s conclusion—which probably represents the compromise they were seeking.

In the end, Bill’s divorce was expensive and time-consuming, but alternatives to litigation helped his ex-wife and him resolve their dispute more quickly and with less expense than if they’d relied solely on going to trial.

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