

Alternative Dispute Resolution

By the Honorable Elbert Tuttle

Disputes between parties may be resolved by a traditional lawsuit or alternatively by mediation or arbitration. Given the current court overcrowding, the difficulty of scheduling trials in the court system and the high cost of litigation, mediation and arbitration have become attractive alternatives to traditional civil lawsuits. Mediation is a process in which the parties secure the services of a third person who tries to reconcile the parties, or persuade them to settle their dispute. The mediation process is generally informal. The mediator generally opens the mediation session with both parties present. Generally, each party then sets forth his/her position in the dispute. The mediator then informs the parties that they will be separated, and that the mediator will speak to each of them separately in order to probe the strengths and weaknesses of their respective positions. The mediator informs the parties that whatever is divulged to the mediator in these separate conferences will not be divulged to the opposing party without that party's consent. The mediator then shuttles back and forth between the parties with a view to reaching a compromise that both parties will accept. In mediation, the mediator has no power to force either party to settle the controversy. Mediation should not be undertaken by any party who does not wish to compromise.

Arbitration is a process in which the parties secure the services of an arbitrator (or arbitrators) selected by the parties to hear the matter in dispute and render a decision. The parties agree in advance to be bound by the arbitration decision. The arbitrator is generally a person with expertise in the matter under dispute, or may be a retired judge.

Arbitration usually results from a voluntary, written agreement between the parties. Arbitration may be required if the dispute arises from a contract which contains a provision requiring arbitration of any dispute arising under the contract. There are also specific areas of dispute which require arbitration as a matter of law. These include certain disputes under auto insurance policies, as well as disputes arising from the purchase and sale of securities, to name a few.

Most states have adopted the Uniform Arbitration Act, which provides a framework for the arbitration procedure. Massachusetts adopted the Uniform Arbitration Act in 1960 (see Massachusetts General Laws, Chapter 251).

The Massachusetts Uniform Arbitration Act provides that parties may submit for arbitration any controversy arising between them, with the exception of collective bargaining agreements, which are subject to a separate provision of Massachusetts law.

The act provides that a contract provision requiring arbitration of any dispute arising from that contract may be enforced by court action if one of the parties refuses to arbitrate. It also provides a procedure for courts to enforce the arbitration award if any party fails to comply with the arbitration decision.

One of the advantages of arbitration is the ability of the parties to schedule the time and place of a hearing, and to arrange for the presence of anyone necessary to testify concerning the dispute. Usually, payment of the arbitrator's fee is borne equally by the disputants.

Mediation and arbitration should always be considered when a dispute arises. These processes are not, however, for everyone. Careful consideration should be given to the scope of the dispute, the time and cost of its resolution, and the likely outcome by mediation, arbitration or litigation. It is always wise to consult with competent counsel who has expertise in the area of the dispute.

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