

# Business News

inside  
business

by Eric Berg

## *Solving problems without litigation*

**I**f you have recently bought a home in Santa Barbara, opened a checking account, or even started a new job, chances are very good that you signed a document that requires you to resolve any future disputes not in court, but by way of “alternative dispute resolution.”

Alternative dispute resolution can take many forms, and its increased prevalence means that it is more important than ever to have a basic understanding of three of its most common and popular forms.

1. Negotiation. This is the first step in the process. The parties try to work out their differences, either on their own or with the help of their lawyers. Generally, outside third parties do not get involved, and the parties talk as long as they feel they are making some progress toward resolution.

2. Mediation. If the parties cannot resolve their differences on their own, a neutral third party — the mediator — gets involved. A mediator is typically a lawyer or retired judge from the community whom all sides must voluntarily agree to have participate. A mediator will meet directly with the parties and lawyers in an effort to resolve the dispute.

A mediator is different from a judge in that he or she typically does not have the authority to render decisions that are binding. The mediator’s primary goal is to act as a sort of “middleman” between the parties and their lawyers — listening to both sides and communicating messages and positions from one side to the other when it’s apparent the parties are having difficulty talking to each other.

One should not underestimate the mediator’s role in getting the problem solved. Some of the most effective and successful mediators use their background and experience as a sort of sounding board for the positions that the parties are taking. This can often go a long way toward getting one or more sides to re-evaluate their position as discussions go on.

So choose your mediator wisely — sometimes a more active, opinionated personality is needed, sometimes not. The best mediators can be as active or passive as necessary depending on the particular dispute with which they have been presented.

Mediations are confidential, which is often far preferable to having your dispute a matter of public record at the courthouse. Compared to a full-blown court case, it is certainly more economical for the parties. But be aware that this is a voluntary, nonbinding process — at the end of the day someone is not going to be compelled to do something that he or she does not want to do.

3. Arbitration. If mediation cannot get the problem resolved, the next step to consider is arbitration. This involves having the parties submit their differences to one or more people who render an actual decision, much as a judge would do in a trial. If the parties have entered into a contract that specifies that any dispute between them will be resolved by arbitration, the results of that arbitration are generally binding on all sides.

While an arbitration proceeding is generally less formal than if the case were being heard by a judge and jury, it shares many common attributes with its more formal brethren. Both sides present evidence, witnesses are called and examined by the lawyers, and opening and closing statements are generally made.

There are several potential advantages to resolving a case through arbitration rather than by trial.

It is a generally faster process because it is not dependent on the calendar of a judge who has potentially hundreds of other cases to deal with. It is also a generally less expensive process because certain procedures for sharing and presenting information are more relaxed and streamlined than going to court. Finally, it usually allows for greater confidentiality for all concerned because an arbitration is generally not a matter of public record.

All of these apparent advantages, however, can prove to be detriments depending on the type of legal problem with which you find yourself.

If you think a jury is going to be particularly sympathetic to your position, you may prefer to have your case resolved by members of the community by way of a jury trial. If your dispute has ramifications for other business that you do, and you think you can set a favorable precedent, there also may be some advantage to obtaining a more public court verdict that could be a valuable deterrent against similar future problems.

One final word of caution. An arbitration result is generally binding upon the parties, without the right to appeal. A court trial, while often a more lengthy and expensive undertaking, generally affords the losing side the right to appeal the result. While finality and closure are generally good things when discussing dispute resolution, make sure you are comfortable with this approach, win or lose.

Mr. Berg is co-chair of the Litigation Practice Group at Hatch & Parent, a Santa Barbara-based law firm. He can be reached at [EBerg@HatchParent.com](mailto:EBerg@HatchParent.com)

Posted with permission from the Santa Barbara News-Press.