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The Strategic Use of Arbitration, Mediation, and Litigation: Which to Use and Why

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Litigation v. ADR – Overview

- Litigation
- Arbitration
- Mediation
- Other:
  - Binding Mediation
  - Neutral Evaluation

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Advantages and Disadvantages

- Level of Party Involvement
- Procedural Protections
- Control of Costs
- Control/Duration of Proceedings
- Control of Outcome
- Finality/Appealability

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Attachments

- JAMS Guide to Dispute Resolution Clauses for Commercial Contracts
- Forms of Arbitration and Mediation Clauses for:
  - Employment Agreements
  - Commercial Contracts, including settlement agreements and Stock/Asset Purchase Agreements

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Drafting Considerations

- Business advice approach
  - Know your client
  - Likely outcomes that would lead to litigation, mediation or arbitration
  - Relief your client will likely desire
  - Cost of obtaining a given result
  - Documents/discovery you will need to obtain a given result
  - Confidentiality

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JAMS Overview

- *See* the attached JAMS Guide to Dispute Resolution Clauses for Commercial Contracts
  - Cost effectiveness of ADR
  - Planning is the key (see the previous page)
  - Step clauses (*e.g.*, mediation (or some other dispute resolution mechanism) first; arbitration or litigation second)
  - Address confidentiality
  - Streamlined procedures, if you want them ($250,000 suggested as cut-off)
  - Allocation of fees and costs

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Example: Drafting Considerations

- Suppose you are drafting a template employment agreement for a client. Do you want to require arbitration of some or all disputes?
  - Is your client likely to have breached an obligation or acted inappropriately?
  - Is there a non-compete or confidentiality provision that is important to the client?
  - Does your client want to set an example OR does your client want disputes like these to go away?
  - Will the client want to obtain an injunction?
  - Is the cost of litigation an issue?
  - What documents/discovery will your client need to prove its case?
  - What state?
    - In California, for instance, you cannot bifurcate.
    - In Oregon employment agreements, you need to provide two weeks' notice.

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Example: Drafting Considerations (cont.)

- Bifurcated Employment Agreement Arbitration Clause:
  - Example 1: All disputes under this Agreement shall be submitted to and governed by binding arbitration with an arbitrator from the American Arbitration Association; except only that the Company may seek relief in a court of competent jurisdiction in the event of a claimed violation of Section 5 [Non-Compete] or Section 6 [Confidentiality] of this Agreement.

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Example: Drafting Considerations (cont.)

- Example 2:
  - Dispute Resolution.
    - 1. Arbitration. The parties shall attempt amicably to resolve disagreements by negotiating with each other. In the event that the matter is not amicably resolved through negotiation, any controversy, dispute or disagreement arising out of or relating to this Agreement (a "Controversy") shall be submitted to the American Arbitration Association for final arbitration, which shall be conducted by a single neutral arbitrator in _____, _____, pursuant to the American Arbitration Association Rules (the "Rules"). The arbitrator shall be selected in accordance with the Rules. The parties agree that Rules on Expedited Procedures contained in the Rules shall be applied in any arbitration proceeding hereunder, and further agree that, notwithstanding anything to the contrary contained in the Rules, the arbitrator shall not award consequential, exemplary, incidental, punitive or special damages.

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Example: Drafting Considerations (cont.)

- 2. Procedure. It is agreed that if any party shall desire relief of any nature whatsoever from any other party as a result of any Controversy, such party will initiate such arbitration proceedings within a reasonable time, but in no event more than 270 days after the material facts underlying said Controversy first arise or become known to the party seeking relief (whichever is later). The failure of such party to institute such proceedings within said period shall be deemed a full waiver of any claim for such relief. The parties shall bear equally all costs of said arbitration (other than their own attorneys' fees and costs); provided, however, that the arbitrator shall be entitled to award attorneys' fees to the prevailing party. The parties agree that the decision and award of the arbitrator shall be final and conclusive upon the parties, in lieu of all other legal, equitable (except as provided in Section _ above [Equitable Relief: Non-Compete and Confidentiality]) or judicial proceedings between them, and that no appeal or judicial review of the award or decision of the arbitrator shall be taken, but that such award or decision may be entered as a judgment and enforced in any court having jurisdiction over the party against whom enforcement is sought. Any equitable relief awarded under Section _ [Equitable Relief: Non-Compete and Confidentiality] shall be dissolved upon issuance of the arbitrator's decision and order.

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Drafting Considerations Revisited

- Which example should we use?
  - Is the more in-depth example always better?
- Return to Drafting Considerations:
  - Know your client: What are the client's most important concerns? The non-compete?
  - Likely outcomes that would lead to enforcing the agreement: Enforce the non-compete; commission dispute.
  - Relief desired: Injunction? Monetary settlement? (Will splitting the difference hurt or help your client?)

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Drafting Considerations Revisited (cont.)

- Cost of obtaining a given result: Cost to litigate a non-compete dispute? A trade secret act dispute? Can you recover fees from the employee? Cost to litigate a commission dispute?
- Documents and discovery: Will most of the information be in your hands? Will you need discovery to have any chance of proving your case?
- Confidentiality: Does the client have an interest in using the case as a deterrent to other employees? Are there public relations reasons for keeping the dispute confidential?

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Other Examples

- JAMS Examples (step clauses; compulsory mediation; "standard" clauses; allocation of fees and costs; confidentiality; streamlined procedures)
- Example 3: Mediation/Arbitration—Short-form. This was from a contract between two companies for the provision of services.
- Example 4: Cooling-Off Period/Arbitration. This is from a settlement agreement negotiated after summary judgment motions were filed but before they were ruled on. The parties have a long history of mistrust for each other. Hence, the cooling-off period and the mechanism regarding payment of legal fees.
- Example 5: Long-Form for Purchase Agreement: includes bifurcation; number of arbitrators; precise time frames; jurisdiction; confidentiality.
- Not limited to examples; example 4 is an illustration of how creative you can be.

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Final Thoughts

- My experiences in mediation and arbitration
  - Arbitration: No dispute is cheap, although arbitration is probably a bit more streamlined.
  - Mediation:
    - Mediators can be very useful, but think through how a mediator will view your dispute. (How would a jury view that same dispute?)
    - Strategic tool in litigation, even if not drafted for.
    - Don't be passive about it. Mediation is a great tool if you take some control of the process.
    - Ask questions. Know what to keep to yourself. Know what to share. Use a litigator.
    - Treat mediation as a negotiation. Negotiate, don't argue.

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Tips on Mediation/Arbitrations

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What is the role of an expert?

1. Varies with assignment and venue
2. Testifying and/or consulting expert
3. Add objectivity to the team
4. Simplify complex financial matters
5. Calculate appropriate level of damages
6. Interpret / critique analysis of other experts

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What is the role of an expert?

- Litigation
  - Varies depending on role as a testifier or a consultant.
  - Assist the court in understanding of complex financial matters.
  - Calculation of damages – presentation in an independent and impartial manner is critical.
  - Non-testifying expert – help counsel understand the strengths and weaknesses of their case and certain facts without the risk of being discovered. – often support the testifying expert.
- Arbitration
  - Similar to litigation.
  - Hired by arbitration panel.
    - Objectivity and impartiality to both sides is crucial.
    - Raise issues and solutions --help the panel be educated on technical issues.
- Mediation
  - More flexibility – comments in mediation typically can't be used in litigation if agreement is not reached.
  - Be objective but also understand your client's goals of the mediation.
  - An opportunity to teach the mediator.
  - An opportunity to help the other side understand the work, diligence, and accuracy with which analysis was performed.
    - Show the opposing party you will be a strong witness if the case progresses.

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Approach to analyses

- Thoroughness (Quick and dirty only gets you into trouble)
- Future discoverability
- Cost sensitivity
- Generally the same regardless of potential forum.
  - Sometimes mediation can occur earlier in the process – analyses may evolve if mediation fails.
  - Leverage mediation to gather more facts.
- Even if case is thought to be heading to mediation – need to be prepared for arbitration/ mediation and prepare work with same level of quality and thoroughness.

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Things to consider when hiring an expert

- When to bring an expert into the case
  - As early as possible –
    - Helps counsel to better evaluate their case early on
    - Set realistic expectations early
    - Minimizes the expert's risk of errors or omissions
    - Typically minimizes costs through greater efficiency
    - Avoids losing preferred expert to conflicts
- Advise your expert on discoverability concerns early in the process.
- Make sure the expert understands their role in the process
- Hire an expert that you can trust and that has high ethical values.
- Don't put your expert in a compromising position – more likely to hurt your case than help.

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