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TWLF NEWS & VIEWS

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"Two Siblings"

In this quarter's newsletter, Elan E. Weinreb, Esq., Managing Member of The Weinreb Law Firm, PLLC, explores some key differences between arbitration and mediation and how one can save time and money in taking advantage of either alternative dispute resolution discipline.

Key Differences Between Arbitration and Mediation

Many of my friends and family members have often confused the two most commonly utilized alternative dispute resolution ("ADR") disciplines: arbitration and mediation. If I happen to serve as a mediator one day, I get asked, "How did your arbitration go," and vice versa if I happen to serve as an arbitrator.

While it is true that both disciplines share common features—much as two biological siblings may share common features—it also is true that they are not the same and have unique characteristics (which, again, is almost always the case with siblings). Below, I will explore three key differences.

Difference No. 1: Finality

Arbitration involves a final, binding decision that is distributive in nature. One or more neutral arbitrators order the substance of the parties' conflict—whether it be money, property, or any other item or right of legal significance—to be divided between or among them (or, in rare cases, between or among third parties). An arbitrator thus prioritizes the overall arbitration process and the arbitration award over the parties themselves.

Mediation, in contrast, does not involve any sort of final, binding decision. One or more neutral mediators act as facilitators—assistants—to the parties in helping them to resolve their conflict themselves by exploring their needs and interests in an inquisitive, objective (albeit empathetic), and hopefully constructive manner. Unlike arbitrators, mediators—even those who act in an evaluative or directive mode in dealing with the parties—have no power to impose a final, binding decision upon them. A mediator thus seeks to prioritize the needs and interests of the parties above any perceived final resolution of the parties' conflict.

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Difference No. 2: Formality

Arbitration is often characterized as "litigation-lite" in that it is usually governed by a formal set of rules and procedures established by the arbitrator himself or herself, an arbitration organization such as the American Arbitration Association or the Nassau County Bar Association's ADR Committee, or a combination of both (which is very frequently the case). "Follow the rules or else" is the expectation of those involved.

Mediation, in contrast, is not so formal. Unlike an arbitrator, a mediator does not "preside" over a mediation session, and while he or she may establish ground rules to facilitate the parties' exploration of their needs and interests, should the parties decide at any time that such rules no longer are beneficial, they may elect to dispense with their enforcement. There is also no formal "burden of proof" in mediation, any set order of speakers in a mediation session, or any requirement that briefs or other written materials be submitted to a mediator at any point in time.

Difference No. 3: Temporality

Arbitration almost always has a set timeframe in that its purpose is to supplant or override litigation. As such, it is common to hear of parties heading to arbitration instead of litigation and rare to hear of arbitration occurring after the parties have litigated their conflict to a final conclusion.

Mediation, by contrast, is not so temporally-limited. While it can certainly be used in advance of litigation, unlike arbitration, its purpose is not necessarily to supplant or override litigation. As such, mediation can be used to complement or supplement litigation.

Let's illustrate this with an example: assume that two parties—X and Y—have a conflict involving three issues of contention. The parties cannot come to an agreement on one of these issues, which they mutually wish to litigate. They further agree that resolving the remaining two issues depends upon the litigation's outcome, but both are willing to mediate these issues.

Litigation of the solitary issue proceeds, and X prevails. Y, now in an ostensibly weaker position than X, requests mediation, and X agrees. At the mediation session, things seem to be taking a seemingly ugly turn. Emboldened by her court victory, X makes excessive demands of Y concerning the two remaining issues. The latter—rather upset and initially wishing to litigate further—speaks to their mediator in confidence, who in turn uses specialized training to bring Y to an epiphany: on account of a tax contingency that has not been adequately explored, in approximately two years' time, what X has asked of Y will advance both parties' needs and interests or be detrimental only to X's needs and interests.

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In revealing this information to Y, the mediator has reframed what Y initially perceived as X’s malicious demands into a positive (should Y end up benefiting after two years) or neutral (should X end up suffering harm after two years) opportunity. Now seeing the proverbial forest instead of just the trees—that is, both short-term and long-term perspectives—Y agrees to X’s demands, provided that X make two small concessions that are important only to Y. The latter readily agrees to part with these “small fish,” and both parties proceed to sign an agreement resolving their conflict, happy that they have successfully used mediation in a complementary manner relative to their prior litigation and in lieu of subsequent litigation.

How to Save Time and Money in ADR

Regardless of whether one decides to utilize arbitration, mediation, or another ADR discipline like early neutral evaluation in resolving a dispute, there are some universal time and cost-saving tips applicable to all ADR proceedings: (1) Solid Preparation — As is the case with many things in life, serious preparation for an ADR proceeding—meaning at the very least in-depth knowledge of relevant facts, occurrences, and transactions, a basic understanding of any relevant rules and/or procedures (especially in the case of arbitration), and a clear understanding of the strengths and weaknesses of all party positions—will accelerate the proceeding, which in turn translates to dollar savings; (2) Emotional Inoculation — ADR proceedings often involve highly emotional situations, especially where children are concerned. By anticipating these situations and deciding upon coping strategies in advance of an ADR proceeding, less time is spent on psychological damage control and more on addressing substantive issues; and (3) Issue Prioritization — Knowing exactly which issues in an ADR proceeding are most important to you and how you plan to conduct your life after it has concluded—no matter the outcome—will go a long way towards minimizing analytical detours that inevitably waste time and money.

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