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USE OF ALTERNATIVE
DISPUTE RESOLUTION IN
NATURAL RESOURCES
LITIGATION

Stanley A. Leasure

USE OF ALTERNATIVE DISPUTE RESOLUTION IN NATURAL RESOURCES LITIGATION

After conducting over one hundred mediations and arbitrations, I have reached one inescapable conclusion: Alternative dispute resolution, especially mediation, should be seriously considered in every case.

The purpose of this paper is to generally describe the principal forms of alternative dispute resolution (“ADR”); to discuss the advantages of ADR; to describe, in some detail, the process of mediation, the most commonly used form of ADR; and to offer some suggestions both to practitioners who are called upon to represent clients in the ADR process and to those of you who are those clients.

I.

OVERVIEW OF ADR

Mediation. Mediation is a meeting at which a neutral third party, the mediator, assists the parties to a dispute reach a settlement on terms they can all live with. The mediator makes no decisions and cannot force a settlement between the parties.

Mediation can occur, by agreement of the parties, at any time during the life of a dispute, from a point before suit is filed to a point after judgment while the case is on appeal.

In a nutshell, mediation is a process where the mediator helps the parties resolve their own dispute.

Arbitration. Arbitration is a form of ADR in which the parties to a dispute agree to present their case to one or more neutral third parties, the arbitrator(s), for decision. Like mediation, the agreement to arbitrate can be made with respect to an existing dispute or by virtue

of a pre-existing arbitration clause in a commercial contract. Unlike mediation, the arbitrator, not the parties, makes the decision. The decision of the arbitrator can, by agreement of the parties, be either binding or advisory.

The arbitration hearing is adversarial and similar to a presentation in court, with relaxed rules of procedure and evidence.

The general goals of arbitration as a dispute resolution process have been identified by Branton and Lovett in *Alternative Dispute Resolution Volume 10 Trial Lawyer's Series (Knowles Publishing)* as follows:

1. Giving the parties the benefit of a decision-making process.
2. Giving each party his day in court without the necessity of actually going to trial.
3. Giving the parties the benefit of a neutral third party evaluation of their case (non-binding arbitration).
4. Providing the opportunity for a decision by a third party with subject matter expertise.

Med-Arb (Mediation-Arbitration). Med-Arb is a combination of mediation and arbitration. Under this process, a case is first mediated and if a voluntary settlement is not reached between the parties, the mediator becomes an arbitrator who renders a decision which is usually non-binding.

Arb-Med (Arbitration-Mediation). This form of ADR is similar to Med-Arb, except the order is reversed. Here, the case is first submitted to one or more arbitrators for a binding decision which will be sealed and not disclosed to the parties. Following the arbitration phase,

the case will proceed to mediation. If the mediation is unsuccessful, the arbitration decision is given effect.

Moderated Settlement Conference. In a Moderated Settlement Conference, the parties submit a summary of their cases to a panel of independent third parties who issue an advisory opinion. This advisory opinion can be used by the parties in further settlement discussions.

II.

ADVANTAGES OF ADR

ADR is almost always more confidential, more efficient and more cost effective than litigation.

While litigation is a very public process and a matter of public record, ADR is generally confidential. In Arkansas, this confidentiality is assured, with minimal exception, by virtue of the provisions of Ark. Code Ann. § 16-7-206 which provides:

(a) Except as provided in subsection (c) of this section, a communication relating to the subject matter of any civil or criminal dispute made by a participant in a dispute resolution process, whether before or after the institution of formal judicial proceedings, is confidential and is not subject to disclosure and may not be used as evidence against a participant in any judicial or administrative proceeding.

(b) Any record or writing made at a dispute resolution process is confidential, and the participants or third party or parties facilitating the process shall not be required to testify in any proceedings related to or arising out of the matter in dispute or be subject to process requiring disclosure or production of information or data relating to or arising out of the matter in dispute.

(c) If this section conflicts with other legal requirements for disclosure of communications or materials, the issue of confidentiality may be presented to the court having jurisdiction of the proceedings to determine, in camera, whether the facts,

circumstances, and context of the communications or materials sought to be disclosed warrant a protective order of the court or whether the communications or materials are subject to disclosure.

In addition, ADR processes can, and probably should, be the subject of confidentiality agreements. The confidentiality agreement I use in my mediation practice covers, among other things, the following points:

1. Statements made during the proceeding are privileged, non-discoverable and inadmissible in any legal proceeding.
2. The privileged character of the information is not altered by disclosure to the neutral and the neutral cannot be compelled to disclose records or to testify at any judicial proceeding.
3. No aspect of the ADR process can be relied upon or introduced into evidence in any judicial proceeding.

The advantage of confidentiality in the resolution of any dispute is obvious, particularly so in connection with most business related disputes. The cloak of confidentiality, in fact, enhances the prospect of the successful resolution of most controversies. Confidentiality is one of ADR's most important advantages.

Another principal advantage of the ADR process is efficiency in the management of the dispute resolution process.

The inefficiency of the traditional litigation process is manifest. Initial pleadings are filed and discovery requests served. Objections to the propriety of the discovery requests follow. This issue is fully litigated. Protective orders are requested, resisted and finally issued. Thereafter, mounds of paperwork, much of which having nothing to do with the issues involved, are

accumulated at great expense and effort. Extensive motion practice is conducted in what is frequently a vain attempt to narrow the issues. Dispositive motions are filed, resisted and ultimately decided. Depositions drag on interminably. After a year or two or three, a trial is set and the resolution of the controversy is entrusted to either a judge who is a generalist with usually no specific knowledge or expertise in the area or, alternatively, to a jury of citizens who are selected based upon the principal qualification that they know nothing about anything important to the litigation.

After the verdict is rendered, the almost obligatory appeal follows with its own labyrinthine process. A year or so later, the matter is finally concluded.

Can there be any wonder that alternatives to this have been developed?

Perhaps the greatest advantage of ADR over litigation in connection with the effective management of disputes rests in the control the parties themselves can have over the process. First, the parties determine the time line upon which the resolution of the dispute is managed. Almost every party to a dispute wants the dispute over as soon as possible. ADR typically permits a resolution at a date earlier than that possible through litigation. The ADR process can be conducted before or after a lawsuit has been filed. It is not affected by the dictates of the court dockets. It can be scheduled at the first date agreeable to the parties. ADR permits resolution of the dispute at the earliest possible date.

In addition to control over timing, the parties, through the use of ADR, control the resolution process itself. Rather than focusing, through court mandated requirements, on the technical or procedural aspects of the case, the parties can direct the focus to the merits of the dispute and their own needs and interests. The focus in ADR shifts from the compliance with

court imposed rules of procedure, which attempt to accommodate any and all types of civil disputes, to the particular requirements of the case at hand.

Additionally, the formalities of a trial are not imposed on the parties under ADR. There is no requirement of a written transcript of the proceedings. There are no formal rules of procedure or of evidence.

Finally, the parties can have infinitely greater control over the outcome of their dispute in an ADR setting. This can take one of several forms.

In a mediation context, the parties decide their own fate. Mediation provides the opportunity for creative solutions specifically tailored to the dispute and the special needs of the parties. Through the mediation process the parties have ultimate flexibility.

This control presents itself in a different manner in the arbitration proceeding. In the arbitration context, whether the agreement to arbitrate was entered into before or after the dispute arose, the parties to the agreement control the manner in which the arbitrator is selected, the arbitrator's qualifications and experience, the scope of the arbitrator's authority, the finality of the award and the nature and type of relief available to be awarded in the process.

The ADR process permits the parties to select the neutral(s) to assist in the resolution of the dispute. This can be a distinct advantage in the natural resources arena. It would often prove beneficial to enlist the services of a neutral with experience in the field and an understanding of the issues and the context in which those issues arose. This is contrasted with the system of litigation where the decision is entrusted to judges and juries who are less likely to understand the complex issues which arise in natural resources litigation, thus increasing the chance of aberrant decisions.

ADR can be specifically tailored to a more effective process of dispute resolution than that usually available through the process of civil litigation.

In addition to being confidential and more efficient in the management of disputes, the ADR process has proven to be more cost effective. ADR, quite frequently, results in significantly lower legal costs than traditional litigation. The cost savings can be particularly pronounced in natural resources litigation. The cost of presenting the complex scientific and economic proof often required in these cases can be staggering. Additionally, particularly in a business dispute context, the time devoted by in-house staff to the dispute resolution process and the attendant costs and loss of productivity are significantly reduced.

In summary, ADR provides three major advantages to litigation: Confidentiality, more efficient and effective resolution of the dispute and significant cost savings.

III.

HOW MEDIATION WORKS

Mediation is a form of ADR by which a neutral third party, the mediator, at a mediation session, assists the parties to a dispute in the negotiation of a settlement agreement all of the parties can live with.

The mediator is neither judge nor jury. The mediator makes no rulings on evidence. The mediator does not decide who is right or wrong or who wins or loses. The mediator cannot force a settlement. Quite simply, the mediator facilitates communication between the parties with the goal being a resolution of the dispute.

With the exception of the settlement conferences conducted in federal court, in Arkansas there is virtually no mandatory court-annexed mediation of typical civil disputes.

In 1993, the Arkansas General Assembly passed Act No. 641 in which it generally encouraged, but did not require, the use of ADR processes in Arkansas. Ark. Code Ann. § 16-7-201(1) provides:

It is the intent of the General Assembly to:

- (1) Encourage and authorize the use of dispute resolution processes throughout this state to resolve disputes, cases and controversies of all kinds. Such processes include, but are not limited to, negotiation, mediation, conciliation, arbitration, private judging, moderated settlement conferences; med-arb, fact finding, mini-trials, and summary jury trials; . . .

In addition, Ark. Code Ann. § 16-7-202 provides:

(a) It is the duty of all trial and appellate courts of this state, and they are hereby vested with the authority, to encourage the settlement of cases and controversies pending before them by advising the reference thereof to an appropriate dispute resolution process agreeable to the parties, and, on motion of all the parties, must make such an order of reference and continue the case or controversy pending the outcome of the selected dispute resolution process.

(b) All courts are further granted the discretionary authority to make, at the request of a party, appropriate orders to confirm and enforce the results produced by such dispute resolution process.

Clearly, this “encouragement” by the legislature back in 1993 falls well short of a court sponsored mandatory program. Accordingly, ADR in Arkansas results from voluntary agreements between the parties reached either before or after a controversy arises.

The goal of a mediation is the execution of a settlement agreement. In my experience with voluntary mediations, the prospect of success is quite high, in excess of ninety percent. The reason is self-evident. The parties have agreed to voluntarily come together for the express

purpose of attempting, with the help of a mediator, to resolve their dispute.

A mediation can occur whenever the parties agree. There are obvious advantages to early mediation. However, in mediation, like romance, timing is important. If a mediation occurs before the parties have enough information to evaluate the critical aspects of the case, the mediation may flounder. The information essential to settlement must be gathered and exchanged prior to the mediation.

Once the parties have agreed to mediation and selected the mediator, the mediator will typically require the execution of an agreement for mediation and the adoption of rules for mediation.

Prior to the mediation, the mediator will typically request that all parties submit a confidential mediation memorandum. The mediation memorandum I request in my mediation practice covers:

1. Identification of settlement representatives (not counsel) who will attend the mediation.
2. Status of discovery.
3. A statement as to whether the party has enough information to make a settlement offer and, if not, what additional information is needed.
4. History of settlement offers.
5. Disputed issues of facts and law.
6. Concise statement of points (factual, legal, practical) which the attorney believes affects the client's chance of winning at trial.

The procedure used at the mediation session can be as varied as the wishes of the parties

and the practice of the mediator. However, the typical mediation breaks down into three parts: a group session, several private caucuses and, hopefully, the preparation and execution of a settlement agreement.

During the group session, all of the parties and their counsel are present together with the mediator. It is at this point in the mediation that the mediator will typically require all persons present, including counsel, to execute a confidentiality agreement.

At the commencement of the group session, the mediator will discuss his role, the goals of the mediation and the procedure to be used. The mediator will almost certainly stress the confidentiality aspects of the mediation and obtain the commitment of the parties to act in good faith throughout the process.

In addition, the mediator will, at the outset, want to assure that the parties present have the authority to make a binding settlement agreement. It is critical to a successful mediation that the clients' real decision makers be present with authority to make a binding settlement agreement.

After the introduction, counsel for each of the parties will be permitted to make an opening statement about the case and to outline, for the other side and the mediator, the factors believed to be the most important in evaluating the case. Also, the parties will be permitted, if they desire, to make a presentation.

After this group session, the parties and their attorneys will be separated into different rooms to meet independently with the mediator.

During these private caucuses, the mediator will typically probe the positions of the respective parties in an attempt to get an assessment of the strengths and weaknesses of the positions and to determine the essential needs and interests of the parties. It is during these private

caucuses that the mediator will relay offers and obtain authority to make counter-offers. The mediator will typically have several private caucuses with each party before a settlement agreement is reached.

Once an agreement has been reached, the mediator will assist the parties and their counsel in the drafting of a settlement agreement to be executed prior to the conclusion of the mediation. In most cases, it is desirable that a settlement agreement be drafted and executed by parties before the conclusion of the mediation.

IV.

EFFECTIVE ADR ADVOCACY

The representation of clients in an arbitration hearing is not significantly different from conducting a trial in court. The procedural and evidentiary rules are relaxed, but the elements of the claim and the defenses must be presented using the standard techniques of direct and cross examination of witnesses and admission of documentary evidence. The fact finder consists of one or more arbitrators as opposed to a judge or jury, but the advocacy is very similar.

The same, however, is not true with respect to the representation of a client in a mediation proceeding. In fact, some of the techniques of advocacy used in the litigation process are counterproductive in a mediation setting.

As noted above, the attorney's role in the mediation begins with the preparation and submission of the confidential mediation memorandum. The preparation of this document often receives too little attention. It is through this document, submitted separately and confidentially from each side, that the mediator first learns about the issues and the factors which will be important in a resolution to a case. It is frequently the case that an attorney representing a party

to a mediation will attempt to play “hide the ball” from the mediator in the mediation memorandum. To read some mediation memoranda, one would conclude that the attorney views the mediator’s role as simply to convince the other side that his client is one hundred percent correct and that an appropriate approach to the mediation would be for the mediator to ask the other side to capitulate during the open session. A presentation of the strengths of his client’s position from the advocate is anticipated. However, a recognition and an analysis by the advocate of the weaknesses of his client’s position is also very helpful in the confidential mediation memorandum.

The next order of business is the preparation of the client representative for the mediation process. Unless the client representative is an adjuster for a liability insurance company, it is quite likely that he or she will be somewhat, or even completely, unfamiliar with the mediation process. Accordingly, it is important that the attorney advise the client representative in detail of the role of the mediator and the goal of the mediation process. The steps in the mediation meeting should be fully explained.

As previously noted, the client representative will be invited to make a presentation during the general session. The decision must be made by counsel and the client prior to the mediation as to what, if any, presentation will be made by the client representative at the general session. This is not the time for an off the cuff soliloquy.

The client representative must also be forewarned about the sometimes slow, frustrating progress to be expected during the mediation process. I frequently tell parties to a mediation that mediation is like making sausage. You may like to eat sausage, but you probably would not want to see it made. Likewise, you may want your case settled, but the process may be somewhat

unpleasant. Frequently, the parties find this to be true. They should be told to expect it. It will lessen their frustration level. Frustrated decision makers are not conducive to a successful mediation.

The client representative must also be prepared to be engaged by the mediator in the private caucuses. While it is unlikely that the mediator will push the client representative for a “bottom line” settlement position, it is common for the client representative to be probed concerning the strengths and weaknesses of the case and the important evaluative factors and interests.

In the opening session, the attorneys for each side will be called upon to make an opening statement. That opening statement should outline the important factors to be considered in the evaluation of the case. This presentation is, in reality, more akin to a combination opening statement/closing argument presented at trial. Its purpose is to persuade the decision maker on the other side of the merits of your position. However, unlike at trial, it must be presented in a manner such that the decision maker, who at a mediation is the opposing party, will be affected and, hopefully, persuaded without anger, insult or offense. The goal of your opening statement should not be to elevate the blood pressure of the decision maker on the other side to stroke level.

However, at the conclusion of your opening statement, the opposing decision maker must be persuaded that you, your client and your client’s position are a force to be reckoned with and taken seriously. Sometimes, your opening statement is the first realistic view the opposing decision maker has ever been required to take of the fact that his or her position is not legally, factually and morally unassailable.

Likewise, in the private caucuses, the attorney should be prepared to discuss with the mediator the strengths and weaknesses of his client’s position. The advocate should be prepared

to assess for the mediator the prospects of success at trial. Additionally, the advocate must be prepared to evaluate the probable range of recovery if the case proceeds to trial. Hopefully, these discussions will have taken place between the client representative and counsel prior to the mediation session, but if not, the attorney should anticipate that such discussions will occur during the private caucuses.

V.

CONCLUSION

ADR is not a panacea. Some cases must be fully litigated. However, the take-home message here is that ADR, and particularly mediation, should be considered as a viable alternative to the resolution of most disputes which arise in natural resources litigation.