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Tiered Clauses in Dispute Resolution: The Role of Adjudication as an Influence on Mediated Settlements

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November 7, 2024

My first job after law school was as an assistant district attorney in Massachusetts. In my first six months on the job, I probably tried more than 50 cases to verdict. However, for each case I tried, at least 10 more settled as a result of plea bargains, many just before trial. The imminence of trial created a strong incentive for compromise.

I then became an academic and was lucky enough to work for Robert Mnookin, the author of one of the most-cited articles in the history of law reviews: "Bargaining in the Shadow of the Law." The article suggests that while most cases settle—more than 99% of all filed civil matters, according to Marc Galanter's research in "The Vanishing Trial"— the outcome of a settlement is strongly influenced by the presence of a robust court system and a looming trial date.

By the mid '90s, every court system had adopted programs that encourage settlement on the eve of trial. Many mandatory or "voluntary with a push" programs proved highly successful in reducing court dockets and judicial caseloads. In addition, according to studies by the RAND Corporation, these programs produced high levels of client satisfaction. For many practice areas, mediating as trial approached became the preferred means to settle cases. Mediation, post-discovery and pretrial, became at least as prevalent as direct negotiations between lawyers (and perhaps more so) when attempting to resolve legal disputes.

The Rise of Arbitration

Arbitration has been a mainstay in the world of dispute resolution for centuries. Over the last few decades, I've watched arbitration supplant civil trials as the more popular method for adjudication. The advantages of arbitration are many and include the ability of the parties to choose a dedicated neutral with substantive and procedural experience who is undistracted by the pressures a sitting trial judge might face (e.g., too many cases, a lot of criminal work and insufficient resources). Among other advantages, arbitration is confidential, efficient and cost-effective. It's no surprise that its popularity has increased.

So, if cases tend to mediate to resolution on the eve of a binding decision after an adversarial presentation,

one would expect that the next logical step would be for mediation to become a common step in the shadow of arbitration. The best way to make sure that happens is for more dispute resolution clauses to be "tiered"; that is, the clause requires mediation between the parties, then, if unresolved, arbitration or litigation would be the final step.

Tiered Clauses

Tiered clauses have been around for a long time. I've seen many contracts in which mediation is a condition precedent for arbitration, so a clause drafter need not reinvent the wheel. My first encounter with a municipal requirement for mediation as a condition precedent for trial was in the late '80s in family court; I encountered it again in the early '90s when I learned that neighbors in Marin County could initiate a process to remove a tree that blocked their view. The regulation required good faith negotiation followed by mediation followed by a binding hearing.

If the past is a guide to the future, then as arbitration rises, the next generation of smart lawyers will draft dispute resolution clauses that require parties to engage in mediation prior to the commencement or completion of arbitration.

Complications

There are two ways tiered clauses may create traps for the unwary.

First, some parties may turn mediation into a "check the box" event and will not make a meaningful attempt at getting a case resolved. It may make sense to include good faith requirements (even if hortatory) and to indicate a named provider with established procedures and a solid reputation to be the mediator. Of course, post-dispute, the parties could agree to whatever they want, but the clause will be a powerful default.

Second, there are issues regarding timing. When does the mediation occur? Usually, in litigated matters, mediation occurs after discovery is complete or nearly complete. But if mediation is a condition precedent to filing the arbitration, the timing is skewed. Perhaps a superior way to mimic the "mediation on the eve of trial" dynamic is to schedule a mediation either right before the presentation of evidence to the arbitrator or between the close of evidence and the issuance of an award. If the arbitrator knows from the commencement of proceedings that such a step is contemplated by the dispute resolution clause, appropriate accommodations can be made to the arbitration schedule.

While I don't have a crystal ball and I can't predict the future, my guess is that tiered clauses will be employed more and more.

I'd encourage any attorney drafting ADR clauses to be a thought leader in this area and to craft clauses that resolve conflict at the lowest possible level in the most effective and efficient way.

For more information, JAMS offers a guide to drafting dispute resolution clauses, which can be found here.

Richard Birke is senior vice president and executive director of the JAMS Institute, and chief architect of JAMS Pathways. He is experienced at resolving complex, multiparty disputes. With over 35 years of hands-on dispute resolution, he draws on experience in a wide range of disciplines, including mediation, psychology, economics, law, communications, negotiation theory, strategic behavior, and diversity, equity and inclusion, to apply the right tools to every client situation.