

MEDIATION AND ARBITRATION

ALTERNATIVES TO LITIGATION AND WAYS TO MANAGE CONFLICT

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The Growing Popularity of Alternative Dispute Resolution as Both an Alternative to Litigation and A Way to Manage Conflict

During the last two decades the use of arbitration and mediation as alternatives to court litigation has grown so popular that a virtual cottage industry has been created that is regularly referred to as “Alternative Dispute Resolution” or “ADR.” This is, in some ways, an unfortunate misnomer, however, because it implies that our work is limited to resolving disputes otherwise irreversibly destined for the courts.

Although the incredible growth and acceptance of ADR is in no small way attributable to its usefulness as an alternative to litigation, the promise of ADR is much broader. Mediation, facilitation, early neutral evaluation, and any number of other techniques are now regularly being used for the prevention, control and management of emerging conflicts before they blossom into full-blown disputes. For example, the Mediation Committee of the Dispute Resolution Section of the American Bar Association recently discussed the growing use of neutral third parties to facilitate business transactions. Noting that when a transactional negotiation collapses, it is generally unrelated to the merits of the underlying deal, the Committee observed that third party neutrals often make the difference between a failed negotiation and a successful deal. Although this use of mediation is not yet widespread, the Mediation Committee sees “Deal Mediation” as possibly the next frontier in the growing use of mediation.

In another recent development, a World Bank Group entity, the International Finance Corporation, published a 57 page report of its Global Corporate Governance Forum, entitled “Mediating Corporate Governance Conflicts and Disputes,” in which they strongly advocated the use of mediation skills and techniques, and the involvement of third party neutrals, to manage and control internal corporate governance conflicts in order to help keep them in the boardroom and prevent them from escalating into public disputes. As the IFC observed, full-blown disputes “are always bad news for a company. They can lead to poor performance, scare investors, produce waste, divert resources, cause share values to decline, and, in some cases, paralyze a company.” The IFC promotes both the training of upper management in the skills and techniques of mediation and facilitation and the use of outside third-party neutrals in the more classical mediation and facilitation models. In discussing the many benefits of mediation in corporate governance, the IFC noted:

More than helping solve corporate governance disputes in a more efficient and effective way, mediation can also help manage conflicts and, therefore, prevent disputes. Conflict has the potential to be constructive, by bringing to the surface issues, interests, perspectives, and concerns that need to be addressed so that the corporation can perform more

effectively and efficiently. The challenge for effective boards today is to harness the potential for conflict, which would lead to constructive outcomes rather than destructive ones.

Another area in which mediation and facilitation are growing exponentially is in land use matters. Land use disputes, by their very nature, are often multi-party and multi-dimensional. It is not unusual to have property owners, developers, interested neighbors, advocacy groups (local, regional and national), elected officials, appointed officials and governmental agencies all asserting diverse and overlapping positions and interests simultaneously. As a result, land use conflicts are sometimes difficult to manage in the more structured traditional adversarial processes, and are often administrative and political in their nature and not susceptible to determination by litigation. The City of Phoenix has encouraged the use of mediation in a number of high profile land use conflicts in the past five or six years, almost all of which have resulted in mutually acceptable solutions by the private interests, which were then accepted and adopted by the public bodies.

Possibly the newest application of mediation techniques to conflict management is in the area of estate planning. Some estate planners (attorneys and others) are engaging mediators to facilitate pre-estate planning conversations among family members and other interested parties. The goal is to develop a better understanding of the real interests and intentions of all of the parties (trustors, testators, potential beneficiaries, trustees and executors) and create more enlightened estate plans less likely to produce misunderstandings, resentments, alienation of family members, and even litigation.

Mediation and facilitation are being used regularly by all kinds of organizations to promote better decision making. In almost every environment, issues arise from time to time that generate such strong emotions and seemingly intractable positions, that, for all practical purposes, the individuals or organizations are so polarized as to become dysfunctional. Proceeding by Roberts Rules of Order and majority rule rarely produces satisfactory outcomes, and often only furthers exacerbates the disenchantment of those in the minority. In such situations, enlightened organizations more and more frequently are utilizing third party neutral facilitators to manage the meetings and incorporate more collaborative approaches into the decision making process. Such collaborative approaches reduce the polarization of the parties; mend fences and restore personal relationships; focus on finding areas of mutual interests or at least compatible interests rather than adversarial positions; lessen the sense of disenfranchisement of the stakeholders, and produce decisions that everyone can buy into.

Although Alternative Dispute Resolution has its roots, and the basis for much of its early acceptance and success, in providing alternatives to litigation

(which will continue to be a significant part of our work), the real promise of Alternative Dispute Resolution is in the ever expanding uses for the techniques, skills and processes to not only resolve full-blown disputes, but to prevent, control and better manage all kinds of conflicts in their early stages. In time the field may redefine itself and be known as “Conflict Management” or “Conflict Management and Resolution,” but, in the meantime, ADR should be seen as not only an alternative to litigation, but as a collection of powerful tools for the prevention, management and resolution of emerging conflicts before they reach the level of litigation.

An Overview of Conflict Management and Resolution

Conflict is, has been, and will probably always be, a regular part of our lives. In both our personal and business relationships, we regularly find our own wants, needs, and even our core values, in conflict with those of others. While some ADR practitioners advocate the utopian eradication of conflict, a far more realistic goal is to accept the inevitability of conflict and learn to better manage and resolve it, and turn it into an opportunity for constructive growth.

As a society, we have developed a variety of dispute resolution mechanisms. Most of these mechanisms have developed over time, often in response to some perceived defect or deficiency in the then available dispute resolution options.

Reduced to their most basic human responses, the earliest dispute resolution mechanisms were “fight or flight,” or, put differently, self help or avoidance. Avoidance is commonly adopted as a result of perceived weakness, while self help is generally exercised as a result of apparent strength, often involving the use of force. Both offend our fundamental sense of fairness, because the outcome is based solely on an actual or perceived power imbalance, independent of the merits or the parties’ rights or obligations. While the option to engage in direct negotiation always exists, in the absence of any external restraint on the exercise of power, the party with the apparent power has little incentive to negotiate.

The notion of resolving disputes on their merits, based on the rights and obligations of the parties as set forth in a defined body of rules or laws, represented one of the high points in the development of civilized societies. The resolution of disputes by litigation in courts rather than duels in the street, was, ironically, the first real Alternative Dispute Resolution process. A disputant no longer had to fight or flee, but could seek a “judicial” resolution.

Judicial dispute resolution, however, is inherently expensive, time consuming, subject to considerable uncertainty as to outcome, and solely within the control of third parties (judges and jurors) rather than the disputants. If the parties can no longer resolve their disputes by the application of raw power, and

the costs and uncertainties of litigation are unacceptable, they have a greater incentive to engage in alternative dispute resolution options.

Although litigation arose as an alternative to less acceptable self help methods of dispute resolution, litigation soon became so predominantly the accepted method of dispute resolution in the United States that we have come to view it as traditional dispute resolution, and to lump all other dispute resolution mechanisms under the general rubric of Alternative Dispute Resolution. The general acceptance of the ADR label and the fashionable popularity of the concept of Alternative Dispute Resolution have, unfortunately, fostered considerable misunderstanding as to the distinctions between different forms of Alternative Dispute Resolution.

As our society has become more complicated, laws have become more complex and litigation has exploded, resulting in our judicial process becoming hopelessly protracted and prohibitively expensive. Arbitration, as an alternative to litigation, was a direct response to these growing problems with judicial dispute resolution.

Arbitration is a process in which the parties voluntarily consent to submit their dispute for resolution to an impartial third party chosen by them. Although there are some variations, true arbitration is final and binding, with no right of appeal. In the absence of agreement by all of the parties, pre-hearing discovery procedures and motion practice are quite limited. Unlike court proceedings, arbitration hearings are conducted in private, and, although based on the customary presentation of testimonial and documentary evidence, neither the Rules of Civil Procedure nor the Rules of Evidence are literally applied. The final award of an arbitrator is enforceable by the court. Arbitration is meant to be a true alternative to court litigation by providing a speedy, less expensive, fair hearing and a final determination of the dispute.

For many years arbitration was the predominant Alternative Dispute Resolution process. It has been touted as a cure for the court backlog and the high cost of litigation, and agreements to arbitrate are now so uniformly and liberally enforced that even the courts are sometimes accused of favoring arbitration over litigation. While there is concern that arbitration has been evolving into litigation in a private room, arbitration remains a powerful tool for the efficient and cost effective resolution of disputes that ultimately require determination by a third party, particularly when conducted in the efficient manner originally contemplated.

Even when conducted with reasonable speed and moderate cost, making it a real alternative to court litigation, arbitration may not be the best ADR process for many conflicts. Arbitration, like litigation, is often a high stakes, zero sum, win - lose game. Like litigation, it is a highly adversarial process in which a third party makes a binding decision over which the parties have little control. If

the conflict proves unmanageable in any other way and has blossomed into a full blown dispute requiring a third party decision, arbitration, properly designed and administered, is generally a much better alternative than litigation, but mediation, arguably the most powerful of all ADR processes, should almost always be tried first.

Mediation is not just another variation on litigation, but is a quantum leap to an entirely different paradigm for conflict resolution. Whereas litigation and arbitration are adversarial contests in which third parties are empowered to determine winners and losers, mediation is a collaborative process in which the disputants are empowered to fashion their own solutions to their own problems. Mediation is a process in which a specially trained impartial third party, who has no decision making authority whatsoever, facilitates negotiations between the disputing parties and, through his or her careful management of the process, helps the parties reach a mutually acceptable solution to their dispute. The process is purely voluntary, totally confidential, and non-adversarial. Although the parties are usually accompanied by their attorneys, the parties often speak for themselves and are encouraged to participate fully in the process. Instead of evidentiary type hearings, the parties are invited to engage each other in joint meetings in an informal setting under the supervision and management of the mediator, and to meet in private caucuses with the mediator for candid and in depth exploration of issues.

If we were to summarize the foregoing overview of conflict management and resolution on a dispute resolution continuum, it would look like this:

<u>Collaborative</u>		<u>Adversarial</u>
negotiation	mediation	arbitration litigation

The fact that the distance between mediation and arbitration on our continuum is much greater than the distance between mediation and negotiation, or the distance between arbitration and litigation, is not accidental, but reflects the organic difference between the two. Simply because they are both ADR processes, they should not be thought of as similar. As one moves along the continuum from left to right, one moves generally from less expensive, less formal and more collaborative mechanisms toward more expensive, more formal and more adversarial processes.

Although the focus of this paper is on the use of mediation and arbitration for the management of conflicts and the resolution of disputes, mediation and arbitration are not the only conflict management and resolution mechanisms in the ADR galaxy. For sake of completeness, it should be noted that there are numerous other alternative dispute resolution mechanism in use in varying degrees in various locales around the country, including private judging, mini-trials, summary jury trials, early neutral evaluation, med/arb, arb/med, and any number of variations of all of the foregoing. Virtually all other forms of alternate

dispute resolution would, if placed on our continuum, be to the right of mediation, either between mediation and arbitration or between arbitration and litigation. In other words they are generally less collaborative and more adversarial than mediation. While an in depth discussion of all of the ADR processes is well beyond the scope of this paper, for those who wish more information, Edward J. Costello, Jr., in his excellent book, *Controlling Conflict – Alternate Dispute Resolution for Business*, does a superb job of explaining and distinguishing the various ADR mechanisms, including an in depth discussion of both mediation and arbitration.

A More In Depth Look at the Magic of Mediation

There is no equivalent to the Rules of Civil Procedure governing mediation, nor is there any single correct formula. The process is, by its very nature, highly fluid and flexible. If one were to try to identify a single common denominator that distinguishes mediation from virtually all other forms of dispute resolution, it would probably be the fact that the dynamics of the process, when properly managed, gradually cause the disputants to change the way they view their conflict, thereby opening the door to resolution.

Most people view conflict in negative terms; approach its resolution in an adversarial way; and engage in what Roger Fisher and William Ury, in their now famous book, *Getting to Yes*, describe as “positional” bargaining. Each party wants to maximize its recovery at the expense of the other and without regard for what the other wants or needs. Accordingly, each disputant asserts a position, and the parties then engage in the slow dance of offer and counter offer, often ending up at some half-way point.

Skilled mediators see conflict as an opportunity for positive growth and change, and almost uniformly guide the disputants away from positional bargaining toward what Fisher and Ury call “principled negotiating” or “negotiating on the merits”. The hallmark of principled bargaining is the ascertainment of and focus upon the real interests of the parties, not their negotiating positions. Sometimes it is as uncomplicated as finding out what a person really needs, as opposed to what they say they want. The shift in focus from arbitrary positions to rational interests is often the first step in changing the way disputants think about the conflict. Although their interests may still conflict, the parties each begin to understand the dispute from the other’s perspective. While they still may not agree with each other, the parties begin to see the conflict less as a battle to be won or lost, but more as a business problem to be solved. When this happens, the parties begin to address their real needs and interests in mutually acceptable ways and are able to begin thinking creatively and start to develop and explore multiple potential solutions that no one previously considered, and that go beyond the authority of any judge, jury or arbitrator. Although it is an overworked cliché, it is frequently possible to find a “win-win” solution when the parties truly understand each other’s perspectives

and interests and turn their full attention to solving the problem instead of positioning for litigation.

Sometimes the parties are quite receptive to the change from an adversarial to a collaborative mind set, but sometimes they are very resistant. Robert D. Benjamin, a skilled mediator and prolific writer on the subject, has compared the role of the mediator to the folkloric trickster figure in his article in *13 Mediation Quarterly*, No. 1 (fall 1995):

“Both tricksters and mediators are first and foremost conflict managers; their fundamental role and responsibility is to reconcile oppositional forces – immovable objects with irresistible forces. Their conceptual understanding about the nature of conflict and their approach to thinking about problem solving are remarkably congruent. Their understanding and thinking is significantly different from traditional professionals such as lawyers, doctors, and mental health professionals, whose work is anchored in a technical-rational paradigm of thought. Thus, whereas the traditional professional views conflict as an aberration to be fixed, solved, or cured, the mediator-trickster considers conflict to be a part of the natural landscape of living, a matter to be managed and used constructively. Further, while traditional professionals maintain a linear focus on those aspects of a conflict that directly relate to their subject disciplines, mediators-tricksters must be holistic and systemic in perspective. ... The trickster character, apropos to a mediator, combines intuitive sensibilities with analytic skills. The management of complex protracted disputes can seldom be accomplished by pure rational analysis alone; wit as well as reason is required.”

Mediation is more an art than a science, and, as the field has grown, a number of different philosophical approaches have developed concerning the nature of mediation and the style of the mediator. While different writers have used varying terminology, the three principal philosophical positions might accurately be labeled (i) evaluative, (ii) facilitative and (iii) transformative.

An evaluative mediator, sometimes called a directive mediator, tends to evaluate the dispute more like a judge or arbitrator would. Although the evaluative mediator, like all mediators, has no authority to impose a settlement on the parties, the evaluative mediator is not bashful about letting the parties and their counsel know how he or she evaluates the matter and will often push the

parties toward the settlement the mediator thinks is appropriate, often encouraging the parties to defer to the judgment of the mediator. While the purely evaluative model may produce settlements in a substantial number of cases, it risks doing a disservice to the parties by denying them many of the real benefits of mediation.

A facilitative mediator, on the other hand, is more inclined to help the parties change their mind set; assist them in focusing on their real needs and interests as opposed to their legal positions; and aid them in developing and exploring various possible solutions to solve their own problem. Although the facilitative mediator may well have reached some preliminary evaluation of the dispute in his or her own mind and use that evaluation in managing the process, a purely facilitative mediator will not readily inject those conclusions into the process. The facilitative mediator believes mediation is a process in which the disputants are the ones empowered to fashion their own solution to their own problem. The mediator is an impartial third party with no power who facilitates that process, without pressure, coercion or manipulation.

Transformative mediation is, in a sense, an extension of the facilitative process, in which the empowerment of the parties, and the recognition of their self worth and control over their own problems and lives is elevated to paramount importance. The truly transformative mediator is less concerned with settlement of the particular dispute than with the empowerment and validation of the parties, and believes that over time the use of the process will change for the better how all people, cultures and nations view and deal with conflict.

Some would suggest that evaluative mediation is an oxymoron, and, although it may settle a lot of disputes, is not really mediation. While transformative mediation is really mediation, if it does not settle a lot of disputes, it will have little appeal to people in conflict. Although there is a place for both pure evaluative and pure transformative processes in certain types of disputes and to achieve certain kinds of objectives, the real magic of mediation arises out of the blending and implementation of techniques drawn from all three philosophical orientations by a skilled mediator. A mediator, when asked if he or she is evaluative, facilitative or transformative, ought to be able to simply answer "yes!"

In addition to the mediator's philosophical approach to mediation, much is often made of whether the mediator has expertise in the subject matter of the dispute. The lay perception, shared by many attorneys, seems to be that substantive expertise is very important. The vast majority of practicing mediators would disagree. As Robert D. Benjamin said in the passage quoted earlier, "mediators are first and foremost conflict managers". The mediator brings a new way of thinking, a process, and skill in the management of that process to the table. The parties are often experts themselves; they have retained their own outside experts; and the last thing they generally need is another expert with

preconceived notions and biases. If anything, too much substantive expertise by the mediator often gets in the way of the kind of free “out of the box” thinking and creative problem solving that are the mediator’s stock in trade.

Whatever their philosophical orientations, and whether they do or do not have substantive expertise, there are a number of qualities that most successful mediators share.

First and foremost, they must not only be, but must be perceived to be, completely impartial. One of the keys to successful facilitated conflict resolution is the gradual establishment of trust by the participants in the mediator. Impartiality is the bedrock upon which that trust is built during the process.

Good mediators are skilled communicators. Mediation is, if nothing else, about communication. What all of the participants, including the mediator, say and how they say it is important, but often is not as critical as how well they listen. Mediators have to be good, patient and active listeners, and have to manage the process to the end that all of the participants not only are heard, but truly feel that they have been heard and understood by both the mediator and the other parties. Even when parties don’t agree with each other, there is a catharsis that occurs when parties feel they have been heard and understood, and a kind of validation that signals the beginning of the collaborative problem solving process.

Successful mediators are quick studies. They have the ability to absorb, understand, analyze and evaluate a lot of material quickly and retain it throughout the process, even if they will forget it all by the next morning. Part of the trust building process that enables the disputants to be gently, and often subtly, guided toward resolution is their realization that this newcomer, the mediator, really does understand the conflict and each of their perspectives on the conflict.

Although inherent in the earlier discussion of the tension between substantive expertise and mediation skills, successful mediators are generally creative problem solvers, who do not feel restrained from exploring solutions beyond traditional legal rights and remedies.

Finally, good mediators are not themselves intimidated by conflict, do not need to engage in avoidance to deal with it, and act reasonably and calmly under pressure. More often than not, both parties will not only be comfortable with, but will identify with, the mediator.

Mediation should be conducted in a relaxed and informal manner, generally in the office of the mediator or in some other neutral setting. It should have none of the trappings or feel of an adversarial proceeding. When the size of the dispute justifies the expense, it is effective to move the process to a hotel

or some other non business environment.

Although a few mediators believe they should enter the mediation with their minds a blank slate, most believe the more information they have gathered and assimilated before the parties actually arrive, the better the process will work. For virtually all disputes, preparation by the mediator is invaluable. The parties should each be asked to file a pre-mediation memorandum. The memoranda need not be long, and can even be in letter form, but the mediator should be provided with copies of all important documents, contracts, pleadings, disclosure statements and court orders. Although not all mediators agree, the process seems to work best if the memoranda are not exchanged between the parties and counsel, but are submitted to the mediator in confidence. This allows the parties to more candidly assess their positions and more openly address the issues with the mediator. Since the mediator has no decision making authority, and will caucus privately with the parties and their counsel throughout the process, there is no prejudice to anyone by having the pre-mediation memoranda submitted in confidence. Sometimes, when mediation occurs in the earliest stages of the dispute, the parties will benefit from an exchange of the pre-mediation memoranda to better understand each other's starting positions and perceptions. If the pre-mediation memoranda are to be exchanged between the parties, however, then the mediator should require each party to submit a confidential supplement to the mediator in which they provide the candid assessment and any other information that might help the mediator.

While there is no single correct formula or agenda for the conduct of a mediation, experience has shown that an opening statement by the mediator to help create the right collaborative environment; a joint session in which the parties outline their perceptions of and perspectives upon the conflict; followed by a series of private caucuses between the mediator and each of the parties and their counsel, is probably the most common format.

Although almost all mediators make their opening statement in a joint session, there is considerable controversy swirling around whether to hold a substantive opening joint session in which the parties themselves actually begin to discuss the dispute. Those opposed to the substantive joint session (mediators and advocates) argue that the parties can't even be in the same room together— their positions will become more polarized at best, and at worst the mediation will blow up before it really gets started. Many mediators who favor the substantive joint session believe that any mediator who regularly skips it and separates the parties into caucus rooms is a mediator who is, himself or herself, afraid of conflict, so how can he or she help anyone else manage or resolve their conflict.

Mediators who conduct substantive joint sessions generally use their introductions to prepare the parties. The mediator should warn the parties that they are likely to hear things they don't agree with, maybe even things that make

them angry, but they need to listen and try to understand how the other parties feel, and when it is their turn to speak, they will probably say things that the other party does not agree with and that will make the other party just as angry, but before they can solve the problem, they each need to understand how the other perceives it and feels about it.

The parties (not their lawyers) need to vent, need to tell their story and need an opportunity to feel that they have been heard and understood, all of which distinguishes real mediation from judicial settlement conferences. If the mediator is not afraid of conflict, understands how to monitor it, when to intervene, and what interventions to use, it is not only all right, but often healthy, to let the situation get worse for a little while before it begins to get better. When the parties have really had their say, with a little help from the mediator, one often can actually feel the tension seeping out of the room.

A well conducted substantive opening joint session provides: (a) each party the opportunity to be heard and understood by the other parties, not just the mediator and their own lawyer; (b) each party the opportunity to understand the other's perceptions and perspectives on the dispute, even if they don't agree with each other; (c) each party the opportunity to express the personal, physical, emotional and economical impact the dispute has had and for each party to understand, often for the first time, how the dispute has affected the other; (d) each party the opportunity to achieve the extraordinary catharsis that almost always occurs during this process, which tends to clear the way for meaningful settlement discussions; and (e) the opportunity to expose misperceptions held by each party, often about the other's motives and actions, which also tends to open the door to real problem solving.

Although a really good substantive opening joint session sometimes leads directly to meaningful settlement talks in the joint session, generally it simply sets the stage for more productive caucuses that follow. Often, after a particularly difficult and emotional substantive opening joint session, the mediator will go into the separate caucuses and hear the parties acknowledge that they never really understood how the other party felt, or why they did what they did. Frequently the joint session exposes the misperceptions of the parties about the other's motives, and, although they still disagree, they begin to develop enough trust to at least be able to begin negotiate meaningfully and in good faith.

Although it is initially a little disconcerting for many attorneys, the process works much better if the parties and their business representatives speak for themselves in the opening joint session, and participate frequently throughout the process. When the attorneys dominate the opening session, they generally present the equivalent of opening and closing statements, the presentations are highly positional and adversarial, and the entire effort to change the way the parties view their dispute and create a collaborative problem solving atmosphere is significantly undermined. Since the process is designed to be non -

adversarial, the parties do not really need advocates. Rather, they need counselors in the finest tradition of the legal profession. Although some domestic and community mediators find dealing with lawyers in mediation a problem, most business mediators welcome them, don't want to mediate without their presence, and view them as partners in the collaborative dispute resolution process.

There is little or no risk in allowing the parties to speak and participate, because one of the great benefits of mediation, and one of the reasons it works so effectively, is the umbrella of confidentiality that exists. Arizona has one of the strongest confidentiality statutes in the country, providing that the mediation process is confidential, and all communications, oral and written, made during, or created for or used in connection with, or acts occurring during, a mediation are confidential and may not be discovered or admitted into evidence. ARS § 12-2238. Some parties and some mediators, in an abundance of caution, include a confidentiality clause in the mediation engagement agreement. A sample of such a clause follows:

“Confidentiality. The parties agree that all statements made during the course of the mediation (and written statements prepared for the mediation) are privileged settlement discussions (or documents), are made without prejudice to any party's legal position, and are inadmissible for any purpose in any legal or administrative proceeding. Any information disclosed to the mediator by a party, or by a representative of a party, or by a witness on behalf of a party, is confidential. The mediator will not disclose any confidential information during the mediation without the consent of the party providing the confidential information. The parties agree that they will not seek to compel the mediator to disclose any such confidential information in any legal or administrative proceeding or otherwise. The parties further agree that they may not introduce into evidence any such confidential information disclosed in violation of this Agreement, nor may they introduce into evidence, or use for any purpose, any written or oral testimony of the mediator. Any party that violates this Agreement will pay all costs and expenses, including reasonable attorney's fees, of the mediator and other parties incurred in opposing the efforts to compel confidential information from the mediator.”

Mediation is intended to create a safe environment, and one of the mediator's early responsibilities is to assist the parties and their counsel in

understanding and accepting that concept. The sooner the parties understand that they can examine their differing views and explore all kinds of possible solutions without the positioning and posturing inherent in the other adversarial processes, the quicker they will reach resolution.

During the course of the mediation, the mediator conveys a number of important thoughts and concepts to the parties that all contribute to the gradual change in the way they view their conflict and the possibilities for constructive resolution.

1. For most disputants, the mediation is their last chance to have any real control over the outcome of the conflict. If they do not find an acceptable solution, then a third party having no real concern for their individual needs and interests will simply make a decision and they will have to live with it.

2. The parties have the opportunity to find creative solutions that satisfy, in whole or in part, their real needs, whereas a judge or arbitrator simply applies the law to the facts as he or she understands them and declares a result. Judges and arbitrators are limited to narrow legal remedies and rarely have the latitude to exercise any creativity.

3. A negotiated settlement in the mediation will stop the expense and personal disruption, and free the parties to go back to what they do best with their lives, both personally and professionally.

4. Mediation is not about who is right and who is wrong; it is about people's perceptions and perspectives. One's perception is one's reality. Courts and arbitrators try to decide who is right and who is wrong; mediators help people resolve conflicts and move forward with their lives.

5. Mediation is not about winning and losing, it is about finding a solution that everyone can live with. Furthermore, even when courts and arbitrators decide who wins and who loses, even the winners don't very often feel like they won after all of the tangible and intangible costs are taken into account.

6. The dispute is not a battle to be waged or a war to be fought, it is just a business problem that needs a solution. The parties encounter business problems every day, adopt a solution (not always perfect or everything they would like) and move on to the next problem. That is what they should do in the mediation.

7. Mediation is not about rehashing the past, but about reshaping the future. The parties will have an insatiable need to rehash the past, and there is a definite cathartic effect in having the opportunity to do so at a small table directly across from one's adversary, but the sooner the parties can get past talking about who did what to whom, the sooner they will turn their attention to real

problem solving.

People often believe their disputes take place in a sterile objective environment free from emotions. In reality, emotional components are almost always present in every conflict, and to ignore them is often fatal. A mediator needs to recognize the presence of emotions, despite the denials of the parties and counsel, and have a strategy for dealing with them.

In their recent book, *Beyond Reason*, Roger Fisher (one of the co-authors of *Getting to YES*) and Daniel L. Shapiro offer what they call “a strategy to generate positive emotions and to deal with negative ones.” At the outset, they recognize that for a negotiator in the heat of the moment to observe, correctly identify, ascertain the real cause of, and develop an appropriate response to any one or more of the literally hundreds of human emotions that might be present would be a virtually insurmountable task. Instead, Fisher and Shapiro propose a manageable method for dealing with this broad range of specific emotions by focusing on five core concerns that arguably are responsible for many of the individual emotions.

Fisher and Shapiro define core concerns as basic human desires that are important to virtually everyone, and therefore will almost certainly be important to all of the participants in any negotiation - the parties as well as the lawyers and other players. As a result, by addressing these core concerns, a negotiator, whether a party, a lawyer or a third party mediator, should be able to generate the kind of positive emotions that foster better personal relationships and encourage mutually beneficial agreements among the negotiators.

The five core concerns identified in *Beyond Reason* are appreciation, affiliation, autonomy, status and role. Fisher and Shapiro explain that everyone wants to be appreciated, and in the context of negotiation that means everyone at least wants their ideas acknowledged as having merit, even if one does not entirely agree with or accept them. Affiliation means that people want to be treated as colleagues, not adversaries. By autonomy, Fisher and Shapiro suggest that everyone wants their freedom to decide respected. People want their standing to be given recognition. And finally, they all want to have a role that feels fulfilling.

While mediation is just one of many Alternative Dispute Resolution mechanisms, it is probably the only one that holds so much promise for changing the way we look at and deal with conflict. It has the ability to produce settlements in most disputes, but does so in a collaborative and non-adversarial way that even frequently allow for the preservation of relationships. It allows the parties to the conflict to feel they had significant control over the resolution and had an opportunity to have their real interests met.

Private Arbitration: The User Customizable Alternative to Court Litigation

When a conflict has proven to be unmanageable by any of the more collaborative forms of conflict management, but requires a resolution, the disputants turn to a third party decision maker. In the vast majority of such unmanageable conflicts, private arbitration, particularly if properly designed and administered, will be a better alternative than court litigation.

Private arbitration is a process in which a neutral third party is chosen by the disputants to render a decision which will be a final and binding resolution of the dispute. Arbitration is probably the best known form of Alternative Dispute Resolution. In fact, it was in use long before even the terms “Alternative Dispute Resolution” and “ADR” became a part of our regular vocabulary.

As an alternative to court litigation, early proponents of arbitration emphasized three primary benefits: (1) speed, (2) reduced cost, and (3) finality. Private arbitration was never intended to be simply litigation in a private conference room, but, rather, a meaningful alternative to such litigation. Historically, arbitration originated as an industry dispute resolution mechanism in which the arbitrators were generally industry representatives, not lawyers, and disputes were resolved by the application of the customs and usages of the particular industry and the reasonable expectations of the parties, not the literal application of law.

As arbitration grew, so did the role of lawyers in all aspects of the process. Today almost every party in arbitration is represented by a lawyer, and in most commercial disputes most of the arbitrators are also lawyers. While lawyers bring to the arbitration process a rich tradition of procedural fairness and due process developed in the court system, they do not always adjust well to the notion that arbitration is not litigation, but an alternative to it. Indeed, lawyers are primarily responsible for gradually bringing into the arbitration process those litigation rules and practices with which they are so comfortable (legalistic pleadings; burdensome written discovery; numerous and lengthy discovery depositions; procedural and substantive motion practice; and trial like presentation of, and objections to, evidence), all of which tend to undermine the arbitration goal of a speedier and less expensive dispute resolution process. In fact, as a profession trained in appellate advocacy, lawyers are now increasingly seeking new and creative theories upon which to pursue reversal of arbitral awards, jeopardizing one of the hallmarks of arbitration – finality.

The increasing incorporation of litigation based practices and procedures into arbitration (the “litigationization” of arbitration, or what one of our local arbitrators calls “arbigation”) is neither necessary nor inevitable. Arbitration is the product of the voluntary consent of the parties. As a result, subject to certain statutory limitations, the parties are not only able to agree to arbitrate, but free to define both the scope of their submission to arbitration, and also the terms,

conditions and procedural rules governing the process. The parties are able to contractually define the arbitral process in order to obtain the intended benefits of a speedier, less expensive and final resolution, if that is what they desire. On the other hand, if they are less concerned with speed or cost and are choosing arbitration primarily for some of its other benefits (privacy, confidentiality, control over selection of the decision makers, avoidance of published opinions and precedents or finality, which will be explored more fully below), they can contractually define the process to achieve those aims.

It is this ability to customize the process to meet the particular objectives of the parties on a case by case basis that, more than anything else, distinguishes arbitration from litigation. As Thomas J. Stipanowich, William H. Webster Chair in Dispute Resolution and Professor of Law at Pepperdine University School of Law, and Academic Director of the Straus Institute for Dispute Resolution, says in his article *Arbitration: The "New Litigation"* (2010 U. Ill. L. Rev. 1, Jan. 2010):

Because users seek different things from arbitration, and because business goals and needs vary by company, by transaction, and by dispute, no one form of arbitration is always appropriate. For this reason, the central and primary value of arbitration is not speed, or economy, or privacy, or neutral expertise, but rather the ability of users to make key process choices to suit their particular needs. In an extensive set of recommendations entitled *Commercial Arbitration at its Best*, the CPR Commission on the Future of Arbitration observed that "many business users regard *control over the process* – the flexibility to make arbitration what you want it to be – as the single most important advantage of arbitration. . . ."

In short, the parties can decide which goals are most important and then tailor the process to their needs. If the parties do not contractually alter the customary practices and procedures traditionally employed in arbitration, but select experienced arbitrators and/or utilize well recognized arbitral administrative organizations, they are likely to receive both a speedier and less expensive process and many of the other benefits generally inherent in the arbitral process, but they will have given up the extraordinarily valuable opportunity to individualize the process to meet their needs.

There are many differences between traditional private arbitration and court litigation. Most of those differences, in most disputes, will be perceived by most disputants and their lawyers as providing significant advantages in favor of arbitration. That is not to say that arbitration is always better for every party in every case. The following discussion of some of the more significant differences between private arbitration and court litigation should assist the parties and their

lawyers in thoughtfully deciding whether arbitration is the better choice. Some of the differences are related primarily to furthering the aims of speedier and less expensive resolutions, but some of the differences further other objectives that, in many disputes, particularly large complex matters, may be even more important than speed or cost.

Privacy/Confidentiality. Arbitration is private and confidential. Pleadings are not filed in an office open to the public; hearings are not conducted in a courtroom open to the public; final awards are neither filed in an office open to the public nor published. Personal information, confidential business information, and even the existence of the dispute itself or its outcome can be kept private. Even in certain large cases in which the parties and counsel intend to incorporate, by agreement, all of the time consuming and expensive trappings of full blown litigation, just being able to conduct the proceeding in private is often justification enough for choosing arbitration.

Selection of the Arbitrator. The parties and their lawyers select the arbitrator, rather than being required to accept the judge randomly assigned. Before agreeing to an arbitrator, the parties and their attorneys can examine the proposed arbitrator's background and qualifications. In private arbitration you do not have to present a complex commercial dispute to a judge whose entire career was, for example, in prosecuting or defending criminal cases in the public sector before going on the bench.

The parties and their lawyers can elect to have a single arbitrator or a panel of arbitrators (usually three). In larger cases involving a variety of issues, this allows for a panel of arbitrators who each bring different areas of expertise to the table. Panels which include, for example, in addition to one or two attorneys, an accountant, architect, appraiser, contractor, realtor, stock broker, etc., are not uncommon. The key, however, is that the parties and their lawyers are able to control the make-up of the panel.

Potential arbitrators are required, whether by state statutes, court decisions, applicable codes of ethics, or rules of administrative organizations like the American Arbitration Association, to make disclosures of all past and present relationships with the parties, lawyers, law firms, witnesses and others in any way involved with the dispute. These disclosures customarily go far beyond anything required of a judge. Although the disclosures do not require automatic disqualification, they provide the parties and their lawyers information upon which a meaningful decision regarding a proposed arbitrator might be based.

Arbitrator selection criteria can be as general or specific as the parties desire, and can even be agreed upon and included in the contract containing the agreement to arbitrate. In one contract, the parties provided that the arbitrator must (i) be an A/v rated lawyer by Martindale-Hubbell, (ii) have practiced law continuously for not less than 25 years immediately preceding selection, (iii)

have devoted not less than 75% of his or her professional practice during the last 25 years to business transactional matters and/or business litigation, a substantial portion of which must have involved purchases and sales of privately held corporations and the formation, operation and dissolution of privately held corporations, and (iv) never have lived or practiced within 500 miles of Kansas City or Omaha.

Arbitrator selection is another advantage of arbitration wholly independent of speed and cost.

Rules of Procedure. In the absence of an agreement by all parties to the contrary, neither the Arizona Rules of Civil Procedure nor the Federal Rules of Civil Procedure apply to private arbitration. Although these rules have served well in court litigation, they contain the procedural framework for much of the delay and cost which arbitration seeks to avoid. To the extent they include provisions relating to procedures, the Uniform Arbitration Act, as adopted in Arizona, ARS §§12-1501 to 1518, or the Revised Uniform Arbitration Act, as adopted in Arizona, ARS §§12-3001 et seq. ("RUAA") or, if applicable, the Federal Arbitration Act, 9 USC §§1-16, will govern.

Organizations like the American Arbitration Association provide comprehensive rules for governing private arbitration proceedings (see, for example, Commercial Arbitration Rules and Mediation Procedures (Including Procedures for Large Complex Commercial Disputes) of the American Arbitration Association, Amended and Effective June 1, 2009). Many contracts containing agreements to arbitrate disputes incorporate these Rules, or other Rules of the American Arbitration Association, such as the Construction Industry Dispute Resolution Procedures or the National Rules for Resolution of Employment Disputes. These Rules are designed to promote fair and just resolutions of disputes and preserve the integrity of the process, while achieving the benefits of speed, lower cost and finality. They do so, in part, by taking away various time-consuming and expensive pre hearing procedures as matters of right, and substituting instead the sound discretion of the arbitrator in the management of the process.

In the absence of an agreement by all parties to adopt any particular procedural rules, and to the extent not controlled by applicable state or federal arbitration statutes, many arbitrators look to the Rules of the American Arbitration Association for guidance, and all experienced and well trained arbitrators exercise their discretion in managing the process to try to achieve the goals of speedier, less expensive and final resolutions, while avoiding any prejudice to the parties and preserving the fairness and integrity of the process. When, however, all of the attorneys, with the informed consent of their clients, wish to incorporate the Rules of Civil Procedure despite the costs in time and money, most experienced arbitrators will not stand in the way, the feeling being that in the end it is the parties' voluntary process, not that of the arbitrators.

Discovery. Because traditional discovery is one of the major causes of delay and expense in court litigation, in the absence of an agreement by all parties to the contrary, most arbitrators will require an expeditious disclosure of all relevant documents and a preliminary witness list, but will not allow interrogatories, requests to admit or extensive discovery depositions, except for compelling reasons.

Although substantial pre-trial discovery has become a way of life, some experienced litigators have concluded that the most truthful answer they will ever get to a hard question will be the answer given the first time the witness hears that question, and in many discovery depositions they give away more information than they receive. With full document disclosure and adequate preparation, in most cases clients will do as well or better without interrogatories, requests to admit and even depositions. There are, of course, situations in which imbalances in availability of information exist and further discovery is essential to a fair process. In those situations the arbitrator has the authority to order such discovery as is appropriate, even in the absence of agreement by all of the parties. Of course, just like the Rules of Civil Procedure, when all of the attorneys, with the informed consent of their clients, wish to incorporate full blown discovery despite the costs in time and money, most experienced arbitrators will not refuse.

Evidentiary Rules. In the absence of an agreement by all parties to the contrary, traditional rules of evidence, as embodied in Federal or Arizona Rules of Evidence, do not apply. This is in part a consequence of the historical origins of arbitration as an industry dispute resolution mechanism, and in part a modern acknowledgement that arbitration is not supposed to mimic court litigation, and not all arbitrators are even lawyers.

Arbitrators will generally admit all relevant evidence, including evidence that otherwise might be excluded, such as hearsay, but will enforce all traditional privileges. Most well trained and experienced arbitrators, even those who are not lawyers, understand the policy considerations regarding lack of reliability underlying exclusionary evidentiary rules, and will only give such evidence the limited weight to which it is entitled.

One of the limited statutory grounds for a court refusing to confirm an arbitration award is the refusal to hear evidence material to the controversy. Because of the paramount importance of finality in the arbitration process, most experienced arbitrators will resolve most doubts in favor of admitting the evidence, for whatever it is worth, in order to protect the final award. The relaxed rules of evidence not only further the goals of speed and reduced cost, but many parties have expressed the perception that they were given a real opportunity to be fully heard and had a fairer hearing than they would have received in court litigation, with the application of all of the exclusionary rules.

Motions in Limine. Although motions in limine, which are designed to obtain rulings in advance of the hearing for the exclusion certain possible evidence for various reasons, would appear to reduce hearing time and therefore further the goals of speed and economy, they are rarely granted for the same reasons articulated above with regard to the admission of evidence. Moreover, the time and expense incurred in pursuing motions in limine probably equals or exceeds any time that would be saved at the hearing if the motions were granted. Arbitrators, however, sometimes will entertain motions in limine to exclude clearly irrelevant evidence, or to exclude evidence that, although arguably relevant, is so highly prejudicial that any possible value is outweighed by the prejudice. Even then, arbitrators are generally far more experienced and sophisticated than lay jurors, and are far less likely to be overwhelmed by prejudicial or other marginal evidence.

Dispositive Motions. Historically, motions for summary judgment were disfavored not only in arbitration, but in court litigation. With the mounting frustration with rising litigation costs and the growth of arguably frivolous lawsuits, the use of early dispositive motions gained renewed currency in both federal and state courts.

Relying in part on the revival of summary judgment in the courts, and in part on the continuing desire of arbitration advocates and practitioners to provide a speedy and economical alternative to litigation, there has been a renewed interest in dispositive motions in arbitration in the past decade or so. The utility of dispositive motions has been getting a fresh look in current ADR literature and arbitrator training programs. Notwithstanding this renewed interest in summary judgment, most experienced arbitrators rarely, if ever, grant dispositive motions. In Arizona, prior to the adoption of the new RUAA, and in cases still governed by the old statute, arguably summary disposition is precluded by statute. ARS §12-1505 (2) provides:

“The parties are entitled to be heard, to present evidence material to the controversy and to cross-examine witnesses appearing at the hearing.”

Some argue that the right to be heard and present evidence does not necessarily mean oral testimony, and that the requirement that the parties be heard and have an opportunity to present evidence can be satisfied by a traditional summary judgment presentation. While there does not seem to be any reported case in Arizona raising this issue, it is not too hard to imagine an appellate court, disagreeing with the merits of an arbitral summary disposition, seizing on this statutory provision as a basis for vacating the award, thus undermining the finality of the award so important to the arbitral process. If the case is governed by the new RUAA, ARS §12-3015 (B) expressly grants arbitrators the authority to decide motions for summary disposition. Only time will tell whether this

statutory grant of authority will change the long established reluctance of arbitrators to resolve cases on summary disposition and without a full hearing.

An article in the New York Law Journal in March of 2008 noted that some arbitral organizations are amending their rules with a view toward limiting the availability of pre-hearing dispositive motions to insure that parties in arbitration have an opportunity to have their claims fully heard. While this may be in part a response to the current pressure on the arbitral process being brought by consumer advocates, there certainly is a continuing tension between insuring that a final award is based on a complete factual and legal record and providing a cost effective way to dispose of frivolous or legally barred claims.

There is a compelling reason why almost every experienced arbitrator has resisted the temptation to grant summary judgment. Arbitration awards are intended to be final and non-appealable. Any possible benefits of speed and economy are outweighed by the awesome consequence of finality. Arbitrators need to get it right the first time, because no one gets to take a second look and correct their mistakes. Therefore, arbitrators are generally more comfortable rendering an award after a full hearing.

Finality of the award is a prime directive. As discussed above, one of the few statutory grounds for vacating an award is the refusal to hear material evidence. If the award is entered without a hearing by summary disposition, the risk of the award not being confirmed, and the parties having to start the process all over again, is greatly increased.

Arbitration, being a private contractual process, derives much of its credibility and acceptability from the parties' perceptions of fundamental fairness. Parties who feel they had a full and fair opportunity to be heard tend to accept the outcome and the integrity of the process, even if they were unsuccessful. The same can not be said for resolutions by summary disposition.

Finality, Appeal, and Duty to Follow the Law. An arbitral award, if rendered pursuant to a valid agreement to arbitrate and confined to the matters submitted to arbitration, is intended to be a final. The presumption is that, in choosing arbitration, the parties are expressing their desire for a prompt and economical final decision, rather than the protracted and seemingly never ending process of appellate litigation.

The Arizona statutory grounds for overturning an arbitration award are very limited, and include: (1) procuring award by corruption, fraud or other undue means, (2) evident partiality of neutral arbitrators, (3) corruption of arbitrators, (4) misconduct prejudicial to rights of a party, (5) arbitrators exceeding their powers, (6) arbitrators refusing to postpone a hearing for sufficient cause, (7) arbitrators refusing to hear material evidence, or (8) arbitrators otherwise failing to conduct the hearing in accordance with statutory requirements. The federal statutory

grounds are similar, but not identical

An arbitration award can not be set aside for errors of law or fact. The decisions of an arbitrator as to questions of both law and fact are final and conclusive. If this were not so, every award would be challenged in court for purported errors of law or fact, and the whole concept of arbitral finality would evaporate. As the court said in Smitty's Super Valu, Inc., *supra*, at 22 Ariz.App. 178, 181, 525 P.2d 309, 312:

“If the conclusions of the arbitrators were to be subjected to the full range of ordinary judicial review, then the function of the substituted arbitration tribunal would be largely defeated—the objectives of an inexpensive and speedy final disposition of the controversy would become illusory and the arbitration tribunal would in fact become merely a lower rung in the ascending ladder of judicial review.”

Not only is an arbitration award not reversible for errors of law, but an arbitrator is not absolutely required to literally follow the law. While this concept is often surprising to parties and their lawyers, it has honorable roots in the historical origins of arbitration as an industry dispute resolution mechanism based upon notions of equity governed by customs and usages, not law.

If finality of arbitration awards is a paramount objective, then freeing arbitrators from the obligation to literally follow the law is justifiable independent of the historic roots of arbitration. If there is no meaningful right of appeal, then the only place one can argue for an exception to the law as it applies to these facts, or any equitable relief from the literal application of strict law, is at the arbitration level. Most arbitrators, most of the time, follow the law to the best of their ability, but they are empowered to render fair and equitable decisions taking into account not only the law, but the customs and usages of the industries involved and the reasonable expectations of the parties to the dispute.

No discussion of the finality of arbitration awards would be complete without acknowledging the notion of “manifest disregard of the law”. The federal courts have created a non-statutory ground for vacating an arbitration award – the manifest disregard of the law by the arbitrator. While the meaning of “manifest disregard of the law” is not totally clear, most federal courts have said that it means something more than just an error of law or even a failure of the arbitrator to understand or apply the law. It would require a clear showing that the arbitrator recognized the applicable law and willfully ignored it.

It is hard to rationalize the federal concept of manifest disregard of the law with the historical origins of arbitration and the clear state court rulings in Arizona

and elsewhere that arbitrators are not literally bound to follow the law. The Arizona Court of Appeals, in a memorandum decision which is therefore not precedent, rejected a manifest disregard challenge to an award, noting that Arizona courts have not adopted this non-statutory ground for vacatur, and finding that, even if it were applicable in Arizona state courts, the facts did not indicate that the arbitrators recognized applicable law and knowingly and willfully disregarded it.

Although the concept of manifest disregard undermines the notion of finality, and is generating quite a few expensive, albeit often unsuccessful, appeals, it is likely that, with a little more time to mature in the federal courts, vacatur for manifest disregard of the law will be limited to only the most egregious cases. Indeed, a case decided in March 2008 by the United States Supreme Court said that the permissible grounds for judicial review were set out in the Federal Arbitration Act, and that those were the only grounds a court may consider. While the Court did not specifically reject the court made doctrine of manifest disregard of the law, many commentators believe the decision portends the demise of the federal court doctrine of manifest disregard of the law as a basis to set aside an arbitration award. Since the Supreme Court decision the Circuit Courts that have addressed the issue of manifest disregard have been divided. It now seems likely that the United States Supreme Court will ultimately have to resolve this question it left open in the 2008 decision.

Availability and Attention of Arbitrator. Two very significant, but infrequently discussed, differences between private arbitration and court litigation are related: (i) the relative availability of arbitrators, and (ii) the ability of arbitrators to give focused, almost undivided, attention to a single case at a given time. The judicial caseloads are overwhelming, and, despite their best intentions and efforts, most judges, most of the time, simply cannot be as readily available when the parties and their lawyers need them and cannot devote the time or the degree of attention to any single motion or case at any given time as even the busiest of arbitrators. This is an enormous advantage of arbitration, particularly when coupled with ability to carefully select the arbitrator, and is wholly independent of considerations of a speedier or more economical process. A former house counsel for a Fortune 500 Company, commenting on complaints about the rising cost of arbitrator fees, recently said that the arbitrator fee component of most cases was probably the least significant cost of the dispute resolution process, and possibly the best spent money of the entire process.

Jury. By agreeing to arbitrate, the parties of course give up their right to a jury trial. Depending on ones point of view and the nature of the dispute, this could be perceived as a great advantage or a substantial disadvantage to arbitration. In most business to business dispute (as distinguished from consumer and employment cases) the parties would agree that a jury of lay folks is probably not a plus. The parties do have the right to agree to a panel of arbitrators, rather than a single arbitrator, and can virtually insure a more

qualified group than the jury pool usually produces.

Attorneys' Fees. In Arizona, prior to the adoption of the RUAA and as to any cases still governed under the old Act, attorneys' fees are not recoverable in arbitration unless they are specifically agreed to by the parties or are available under applicable law. In particular, if a party is relying on an attorneys' fees clause in the contract, it needs to be incorporated into the arbitration agreement (the arbitration clause) or expressly state that it applies to arbitration.

By incorporating the rules of an arbitration organization, like the American Arbitration Association, into the arbitration clause of a contract, the parties will get the benefit of any right to attorneys' fees granted by those rules. Under the Commercial Arbitration Rules of the AAA, if both parties request an award of attorneys' fees, the arbitrator is authorized to do so even in the absence of any other contractual agreement or statutory right.

Under the RUAA, an arbitrator may award reasonable attorneys' fees if such an award is authorized by law in a civil action involving the same claim or by agreement of the parties. Therefore, under the RUAA, attorneys' fees should be recoverable in contested contract cases under ARS §12-340.01.

Access to Process. Any person can initiate court litigation against any other person, limited only to finding the court or courts where jurisdiction and venue are proper. Arbitration, on the other hand, is purely voluntary, and is only available upon agreement. Agreements to arbitrate will be enforced by the courts, subject only to traditional contract defenses invalidating the alleged agreement to arbitrate.

As a general rule, a non-signatory to an arbitration agreement can not be compelled to submit to arbitration, although there are some exceptions which are beyond the scope of this. This can pose a significant problem in multi-party disputes in which some of the parties are signatories to the arbitration agreement and can be compelled to arbitrate, while other parties are not, and can not be so compelled. In such situations, it is quite possible that parallel proceedings in different forums will be required simultaneously and will result in inconsistent outcomes. Short of the parties agreeing to consolidate all of the cases either in court or arbitration, there is no satisfactory solution.

While there are some disputes which probably should go to the court system and ultimately result in published opinions setting precedents for future guidance, and there are probably some disputes in which at least one side perceives there to be benefits in going to a jury, the vast majority of disputants would be better served by the private arbitration process. The ability to fashion the process to meet individual needs allows the parties to insure a speedy, inexpensive and final determination if that is the primary goal. Even where the concerns for speed and cost control are not paramount, however, and the parties

intend to engage in full blown litigation-like practice, the ability to select a panel of experienced and highly trained decision makers, conduct the proceeding in privacy, and avoid a published precedent setting decision are often compelling reasons to chose arbitration. The beauty of arbitration is that one size does not need to fit all, and if the conflict could not be contained and managed by collaborative techniques, resolution by private arbitration will almost always be preferable to court litigation.

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