Mediation, Arbitration, Litigation: Benefits and Risks

As strange as it may seem, lawyers and judges alike in recent years have welcomed mediation as a worthwhile alternative to litigating many business disputes.

Abraham Lincoln once wrote, "*Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often the real loser—in fees, expenses and waste of time.*" Lincoln, as a lawyer, recognized long ago, as business leaders do today, that even through the rule of law is the foundation of a civil society, litigation should be used only as the last resort.

Recent Advent of Mediation

Mediation has become commonplace in courts throughout the country, including Missouri and Kansas. The state court in Jackson County recently issued a rule essentially requiring all civil matters to be mediated within 180 days. A commission chaired by former Judge Jay Daugherty, now a full-time mediator/arbitrator, is considering a recommendation to broaden the requirement that most civil cases be mediated to all state courts throughout Missouri before a case proceeds to trial. The trend toward mediating actually began in federal courts in 1992, when the federal court in Missouri adopted an Early Assessment Process as a pilot project requiring mediation within 60 days after the filing of a responsive pleading. Surprisingly, a majority of cases settle through mediation, sometimes before any costly discovery such as depositions and interrogatories taking place, and often settling the day of the mediation.

The parties have found that successful early mediation can result in substantial savings not only in attorneys' fees but also in time, cost and emotions of the parties. No longer is mediation a sign of weakness, but of wisdom and the experience of the high cost of litigating through trial and the vagaries of the jury system. Mediation is *voluntary* in the sense that the parties are not required to agree, just that they sit down in good faith and at least discuss resolving their differences. The advantages of mediation are many in that not only are there *significant cost savings*, but the process is *faster*, and allows the parties to vent and tell their side of the dispute. Moreover, mediation is *private*, the terms of resolution can be *confidential* and the mediation often *preserves business relationships* that would become broken in an adversarial proceeding such as trial.

A mediator is often chosen not only for skills at facilitating a discussion of the dispute and possible resolutions, but for knowledge and expertise in specific areas of law. Mediators, unlike arbitrators, do not act as a judge; rather, they engage in shuttle diplomacy, often starting with a joint conference of all parties but using private caucuses to determine and then share underlying interests. One of the great benefits of mediation is that the parties can reach a resolution that is creative and would not be permitted under the jury system or even in a judge-tried case. Finally, if a settlement agreement is reached and properly reduced to writing, it is enforceable in court.

Arbitration as the Alternative to Trial

If mediation is not successful, the parties usually are able to narrow the issues and refine the discovery needed to litigate either in arbitration or in a courtroom. Businesses often agree in advance that if a dispute arises, the parties will submit the dispute to arbitration rather than to court. The alternative of arbitration rather than litigation also offers advantages. It, too, is usually more efficient, speedier and less costly than resorting to trial by jury. Like mediation, arbitration can keep the matter private and confidential, and may help preserve business relationships. Sometimes parties agree to arbitrate in order to have a neutral decision-maker with specialized expertise of the subject matter. The arbitration tribunal renders an award that is enforceable in court with very narrow grounds of appeal called "vacatur." This can be viewed as positive or a negative in that the courts do provide for an appellate system for legal errors not available in arbitration. There are some instances in which businesses desire to litigate in court even though more time-consuming and expensive—specifically for the purpose of having a public hearing and establishing precedent. Also, broad discovery and depositions, usually restricted in arbitration, are occasionally necessary.

However, using mediation and then having arbitration as the alternative has proven in many instances to make good business sense. If arbitration is desirable, care should be taken in drafting a dispute resolution process tailored to the needs of the business. One size does not fit all and there are several important considerations, such as choice of service provider, location of the mediation or arbitration hearing, selection of the neutral and contractual limitations on discovery, among other considerations. I

John R. Phillips is a litigator at the firm of Husch Blackwell, and a private mediator/arbitrator.
P | 816.983.8119
E | John.Phillips@huschblackwell.com