

Resolution in One Day: Guaranteed!

By Laurie Quigley Saldaña

We have all heard about the awful impact the state budget crises has had—and will continue to have—on our court system. Despite the mandate of the “fast track” litigation program that all cases be disposed of within two years of filing (Cal. Rules of Court, Standards of Jud. Admin. 2.2(d) & (f)), many judges predict that massive court cuts will result in a three or four year wait for a courtroom. Civil cases need to be resolved sooner rather than later, or the cost of litigation (economic, emotional, systemic) will exceed the “value” of the dispute at issue. What can be done to improve the situation?

New ideas are always helpful and I recently read about one in California Lawyer which is worth sharing, in the event you missed it. According to the authors, Harvey Goldhammer and Akram Awad, the most promising relatively new ADR model is “Arbitration-Mediation in a Day.” No...I am not talking about the reverse: mediation arbitration, where after a failed mediation, the “neutral” changes hats and issues an arbitration award. There are so many pitfalls with this model that it is rarely used.

Instead, “Arbitration-Mediation in a Day” turns that failed model on its head. After you, as counsel, have had the opportunity to perform written discovery, obtain documents, and take key depositions, this new ADR model might be just right for your clients. Imagine a method of resolving cases while facts and evidence are fresh and avoiding the costly delay of waiting for a trial court. Here’s how it works: The parties conduct a half day arbitration in the morning in front of Neutral #1. Immediately thereafter, the neutral renders a sealed decision, which all parties and counsel have previously agreed will be binding in the event subsequent mediation fails. After lunch, the parties mediate before Neutral #2. Importantly, neither the parties, counsel, nor Neutral #2 are aware of how the first neutral ruled in arbitration. If the afternoon mediation fails, the arbitration decision is unsealed and the parties are bound by that ruling (in advance, the parties sign a binding arbitration provision, waiving appeal rights). If the afternoon mediation is successful, the arbitration decision is destroyed and remains confidential.

The benefits of this “Arbitration-Mediation in a Day” model are numerous! Of course, there is the knowledge that the case will end on the appointed day. The cost savings (over litigation, multi-day arbitration, or failed mediation) are tremendous. By agreement of the parties, testimony of experts, may be presented by reports or declaration. Importantly, the key principals (business owners, parties, insurance adjusters) can see how key witnesses present at the morning arbitration, which will likely influence negotiation strategy in the afternoon mediation. Perhaps most importantly, all participants in the mediation are highly motivated to resolve the case in mediation, as no one knows how the first neutral ruled in the arbitration.

For a successful “Arbitration-Mediation in a Day”, I suggest a few key parameters. First, a written agreement (no more than a page or two!) signed by all parties addressing the following: that the arbitration decision is binding if mediation fails; waiver of appellate rights; identity of witnesses who will testify in person; evidentiary matters such as testimony via declaration, the admissibility of documents, etc. Further, all counsel and Neutral #1 must have a pre-arbitration telephone conference sufficiently in advance, to be sure that all the above issues have been ironed out; avoiding wasted time the morning of arbitration-mediation is key. Finally, with minor adjustments, the same brief may be provided to both the arbitrator and mediator, so there is not duplicative work for counsel. Of course, if cases are more complex, the parties can agree to a lengthier arbitration, followed immediately by a full day mediation. These are small issues that can be discussed with counsel and the neutrals.

As the crisis with our state budget deepens, the victims will be those people who are unable to achieve resolution of disputes in a reasonable time at reasonable expense. "Arbitration-Mediation in a Day" offers a fresh approach to dispute resolution and provides certainty for your clients.

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