Should You Name the Rules or Provider In your ADR Clause?

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WELCOME

Thank you for considering me as your neutral—either as your arbitrator or mediator. I am an arbitrator and mediator on panels of the American Arbitration Association, including Commercial, Construction and Large, Complex Case panels. I am also a neutral for the Financial Industry Regulatory Authority, the National Futures Association as well as others and have served as a judge pro tem.

I have published over thirty articles relating to law and Alternative Dispute Resolution in trade, industry and legal periodicals and authored the chapter Drafting the ADR Clause in the American Bar Association (ABA) book, Construction ADR. I sit on the American Bar Association ADR Section's Ethics Committee and am a past chair of the California State Bar Association ADR Committee's International Sub-committee. I have trained arbitrators and mediators in twelve countries in five continental areas and was founding chair of the Sacramento County Bar Association's ADR Section.

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Alternative Dispute Resolution (ADR) in the private sector is a creature of contract. While people can orally agree to go to mediation, arbitration requires a written agreement. Most often, the agreement to arbitrate is a clause in a contract. If a contract does not contain an ADR provision or if people entered into an oral contract, they can still agree to go to arbitration by signing a *submission agreement.*

Many ADR clauses in contracts today include provisions for both mediation and arbitration although there are still a few around that just call for arbitration. As mediation is essentially settlement negotiations facilitated by a third party neutral, actual settlement is not guaranteed. (In reality, skilled mediators are able to help settle a high percentage of the cases brought before them.) A solid ADR clause will require the parties to proceed to arbitration in the event the case does not settle at mediation.

Experienced mediators will likely negotiate the ground rules for the mediation with the parties, typically by conference call. There may be separate calls with the parties.

Arbitration, however is different. Private communications with the arbitrator are disapproved, and in fact are considered unethical. In most cases except the smallest, there is usually a conference call with the arbitrator and all the parties to set hearing dates, dates to file briefs and so on. Once a case is going to private arbitration, questions arise: Who will administer the arbitration? Who will the arbitrator(s) be? What are the procedural rules? These questions can be answered by the wording of the arbitration provision in the contract or in the submission agreement.

If your clause names a well-known provider such as the American Arbitration Association or JAMS and you file with one of those organizations, unless your ADR clause names different rules, the rules of that organization will be followed. What if you name the organization's rules but do not name the provider? You can file a claim with a different provider but that organization must follow the rules specified in your ADR clause.

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The vast majority of ADR clauses name both the provider and the rules to be followed. We are left with an important question: What about selecting the neutral, that is to say the mediator or arbitrator? While some Alternative Dispute Resolution clauses name a specific neutral, it is rare. There would be a problem if the mediator, arbitrator or arbitrators you name would not be available or decline to serve as your neutral. The major ADR providers maintain lists, or panels of neutrals from which parties may choose. If the parties do not agree, there is a process of elimination for arbitrator or mediator selection—another good reason to name the ADR provider in your ADR clause or submission agreement. The process for neutral selection—whether for a mediator or an arbitrator—is very similar among most major providers.

What if you are faced with a very minimal ADR clause, something that says only something such as "In the event of a conflict between the parties, they shall proceed first to mediation and if mediation is not successful, then to arbitration."? If the parties meet and confer and cannot agree on a neutral or a provider, what then? In most states, parties can go to court and ask the court to appoint a mediator or arbitrator. Unfortunately, going to court defeats a major advantage of Alternative Dispute Resolution in that ADR helps parties avoid the complexities of court, is simpler, saves time and usually costs considerably less than a lawsuit to complete a case. Of course,

There are many other things to consider when drafting an ADR submission agreement or clause for a contract, partnership agreement or other legal document. This e book only discusses naming the provider. Before you name the provider you should read its rules and determine if they are right for you. Are they too complex or are they streamlined? Do they allow too much discovery, and so on. If you are looking for suggested language, the American Arbitration Association has remarkable page on its website, a clause builder. You can find it at www.ADR.org.

This e book is informational only and is not intended to provide legal advice, or create an attorney-client relationship, nor is it a solicitation for employment.

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