Mediation and Other ADR Techniques for Resolving Association Disputes

Presented by Clayton R. Hearn
Roberts Markel Weinberg Butler Hailey, PC
214-365-9290 phone, www.rmwbh.com

Overview – Introduction to Alternative Dispute Resolution

Community associations face an interesting challenge: they imitate a government (without the immunity or taxing powers granted to governments) including having the authority to enact and enforce "laws." Yet some residents do not recognize this jurisdiction and feel no obligation to abide by the rules set down in the community's governing documents, particularly the covenants, conditions, and restrictions (CC&Rs). Inevitably, conflict arises.

Resolving conflicts between residents and the association is a difficult and delicate task for boards of directors. Boards have an obligation or right to enforce the CC&Rs because that's how they maintain the appearance and value of the community and ensure a high standard of livability for all residents. On the other hand, residents are neighbors and friends, and they are entitled to reasonable treatment.

Alternate Dispute Resolution (ADR)

Alternate Dispute Resolution generally refers to the use of a neutral third party to facilitate settlement of a dispute outside of a formal court of law.

In Texas, a common use of ADR is as a reference to nonbinding settlement procedures described in and subject to the 1987 Texas Alternative Dispute Resolution Procedures Act (the "ADR Act"). The inclusiveness of this ADR umbrella can be confusing.

A voluntary mediation subject to the ADR Act differs in form and purpose from a mandated arbitration subject to the Texas General Arbitration Act or the U.S. Arbitration Act. Under this definition, ADR includes a wide range of dispute resolution procedures from voluntary and nonbinding settlement procedures to mandatory and binding arbitration.

Alternative Dispute Resolution (ADR)

ADR is less costly and more productive than litigation. It comprises several phases: negotiation, mediation, and arbitration.

- In **negotiation**, the parties identify the issues, educate one another about their needs and interests, propose settlement options, and bargain over the final resolution.
- In **mediation**, a neutral mediator facilitates the negotiation between the association and resident to helps them agree on a solution that's acceptable to each of them.
- In **arbitration**, a neutral arbitrator hears both sides of the case and renders a decision based on evidence and testimony. An arbitrator's decision may be legal and binding as a court decision; however, the process is much less formal and far less expensive.

ADR IN ACTION

Alternative dispute resolution has been used to good effect in many real-life cases— including these:

- **Arbitration.** Residents in one association complained about a swim team that had been granted use of the community's swimming pool. The board interpreted the CC&Rs as allowing the use, but when the association's attorney disagreed, the board instigated an arbitration proceeding, specifically because board members wanted a final determination. The arbitrator found that the CC&Rs didn't authorize the use, and that an amendment would have to be submitted to a member vote.
- **Mediation.** In another association, one family's portable basketball net occasionally ended up in the street, encouraging children to play in traffic and also sometimes tipping over. Worried about the safety hazards, the board decided that the portable net violated association rules and had it removed. The family immediately reported the net stolen and demanded that police arrest members of the board. Mediation was scheduled, and everyone agreed to how the net was to be used, maintained, and stored.
- **Neutral evaluation.** When an owner in an association withheld assessments because a leaky roof hadn't been repaired, the association filed a lien and threatened the owner with eviction. The owner located a legal expert online, and the board agreed to neutral evaluation. The evaluator found that the law didn't allow assessments to be withheld in such cases and wrote a report to that effect, submitting copies to the owner and the board. The owner paid the assessments immediately.

Preventive and Initial Methods of Dispute Resolution

Ways to Minimize Rules Violations

There are actions the association can take to minimize rules violations, reduce conflict between residents and the community and to build consensus:

- Educate residents about the rules—what they are, why they're important, why compliance maintains property values, and so on.
- Enforce rules consistently and even handedly.
- Intervene as early as possible; don't allow the violation to continue or to become serious.
- Modify association governing documents or pass a resolution confirming the association's commitment to alternative dispute resolution.
- Establish a policy that outlines how the association will resolve conflicts.

Ways to Resolve Conflicts

CAI recommends the following progression of steps to resolve conflict successfully when it does occur:

- Start with a casual conversation and inform the resident of the rule.
- Send a friendly letter reminding the resident of the conversation.
- Send a second letter informing resident of violations, deadlines, and potential penalties.
- Send official notification that the association is about to take action. Schedule a hearing when the resident may address the association.
- Conduct a fair hearing and treat the resident with respect.
- After the hearing, the board will decide how to proceed.
- Allow the resident to appeal the decision. Pursue alternative disputed resolution (ADR) options if the association and the resident cannot resolve their differences.

Negotiation

Through negotiation, the disputing parties themselves—and in some cases their attorneys—work out a solution, through either written or phone exchanges or face-to-face meetings. The parties have complete control over the proceedings, which can lead to a written, enforceable agreement, an oral agreement, or something as simple as a new understanding.

Conciliation

A conciliator is a neutral third party who helps facilitate communication during a dispute. Conciliation is conducive to the same sorts of agreements as negotiation or mediation, with the facilitator helping the parties arrive at their own resolution.

A difference between conciliation and mediation is that a conciliator might simply be someone who can help the parties remain peaceful so they can discuss matters (such as a counselor), or who might make suggestions (such as a minister). Sometimes this amounts to an agreement to settle based on the opinion of a specially chosen, expert, neutral person.

Neutral Evaluation

This process is used when the parties agree or are forced to rely on someone else's expertise to resolve their dispute. At that point, a court-appointed neutral evaluator—often an attorney—may meet with the parties to evaluate the case, including its monetary value, everyone's strengths and weaknesses, and goals. The evaluator tries to help the parties arrive at a settlement or prepare the case for trial.

Outside of trial, parties sometimes agree to use the evaluator, who represents neither party individually, because everyone wants a fair solution, and everyone agrees to trust the evaluator's decision (or to ask for the evaluator's opinion, review it, and then see if they agree to accept it).

Arbitration & Mediation

Business and personal disagreements are increasingly resulting in litigation. An average of 20 million lawsuits are filed annually in the United States. Moreover, these suits are becoming more expensive, more tenuous and more "creative." Lawsuits can be a costly way to solve problems in community associations.

Legislatures have seen fit to mandate alternative dispute resolution, which includes mediation, in order to rid the judiciary of a growing number of disputes. Therefore, it has become imperative for professionals working in the homeowners' association industry to become familiar and comfortable with the process.

Arbitration

Arbitration is a process in which a third party—called the arbitrator—renders a decision as to the respective liabilities of all parties. The object is not to reach a settlement, instead the arbitrator ultimately makes a ruling.

Arbitration: More Formal; Binding or Non-Binding

1. Disputing parties agree upon one or more arbitrators who will hear the claim and reach a decision which is usually binding.

2. Arbitration, while a formal process, does not require adherence to courtroom rules of evidence and procedure.

3. Parties have flexibility in timing and the choice of arbitrators.

4. Binding arbitration is typically enforceable in court and not usually appealable.

5. In non-binding arbitration, the process is virtually the same as binding arbitration, but the decision rendered is advisory, not compulsory.

6. Discovery in the form of depositions and written discovery is permissible and may be limited by agreement, order of the arbitor or statute.

Mediation

In a mediation, a neutral third party—called a mediator—attempts to guide the parties into reaching a resolution or settlement that is favorable to everyone. It gives both parties a chance to present their side in a forum where confidentiality is guaranteed, however, as will be explained, it can be compromised. Often times mediation is the first meaningful discussion the parties have engaged in.

Mediation: Private, Voluntary, Informal and Non-Binding

1. A participatory process. Both sides are invested in the process and are thus more likely to carry out the agreed upon solutions.

2. The parties retain control over the outcome of the dispute.

3. An informal process, which usually allows for faster and cheaper resolutions.

4. A neutral third party facilitates a discussion and settlement between the two disputing parties.

5. The mediator does not have the power to insist upon a solution or agreement between the disputing parties.

6. The mediator may establish the ground rules and affect the proceedings depending upon the mediator's agreed upon role.

The most significant difference between a mediation and an arbitration is the fact that a mediation should result in a settlement agreeable to both parties, whereas an arbitration will result in an award that may not be agreeable to any of the parties.

MEDIATION

How a Dispute Ends Up in Mediation

- Contractual Agreements
- Court-Ordered Mediation
- Voluntary Submission
- Statutorily Required ADR

Defining the Goals of Mediation

Mediation involves compromise. It is important to understand that the outcome of the mediation is meant to partially satisfy the interests of all parties in the dispute.

- Mediation is a process that seeks to reconcile disputes. Mediation is not a process that seeks to adjudicate disputes. The outcome of reconciliation is an agreement with the other side, whereas the outcome of adjudication is a judgment against the other side.

The primary goals of mediation may include the following:

- Final Settlement of All Issues in a Dispute
- Partial Settlement of Issues That Can Be Settled
- A Process to Move Toward Settlement
- Gain a Better Understanding of the Case

Goals of Mediation: A Partial Settlement of Peripheral Issues

All claims and all defenses arising out of the same set of facts must be asserted in the same lawsuit. The result is often a lawsuit filled with many peripheral issues and claims that are not central to the main case.

Mediation can eliminate those peripheral disputes by settlement agreements or agreements to informally set certain issues aside pending the resolution of the main claims. This can result in a shorter trial with proportionately lower costs

Goals of Mediation: Finding a Process to Move Toward Settlement

If a mediation does not resolve a dispute, it still provides the opportunity to decide on a program that will shape the path forward toward an eventual settlement. Such programs include:

- Evaluative Input of a Neutral Third-Party
- Joint Investigation or Testing Programs
- Stipulated Discovery Programs
- Scheduling of Future Mediation(s)

Goals of Mediation: Gain a Better Understanding of the Case

If there is insufficient information or lack of agreement on what the mediation negotiations have identified as core issues, the mediation can be adjourned until further research.

Mediation plays a critical part in providing an opportunity to see both sides of the story. The mediation process will often reveal the other side's hidden issues and/or goals.

An important part of understanding the process is for the party to fully understand its own side of the case. The parties should also examine the actual and hidden costs of proceeding with litigation.

The Advantages of Mediation

1) Outcome/settlement may be reached faster.
2) Most ADR proceedings are confidential.
3) The parties have greater control over the outcome of their case.
4) Mediation affords greater communication between the parties.

Types Of Cases That Lend Themselves To Mediation

Most non-criminal matters and issues that don't involve a legal claim can be mediated, such as:

- Pet-related problems
- Disputes between neighbors
- Policy issues

When Not to Use Mediation

In some cases, it may be very disadvantageous for a party to go through the mediation process.

- If a homeowner has taken a very tough stance and there is no chance of compromise, mediation will be a waste of time and money.
- In some cases the association's lawyer will be looking at a case in which the association is clearly in the right (e.g. a homeowner just stopped paying assessments). In that situation, the association is not expecting to compromise its position in any way.

Choosing a Mediator, Location, and Time

The parties can benefit by controlling the mediation process themselves rather than waiting for the court to order them to mediate with a court-appointed mediator. The parties can agree on a mutually agreeable mediator at a mutually agreeable time and location.

It is important to chose a mediator that the other side will be willing to listen to. Typically each side can produce a list of several mediators that would be acceptable to them. Mediators vary in mediation style and experience, and often the mediator's knowledge of a particular area of law can be a benefit to the parties.

Types of Mediators

There are four types of styles that a mediator typically falls into:

1. Orchestrator: This type of mediator asks many questions regarding the facts, evidence, and general jurisprudence of the case, probing the parties' positions and perceptions. The Orchestrator tries to conciliate by focusing primarily on the process. The Orchestrator typically uses multiple joint sessions and assists/encourages the parties to communicate directly.
2. Third-Party Negotiator: After the first joint session, this mediator separates the parties and keeps them apart. S/he carries the party's positions back and forth, filtering and interpreting them the way s/he thinks best to achieve a settlement. This often creates a problem with the parties' perceptions of the mediator's neutrality.
3. The Deal Maker: This mediator intentionally keeps the parties apart. This mediator can be extremely manipulative; may deceive either or all parties to achieve a settlement; pushes very hard; often attempts to browbeat, intimidate, or coerce a party into setting the case on the basis that the "Deal Maker" thinks most appropriate. This type of mediator has the greatest problem with the parties' perception of her/him. S/he is usually mistrusted by all the parties and may only be used once by a party.
4. The Rescuer: The Rescuer tries to keep parties out of court and away from lawyers at all cost. The Rescuer usually follows a style that does allow, or severely restricts the use of private sessions with the parties. This style greatly reduces the effectiveness of the private sessions with the parties. The Rescuer rarely has the knowledge, education, mediation training, or expertise to mediate serious commercial, personal injury, or insurance cases.

Mediation Location

The choice of location for a mediation should include factors such as:

- The need for audio/visual availability
- The number of people who will be attending
- The travel convenience for those involved.

The location should be adequate to satisfy the needs of the parties as to document display. There should be room for a joint opening session with separate rooms for the parties to adjourn to at the conclusion of the opening session.

When to Start Mediation

Timing is critical in mediation. It should begin as early in the dispute as possible after the parties and attorneys have a good grasp of the factual and legal issues.

It's best if mediation takes place before the taking of depositions and other expensive steps in the discovery process unless the information is needed to assist with the resolution of the claim.

In addition, be sure to contact your insurance company before you begin the process. Unless your carrier is part of the process you cannot expect them to participate in any monetary settlements.

Mediation Deadlines

Statute requires that the association must give a notice to the developer ninety days prior to filing suit. During these ninety days the Statute of limitations is tolled.

If with in the first 25 days after receiving the notice the developer does not attempt to "meet and confer" with the association, the association may forgo ADR and sue immediately.

The Mediation Process

Success in mediation is getting the parties into a position of being able to make an intelligent choice between the best options available.

- Mediation is a process that seeks to reconcile disputes, it is not meant to adjudicate disputes. The outcome of the reconciliation process is an agreement with the other side. The outcome of adjudication is a judgment against the other side.
- Reconciliation of a dispute is achieved by developing terms of agreement that mutually satisfy the interests of the parties rather than establishing concepts of right and wrong.
- The mediation process does not dwell on who may be proven right or wrong in court. The probability of various judicial outcomes is a factor, but not a controlling factor, in considering settlement options.

Types of Mediations for Association Disputes

For an association dispute there are generally two types of mediation; the ones used for construction disputes and the ones used for everything else. Construction disputes require the mediator to be flexible in the process to allow for the individual aspects of each case.

In contrast, CC&R violations and assessment collections can utilize the process known as "classic mediation". Classic mediation is a four-step process:

1. The mediator introduces everyone and then each party (or their lawyer) presents their case.
2. The case is presented by simply stating the facts or telling the story. There is no testimony or cross-examinations. Documents are simply handed to the mediator and the opposing side.
3. The mediator sets aside time for the parties to ask each other questions or the mediator will meet with each party individually.
4. Thereafter the mediator will attempt to facilitate a settlement.

Mediating a Construction Defect Suit

Construction defect suits are usually big and complicated. They are often very fact-specific, involve a lot of finger pointing, and require multiple experts.

For these reasons, mediation is a bargain for all parties, and even if it does not work out, everybody knows what the real issues are by the time you get to the courtroom.

It is helpful to contact the mediator early in the lawsuit.

Legal Ground Rules for Mediation

The legal framework for a mediation should include the following:

- A stipulation to mediate with a reference to those standards may be all that is necessary to set the legal framework. In areas where there are no pre-established procedural rules, a simple agreement to mediate will suffice.
- Provisions should be made to cover the confidentiality of the process. While some states impose a legal privilege on the process, all that is really needed is an acknowledgment that any concessions, admissions or communications exchanged are inadmissible in any subsequent evidentiary proceedings.
- The mutual assurance that both parties shall appear with all necessary authority to reach an agreement might also be included in a stipulation or agreement to mediate.

Pre-Mediation Organizational Meetings

In certain cases, a pre-mediation organizational meeting of the mediator, counsel, and, if necessary, a very limited number of client representatives may be warranted so that the parties can plan an agenda and establish a daily schedule for the mediation session. Such cases where pre-mediation organizational meetings may be beneficial include:

- Large Cases with Multiple Parties
- Multi-Issue Cases

How Mediation Works

- **Who attends:** Each party must be represented by someone authorized to make a decision. Individual parties must be personally present. Corporations, including insurance companies, must have an officer or authorized representative attend. At mediation is no time to be calling and polling people, those who attend must be granted authority.
- **How to prepare:** Both parties need to consider in advance about what solutions, both monetary and non-monetary, would be satisfactory. They should frankly assess the strengths and weaknesses of their own case, prioritize their needs and try to anticipate similar elements of the other side's case. Any relevant documentation or other evidence that would help explain the conflict should be brought to the mediation session.

What Individuals/Authorities Will Be Present?

Having the right players at the table is critical to the success of any mediation. Certain individuals and authorities expected to participate may include:

- Individuals Selected to Serve as Party Representatives
- A Suitable Mediator
- Insurance Claims Adjuster
- Corporate Representative/General Counsel
- Representative of Governmental Entity

How Mediation Works (*Continued*)

- **Mediation Introductions:** the mediator, an objective neutral facilitator, normally trained in dispute resolution, introduces everyone, explains the goals and rules and encourages each side to work cooperatively toward a settlement.
- **Opening statements:** Each party through their attorney or personally tells his or her story about the nature of the dispute, how it has affected him or her and offers some general ideas about how to resolve it. The parties also present the law and how it affects the outcome of the case.
- **Follow-up discussion:** The parties then talk to each other about what they said in their opening statements and try to determine what issues need to be addressed further.
- **Private caucuses:** Each party meets privately with the mediator to discuss the merits of his or her position and explore further ideas for settlement. The mediator may caucus with just one side or both, just once, or several times. In these sessions the pros and cons of the case are discussed.

Opening Presentations

The presentation of the client's case in the opening phase of a mediation is a task that must meet two, often conflicting, needs.

1. The client must feel his or her story has been told and fairly presented.
2. Opening presentations must clearly and effectively communicate the "other side of the story" to the opposition.

Opening Presentation Strategies

- While interactive exchanges during the opening presentations can be helpful, they should be carefully monitored and controlled.
- As claimant, avoid making an overly defensive presentation that dwells on anticipated defenses that are expected to be raised by the opposition.
- Graphics should be used to effectively illustrate the case.
- It should also be remembered that an opening presentation in mediation need not be confined to a preview of the lawsuit or limited to a discussion of admissible evidence.

Private Caucus Discussions

The confidential, closed-door nature of the caucus provides a forum with the mediator to accomplish two basic tasks.

1. Gives the mediator a chance to privately "probe vulnerabilities" in each party's position.

2. Allows for the development and exploration of possible settlement scenarios and options.

Opening Presentation Players

- Lead Trial Counsel/Special Counsel: Primarily responsible for making the opening presentations in a mediation session.
- Key Expert Witnesses: May be effective in giving short samples of their proposed trial testimony as well as taking the parties through some of the more complex aspects of liability or damage positions.
- Key Lay Witnesses: Either to directly participate & offer a preview of their trial testimony, or indirectly appear through affidavits, letters, or a video taped appearance.

Information Sources

One principal factor that leads parties in a mediation to a settlement agreement is the discovery of new or different information during the mediation process. The manner in which the stage is set for the new information to emerge is varied and may include:

- Post Presentation Dialogue
- Questions Related to Sub-Issues (The Squaring of Contract Balances, Quantification of Change Orders, Review of Meeting Minutes, Confirmation of Test Reports, Verification of Notices, etc.)
- Testimony of Key Employees w/ Direct Knowledge of Underlying Facts
- Clarification of Issues by Non-Party Witnesses

The Decision Makers

The people who will ultimately decide upon settlement terms are obviously critical components of any mediation team.

In addition to someone with complete and full authority to both define and bind a party to an agreement, the decision-making components of a team may also include the financial, administrative or executive advisors appropriate to reach an agreement.

The people who are to decide should be given ample resources to enable them decide intelligently. Some care should be taken in advance of a mediation to make sure everyone participating in the process has a clear understanding of who will be making the ultimate decision.

Final Stages of Mediation

- **Direct negotiation:** After caucuses, the mediator may bring the parties back together to negotiate directly with each other.
- **Closure:** If an agreement is reached, the mediator may recite and write down its main provisions, with the parties listening or the parties will memorialize their own agreement. The mediator will ask each side to sign the written agreement. The parties have the option of writing up and signing a legally binding agreement later. However, it is preferable in most cases to having the formal documentation signed prior to all parties leaving the mediation.

Closure Requirements

1. Prepare releases in advance.
2. Indemnification agreements.
3. Confidentiality agreements.
4. Lien waivers, close out documents.
5. Continuing warranties.
6. Enforceability of settlement agreement—binding arbitration, mediation, “no suit” clauses.

Enforcing Settlement Agreements

The Texas ADR Act provides for the enforcement of a settlement agreement.

- A party who participates in an ADR procedure should obtain competent professional advice concerning the enforceability of settlement agreements.
- However, in Texas, a settlement agreement is generally enforceable as a written contract between the parties.

Alternatives to Complete Settlement

1. What can be settled—or eliminated from contention?

- a. Contract balance.
- b. Change orders pending.
- c. Reasonable remedial measure.
- d. Per Diem rates on delay damages.
- e. As built schedule.

2. What can be resolved through other future ADR processes?

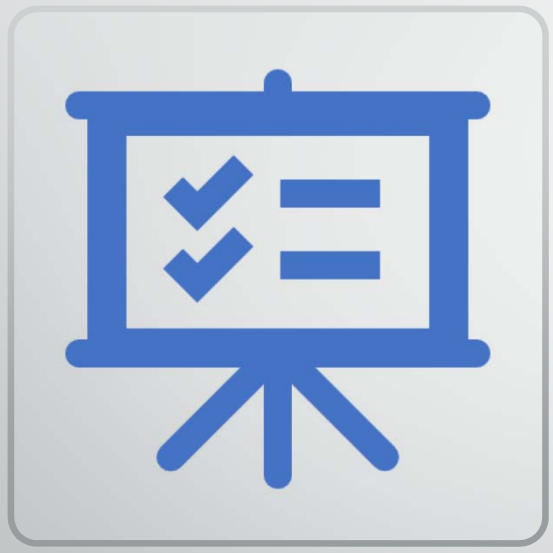
- a. Evaluative input—non-binding adjudication on key issues (confidential "advisory" opinions coming from mutually agreeable neutrals).
- b. Joint investigation programs—audits, tests, inspections.
- c. Joint expert analysis—schedule study, design reviews.

3. Can we adjourn to develop more facts and return to deal with specific issues?

Mediation Shows a High Success Rate

Studies show that people who agree to mediate disputes are more likely to be satisfied with the outcome than litigants who go to court. The parties themselves resolve the issue, so the settlement suits their needs better than a resolution imposed in court.

Statistics show that mediation succeeds in 80% to 85% of cases.



In short, mediation is a voluntary method of resolving the types of aesthetic and "quality of life" conflicts that are inevitable in residential communities.

- Because the parties in mediation determine the result themselves, an outcome acceptable to all parties is assured.
- Mediation is informal, confidential, fast and cost effective. Disputes that typically take months or years in court can often be resolved in half a day.
- If mediation does fail, all other traditional dispute resolution options, including litigation, remain available.
- Most importantly, mediation enables disputing parties to "lower the temperature," understand each other's position and point of view, and when the issue is resolved, to go about their lives as good neighbors.

Arbitration and Other ADR Options

Arbitration Proceedings

Arbitration proceedings are much like trials, with a presiding party or parties—usually one arbitrator or three, with one chosen by each party and then a third chosen by the two arbitrators—sitting to hear evidence and render a decision. But arbitration is less formal than a trial. The arbitrator usually isn't required to follow the rules of evidence, meaning that testimony, hearsay, and records that would be excluded in a trial might not be off-limits.

Non-Binding Arbitration

In choosing nonbinding arbitration, parties are generally indicating a desire for an inexpensive, quick resolution. Thus, the decision is usually advisory in nature—but usually a good indication of what you could expect at trial.

Many consider nonbinding arbitration to be an unnecessary expense, an investment of time and money with no guaranteed resolution. This is a fair objection but realize that in binding arbitration—which is explained next—the proceedings tend to be more adversarial; each side is much more invested because of the permanence of the decision.

How a Dispute Ends Up in Non-Binding Arbitration

You can agree voluntarily to nonbinding arbitration

You might find yourself thrust into the process by virtue of a contractual clause or a judicial mandate.

Binding Arbitration

In binding arbitration, an arbitration is held, the arbitrator renders a decision, the decision is presented for court approval, and a court order makes the decision enforceable. Binding-arbitration decisions are subject to judicial review only in very specific cases—if the arbitrator committed fraud, for example, or either party was not allowed to present its case.

- As a result of this authority, some people fear that arbitrators have more power and flexibility than judges—with none of the accountability. Or they feel severely limited in their choices when binding arbitration is imposed and so resent the process. However, binding arbitration often saves the public more money and grief than can be easily quantified, especially when you consider that the costs of protracted litigation eventually filter down to the unassuming public.
- Generally, the finality of binding arbitration is what makes the process so appealing. People who have been involved in trials and appeals know that a case can drag on seemingly forever, with appeal costs becoming so prohibitive that it's easier to give up.

Mediation-Arbitration Hybrids

Med/arb or arb/med are hybrids of the mediation and arbitration processes.

- Med/arb: A neutral third party first tries to mediate the dispute, then, if that is unsuccessful, makes a decision that may or may not involve an arbitration-type proceeding.
- Arb/med: The third party arbitrates the dispute, then seals the decision until the parties go through mediation. If the dispute isn't resolved through mediation, the decision—which the parties have agreed to accept—is unsealed.

Hybrids aren't usually imposed by courts or contracts; rather, the involved parties agree to them. This is because these processes raise difficulties when it comes to confidentiality and potential conflicts facing the mediator, who likely would be exposed to the confidences of both parties.

Moderated Settlement Conference

A **moderated settlement conference** is a confidential method whereby a panel of experienced attorneys (or other experts – or a combination of both) provide an objective case evaluation to the parties.

- The attorneys for the parties make a brief presentation of the facts and law. Each side is typically provided a period of approximately 30 minutes.
- After each side presents its position, the panel of experienced individuals asks the litigants questions regarding the case, the facts and the law.
- After the presentation and questioning, the panel retires and deliberates as to its opinions regarding the facts and law that they have been presented.

Summary Jury Trial

The **Summary Jury Trial** allows the parties to present their case to a jury in summary form. The jury then renders a non-binding, advisory verdict.

- The parties utilize the advisory verdict to evaluate their case and, in most cases, are able to bridge whatever gap separated them from their adversary in negotiating a resolution.
- Some jurisdictions report a settlement rate at or just below 100% for cases that submit to summary jury trials. This procedure allows for cost savings and a measure of certainty, without depriving the litigants of their "day in court."

Summary Jury Trial Process

1) The parties select a jury from the regular jury pool provided by the court.
2) Each party is given a set amount of time to present a summary of their case through its counsel.
3) The judge then gives an abbreviated instruction on the law and the jury immediately goes into deliberation. The verdict may be on liability, damages or both. If no consensus is reached, anonymous individual juror reactions are revealed.
4) Afterwards the parties get an opportunity to question the jurors to gauge their reaction and understanding of the case.

Pros and Cons of Summary Jury Trial

PROS

- A litigant knows how a real jury evaluates its case, without running the risk of a final, adverse judgment or the expense of a mock trial and/or full-blown jury trial.

CONS

- The strengths and theory of the case is revealed to the opponent. Some parties are reluctant to give up the strategic advantage they perceive having when the other party is unaware of certain “smoking guns” or “secret weapons.”

Factors to consider as to whether the summary jury trial is appropriate:

1) How long a trial will the case require;

2) The amount in controversy;

3) The complexity of the case;

4) The status of discovery;

5) Whether other ADR procedures have been tried unsuccessfully; and

6) When the case is set for trial, and how likely it is that it will be reached.

Mini-Trial

Mini-trials are similar to summary jury trials, but the difference is that the arguments/summaries are made to the decision-makers of the opponent and a neutral third-party advisor, often an expert in the subject matter. Afterwards, the parties attempt to negotiate a settlement, with or without input from the third-party advisor.

- The advantage a mini-trial may have over a summary jury trial is that sometimes the parties are more comfortable with an expert in the field rendering advice on the merits of the case.

Contractual Provisions for ADR

Sample Dispute Resolution Policy

"Any owner or occupant must give written notice to the board requesting a hearing with the board and must attend such hearing to discuss amicable resolution of any dispute before that owner or occupant files any lawsuit against the association, the board, any director, or any agent of the association. The owner or occupant shall, in such notice and at the hearing, make a good faith effort to explain the grievance to the board and to resolve the dispute in an amicable fashion, and shall give the board a reasonable opportunity to address the owner's or occupant's grievance before filing suit. Upon receiving a request for a hearing, the board shall give notice of the date, time, and place of the hearing to the person requesting the hearing. The board shall schedule this hearing for a date neither less than seven (7) nor more than twenty-one (21) days from the date of receipt of the notice of hearing by the person requesting the hearing."

Outline of Sample Provision For Mediation

A. Dispute Resolution

B. Outside Mediator

C. Mediation is Not a Waiver

D. Assessment Collection and Lien Foreclosure

E. Term