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Creative ADR

Getting creative with dispute resolution | Stuart Rudner

By **Stuart Rudner**

Stuart Rudner

(September 26, 2019, 11:04 AM EDT) -- When it comes to how we handle disputes, there are many options. And yet the reality is that most of us tend to do things the same way every time.

For example, in the case of a wrongful dismissal, counsel for the plaintiff will typically start by sending a demand letter to the former employer. The employer will typically forward that letter to their own counsel, who will send an initial reply advising that they are looking into the matter, and then follow that up with a more substantive response in which, almost undoubtedly, they will deny the allegations. They may or may not open the door to further discussion, in which case, the two lawyers will attempt to ascertain if a resolution can be reached. If not, and if the plaintiff is of the view that the matter is worth pursuing, then the next step will be to file a civil action or, if it is a purely human rights claim, a human rights complaint.

The parties will then proceed down the litigation path and may or may not engage in mediation at some point. Of course, there are some jurisdictions, such as Toronto and Ottawa, where mediation is mandatory. Throughout the process, the lawyers may occasionally revisit the issue of whether resolution is possible, including at a pretrial or settlement conference.

However, there are lots of other ways that this could unfold. To begin with, prelitigation mediation is often a viable option. You do not have to have an active lawsuit in order to mediate. Furthermore, before proceeding with a claim in civil court, the parties and their lawyers should consider whether arbitration would be a better option. There are many advantages to arbitration, several of which I have discussed in a previous column. Among those are the degree of control that the parties have over the process and remedies available, as well as the fact that the dispute can remain confidential.

As I have said in the past, there are many cases in which the full litigation process is simply unnecessary. Arbitration offers the parties the chance to customize the process to the dispute. This includes determining the extent of documentary and oral discovery, whether there will be *viva voce* evidence and if so, how much, the scope of the evidence that will be adduced, and the extent of the remedies available to the trier. The parties can also agree to proceed with a hybrid process: med-arb.

Mediation/arbitration allows the parties to attempt to resolve the matter through the use of a neutral third party, but if it is unsuccessful, the neutral third party will continue their involvement as the arbitrator. This can be done over an extended period of time or in some cases, it can all be completed in one day.

Sometimes the parties will engage in mediation and, if it is unsuccessful, proceed to arbitration a few weeks or months down the road. In other cases, the parties are concerned that the trier of fact may be influenced by the discussions at mediation and prefer that he or she render an opinion *before* mediation takes place. In that case, the arbitration will take place first and the arbitrator will reach a decision but not disclose it. The parties can then pursue mediation, knowing that a decision has already been reached and anything that they disclose to the mediator will not influence that decision.

Of course, the hope is that mediation will be successful in helping the parties to reach a resolution and it will not be necessary to proceed to the verdict stage. This can take place over several months or all in one day. In fact, it can be extremely effective to go through mediation when the parties know that if they do not reach a settlement by 5 p.m., the arbitrator will unseal the envelope and reveal his or her judgment. That can be far more powerful than knowing that if a settlement is not reached, there will be a trial and judgment sometime far in the future. Knowing there is no time to return to settlement negotiations later, the parties are more likely to engage in meaningful dialogue then and there.

Many parties also truly value the idea of knowing that there is a firm end date to their dispute. For example, if mediation-arbitration is scheduled on a particular day, everyone will go into that day knowing that no matter what happens, the dispute will be over at the end of the day. The conclusion might be brought about by settlement or by judgment, but there will be finality; that has a value to most parties.

In my ADR practice, I have seen how much parties appreciate closure. Obviously, any settlement must be reasonable, but in the vast majority of cases, it is possible to help the parties reach a resolution that is more attractive than proceeding with litigation. That is why more than 90 per cent of my mediations end in settlement. Adding arbitration or med-arb to the mix makes ADR even more attractive since it provides the best of both worlds: either a negotiated settlement or a judgment that is provided by a judge of the parties' choosing in accordance with a process that they establish.

I continue to encourage counsel to think outside the box rather than handling every file the way that they always have. They should consider alternative methods of reaching a resolution that include prelitigation mediation, private arbitration or med-arb. Particularly as the employment law bar continues to express concerns regarding the civil litigation process, it makes no sense to continue to ignore the alternatives.

Realistically, we are never going to see a specialized employment law court the way that we have a family court. However, arbitration allows us to create our own and customize it to each specific dispute. Most importantly, it allows the parties, with the advice of their counsel, to select the best judge for the case.

We all need to remember that when it comes to dispute resolution, there are many alternatives. Rather than simply preparing a statement of claim, consider whether there is a better way to handle each matter.

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