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Civil Litigation

or



Arbitration

or



Mediation

Which is Better?



LIGHTING THE WAY



1) What is  
the  
difference?

2) What are benefits and  
detriments of each?

3) when do you want  
which?

# Option #1

## Civil Litigation



Lawsuit, filed in court  
(State or Federal)



Civil suit; between  
parties



(vs. criminal case, where  
state is the Prosecutor)

## Civil Litigation

Rules/Procedures that Apply

Court will interpret and apply the law

and the procedures

## Civil Litigation

Who pays  
for judges,  
juries,  
courtroom,  
staff?

We all do! (from taxes)

But it means you do not  
have to pay MORE to try  
your case.

Though the Clerk's  
office charges for filing  
pleadings.

## Civil Litigation

If Jury Trial, Jury will decide:

- Facts
- Who wins
- Damages

If Bench Trial, Court decides all of these, too

# Civil Litigation

Jury Trial v.  
Bench Trial

BIG  
DIFFERENCE!



JURY:  
KISS



STORY



PERSUASION

If Judge:



BENCH:



REVIEW OF  
STATEMENT OF  
LAW



ELEMENTS OF  
CAUSES OF ACTION



SUFFICIENCY OF  
EVIDENCE

# Civil Litigation

## JURY TRIAL

- Jury of your peers (7<sup>th</sup> Am.)
- Who are “peers”?
- What are “peers” like?

# Civil Litigation

## Jury Selection

- From voting records
- From driver's license records
- Intended to be random; selected by computer



# Civil Litigation

## Jury Selection

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“Voir Dire” process

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Jury questionnaires

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Jury experiences

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Jury likes and dislikes

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“appropriate jury for this case”

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Challenges for Cause

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Strikes per party

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Really, jury *d*eselection

# Civil Litigation

- Discovery

A) generally, broad use of discovery, with all relevant docs to be produced

B) All relevant witnesses to be deposed,

Experts:

- Broad use of experts.
- Often reports and depositions
- Frequently provides live testimony at trial

# Civil Litigation

## How resolved

- Court enters order of its own, such as:
- Summary Judgment,
- approval of settlement,
- or Findings of Fact and Conclusions of Law

OR

- Court enters an order accepting the decision of the Jury, following Jury Deliberations

# Civil Litigation

## “Blind Justice”



- Why “blind”
- Credibility
- Persuasion
- No bias
- Scales of Justice
- Weight of the evidence
- Standards:
  - a) preponderance (51%-49%)
  - b) greater weight and sufficiency
  - c) vs. beyond a reasonable doubt

## Civil Litigation

# Expert Witnesses

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To help teach and explain difficult or complex issues

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To “help the jury understand”

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Who presented (and paid for) the expert?

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Why do experts disagree?

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Do experts help explain, or persuade?

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## Civil Litigation

# Damages

## Actual Damages:

- As determined by the jury
- Based on the evidence presented
- Punitive Damages:
  - Intended to punish
  - Intended to discourage repeated bad behavior
  - Higher standard of proof (but do jurors appreciate that, or are they just angry?)

# Finality/Appealability

- Any party can appeal
- Ct of Appeals considers controlling law
- And “sufficiency of evidence” presented at trial
- If sufficient evidence to support finding, upheld
- Not to second-guess the jury, or impose their own views

# Civil Litigation

Trial=  
Public Hearing

- Anyone can attend.
- Generally, all trials are public, and the public (and media) are welcome.
- Parties get to “tell their story”, to the judge, the jury, and the world
- Can change or influence public opinion or policy
- Catharsis



## Option #2 Arbitration

- No judge
- No jury
- Rather, one (or three) arbitrators decide everything

# Arbitration

## How Arbitrators Chosen?

Usually:

- From a panel approved by the association
- Can be selected by a party
- Often, each party selects one, and those 3 arbitrators select the third (who becomes the chair of the panel)

# Arbitration Rules and Procedures

- Selected from existing Rules and Procedures
- Usually from approved body:
  - a) AAA
  - b) London Rules
  - c) SNAME
  - D) HMAA
- Usually identified in advance

# Arbitration

## Arbitration is BY AGREEMENT

- Usually in writing, in advance of the dispute
- Which means “a writing...”
- Usually an agreement between the parties
- Ex: Purchase and Sale Agreement
- Ex: Drilling Contract
- Ex: Master-Service Agreement



## Caution

- You have “agreed” to binding arbitration in contracts you are not aware of:
- Phone lease agreements
- Purchase of shares of stock
- Purchase of computer equipment
- Purchase of your car
- Parking lot use
- Likely ‘Contracts of Adhesion’ (unequal bargaining power)
- So, “caveat emptor”

## How to start Arbitration

### Invoke

Invoke it, citing the clause in the contract that governs it

### Practice Tip

Be sure you comply with the notice and timeliness requirements!

### Agree

If you do not have an agreement that provides for it, see if O/P will agree to it (but don't hold your breath)

# How are Arbitrators paid?

- The parties pay, in advance or as you go.

Usually professional credentials, so

Retainer

Draws

Minimums

(Same as for each party's lawyers.....)

## Discovery

- A) generally, all relevant docs are to be exchanged,
- and brief depositions or written Q&A to witnesses or parties.
- Experts:
  - Limited use of experts.
  - Often reports only
  - On limited topics
  - Sometimes no testimony at the hearing



## How resolved

- Written award from the Arbitrator(s)
  - a) Simple award \$
  - b) Reasoned award \$\$;
  - c) Findings of Fact etc., detailed award \$\$\$

## Finality (Appealable?)

- Generally, no.  
But see Rules and Procedures of the relevant association
- Generally, appealable only if;
- a) arbitrator did not properly disclose a conflict of interest, or
- b) arbitrators completely ignored the clear controlling law and the clearly-convincing evidence (really an abuse of justice claim, hard to win)

## Confidential or Public access?

Generally, strictly confidential, esp. re trade secrets, proprietary information or processes, etc.

Confidentiality is such a norm that it often is difficult to get even the final results of the hearing made public, such that arbitration is sometimes seen as “veiled in secrecy”

No way to create precedent, if only the parties and the arbitrators know the result.

# Option #3

## Mediation

- = a less formal process of negotiation and settlement of disputes
- Can be done at any time, or various times, in the process
- Done by agreement between the parties
- (In comparison, does not require a written contract invoking arbitration)
- Confidential throughout the process



# What Mediators are not:

- Mediators are not Judges (though some used to be)
- Mediators are not arbitrators (though some may do that in other settings)
- Mediators do not determine what the facts are.
- Mediators do not determine what the controlling law is.
- Mediators do not give legal opinions.
- Mediators do not issue orders, opinions, or decision.

What Good Mediators do:

- listen
- ask questions
- test theories
- ask about “relative risks”
- help identify possibilities
- suggest possible resolutions/options
- identify needs
- distinguish them from wants.

The best mediators are “settlement consultants”

A few examples are. . . .



# Mediation Costs

- Like Arbitrators, Mediators charge an hourly rate.
- But mediation typically is half-day, full day, or (at most) a few days.

Generally, costs are much less than arbitrators, fewer hours involved, and no “award” issued.

# Mediation

## Discovery

- a) basic info already identified and completed,
- b) can do more, limited discovery, or find and exchange certain docs, expedited.

## Experts:

Limited use of experts' reports, for discussion purposes.

Often reports only

Generally not present at Mediation.



# Mediation

## Goals of Mediation

- Identify the issues
- Identify the major facts in dispute
- Seek agreement between the parties on the above
- Try to narrow issues and facts in dispute
- Identify possible solutions. Options!
- Identify risks with various options
- Explore best case/worst case scenarios
- Explore what happens if dispute NOT settled here

# Mediation

## Ultimate Mediation Goal

- Reach agreement where dispute is settled!
- If all parties cannot agree, it is not settled (yet)
- MSA to be prepared at end
- Parties to prepare MSA main terms
- Signed agreement
- Further docs to be prepared
- Come back to Mediator if issues arise!

## How concluded?

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If settlement reached, MSA prepared and signed

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If no settlement;

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a) "impasse", and no follow-up

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b) follow-up, to test thoughts, new info gathered, reflection, re-evaluation.

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c) Letter to Court; dispute settled, or it did not.

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# Mediation

## Who are Mediators?

- How selected?
- experience?
- Knowledge of issues, venue, judges/juries?
- credibility?
- Creativity?
- Discretion?
- Reasonable?
- Good listener?
- Good people skills?
- Skilled at negotiation?

## Major Benefits to Mediation

- Confidentiality throughout the process
- Cannot be subpoenaed to testify
- Evidence not admissible at trial (but cannot “un-hear”)
- MSA is enforceable as a written contract, in court (so get it right!)
- MSAs are not Appealable

# COMPARISON TIME!

Civil Lit v, Arb. v. Mediation

Question:  
So, which is better?

Answer:  
*It Depends!*



Question:  
So, which is better?

Answer: *It Depends!*

- 1) what are your goals?
- 2) quick resolution? Drag it out for years?
- 3) Secrecy of dispute? Or Public Hearing?
- 4) Confidential or proprietary info?
- 5) Confidential proceedings? Result?
- 6) "Let the whole world see", or "let only us see"?

Question:  
So, which is better?

7) Is public opinion important? Or to shy from?

8) Important that party/ies have their "day in court"?

9) Issues and Facts easy to comprehend, or difficult?

10) Do you need an expert to understand and explain what dispute is about?



## Summary: Civil Litigation

# Civil Litigation

- More opp for discovery
- Jury decides facts, damages (wild-card?)
- Public hearing
- Each party gets to “say their peace”
- No additional costs for judge, jury, courtroom, etc.
- 1-2 year delay
- Expert witnesses heavily involved?
- Likely “win-lose”
- Appealable (reversible)

# Arbitration

- Private
- Some discovery conducted
- Expedited discovery
- Limited use of experts
- Arbitrator(s) may have great experience
- Likely not appealable
- 1-2 year delay.
- Arbitrator(s) fees can be high; pay as you go
- Parties can agree on detail of ruling

# Mediation

- Flexibility (time, location, forum)
- Many options for creative problem-solving (sometimes more that Court or Arbs could award)
- Private and confidential
- Experts less important
- Written settlement agreement, enforceable as a contract
- Parties must agree, or no deal.
- Looks for “win-win”
- Especially valuable when parties will continue to work together



**Questions?**

**Comments?**



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