Tipping the Scales of Justice: The Rise of ADR

John M. Barkett

To anyone who has been doing trial work for more than thirty years, the ascent of alternative dispute resolution (ADR) processes—especially mediation—is unsurprising; litigation is costly. There are a number of reasons why. The ability to end litigation early is limited. Motions to dismiss are rarely granted. The rejection of the "no set of facts" language (*Conley v. Gibson*, 355 U.S. 41 (1957)) as a pleading standard by *Bell Atlantic v. Twombly*, 127 S. Ct. 1955 (2007), is not likely to materially change that custom. *Cf. Erickson v. Pardus*, 127 S. Ct. 2197 (2007) (reinstating a complaint dismissed by the trial court).

In the federal system, under Federal Rule of Civil Procedure 26, without awaiting a discovery request, lawyers have to disclose the names and addresses of individuals likely to have discoverable information that may be used to support a claim or a defense and provide the other parties with "a copy of, or a description by category and location" of all documents and electronically stored information in the possession, custody, or control of the party that may be used to support a claim or defense. These initial disclosure obligations can represent a tidy sum in a litigation budget spreadsheet.

Outside counsel are being told by the federal district courts in cases such as *Zubulake v. UBS Warburg LLC*, 229 F.R.D. 422 (S.D.N.Y. 2004) that they are responsible for their client's discovery failings and will be sanctioned along with their clients for failing in that obligation. *See, e.g., Phoenix Four, Inc. v. Strategic Resources Corp.*, 2006 WL 1409413 (S.D.N.Y. May 23, 2006).

E-discovery costs involving backup tapes can run into the hundreds of thousands of dollars, even in a single-individual employment discrimination claim, as another of the *Zubulake* decisions explains. *Zubulake v. UBS Warburg LLC*, 216 F.R.D. 280 (S.D.N.Y. 2003).

In the environmental arena, the preparation of air models, groundwater fate and transport models, or, post-*Rapanos*, surface water transport models is very costly *before* the cost of the expert's testimony sponsoring the results of the model is incurred. In multiparty Superfund cases, the litigation paradigm for many years involved dozens of lawyers questioning one witness for days before they moved *en masse* to the next witness. Also, communicating scientific testimony effectively is an art that continues to challenge lawyers and witnesses alike. And in almost any type of case, where a judge refuses to grant summary judgment, the prospect of a trial, an uncomprehending jury or busy judge, an appeal bond, and a costly appeal can be daunting.

For those parties who elect to go to trial, litigation is risky. Cases such as *Interfaith v. Honeywell Int'l Inc.*, 399 F.3d 248 (3rd Cir. 2005), demonstrate the high stakes of Resource Conservation and Recovery Act (RCRA) citizen suit litigation. The judgment of the district court, affirmed by the Third Circuit, will result in the expenditure of more than $400 million in cleanup costs. Hercules, Inc. was found liable to the United States for approximately $120 million in response costs at a Superfund site in Tennessee. *U.S. v. Vertac Chemical Corp.*, 453 F.3d 1031 (8th Cir. 2006). Pre-*Rapanos*, the Deatons went to the Fourth Circuit twice only to finally lose their Clean Water Act Section 404(a) appeal because surface water from their property drained to a roadside ditch that drained to a culvert that drained to another ditch that reached two creeks before reaching a navigable water about 8 miles away. *United States v. Deaton*, 332 F.3d 698 (4th Cir. 2003). And new source review enforcement cases have resulted in unfavorable decisions for more than one litigant. *See, e.g., United States v. Cinergy Corp.*, 458 F.3d 705 (7th Cir. 2006); *United States v. Ohio Edison*, 276 F. Supp. 2d 829 (S.D. Ohio 2003).

It is not a surprise, therefore, that trials are a rarity in federal courts. In its *2006 Annual Report of the Director*, the Administrative Office of the United States Courts reported that of the 272,644 cases that were "terminated" during the twelve-month period ending September 30, 2006, 84.7 percent were "terminated" before pretrial. Another 14 percent were terminated during or after pretrial. Only 3,555 cases, or 1.3 percent of the cases, actually reached trial.

Combine high cost and high risk, and reasonable litigants are finding alternatives to trial, tipping the scales of justice in favor of mediation, arbitration, and hybrid forms of ADR processes.

To explain mediation, I like to tell listeners how I resolved a monumental dispute between two of my children when they were young. We had one ice cream sandwich in the freezer, and each of them wanted it. I offered them two options. The first: "Write down a number between one and ten and the closest to the number I'm thinking of gets the ice cream sandwich." They agreed on the second: "Dee, you cut it in half.

Mr. Barkett is a partner in the Miami office of Shook, Hardy & Bacon LLP, and a member of the editorial board of Natural Resources & Environment. *He may be reached at jbarkett@shb.com.*

Published in Natural Resources & Environment, Volume 22, Number 4, Spring 2008.

John, you get the first pick." Each of them achieved a goal, and both were satisfied that the outcome was reasonable given the alternative, which is precisely why mediation has become the ADR of choice for most litigants.

The Proof of the Pie Is in the Eating: Mediation Works

Mediation is a major contributing factor to the vanishing trial phenomenon because it works. If there is an outcome-determinative legal issue, a good mediator can work with the parties before discovery dollars are incurred to assist the parties in evaluating the likelihood of success and the associated settlement value of the case. Some years ago, I spent the better part of a night after the first day of a two-day Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) mediation drafting a ten-page hypothetical summary judgment order in favor of the plaintiff on the legal question separating the parties. The next morning I gave it to the defendant's representatives saying, "Read this. If you can't find a legal flaw in the analysis, please increase your offer." They could not, and they did; the case settled a couple of hours later without the expense of continued discovery or summary judgment filings.

If there are material factual disputes during mediation, a good mediator can assist the parties in outlining possible outcomes and determining the settlement value of a case. A Superfund case that I mediated turned on the interpretation of witness testimony regarding the volume of waste from several pickup locations and the frequency of disposal at a landfill. I gave the lawyers on each side a form I had prepared before the mediation. I asked each lawyer to pretend she or he was the judge making findings of fact on the waste computation issues by pickup location. I then gathered up the forms and compiled the results. On the plaintiff's side, the least favorable outcome was rendered by the lawyer trying the case. On the defense side, the result was the same. Without telling either side what the other predicted, I asked the plaintiff for an offer that matched its trial lawyer's predicted outcome, knowing that the dollars would be accepted because the defendant's trial lawyer had predicted a similar outcome. In yet another case, the parties asked me to meet alone with their technical experts the day before the mediation. We identified the key technical issues, and then I asked them to focus on solving them as though they worked for the same client. They did and by the end of the day had developed an agreed-upon remedial approach. That allowed the parties to calculate the likely future costs, and the case settled the next day shortly after the parties convened.

The "silver bullet" in mediation is to get the parties to the courthouse steps without spending the money to get there. It is doable if parties focus on what the court's judgment will look like instead of what the pleadings say. Every trial lawyer knows that by the time of trial, a matter will funnel down to a few key issues, often just one or two. In a well-conducted mediation, the funneling process will be expedited. Key issues will be identified quickly and confronted fairly so that parties can meaningfully decide whether there is a mutually acceptable way to resolve differences.

Mediation is not always successful, but to give it the best chance of success, parties have to overcome certain obstacles. First is lack of preparation. When the mediator knows the case better than the advocates, there is a problem. When every participant in a mediation is well prepared, the likelihood of success increases exponentially.

A second obstacle to mediation success is confusion over the amount in controversy. Parties demanding relief have to be able to articulate the relief being sought. Normally relief equates to money (damages, costs, and penalties), but it may also refer to one's conduct: either doing something or no longer doing something. Relief might also include the nonmonetary terms of a cost-sharing or cash-out agreement, consent decree, or administrative order. Mediation progress is more likely to occur and be rapid when the parties understand beforehand what relief is being sought.

A third obstacle is failure to have decision makers in the room. Often a mediator's first task is to address complaints by one party that another party will not be represented by a person with "full settlement authority." Mediation works best when no one in the room has to make a telephone call or reconvene with management to authorize a settlement on behalf of a party. Governmental parties are a notable exception because their negotiators must often receive the blessing of a supervisor, board, or council before a binding settlement can be reached. While that can be frustrating, in my experience, the promised "recommendation" of negotiation counsel is generally accepted by the governmental body.

Sometimes, the timing is not right to conduct mediation, typically because of a material information gap, such as what a remedy will cost. A mediator may be able to recognize this from premediation submissions and, depending upon the materiality of the gap, may elect to postpone the mediation until it is filled. Or once it becomes clear that a mediation cannot succeed without filling in a gap or two, the attention of the parties can instead be focused on an agreed-upon process and schedule to gather the information before reconvening.

Mediation success is also frequently frustrated by a party's greed, anger, or pride. In a cost recovery action brought by the United States, a defendant whose credibility was outcome determinative refused a settlement for two-thirds of his exposure because he was convinced the judge would believe him. In the end, the judge did not. In a contribution case, a plaintiff incorrectly weighed the costs the judge would allow while the defendant incorrectly predicted the allocation it would receive. But the former was so much lower than projected that the higher allocation did not make up the difference. As a result, the judgment was one-half of the final settlement demand. In a CERCLA contingent-fee contribution action, the plaintiff settled with forty-seven of fifty-two parties eschewing a global settlement easily within its reach because it was angry at the remaining parties. In a commercial case, a plaintiff walked away from a multimillion dollar settlement, received more money from the jury, but then had the judgment taken

away by the trial court that had strongly encouraged the plaintiff to take the settlement before trial and whose JNOV was later affirmed on appeal. In another commercial case, in an all-or-nothing fight over $1.6 million and with the threat of $100,000 to try the case, a defendant rejected the strong pretrial recommendation of the mediator to pay $800,000 in settlement based on the relative merits of the parties' positions and promptly suffered (and later paid) a $1.6 million judgment after a trial—in addition to the legal fees. And one is forced to wonder why the settlement process failed the parties in the Sullivan's Ledge Superfund Site case, where a defendant that sent 2 cubic yards of waste steel conduit cable to the landfill became involved in three weeks of a CERCLA contribution trial before being dismissed from the action based on a zero-percent allocation. *Acushnet Co. v. Mohasco Corp.*, 91 F.3d 69 (1st Cir. 1999). When parties focus fairly on what can go wrong instead of blindly deciding that nothing can go wrong, a reasonable resolution to a matter should be achievable.

Negotiations involving penalties, permits, rulemaking, and consent decrees present special challenges for mediators and parties. Public perception, consistency in enforcement, economic consequences, and legal constraints can be powerful obstacles to success in these cases even when the best intentioned of stakeholders are trying to arrange an amicable resolution. Having patience and stamina and ensuring that a door is always left open are critical to the success of these types of mediations. And as with any mediation, putting yourself in the shoes of your opponent from time to time should give the case settlement momentum.

Creative ADR Processes

What I call "mediation plus" works for intrepid parties. In this process, the mediator first facilitates the exchange of information. The mediator then interviews witnesses (typically not under oath) who can be directed by a party or persuaded by the neutral to appear for the interview. Under the supervision of the mediation, expert presentations are then made to the mediator, counsel, and decision makers for all parties. Some time thereafter, the mediation is held. A thoughtful process agreement that gives the mediator authority to police the process and to adjust deadlines as reasonably necessary is an important step to ensuring a resolution. While the "mediation plus" process lacks the comfort of the Federal Rules of Civil Procedure, it can achieve resolution of issues without litigation costs presuming there are good-faith efforts made at its implementation.

Nonbinding arbitrations, or what some call "early neutral evaluations," can also be effective ways to assist parties in resolving environmental or other disputes. If there are sufficient amounts in controversy or if there is a pressing need for development of a testimonial record because there are no documents available, an ADR process approved under a Case Management Order (CMO) might make sense.

In a Superfund allocation context, the CMO might, for example, contain the following features: (1) appointment of a third-party neutral to gather evidence, write a report, and perhaps then mediate the dispute; (2) questionnaires and a process to follow up with individual parties to ensure that questionnaire responses feature equivalent levels of due diligence (the success of the process is dependent, in part, upon how forthcoming parties are in divulging information without the need for follow up by the neutral); (3) creation of a document repository; (4) depositions taken by a neutral with some mechanism to provide for cross-examination of witnesses, usually during a resumption of the deposition after the neutral's initial examination (which parties need not attend) and the circulation of the transcript (intended to save costs and, hopefully, expedite resolution); (5) preparation of "position papers" and rebuttal or reply papers; (6) an "opt in" or "opt out" provision depending upon a court's determination of how best to manage the process; (7) a schedule with a mechanism to extend deadlines; (8) hearing processes where oral argument is heard by the neutral; (9) preparation of a preliminary allocation report that will typically address shares of "orphans" or non-ADR participants; (10) a comment period followed by preparation of a final report; (11) a facilitation session with the neutral to attempt to effect a final resolution of the matter; (12) equal contributions to a trust fund by each participant to the pay the costs of the process; (13) if appropriate, expert report exchanges and expert presentations; and (14) flexibility in permitting the neutral to rule on liability issues. *See, e.g.*, CMOs issued in *Global Landfill Agreement Group v. 280 Development Corporation*, Case No. 2:96cv05338 (NHP) (D. N.J. 1997), and *United States v. Beckman Coulter, Inc.*, Case No. 98:CV 4812 (D. N.J. 1998). The use of a neutral to conduct third-party witness depositions in the context of a potentially responsible party (PRP) group allocation process is also reflected by the order of the district court granting a petition to perpetuate testimony under Fed. R. Civ. P. 27. *In Re Verified Petition To Perpetuate Testimony Regarding Butterworth Landfill Superfund Site*, Case No. CV: 1:97-740 (W.D. Mich. 1997).

Alternatively, similar to litigants who use mock juries to prepare for trial, one side, both sides, or all sides to a dispute may elect to present their cases to a neutral for a written evaluation within limits prescribed by the parties. In a CERCLA matter, as a result of an impasse in negotiations, I prepared an evaluation at the request of one side that resulted in a settlement immediately thereafter. It helped that just after the evaluation was issued but just before the parties were to resume negotiations the district court issued a ruling on the defendant's summary judgment motion that mirrored the evaluation, which had accurately predicted the rejection of the defendant's affirmative defenses. In a multibillion dollar international commercial dispute, I played the role of a mock judge critically reviewing the factual presentations and legal arguments of one party to prepare that party for a presuit mediation. Where the stakes are sufficiently high, creative ADR processes can not only help parties settle matters but help them bring into focus the outcome-determinative issues.

The Old Faithful: Arbitration

Historically arbitration is the most common ADR process. In environmental contract disputes, as in commercial contract disputes, arbitration is increasingly used to ensure the involvement of neutrals with experience in the areas to be arbitrated with the expectation that knowledgeable neutrals will give parties the best justice.

A just, speedy, and relatively inexpensive arbitration begins with a good arbitration clause, which is more often overlooked than overnegotiated. It is easy enough to say: "Should a dispute under this contract arise, the parties shall resolve the dispute by arbitration under the rules of . . ." because there are a number of arbitral institutions, and each has its own set of process rules. But the parties may wish to, by contract, dictate the application of their own rules, at least to the extent permitted by law.

There are a number of topics contracting parties should think about in drafting an arbitration clause. First (and foremost to many contracting parties) is the number of arbitrators (one or three), their qualifications, and the selection process. Generally speaking, the arbitrator or the arbitration panel represents the most important component of a successful arbitration process. Scheduling is another checklist item for an arbitration clause. Will the contract control the schedule? The issue here is whether a failure of one party or the other to abide by the schedule should have consequences. Choice of law issues could become material in the outcome of an arbitration and merit attention as well.

Another question to be asked at the time of contract formation is whether the arbitrators will have the authority to issue sanctions for any reason. Arbitrators can draw adverse inferences under certain circumstances as a matter of authority or by rule. *See, e.g.*, Article 9.4 and 9.5, IBA Rules on the Taking of Evidence in International Commercial Arbitration (IBA Rules). But whether the arbitrator or panel should be allowed to consider other sanctions may be a matter of contract.

Along the same lines, should the parties articulate the application of particular rules of professional conduct? Illustratively, *ex parte* contacts with former employees are not necessarily given the same ethical treatment from state to state.

While arbitral processes are confidential, confidentiality may still need to be addressed. If an arbitral institution's rules govern the proceeding, the parties should determine whether the award will be confidential under those rules. Illustratively, Rule 39 of the AAA Employment Arbitration Rules provides in part: "[an] award issued under these rules shall be publicly available, on a cost basis. The names of the parties and witnesses will not be publicly available, unless a party expressly agrees to have its name made public in the award."

The type of award is another topic that needs to be considered. The choices include an award without reasons, an award stating the reasons without discussion, or an award with a detailed analysis of the reasons underlying the award.

Other questions that may be considered when the arbitration clause is being drafted include (1) Will there be an allocation of the costs of arbitration in the contract? (2) Will prejudgment interest be restricted or will governing law control? (3) How will claims of privilege be tested in the proceeding?

The question of deposition discovery is another potential contracting topic. Most arbitral institutions limit discovery, except as allowed by the tribunal. Rule R-21 of the AAA Commercial Arbitration Rules provides that at the request of a party, the arbitrator, "consistent with the expedited nature of arbitration," *may* direct the production of documents and other information. Rule L-3 of the AAA's Rules for Large Complex Commercial Disputes provides that the parties (by agreement) or the panel (by order) will determine the extent to which discovery shall be conducted. Rule 11 of the CPR Rules for Non-Administered Arbitration provides that the tribunal "may require and facilitate such discovery as it shall determine is appropriate in the circumstances, taking into account the needs of the parties and the desirability of making discovery expeditious and cost-effective." Article 3 of the IBA Rules requires specificity in a request to produce documents and leaves to the discretion of the tribunal what production, if any, will be required. If potential arbitration parties want to ensure broad discovery rights, they should provide for them in the underlying contract.

Under the Federal Arbitration Act (FAA), there are limits on the ability of parties to obtain discovery from third parties. Under 9 U.S.C. § 7, an arbitral panel can subpoena third-party witnesses within the subpoena range of the place where the arbitrators are sitting to directly hear their testimony but have no authority to require attendance by a party at a deposition. Article 4 of the IBA Rules recognizes the difficulty inherent in trying to obtain testimony from a person who will not voluntarily appear; the tribunal shall decide on a request "to take whatever steps are legally available to obtain the testimony" and "shall take the necessary steps if in its discretion it determines that the testimony of that witness would be relevant and material."

The conduct of the arbitration hearing will also differ from that of a trial. For example, CPR Rule 12.2 provides that the tribunal "is not required to apply the rules of evidence used in judicial proceedings" but will apply "the lawyer-client privilege and the work product immunity." Rule R-31(a) of the AAA Commercial Arbitration Rules bluntly states: "Conformity to legal rules of evidence shall not be necessary," although Rule R-31(c) also recognizes that claims of privilege must be taken into account by an arbitrator.

And, of course, a major difference between a trial and an arbitration relates to appellate review. The FAA, 9 U.S.C. § 10(a), provides that an arbitration award may be vacated only where the award was "procured by corruption, fraud, or undue means"; there was "evident partiality or corruption in the arbitrators, or either of them"; the arbitrators were "guilty of misconduct" in refusing to postpone the hearing "upon sufficient cause shown," or in refusing to hear evidence "pertinent and material" to the controversy, or of "any other misbehavior by which the rights of any party have been prejudiced"; or "where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made."

Win or lose, those who have had arbitration experience

almost universally endorse the process if the sole arbitrator or the panel is thoughtful, timely, efficient, respectful, fair minded, hard working, and renders a well-reasoned award. Finding those qualities is the challenge.

Litigation is never going to disappear. Trial by jury is part of the fabric of American justice, and we should all jealously protect that right. Where courts require mediation, parties who take advantage of the opportunity to meaningfully discuss their differences in reasonable ways generally can find a solution and thereby reduce cost and better manage risk. And parties who seek an alternative to litigation by agreeing to an evaluative ADR process or a binding arbitration thoughtfully conceived generally will achieve an informed result more quickly and at a lower cost than could have been achieved by judicial resolution of the matter.