

Litigation Alternatives

By: Robert A. Jenks
10/22/09

© Copyright 2009 MAPS, Inc.

Mediation Arbitration
maps ...the leader
in resolution
Professional Systems, Inc.

“The courts of this country should not be places where the resolution of disputes begins. They should be places where disputes end...after alternative methods of resolving disputes have been considered and tried.”

Supreme Court Justice
Sandra Day O'Connor

© Copyright MAPS, Inc. 2009

Mediation Arbitration
maps ...the leader
in resolution
Professional Systems, Inc.

**TWO OF THE MOST
POWERFUL AND EFFECTIVE
OF ALL HUMAN FEARS
ARE THE FEAR OF FAILURE
AND THE FEAR OF SUCCESS**

Mediation Arbitration
maps ...the leader
in resolution
Professional Systems, Inc.

What is ADR?

- **Alternative Dispute Resolution:**
- **a means, other than litigation, of resolving a litigable conflict between two or more parties either before or after suit, trial, or appeal.**

Mediation Arbitration
maps ...the leader
in Resolution
Pro Resolution Systems, Inc.

Why ADR?

- **COST...**
- **TIME...**
- **RISK...**

- **Parties seek ways to reduce litigation:**
 - Tort Reform
 - ADR

Mediation Arbitration
maps ...the leader
in Resolution
Pro Resolution Systems, Inc.

Arbitration

- **Contractual**
- **Submit to a third party to decide**
- **Hearing and Evidence**
- **Briefs**
- **Typically Binding**

Mediation Arbitration
maps ...the leader
in Resolution
Pro Resolution Systems, Inc.

Arbitration

- Virtually non-existent appeal
- Employment matters – *Circuit City*
- Faster
- Less cost than trial

Mediation Arbitration
maps ...the leader
in resolution
Pro Resolution Systems, Inc.

Jury Focus Groups

- One party only!
- Privately conducted summary jury
- Multiple panels – Multiple verdicts
- Options for evidence
- Debriefing – Jury videos

Mediation Arbitration
maps ...the leader
in resolution
Pro Resolution Systems, Inc.

Mock Appeals

- **Mock Appeals:** *one or more parties present briefs and oral arguments to a three-judge panel that provides critiques and guidance*

Mediation Arbitration
maps ...the leader
in resolution
Pro Resolution Systems, Inc.

What is Mediation?

- Mediation is simply a non-binding settlement negotiation in a forum created by a neutral third party.
- The process allows for and encourages free discussion of issues, outcomes, and choices without prejudice.
- If the parties do not agree to settle, the parties retain total control over the outcome.



Mediation and Arbitration

MEDIATION

- Cannot force settlement
- Cannot make decisions
- Facilitates
- Provides safe harbor
- Confidential process

ARBITRATION

- Makes decisions
- Trial-like process – but confidential
- Final and binding
- Less time-consuming and costly than court



Mediation – Joint Session

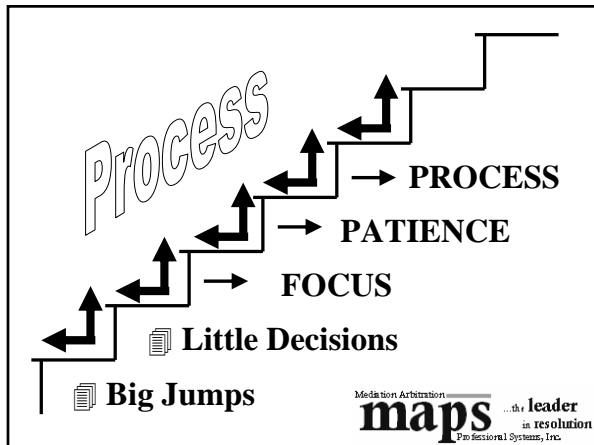
- All parties present
- Informal discussion of each party's position regarding the law, facts, and evidence
- Clients may participate
- Emotional venting – day in court



Mediation – Private Caucuses

- Mediator meets separately with each party
- Confidential – Safe Harbor – No Judgments
- Parties address risks of litigation, trial outcomes, rationale, and settlement positions
- Mediator filters posturing by the parties

Mediation Arbitration ... the leader
maps in resolution
Pro-Resort Systems, Inc.



Party Biased – Emotion Based

OVERCONFIDENCE

- Characterized by asymmetric data
- Mock Trial Study: Note surprise by litigators-dismay at opponent's strength!
- Study: Parties fail to consider important guidance even when encouraged to do so "Not a problem."
- Study: Parties reject positive offers even if it meets needs when emotions overlay.

Mediation Arbitration ... the leader
maps in resolution
Pro-Resort Systems, Inc.

Framing – Positioning for Acceptance

WE SEE THE WORLD FROM THE
BELL TOWER OF OUR OWN VILLAGE

NAÏVE REALISM

- FALSE CONSENSUS
- BIASED PERCEPTIONS
- DEBIASING...THE “IMAGINE” STUDY
- UNEQUAL EVALUATION OF EVIDENCE

Mediation Arbitration
maps ...the leader
in resolution
Professional Systems, Inc.

Re-Active Devaluation

- Source before substance
- Offered or non-offered
- After being offered vs. before offered

AFFECTS CHOICE

Mediation Arbitration
maps ...the leader
in resolution
Professional Systems, Inc.

The Decision Trap

- Stage setting
- Anchoring
- Affects focal point

“The more you buy...”

Mediation Arbitration
maps ...the leader
in resolution
Professional Systems, Inc.

Negotiation/Communication

- **Negotiation:** Communication to influence another person's decision. A discussion using reasoned arguments to resolve a dispute or consummate a transaction.
- **Communication:** An interchange of thoughts and ideas to gain or translate information.
- Communication is only as good as is received.
- Are we sending the message we intend?

© Copyright 2009 Mediation Arbitration Professional Systems, Inc.  ...the leader in resolution Professional Systems, Inc.

Impact
Influence
Significance
Listen!

Mediation Arbitration Professional Systems, Inc.  ...the leader in resolution Professional Systems, Inc.

Parties/Listeners:

- Evaluate the messenger before the message.
- **Evaluate** the source before the substance.
- **Perception Issues:**
 - Vividness
 - Winner's curse
 - Social proofs

Mediation Arbitration Professional Systems, Inc.  ...the leader in resolution Professional Systems, Inc.

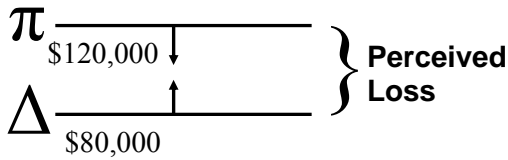
Increasing Value

- Attention
- Acknowledgement
- Acceptance
- Affirmation

Use listening skills/rapport tools
People crave approval and value

Mediation Arbitration
maps ...the leader
in resolution
Pro Resolution Systems, Inc.

Right Outcome Becomes Benchmarks



Process- Moves Benchmarks Changes
Choice Avoids
"Perceived loss."

Mediation Arbitration
maps ...the leader
in resolution
Pro Resolution Systems, Inc.

More Reason to Use Mediation

- WOMAN WITHOUT HER MAN IS NOTHING!
- WOMAN, WITHOUT HER, MAN IS NOTHING!
- WOMAN, WITHOUT HER MAN, IS NOTHING!

Mediation Arbitration
maps ...the leader
in resolution
Pro Resolution Systems, Inc.

Mediation Bill of Rights:

- THE RIGHT to pre-session discussions with the mediator
- THE RIGHT to a mediation process custom-tailored to the needs of the specific case
- THE RIGHT to a mediator who is well prepared
- THE RIGHT to a mediator who listens as well as talks
- THE RIGHT to a mediator whose commitment to settlement extends beyond the mediation session



Mediation Bill of Rights

- THE RIGHT to know the mediator's experience and training
- THE RIGHT to know of any prior relationships between the mediator and mediation participants that could reasonably affect perceptions of impartiality
- THE RIGHT to request and check references
- THE RIGHT to be treated with dignity and respect

(Used with Permission of Michael Landrum, Americord, Inc, Edina, Minnesota)