

Finding the Optimal Path to Dispute Resolution

Negotiation, litigation, arbitration, mediation: One approach does not fit all

Jeffrey Martin and Paul Mastrocola are co-chairs of the business litigation and dispute resolution group at Burns & Levinson. Both are seasoned trial attorneys who know that litigation is sometimes the only option – but certainly not in every case. They often advocate mediation, arbitration or other forms of alternative dispute resolution, always with the goal of efficient and cost-effective outcomes that satisfy all parties involved. The interview has been edited for length and style.

Please tell us about your practice and the types of clients you represent – as well as any litigation success stories you've had recently.

Jeffrey Martin: For the past six years, I have served as the firm's general counsel. So my primary client is now Burns & Levinson. My role is to minimize risk to the firm. In addition to managing disputes after they arise, I try to proactively develop and implement policies and procedures that are intended to help the firm avoid claims.

In addition to serving as general counsel and co-chair of the firm's business litigation and dispute resolution group, I have been a commercial arbitrator for the American Arbitration Association since 2004. Over the course of my career, I have participated in dozens of arbitrations as an attorney representing clients and dozens more as



The range of available discovery in court will almost always be broader than in arbitration.

– Jeffrey Martin

the arbitrator who decides the case. That experience has given me some unique insights into the arbitration process.

Paul Mastrocola: I represent companies of all types and sizes, and individuals involved in business disputes. I resolve the clients' disputes by aggressive negotiation, litigation or alternative dispute resolution methods. For example, I recently represented a client in a dispute between owners in a closely held corporation in the real estate investment business. After a period of hotly contested litigation, we were successful in exposing certain weaknesses in the adversary's factual and legal positions, enabling the client to achieve a favorable

settlement of this dispute without a trial.

In another matter, I represented a technology company that had a former key employee access its computer system without authority in order to misappropriate confidential and proprietary business information. We took action to successfully stop the computer intrusion and secure the confidential information before it was disclosed to a competitor.

What litigation trends are you seeing? Are more companies becoming open to alternative dispute resolution (ADR)?

Martin: Yes, we have definitely seen an uptick in the use of ADR over the past decade. The traditional courtroom litigation process can be extremely costly and time consuming. ADR can be a much more efficient and cost-effective way of dealing with many types of disputes. As more and more businesses recognize the benefits of ADR, the use of mandatory arbitration clauses in contracts has become commonplace. Some clients also include mandatory mediation provisions as well. Even when parties are not required by a contract to use mediation, courts frequently encourage parties to mediate disputes to help clear backlogged dockets.

What are the greatest benefits of alternative dispute resolution? What are the potential downsides?

Mastrocola: The two major ADR methods are arbitration and mediation. Arbitration has a streamlined discovery process, less motion practice, relaxed evidentiary rules and often can bring the dispute to a conclusion sooner than litigation, thereby minimizing costs to the client. However, depending on the circumstances of the case, it may be preferable for the client to conduct extensive discovery beyond what is usually permitted in arbitration, and the client may benefit from access to the courts to file motions for relief of various types.

Mediation is a relatively inexpensive mechanism to conduct an accelerated settlement negotiation. In many cases, mediation is the most efficient route to arrive at a fair and reasonable settlement without engaging in protracted litigation. The vast majority of mediations take place in a single day, which is one of the reasons it is so cost-effective. But that doesn't mean it isn't a complex negotiation. Good mediators have to be able to understand both clients' and legal counsel's perspectives, which requires significant sophistication and finesse. However, it is important to note that mediation is nonbinding, and if the parties do not reach a settlement agreement, the litigation must continue.

The decision to participate in ADR must be considered in the context of the particular facts, circumstances, legal issues and strategy considerations of importance to the client. There is no one-size-fits-all solution.

Are there certain industries or types of companies that are more likely to use ADR? Are there some disputes in which it likely will not make sense to adopt ADR or mediation?

Martin: Generally speaking, financial services and other companies in industries with a high volume of relatively small-dollar consumer disputes have found that ADR is often more efficient than court. We tend to see those types of businesses routinely using arbitration clauses in their contracts. Other clients need to consider a host of strategic issues that may or may not make arbitration an attractive alternative to litigating in court. For instance, if discovery



Mediation is the most efficient route to a fair and reasonable settlement without protracted litigation.

— Paul Mastrocola

is thought to be critical to a matter, keeping a dispute in court might make sense because the range of available discovery in court will almost always be broader than in arbitration. Likewise, if a matter hinges on complex or novel legal issues that might be dispositive, parties generally prefer to have a court decide those issues with full appellate rights preserved. And of course, if privacy and confidentiality is a concern, a client will certainly want to consider arbitration since the proceedings will normally be conducted privately without public access to the final award or the documents filed in the case.

Is privacy a concern for companies that want to use ADR, and if so, how do you address those issues?

Mastrocola: Privacy is one distinct advantage of ADR. Arbitration is essentially a private proceeding that is not open to the public. Similarly, mediation is a closed proceeding, and the content of discussions in a mediation session is protected by confidentiality provisions. Litigation is conducted in federal and state courts that generally are public forums with all written submissions of the parties, decisions of judges, hearings and trial open and available to the public. In cases relating to a company's trade secrets or proprietary business information, for example, ADR is likely a more secure process than court litigation.

Paul, you're a former criminal prosecutor and business litigator with more than 20 years of experience, and you recently became a certified civil mediator. How does your work

as litigator inform your mediation practice and vice versa?

Mastrocola: I enjoy advocating my client's position in court, but the goal is to achieve the optimal resolution of the client's dispute in a cost-effective manner. I see mediation as the best mechanism to help all parties achieve those same goals. My litigation experience allows me to understand the perspectives, concerns and objectives of the other parties and their attorneys as well, and to actively assist them in shaping a mutually acceptable settlement. Being a good mediator is a different skill set than being a litigator, but having that litigation and client service background is invaluable.

Jeffrey, the Massachusetts Supreme Judicial Court recently appointed you to a four-year term on the Board of Bar Overseers, which evaluates attorney misconduct complaints. How does your experience representing lawyers and law firms in legal ethics disputes inform this work, and are there ways that lawyers and law firms can minimize their risks?

Martin: In today's legal environment, all law firms should have strong risk management policies and procedures in place to help avoid or minimize ethical lapses and claims against the firm. Examples include basic policies requiring the use of written engagement letters and mandatory conflict checking procedures. Firms today also need to consider having policies regarding issues such as data security, document retention and the use of social media by attorneys. Law firms should also have a designated attorney serving in the role of GC or ethics counsel. By creating that role, it gives law firms an internal expert to provide advice when risk management and ethical questions arise.

Litigation can be extremely stressful. What one piece of advice do you most often give clients when they are in the middle of intense litigation?

Mastrocola: Indeed, it is common for litigation to cause frustration and prompt emotional reactions by clients, even among seasoned business executives. It is important to maintain a rational, deliberative approach

to the many tactical decisions that arise in the course of litigation. Clients are best served by keeping focused on the ultimate objectives without being distracted by the minutiae of day-to-day events.

Martin: Communication with clients is essential. Nothing is more damaging to an attorney-client relationship than when a

client loses confidence in an attorney due to unrealistic and unmet expectations. To prevent that from happening, I like to temper expectations early in a case, especially with clients who are unfamiliar with litigation. Setting realistic goals is important because some clients go into a litigation expecting a quick and resounding victory or an immediate capitulation by an opponent. Most disputes

are not that cut and dried. In addition to candidly discussing goals, it is critical to give clients a realistic estimate of cost and time. Even when attorneys do their best to work efficiently and cost-effectively, the litigation process will likely end up costing more than a client likes and will take longer than they like. It is always best to get those issues on the table early to avoid surprises.

Jeffrey R. Martin is Co-Chair of the business litigation and dispute resolution group at Burns & Levinson, where he handles business disputes, including contract and tort claims, partnership and shareholder disputes, employee termination claims and litigation involving financial institutions. He also is the firm's General Counsel with responsibility for developing and implementing policies and procedures for risk management and compliance with ethical rules. He is based in Boston and can be reached at jmartin@burnslev.com.

Paul R. Mastrocola is Co-Chair of the business litigation and dispute resolution group at Burns & Levinson, where he focuses his practice on business and commercial law, including contracts, business tort, securities, employment, environmental and real estate litigation. He is based in Boston and can be reached at pmastrocola@burnslev.com.