

TRY ARBITRATION OR MEDIATION

By: Arlen Specter

Got a dispute over money from a business deal or a marriage breakup? Save time and money by avoiding going to court by using a different way to resolve the disagreement. In the 30 years since leaving the practice of law for the U.S. Senate, I have noted the increased use of arbitration and mediation as alternative methods for settling disputes. Both of these procedures share the common goal of avoiding the costs and delays of litigation but are very different in their approach.

In arbitration the parties agree to submit their dispute to a person called the arbitrator who functions like a judge and issues a binding decision. In mediation, the parties select a person called a mediator who then seeks to bring the parties together and succeeds only when they voluntarily agree to a deal.

As our society has become more litigious, big backlogs of cases have resulted in long delays before parties get their day in court. In the U.S. Senate, politics and gridlock have delayed confirmations leaving many federal districts in emergency status. Justice delayed is justice denied. De Tocqueville was correct when he said 150 years ago that every controversy in the United States seems to wind up in court.

The costs of litigation have soared. Lawyers' hourly rates commonly run in the hundreds of dollars per hour. Expenses are high for pretrial motions, depositions, and interrogatories. To catch up on the changing legal world in the last three decades, I went back to law school for specialized training where I studied how to be an arbitrator and a mediator.

In arbitration, there is a trade-off giving up formalized rules of evidence and the right to appeal for simplicity where the parties can agree to procedures tailored to their unique situation. More importantly, the parties can agree on the arbitrator in whom they have confidence without getting whomever the court system assigns.

Mediation has the advantage of not being adversarial, so the mediator can meet with each side ex parte or individually to find the parties' real "bottom line". Parties are understandably not willing to make concessions to the other side for concerns of weakening their bargaining position. But confidential disclosures can enable the mediator to find an acceptable compromise. Also, mediation can avoid contentious confrontations where the parties can benefit by preserving a future cordial relationship.

My interests in alternative dispute resolution goes back to my days as Philadelphia's District Attorney when I started a pretrial diversion program to remove about 7500 cases a year from the criminal docket. A first offender on non-violent charges would have the record expunged if the person stayed out of trouble for one year. If not, that person would go to criminal court on both charges. That program became ARD and is now a national model.

Harvard Law Professor Lawrence Trire made an astute observation about going to court when he said: "the results do not justify the costs: too much law, too little justice too many rules, too few results." Arbitration and mediation offer a way out.