GAINER LAW

Fighting or Settling Your Battles

Taking a look at good old-fashioned lawsuits, arbitration, mediation, direct settlement negotiations

by Stephen R. Gainer

Stephen R. Gainer
LAW OFFICES OF STEPHEN R. GAINER

*** OFFICES IN SAN FRANCISCO FIANCIAL DISTRICT, ***
CENTRAL AND NORTH MARIN COUNTY,
AND EAST BAY

PLEASE COMMUNICATE WITH:
North Marin County Office
1457 Cambridge Street, Suite 1
Novato, CA 94947
Telephone: (415) 892-7214
Facsimile: (415) 892-7216
E-Mail Address: srgainer@gainerlaw.com

Introduction

When people have misunderstandings with others, or feel they have been wronged, there are several different forms of what lawyers call "dispute resolution mechanisms" which can be used to work out or "resolve' or "settle" their dispute. Each of these mechanisms has advantages and disadvantages and I don't think there are clear-cut principles for when to recommend one over the other. As lawyers are so fond of saying, "It all depends" -- it all depends on the unique circumstances of each dispute, and an experienced lawyer needs to work closely with his or her client to determine which mechanism to suggest to the client if the client has a choice.

What follows is a brief explanation of the principal ways in which disputes can be resolved. Portions of this explanation may be familiar or even over-simplified for some readers but hopefully all readers will find some useful insights.

Of course, further consultations with an attorney must be considered where these mechanisms are being considered.

Lawsuits

A "**lawsuit**" is a procedure for resolving disputes between parties by each party presenting his or her position to a presumably "neutral" or unbiased third party (the "judge") who is acting as a public official on government payroll. This can be a significant consideration–quarreling parties are getting a "government handout" in the form of an almost free or at least relatively low cost service from a person or persons (a judge and maybe a jury) who will make a binding decision in favor of one party over the other party.

Often, the parties choose just to have a judge listen to each side's presenting of the "**evidence**" or "facts" ("**hearing the evidence**"), and then decide which evidence he or she believes, and finally decide the consequences of the accepted evidence (the "**rules of law**" which call for the judge's decision to be in favor of one side or the other based on the accepted evidence). Using only a judge will cost less because no fees are charged for to the disputing parties for the judge's services. On the other hand if a group of regular citizens (a "jury") is used to hear the evidence then the party losing the lawsuit must pay fees for the services of the "jurors" and each side's lawyers must spend a lot more time (costing a lot more in attorney fees) in selecting members of the jury and then working with the judge to prepare "**jury instructions**" which are explanations of the applicable rules of law governing how the evidence believed by the jurors will govern who wins the lawsuit.

In certain kinds of disputes only a judge can hear the evidence – no jury trial is permitted.One kind of such dispute involves one side trying to get a judge to order or "**enjoin**" the other side to take some action (other than paying money to the demanding side) or refrain from takingsome action.

When a lawsuit is used as the way to get resolution to a dispute, the parties have the right to conduct "**pretrial discovery**" procedures which permit the attorneys for each side to investigate the other side's "case" in terms of the facts that the other side might present at the trial in that side's favor. Such facts will come in the form of

- sworn written statements or "**testimony**" of the opposing party (these are called "**interrogatories**");

- sworn verbal statements or "**testimony**" of the opposing party or "**NON-expert witnesses**" or "lay witnesses" supporting the opposing party (these are called "depositions");

- sworn verbal statements or "**testimony**" of "**expert witnesses**" who have been hired by the opposing party to support the opposing party's positions (these types of witnesses are experts in a certain field of knowledge--for example, doctors, scientists, etc. – who testify as to special issues involved in the dispute) (again these are called "**depositions**");

- inspection of documents or other physical things (such as buildings, automobiles, equipment, etc.) that the opposing party may control access to and which have any impact on the factual positions of the opposing party (requests for such discovery are called "**inspection requests**");

The positive aspects of pretrial discovery procedures are

- that they help lawyers for each side of a dispute to prepare for trial and head off surprises at trial which they are not prepared to challenge,

- and they can give the lawyers and their clients an idea of the strengths and weaknesses of each side's positions in terms of likely success in the lawsuit, and hereby permit the parties to attempt to negotiate a settlement prior to trial, either by negotiations between the parties and their attorneys by themselves, or by resort to the skills of a "mediator" conducting a "mediation" (discussed below) and so avoid the significant added expense of trial.

One negative aspect of pretrial discovery is that it can be carried out beyond what is necessary to give a side needed trial or settlement negotiation information, and used instead in an attempt to "out-spend" a financially weaker other side and force that other side to "cave in" to a settlement less favorable to that financially weaker side.

Another aspect of many lawsuits is that the attorneys are either required by the court or decide on their own to prepare time-consuming (and fee-accruing) documents ("motions") to present to the court dealing with topics such as disputes over pretrial discovery demanded by one party's lawyer and resisted by the other party's lawyer, or requests for pre-trial forms of court relief for one party or the other.

The outcome of a trial, whether involving only a judge or also a jury, is a "**decision**" or "**judgment**" or "**court order**" (with a jury, a "**jury award**") on what the consequences are for each of the disputing sides depending on what evidence the judge or jury decides represents the true facts in the dispute and how the **rules of law** (framed as **jury instructions** if a jury is used) must be applied. For example:

> which side owes money to the other ("**monetary relief**" by the court);
>
> or that neither side owes money to the other.
>
> or which side must now take some action or stop doing something with respect to the other side ("**injunctive relief**" by the court).

"Lawsuits... easily can cost each disputing party tens of thousands of dollars, or hundreds of thousands of dollars, in the fees of attorneys and expert witnesses."

The final decision or judgment or court order or jury award is then "enforced" by follow-up orders by a judge which can result in a seizing by court agents (such as a county sheriff) of assets of the losing party to pay the winning party, the placing of a kind of hold or warning label on such assets so that the losing party can't successfully sell these assets of his to some unknowing outsider, or even in putting a losing party in jail where the losing party refuses to obey a judge's order for injunctive relief.

A party who feels that the trial court applied incorrect rules of law in reaching its decision or judgment or court order or in giving the jury instructions which led to the jury award can make an "**appeal**" to the next higher level of judges (an "**appellate court**") even going eventually to a State or the federal Supreme Court.

Lawsuits, even with the government carrying the costs of the salaries of a judge and the court clerks and other staff, easily can cost each disputing party tens of thousands of dollars, or hundreds of thousands of dollars, in the fees of attorneys and expert witnesses.

And, since a court's judgment in a lawsuit can be **appealed** to higher level court by the party who is unhappy with the court's judgment, still more attorney fees and court costs

can result.

Arbitration

"**Arbitration**" is a procedure for resolving disputes between parties by each party presenting his or her position to a neutral third party (the "**arbitrator**") at an "arbitration hearing". Sometimes more than one arbitrator is used as part of an "**arbitration panel**". In arbitration agreed to in advance as part of any contract between the parties, with the decision by one or more arbitrators to be binding on the parties ("**binding contractual private arbitration"**) the neutral party is not acting as a public official on government payroll (like a court judge), and the parties must pay for the arbitration proceedings. These payments can be substantial since the neutral parties are often attorneys charging their usual hourly rate fees, and the organizing or administrative functions normally carried out by courts must be handled by an "arbitration administration service" such as the American Arbitration Association that charges fees for such
administration. In almost all binding contractual private arbitration, unless the parties otherwise agree, the arbitrator does have the power to make a binding decision in favor of one party over the other party.

There are also arbitrations conducted as part of the lawsuit process if the parties request such as a procedure from a judge, with the arbitrator or arbitrators being voluntary private individuals, usually local attorneys who have supplied their names to a court list, and perform their arbitration services without charge. These arbitrators do not have the power to make a binding decision, but often their decision ("non-binding judicially ordered arbitration") is regarded as a good predictor of how the judge himself would later rule and so their decision has a powerful impact on the parties resolving their dispute by negotiations and "settlement" without going on to a trial.

The rest of this part of my discussion deals with binding contractual private arbitrations.

With such a procedure, usually anticipated in an earlier contract between the parties involving some kind of business relationship between them (for example, a home sale agreement or an agreement to carry on a business together), once a dispute arises the parties must select an arbitrator, usually by relying on a list presented by an arbitration administration service (again, such as the American Arbitration Association). If the earlier contract provides, the rules for carrying out the arbitration ("**procedural rules**"), such as presenting written or verbal arguments to the arbitrator, presenting evidence to the arbitrator by testimony of witnesses or showing of documents, will be the rules published

by the arbitration administration service, although the parties can also make up their own mutually agreed procedural rules.

The procedural rules for a binding arbitration tend to be more "informal" and can call for much less preparation time for each side's attorneys than is the case for such rules in a lawsuit. Thus, evidence presented by each side is more easily accepted for consideration or "allowed in" by an arbitrator, and discovery prior to the arbitration hearing may be less lengthy and time-consuming and hence less likely to push up attorney fees.

> ***"It can be hard to choose between binding contractual private arbitrations versus lawsuits by trying to anticipate the comparative final costs of each proceeding. But one significant advantage of arbitration is that it can be completed in a much shorter period of time than a lawsuit, and another advantage of arbitration is that its result can be kept confidential by an enforceable agreement between the parties."***

The arbitrator makes his or her decision (called an "**award**"). If the procedure involves more than one arbitrator then the **award** is made by a vote among the arbitrators (so as a matter of common sense where more than one arbitrator us used, this will generally be three arbitrators so a majority vote is possible). Then the party in whose favor the award was rendered files the award in a regular court using a simple procedure, and the court generally gives approval for the award by adopting the award as a "court judgment".This judgment can then be enforced in the same was as any other court judgment, as I discuss above.

What are the advantages or disadvantages of a **lawsuit** compared to an **arbitration**?

On the topic of comparative costs, remember that Judges and the court staff are paid for by the State's taxpayers (although fees paid to **juries** are generally paid for by the disputing parties), so parties have their **lawsuit** disputes somewhat subsidized. On the other hand, arbitrators and their administrators are paid for by the disputing parties, and this can easily result in $5,000 to $10,000 or more in expenses, offsetting any savings from reduced expenses of attorneys battling under the more complicated lawsuit procedural rules. So it can be hard to choose between **binding contractual private arbitrations** or l

arbitration just "showing up" to the arbitration hearing and making its arguments in a straightforward common sense fashion without a lot of formalities of legal evidence rules.

However, attorneys didn't like 'surprises' in arbitrations any more than they did in lawsuits, to now most arbitrations involve the kind of expensive and time-consuming discovery proceedings which a lawsuit involves.

One significant advantage of arbitration is that it can be completed in a much shorter period of time than a lawsuit, particularly in an era where government budgetary limits have reduced the number of judges or their staffs.

Another advantage of arbitration is that both its initiation and its result can be kept confidential by an enforceable agreement between the parties. So when parties want to avoid "airing their laundry in public" they may prefer to use arbitration.

In my opinion arbitration can present one serious concern. The rules which an arbitrator must follow in deciding which party wins an award based on the evidence the parties present (these are "**substantive rules**" as opposed to "**procedural rules**" NEED NOT be the same as the substantive rules which a court must follow in deciding a lawsuit, unless the parties have previously agreed otherwise. Moreover, unless the disputing parties have otherwise previously agreed, with some very small exceptions the arbitrator's award, unlike a court's decision, CANNOT be appealed to a higher decision-making level. Thus there is the chance that an arbitrator can reach an award of serious consequence without following predictable principles which the parties' attorneys have been able to anticipate and thus help their clients consider in deciding whether and on what terms the dispute ought to be "settled" before the arbitration hearing. Of course, many lawyers believe that the outcome of lawsuits decided by judges, and especially juries, can be very unpredictable also. And the remedy of appealing a court's decision can be somewhat of a fantasy given the substantial added attorney fees and other costs involved. Nonetheless I have always felt that judges, who face the possibility of an appeal and "reversal" of their decisions, are more motivated to follow the "substantive rules" of law which attorneys present to the trial court as rules which a appellate court would expect the trial judges to follow.

Mediation

"A mediator can be viewed as similar to a 'village elder'

or 'wise person' – the person whom people in small villages and tribes in some societies turn to for advice in resolving a dispute."

"**Mediation**" is a procedure for attempting to resolve disputes between parties by each party presenting his or her position to a neutral or unbiased third party (the "**mediator**"). Unlike a judge or a private arbitrator the mediator DOES NOT have the power to make a binding decision in favor of one party over the other party (the way a judge or private arbitrator does) unless the parties otherwise agree to this; the mediator, who is often an attorney selected for his or her experience in lawsuit outcomes, can only provide a prediction on the likely outcome of the dispute if the dispute goes past mediation to a judge or jury or to an arbitrator – for example, which side may "win" a court's judgment or an arbitrator's award, and how much money such a side may be awarded. Thus each side is able to consider whether that side wants to refuse to resolve the dispute and instead continue to a trial or arbitration.

As in the case of the parties hiring one or more arbitrators for a binding arbitration, the parties using mediation must pay fees to the mediator.

The mediator tries to recommend solutions to the dispute .

— which are mutually satisfactory

— OR are mutually UNsatisfactory but reluctantly accepted by both sides..

A mediator can be viewed as similar to a "village elder" or "wise person" – the person whom people in small villages and tribes in some societies turn to for advice in resolving a dispute. Many mediations resemble the "Cold War" between the United States and the Soviet Union. Both sides present each other with the weapons the other side has in its arsenal and the potential devastation such weapons can cause, then each side recognizes that if each side uses its weapons the result may be a "lose-lose" situation or a "nuclear winter", then each side tries to see if some kind of creative solutions can be found to "co-exist" together notwithstanding their prior and perhaps ongoing hostile feelings toward each other.

While an attempt at mediation is always recommended by conscientious lawyers concerned about the current and likely continuing accural of costs in a dispute, mediation is preferred as a solution in the following situations:

- Where the disputing parties are both concerned about the devastation themselves personally in terms of

  — financial impact,
  — emotional impact,
  — investment of time and energy,
  — public image of either or both parties,

  which going all the way to trial (and even to an appeal of trial results to a higher court) can involve.

- Where the disputing parties want to try to preserve their historic good relationship by seeking creative solutions for resolving their dispute and not being forced to attack each other's positions or character.

- Where the disputing parties want to try to get a feel for the "strengths" of each party's position and hence how a court or other binding decision-maker might decide the dispute, so that each side can better determine whether their own best interest is to settle on certain terms.

- Where the dispute has underlying factors of emotional hurts or ill will which a mediator with strong "personal relationship skills" may be able to sort through so as to "cure" the real basis for beginning or continuing a lawsuit.

- Where the disputing parties appreciate that despite their mutual hostility they may together be able

  — to focus on the real needs or "interests" each party has rather than merely the "positions" each party takes in the dispute. (often when positions are put off to one side the parties can work together to discover ways that both can satisfy their respective interests);

  — to work out a creative compromise to their dispute which results in an arrangement in which both are happy or neither is too unhappy.

"Lawyers trying to do the best for their clients and not merely run up 'billable time' or prove their 'winning'

skills strongly attempt either a direct negotiated settlement attempt between themselves, or else a mediation of disputes..."

As wise judges often point out to the parties before a lawsuit gets too close to trial, in contrast to the creativity open to the parties in a mediation a court, being bound by rigid "**rules of law**",is not able to work out creative resolutions - a judge is limited in what he or she can do because

- the judge must often decide on an "all or none" or "win-lose" basis for one side or the other.

- the judge can't suggest a creative or "out of the box" or "third way" solution not involving payment of money or ordering action or inaction in a limited manner. As a result, often both sides end up unhappy with a court decision because it didn't deal with real needs of the disputing sides.

Lawyers trying to do the best for their clients and not merely run up "billable time" or prove their "winning" skills strongly attempt either a direct negotiated settlement attempt between themselves, or else a mediation of disputes, at least after each side has conducted "evidence discovery" procedures so each side can measure

— whether there is a chance it can win or lose after a trial and trial judgment;

— how much is "at stake" if it wins or loses after a trial and trial judgment.

While mediation can give the parties a chance to make very creative solutions to their relationship or to ending their relationship, Mediation DOES NOT necessarily mean "kiss and make up." The parties to a mediation may remain very antagonistic after a mediated settlement (or a settlement negotiated between the parties themselves). However, mediation may afford the opportunity for a creative solution to a dispute which both sides may be unhappy with but which they can "live with".

As in the case of arbitration, one advantage of mediation is that both its initiation and its result can be kept confidential by an enforceable agreement between the parties. So when parties want to avoid "airing their laundry in public" they may prefer to use arbitration or mediation.

While mediation would seem to be such an ideal and practical solution to resolving disputes even among people who arrive at the mediation with extreme anger, annoyance, and dislike of each other, in certain situations, especially where one or more of the disputing parties shows no interest in compromise or exploring creative or "win-win" solutions to the dispute, mediation can be time-consuming, costly in attorney fees and ultimately of no benefit in heading off a lawsuit or binding arbitration aimed at resolving a dispute.

Direct Negotiating Between Parties By Their Lawyers

> ***"... direct negotiations between the parties through their attorneys .... can be a successful method where both disputing sides have competent attorneys who like to be creative problem-solvers..."***

The least expensive way to resolve disputes is direct negotiations between the parties through their attorneys, and this can be a successful method where both disputing sides have competent attorneys who

— like to be creative problem-solvers;

— recognize the unpredictable outcomes which lawsuits or arbitration present;

— are concerned about the ethics of sapping clients' funds in a "gladiator contest' to show which attorney is "smarter" or "tougher";

— have their egos under control;

— are careful in their behavior not to challenge the egos or sense of integrity of the opposing side or the opposing attorney while still strongly supporting their own client's positions

As an incidental observation, one more example of the curious and subtle nature of human motives and behavior is that contrary to what some non-attorney clients bitterly believe, many lawyers are not deliberately trying to "run up fees" by aggressively pushing ahead toward a trial; rather, these lawyers are just aggressive and competitive by nature, or else are afraid of appearing to lack courage or energy or intelligence, and they

want to satisfy their own needs to

"win" and they don't take the time to consider what satisfying their own ego needs will cost their client. But to quote an experienced and sophisticated business person I once met: "Bad lawyers create problems or more problems; good lawyers resolve problems."

However, even when each side has an attorney with the above attitudes, a mediator often still has value because a good mediator

— is seen as a neutral fair-minded advisor to both sides as to their chances of win ning or losing;

— may even have more credibility with one particular side than that side's own attorney.

— will have the right "personal relations skills" which can cut through the "emotion al baggage" of either or both sides which may be the pretext for a lot of the pure legal arguments, and that mediator can get a settlement based on the 'real issues' or suggest creative settlement possibilities.