


FROM FAMILY LAW TO LEGACY DISPUTES: THE MANY USES OF ALTERNATIVE DISPUTE RESOLUTION TECHNIQUES IN LOUISIANA

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The use of alternative dispute resolution (ADR) techniques to resolve disputes in Louisiana has exploded in recent years in several areas, such as mediation in family law cases and arbitration in the securities industry. The use of arbitration has particularly gained momentum in the resolution of disputes in the mobile homes industry. Perhaps the most well-known ADR method in Louisiana is the proliferation of mediation to resolve civil disputes. ADR techniques also have been used effectively to resolve disputes in the health care industry. Moreover, while Louisiana state courts are utilizing special masters to resolve complex and highly technical disputes, Louisiana federal district courts are using magistrate judges as neutral mediators in cases that could occupy weeks of the court's time through lengthy trials. Finally, mediation could potentially prove to be an efficient dispute-resolution method in legacy disputes — lawsuits arising out of historical oil and gas exploration and production activities. This article discusses the varied uses of ADR procedures in the state.

Mediation in Family Law Cases

In family and divorce cases in Louisiana, judges have many options to assist them in resolving the thorny issues that arise in family and divorce cases. Judges may assign family law cases to domestic commissioners¹ and hearing officers² for processing. Family court judges can *sua sponte* (even over a party's objection)³ order parties in child custody and visitation cases to meet with a family mediator for resolution of their dispute.⁴ Some family courts have formal programs whereby they resort to a roster of trained mediators for assistance in resolving issues presented in child custody and visitation cases.⁵ Because of the existence of these programs and the fact that mediation provides a private, cost- and time-friendly resolution of highly personal matters, family mediation is being utilized in an increasingly large number of cases in Louisiana.

An Internet search for family mediators in Louisiana reveals that many of these mediators are family lawyers who, along with their services as attorneys and advocates, offer mediation services for litigants in Louisiana family courts. Additionally, many family mediators in Louisiana are mental health professionals, such as psychiatrists, psychologists, social workers, marriage and family counselors, and professional counselors. Further, the Louisiana Child Custody and Visitation Mediator Registry, a registry of family mediators maintained by the Louisiana State Bar Association's ADR Section, contains listings from several mediators⁶ who, by expanding their services to offer family mediation, are responding to the increased need for mediators in family law cases.

Arbitration in the Securities Industry

When a customer has a dispute against a broker or financial advisor, the appropriate place to file the claim is not a Louisiana district court but an arbitral forum such as the Financial Industry

Regulatory Authority, Inc. (FINRA). This is because virtually all broker-dealers include a pre-dispute arbitration agreement in the agreements with their customers that would cover almost any subsequent dispute.⁷ These pre-dispute agreements were not accepted by Louisiana courts until 1987 when the United States Supreme Court decided *Shearson v. MacMahon*⁸ which provided for the enforceability of such agreements, thereby setting in motion the nearly universal use of arbitration in customer-broker disputes. Nevertheless, in the context of securities, the obligation to arbitrate does not stem solely from the customer-broker contract but also from the contracts that all brokers and brokerage firms have by virtue of their registrations with FINRA.⁹

After a claim is filed with FINRA, the parties engage in the selection process to choose either one or three arbitrators to preside over their case, depending on the dollar amount of the claim. In securities cases, customers generally sue broker-dealers for losses in their investments. Typical claims include allegations of breach of fiduciary duty, churning, failure to diversify, material misrepresentation, negligence, unsuitability and unauthorized trading. Discovery in FINRA arbitrations is limited. Thus, after an initial pre-hearing conference where the arbitrator resolves any preliminary matters, a hearing date is set. The arbitrator is the sole judge of evidentiary and procedural issues at the hearing, which is usually recorded on audio devices that constitute the official record of the hearing. Within 30 days of the last hearing date, or of the submission of post-hearing briefs, the arbitrator renders a final and binding award which can be appealed only on extremely limited grounds.¹⁰

Arbitration of Disputes in the Mobile Homes Industry

Occasionally, purchasers of mobile homes in Louisiana may bring claims against sellers and/or manufacturers in state court, alleging contract, tort and/or redhibition damages. In response, the seller or manufacturer may file an excep-

tion of prematurity due to the purchaser's failure to submit to binding arbitration as required by the purchase agreement.¹¹ Purchase agreements contain arbitration clauses that are broadly construed and cover arguably any dispute that could arise between a purchaser of a mobile home and a seller/manufacturer. Although the Louisiana 3rd Circuit Court of Appeal invalidated such arbitration agreements on several occasions,¹² the general stance of the Louisiana jurisprudence is that these agreements *are* enforceable regardless of whether the buyer actually read the agreement and understood its effects; therefore, all contractual claims, including breach of warranty claims, and the tort claims, such as negligent manufacture and negligent repair, must be submitted to binding arbitration.¹³ With 11 percent of housing units in Louisiana being mobile homes,¹⁴ one would expect a significant percentage of sales documents to contain arbitration agreements. This fact is also evidenced by the large number of reported decisions where Louisiana courts have granted exceptions of prematurity when the purchasers initially opted to file a claim in a district court rather than in arbitration.¹⁵

Mediation of Civil Disputes

Perhaps no use of ADR techniques has grown as quickly as the use of mediation, which, over the last 25 years in Louisiana, is fast replacing jury trials as the most common method for resolving disputes in civil cases. The "Who's Who in ADR 2015," an annual directory published in the *Louisiana Bar Journal*, shows listings and biographies of 177 mediators and seven ADR firms, two of which have rosters containing more than 40 mediators.¹⁶ Many of the biographies state that the mediators have conducted thousands of mediations, with one mediator conducting more than 10,000 mediations.¹⁷ One ADR firm has handled more than 55,000 cases since 1987. While many of the mediators are attorneys who mediate full-time, others actively practice law with mediation being adjunctive to their law practices.

In many jurisdictions, state district court judges have the unilateral power to order litigants in civil cases to mediation. That is not the case in Louisiana for, under the Louisiana Mediation Act, the trial judge cannot order the referral of a case to mediation without a party's motion.¹⁸ If a party objects to the order, the trial judge is required to rescind the order.¹⁹ As a result of this law, civil mediations are not commonly court-ordered in Louisiana.²⁰ Consequently, this burgeoning mediation market in Louisiana is apparently thriving because litigants in civil cases are realizing that expensive and timely litigation is substantially outweighed by cost- and time-effective mediations that enable them to retain greater autonomy, flexibility and control over the process.²¹ Litigants also may prefer mediation because it is nonbinding (unless otherwise agreed),²² and because all oral and written communications made during mediation, with certain exceptions, are confidential and cannot be used as evidence in any subsequent judicial or administrative proceeding.²³

ADR in the Health Care Industry

Louisiana, a state that just recently completed its transition from a charity-care system to different public-private partnerships,²⁴ is facing a national trend of moving away from arbitration towards mediation and other interest-based options such as fact finding, early neutral evaluation or case assessment. Louisiana also established an ombudsman program whereby long-term-care ombudsmen investigate and resolve complaints received by people with developmental disabilities residing in state-licensed facilities.²⁵ However, of all ADR mechanisms, mediation is most regularly used for settling any variety of disputes that might emerge in the health care system, including but not limited to, treatment decisions (malpractice) and risk management.²⁶ Whether the issues relate to the aging process (elder mediation), end-of-life choices (bioethics mediation) or quality of care (physician co-media-

tion),²⁷ mediation is a productive ADR technique for their resolution because it allows the parties to maintain direct control over the process and informally settle the dispute.

Health care professionals, as a group, are arguably experiencing more conflicts than any other profession.²⁸ Since little formal dispute-resolution training is available to health care professionals and role models for collaboration and negotiation are far and few between in their profession, ADR is a unique option to provide health care professionals with a hope to successfully resolve challenges present in the clinical environment.²⁹ Bearing in mind that mediation processes and their hybrids will only further evolve as health care disputes expand, the opportunities for mediating and providing ADR training in the Louisiana health care industry are very widespread and lucrative for many legal professionals, business officials, agency administrators, as well those working in the health care industry.

Special Masters

Louisiana judges today often preside over complex and highly technical matters and find themselves in need of assistance in order to reach fair decisions. The Louisiana Special Masters Statute, based on Fed. R. Civ. P. 53, was enacted almost 20 years ago and it empowers the court to appoint a special master in any civil action involving a complicated issue or exceptional circumstances.³⁰ Issues which, over time, have been appointed to special masters include: mass tort cases, complex litigation, and overseeing environmental restoration projects. However, because the consent of the parties is the foundational basis of the statute, the appointment of a special master will be void in the lack thereof or if a party timely challenges the appointment.³¹ If the order of appointment contains specifications or limitations regarding the special master's powers, the special master is bound by such limitations and the court, absent the parties' consent, cannot expand them.³² While special masters generally issue

recommendations and prepare reports on the matters submitted to them,³³ any party may challenge the special master's ruling by filing a written objection within 10 days.³⁴ However, the biggest problem the parties face is that special masters, unless so ordered by the court, are not required to prepare a report. The party wishing to challenge the special master's ruling can hardly, without a report, draft a sufficiently proper argument for attacking it. Therefore, party-litigants should ensure that the court's order of appointment requires special masters to prepare a report for each action taken.

Mediation in Legacy Disputes

Legacy lawsuits are claims filed by landowners for pollution or contamination of their property or groundwater caused by oil and gas operations.³⁵ Hundreds of legacy lawsuits have been filed since the 2002 Louisiana Supreme Court decision,³⁶ which allowed landowners to collect damages greatly in excess of the uncontaminated value of the property without imposing any legal obligation on landowners to spend the money for remediation.

In 2015, the Louisiana Legislature enacted La. R.S. 30:29.2, which allows any party to a legacy lawsuit to compel mediation after the earlier of the close of discovery or 550 days after commencement of the action, whichever comes first.³⁷ The payment of the mediation fees will be based on the parties' agreement or, in the absence thereof, will be borne by the party that moved to compel mediation.³⁸ Any mediator appointed pursuant to La. R.S. 30:29.2 must qualify as a mediator pursuant to La. R.S. 9:4106(A)(1)(a) or (2) of the Louisiana Mediation Act.³⁹

Mediation in Louisiana Federal Courts

The Alternative Dispute Resolution Act of 1998 requires each U.S. District Court to authorize the use of ADR in all civil actions,⁴⁰ thus allowing parties to pursue mediations or settlement confer-

ences before someone who has experience both as a judge and a mediator. Mediations in federal courts are usually very brief and are conducted by magistrate judges who may only mediate cases as a neutral third-party and must not render decisions and impose solutions upon the party-litigants. Having practical experience as judges helps magistrate judges to be effective mediators as they can share with the parties their knowledge of the litigation process, the relevant substantive law, and how the parties' theories of the case may resonate with the fact-finder.

Prior to the mediation, each party must provide to the magistrate judge, in confidence, a brief position paper describing any liability disputes, the key evidence the party expects to produce at trial, the damages at issue in the case, the party's settlement position, and any other special issues that may have a material bearing upon settlement.⁴¹ This requirement focuses the parties on the issues to be negotiated and gives them the chance of resolving their disputes before a trial on the merits. During the mediation, the parties must be prepared to enter into meaningful and good-faith settlement negotiations.⁴² If a party appears at the mediation without authority to negotiate, or without the ability to contact a client with ultimate settlement authority readily throughout the mediation, that party may be sanctioned.⁴³

Conclusion

The use of ADR techniques to resolve disputes has become a standard procedure in many areas of the law. Considering that the use of ADR may expand into other legal areas in the future, it is always prudent for Louisiana attorneys to remain up-to-date on ADR techniques and be aware of changes in statutes and court procedures.

FOOTNOTES

1. See, e.g., La. R.S. 13:711-718.
2. La. R.S. 46:236.5.
3. Branton, Breedlove and Harges (October/November 2014), "Mediating Family and Divorce

Cases in Louisiana," 62 La. B.J. 186.

4. La. R.S. 9:332.

5. See, CDC Family Mediation Handbook: Custody and Visitation — A Manual for Judges and Mediators, available at:

<http://mediationtrainingcompany.com/wp-content/uploads/2013/05/CDC-FINAL-MEDIATION-MANUAL.pdf>. (The site contains the Orleans Parish Civil District Court's Family Mediation Handbook for judges and mediators.)

6. Louisiana Mediator Registry, available at: <http://files.lsba.org/documents/Committees/louisianamediatorregistry.pdf>.

7. S. Urban (2012), "Securities Arbitration of Investor Disputes: A Primer for the Unwary Practitioner," 59 The Advocate 11, 11.

8. Shearson v. MacMahon, 482 U.S. 220 (1987).

9. See, M. Astarita (2010), "Overview of the Securities Arbitration Process," available at: <http://www.seclaw.com/securitiesarbitration.php>.

10. *Id.*; see also, S. Urban (2012), note vii *supra*; J. Burge and L. Richards (2013), "Defining 'Customer': A Survey of Who Can Demand FINRA Arbitration," 74 La. L. Rev. 173.

11. See, e.g., Snyder v. Belmont Homes, Inc., 899 So.2d 57 (La. App. 1 Cir. 2/16/05).

12. See, Quebedeaux v. Sunshine Homes, Inc., 941 So.2d 162, 2006-349 (La. App. 3 Cir. 10/11/06) (agreement invalid because buyers' consent was vitiated by error); Rodriguez v. Ed's Mobile Homes of Bossier City, La., 889 So.2d 461, 2004-1082 (La. App. 3 Cir. 12/8/04) (agreement invalid due to its adhesionsary nature).

13. Snyder v. Belmont Homes, Inc., 899 So.2d 57 (La. App. 1 Cir. 2/16/05).

14. "Percent of Housing Units that are Mobile Homes by State," available at: http://www.statemaster.com/graph/hou_per_of_hou_uni_tha_are_mob_hom-housing-percent-units-mobile-homes.

15. See, Snyder v. Belmont Homes, Inc., 899 So.2d 57 (La. App. 1 Cir. 2/16/05); and Fontenot v. Southern Energy Homes, Inc., 978 So.2d 549 (La. App. 3 Cir. 3/5/08).

16. Louisiana Bar Journal, "Who's Who in ADR" (2015), Volume 63, No. 3, available at: <https://www.lsba.org/Public/DirectoryArbitratorsMediators.aspx>.

17. *Id.*

18. La. R.S. 9:4103.

19. *Id.*

20. The exception is in child custody and visitation cases where the trial judge can order the litigants to mediate their disputes under La. R.S. 9:332.

21. B. Harges (2011), *The Handbook on Louisiana Alternative Dispute Resolution Laws*, p. 7 (discussing the benefits of ADR procedures).

22. La. R.S. 9:4110.

23. La. R.S. 9:4112.

24. C.R. Martin (October/November 2014), "Effective Dispute Resolution in the Health Care Industry: Progress and Opportunities," 62 La. B.J. 182, 183.

25. La. R.S. 28:453.1.

26. R.D. Benjamin, *Mediation and Conflict Management Services: Conflict Management in Health Care Systems*.

27. Martin (2014), *supra* note 24 at 184, 185.

28. D. Gerardi (November 2003), "Conflict Management Training for Health Care Professionals," ACRResolution, Spring 2003.

29. *Id.*

30. La. R.S. 13:4165(A).

31. *Id.*

32. La. R.S. 13:4165(B)

33. La. R.S. 13:4165(C)(1).

34. La. R.S. 13:4165(C)(3).

35. Senate Resolution No. 84, available at: <http://www.legis.la.gov/Legis/ViewDocument.aspx?d=845550>.

36. Corbello v. Iowa Production, 02-0826 (La. 2/25/03), 850 So.2d 686. See also, Loulan Pitre, Jr., "Legacy Litigation and Act 312 of 2006," 20 Tul. Envtl. L.J. 348 (2007).

37. Acts 2015, No. 448, of the Louisiana Legislature; Keith B. Hall and Colleen C. Jarrott, 63 La. B.J. 230 (2015).

38. *Id.*

39. La. R.S. 30:29.2(E)(2).

40. 28 U.S.C. §§ 651 *et seq.*

41. See, e.g., Settlement Conference Guidelines of U.S. Magistrate Judge Michael B. North, available at: <http://www.laed.uscourts.gov/judges-information/judge/honorable-michael-b-north>.

42. *Id.*

43. *Id.*

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