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Debunking the Myths of Arbitration & Mediation

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Myth #1 – Arbitration Takes As Long As Litigation

- Federal court statistics (as of 12/31/17) show the median length of time from filing to a jury or bench trial for civil cases is 27.0 months.
  - Eastern District of Missouri is almost 34 months
- Comparable 2015 American Arbitration Association statistic for construction arbitration cases is 8 months.
- Parties to an arbitration agreement can agree to specific time frames to resolve a matter.

Myth #2 – Arbitration Is As Costly As Litigation

- Generally, arbitration rules permit less discovery
  - Less document exchanges, including ESI
  - Less depositions
- Generally, arbitration rules do not permit unlimited motion practice
- Generally, arbitration costs for administering the process are more than court filing fees

Myth #3 – Arbitration Is Not Suitable For Large Cases

- From 2014 – 2016, the American Arbitration Association administered large cases with damages in the 9 and 10 figure range.
- Arbitrators and parties have flexibility to agree to a variety of non-traditional hearing presentation approaches – bifurcation, tandem expert testimony
- Selection of Arbitrators with large case experience

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Myth #4 – Arbitrators "Split The Baby"

- 2015 American Bar Association Construction Forum survey found that ~95% of arbitrators actually seldom or never issue compromise awards

Myth #5 – Arbitrators Are Unwilling to Make Hard Decisions

- American Arbitration Association has been emphasizing efficient and fair case management by Arbitrators.
  - Enforcement of time limitations.
  - Consideration of meritorious dispositive motions.
  - Directing the presentation of evidence prior and at hearings.

Myth #6 – Arbitration Awards Cannot Be Appealed

- Arbitration awards generally can only be vacated upon limited statutory grounds.
- Arbitration Rules for appeals are available and can be adopted
  - AAA Optional Appellate Arbitration Rules
  - CPR Arbitration Appeal Procedure

MEDIATION

- Cooperative, less costly problem-solving process
- Allows parties greater control of outcomes
- Outcome not limited by what a court can order; parties can create practical & informed solutions

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Myth #1 – Discussing or Proposing Mediation = Sign of Weakness

- Shows understanding of costs of litigation
- Demonstrates a willingness to compromise
- Facilitates constructive communication
- Does not constrain parties from arguing strengths of their case
- Can accomplish creative solutions beyond what can be gained even with a win at trial

Myth #2 – You Shouldn't Use Mediation If Issues Are Complex

- Complexity of issues in dispute should be considered when selecting your mediator
- Mediator is just an added neutral part of your team of professionals
- Consultation with experts in the subject field can be accommodated before and during mediation

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Myth #3 – Mediation Requires the Parties To Disclose Their Evidence

- Free flow and exchange of ideas and information aids mediation process BUT
- No requirement to present your evidence
- Often counterproductive to the mediation process to focus on your legal arguments
- Your attorney is prepared to determine the best strategy as to what to reveal at mediation

Myth #4 – Mediation Must Resolve All Disputes To Be Successful

- Can be a vehicle to streamline the issues in dispute if litigation proceeds
- Can help the parties to identify the issues for which experts and consultants should be used
- Can help the parties move forward in a more civil and cooperative manner

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Myth #5 – The Case Won't Settle; I Want My Day in Court

- Vast majority of cases settle at mediation
- Facilitates constructive discussion
- Neutral assists the parties to get over hurdles
- Mediation can be as creative as the parties
- Mediation can offer solutions the Court cannot
- Can help the parties understand each other
- Can give the parties an opportunity to apologize

Myth #6 – If Lawyers Are Trying To Settle, There Is No Need To Mediate

- Neutral can facilitate discussion in a way that the parties' advocates cannot
- Neutral can assist parties in seeing weaknesses in their case

Myth #7 –Mediating Opens Floodgate to More Litigation

- Legitimate concern when settling litigation; but mediation not shown to be a factor
- Confidential process
- Settlement agreement can include confidentiality provisions
- Opportunity for the parties to issue a joint statement

Myth #8 – Mediation Is a Last Resort After All Else Has Failed

- There is no “sweet” spot for mediation
- Balance litigation costs vs. need for information
- The sooner the better
- More cost effective; can avoid protracted litigation
- Can help to protect particularly sensitive confidential information from disclosure
- Optimum when both parties are at most risk

Questions?

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