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ADR USER'S GUIDE

Introduction

Alternative dispute resolution (ADR) has developed rapidly in the American legal system. ADR has become an integral part of the practice of law, insurance claims handling and, more recently, is being utilized by private individuals and businesses, small and large, as a practical alternative to resolving disputes in the trial court system.

This guide is intended to assist parties, whether represented by counsel or not, in the use of ADR processes to best serve their interest in resolving disputes promptly, fairly, economically and without the anxiety and frustration of litigation and trial in the court system.

What is ADR?

ADR is an alternative to the lengthy and costly pretrial discovery required in the court system and to the uncertainty and frustration of trial in the court system. Many commentators have suggested that ADR should stand for "*appropriate* dispute resolution". The principal advantage of ADR is its inherent flexibility, giving the parties, their attorneys and/or claims handlers the ability to tailor the dispute resolution process to the circumstances of the case and the needs and preferences of the disputing parties.

In Massachusetts, the impact of ADR began to be felt in the legal and insurance community in the late 1980's. ADR services are now available to parties from a wide variety of sources, including private ADR providers such as Massachusetts Dispute Resolution Services (MDRS) as well as some court connected programs. Whereas our

firm (MDRS) is available immediately to parties when a dispute arises, court connected programs are generally available only after suit is initiated and certain pretrial discovery has been completed.

The spectrum of ADR processes range from informal, non binding mediation to more formal, binding arbitration which resembles a trial and results in a binding and final written award by an impartial arbitrator. Unfortunately, much of the well known terminology of ADR, such as *mediation* and *arbitration*, are often used interchangeably, even by attorneys and claims representatives, who may not be fully familiar with ADR procedures, so we include below a glossary of terms used by ADR practitioners.

ARBITRATION. In arbitration, a *binding decision* is made on a disputed matter by a neutral arbitrator or panel of arbitrators after a hearing is conducted which involves the presentation of evidence and arguments by the disputants. This process most closely resembles a trial in the courts. In most arbitrations however, the rules of evidence are relaxed and there is limited prehearing discovery. The award of the arbitrator, except in limited rare circumstances, is final and not subject to appeal.

MEDIATION. Mediation is a voluntary process in which a neutral mediator assists the parties in resolving their own dispute. The mediator has no authority to impose a settlement and the parties are under no obligation to reach agreement. The mediator may, but need not, suggest settlement terms. Mediation proceedings are private and confidential and the substance of the discussions in mediation is generally considered privileged. Approximately 90% of cases mediated with MDRS reach settlement.

CASE EVALUATION. Case evaluation is a process where the parties agree to present a summary of their case to a neutral evaluator for his or her opinion regarding the likely outcome if the case were adjudicated. The opinion of the evaluator is not binding on the parties. It's value is to encourage subsequent settlement, and the neutral is generally a well experienced attorney or retired judge whose opinion is respected by both sides of the controversy.

CONCILIATION. In several court counties, both district courts and superior courts schedule cases for conciliation conferences before retired judges or members of the bar usually acting on a volunteer basis, to assist the parties in settling their case or to ready the case for trial. These sessions resemble mediations but are generally much shorter, usually between 30 to 45 minutes. The conciliation is often scheduled after the discovery period for depositions etc., is complete and shortly before trial is scheduled.

MED/ARB. Med/arb is a combination of mediation and arbitration, in which the parties agree in advance that they will mediate their case, but if the dispute is not resolved through mediation, they will proceed with a binding arbitration. The parties will agree in advance whether the mediator will serve also as the arbitrator if the dispute is not

resolved through mediation. Although the use of the same neutral is more efficient, parties often want a different impartial neutral to serve as arbitrator, a person who was not privy to offers or demands made or other confidential discussions taking place at the mediation.

MINI-TRIAL or SUMMARY JURY TRIAL. Both of these processes can be either binding or non binding, depending upon the agreement of the parties. Both processes involve a *summarized* presentation of the evidence in a dispute to a panel composed of either experienced neutrals (mini-trial) or a lay jury (summary jury trial). Generally the evidence is presented in summary form by counsel for each party as it would be expected should the case go to trial, and arguments are made by both sides based on this evidence. If the process chosen is *non binding*, it resembles in effect a case evaluation, but with a *panel* of neutrals or jury being involved. Mini-trials and summary jury trials are generally only used for cases in which a lengthy trial is anticipated, and where the liability and/or damages issues are in dispute. More often than not, these processes are non binding and only informational, to assist in valuation of the claim or in designing a trial strategy.

HIGH-LOW ARBITRATION. This process is designed to minimize the risks of both parties in proceeding to binding arbitration, and is being used more and more by attorneys, individuals, businesses and insurance claims handlers. In advance of the hearing, the parties agree in writing to a minimum and maximum arbitration award. The decision of the arbitrator is binding but can be no less than nor more than the minimum and maximum limits. Generally the arbitrator is not made aware of the high and low limits chosen by the parties, so as not to be influenced by these limits in making his award. This process is used often when the parties have made some progress in their negotiations and wish not to abandon the progress made, but rather chose to have an impartial arbitrator resolve the differences remaining within set limits.

OTHER ADR PROCESSES. The flexibility of ADR processes has led to the development of numerous hybrids, combining many of the processes described above, including, for example, fact finding hearings, master's hearings, settlement conferences, and "baseball" style arbitrations. The details of any such hybrid agreement should be carefully studied by the parties before entering into a written agreement.

Why Use ADR? The Advantages and Disadvantages

Although ADR is worth considering in most cases, there are certain cases where ADR is clearly better suited than others. The issue confronting parties, attorneys, businesses and insurance representatives is whether ADR offers some advantage over the ordinary course of negotiation, litigation, pretrial discovery and the costs, frustration and

uncertainty involved in trial to resolve a case. Factors relevant to that decision are discussed herein.

Advantages of ADR:

COST SAVINGS. The primary reason why litigation is so expensive in Massachusetts is well known: pre-trial discovery and discovery-related motion practice. According to a recent study of the federal courts by the Brookings Institute, 60% of the cost of litigation is attributable solely to pre-trial discovery. Further, the cost for the personal appearance of expert witnesses at trial, generally required by the trial court's evidentiary rules, is extremely high. ADR's simplified procedures, which allow in many cases for the presentation of expert testimony and other documentary evidence by affidavits and written submissions, generally result in lower legal costs and accrued discovery expenses. The fees for arbitration vary from provider to provider but are a fraction of what discovery and trial in the Court system would cost parties. Please refer to MDRS fees at our website www.mdrs.com.

TIME SAVINGS. Litigation in the Courts is often delayed by the backlog of pending cases. A trial in the court system could take two years or more after suit is filed. Although most courts have improved their efficiency by reducing their case backlogs over the past years, often due to the success of ADR processes, continuing budgetary cuts have dramatically impacted the Courts and their ability to effectively handle the number of cases presently in litigation.

On the other hand, cases submitted to mediation or arbitration with a private ADR provider such as MDRS can often be scheduled for hearing within days of submission, depending on the needs and availability of the parties. Most ADR providers render final and binding arbitration decisions anywhere from 10 to 20 days from the close of the hearing.

CONVENIENCE. Unlike the scheduling of a trial by the court, with ADR the *parties* select a mutually convenient time and place for a hearing. Last minute postponements and delays, often resulting when a court is not ready for the case to commence as scheduled, are generally avoided by using ADR. Last minute calls by court clerks saying that the court needs you commence trial tomorrow do not occur when using ADR.

FLEXIBILITY. Using ADR, the parties can tailor a dispute resolution process that will work best for them based on each individual case, whether, for example, non-binding mediation, binding arbitration or perhaps binding high-low arbitration. Using ADR, the parties often can retain greater control over the manner in which their dispute is resolved than they would if they opted for trial in the court.

CHOICE OF NEUTRAL. Using ADR, the parties mutually select the arbitrator(s) who will decide the case, or the mediator who will assist them in resolving their dispute, having at their review detailed background materials. In the courts, the parties do not know which judge their case will be assigned to, nor what experience that judge may have in the particular field of law that their case involves. If a jury trial is requested, ordinarily the decision makers on the jury have no experience in the law or in the valuation of cases. ADR providers such as MDRS offer retired judges or experienced attorneys as neutrals who have training and experience in the particular area of law involved in each case.

PRIVACY AND FINALITY. For many parties an important advantage of ADR is the *private* resolution of their dispute. This is often the case where reputational interests are involved or where the parties wish to limit public access to documents, exhibits, pleadings and testimony. An ADR arbitration hearing or mediation session takes place in a private office setting and not in an open court room with spectators. A related concern of some parties may be avoiding a reported decision where an adverse precedent would encourage the filing of additional cases against the party. Another important advantage of ADR to many parties is that except in certain rare circumstances, the arbitrator's decision is final and is not subject to appeal, which could take years, require significant further costs and result in continued uncertainty.

PRESERVING ONGOING RELATIONSHIPS. To many, no experience can be more adversarial than trial in the Court system. Prior relationships that may have existed between disputants, i.e., whether former business associates, neighbors, employers and employees, married couples, etc., seldom survive the strain of protracted litigation. In contrast, the informality of the mediation process, the mutual decision to elect mediation, the mutual selection of a mediator, and the focus of the mediator on the existing relationship often can help not only resolve the immediate dispute but also often increases the parties' ability to resolve future disagreements in a nonadversarial manner. Even the process of binding arbitration is less likely to further damage once beneficial relationships that may have existed between parties.

RISK MANAGEMENT. ADR proceedings can be structured in a manner that controls risk by setting limits on the range of outcomes, for example, by using a high-low arbitration format. Such controls are particularly useful where there is a risk of a runaway jury or where the amount in controversy is such that a wholly adverse decision could be ruinous to one of the parties. In mediation, of course, risk is always controlled because a party is free to refuse any offer until a satisfactory one appears.

Some Disadvantages of ADR:

SPLITTING THE APPLE. Anecdotally, a criticism often made by some attorneys and insurers is a perceived tendency of arbitrators or mediators to split the differences between the parties, with arbitrators being reluctant to say "no" to a plaintiff by issuing a defendant's verdict, or, on the other hand, being reluctant to issue a significant award in favor of plaintiff where warranted. With the development of ADR in the marketplace, both with private as well as public providers, however, these concerns have been addressed to a great extent. ADR arbitrators who show a tendency not to make tough choices based upon the evidence presented, risking the alienation of one or another party, or who have any bias for or against plaintiffs or defendants are simply not being selected for service.

LIMITED DISCOVERY. Use of ADR can result in less protracted and expensive discovery, and often results in informal free exchange of information and documents, without excessive depositions, interrogatories and document production requests often involved in the courts. However, for a party in need of information, who needs to take depositions and obtain information through discovery to prove his case, neither mediation nor arbitration at an early stage may be advantageous to them. Certain discovery may be needed for this party to properly prepare their case, before a mediation or arbitration is scheduled.

RELAXED RULES OF EVIDENCE. Some parties want the protection of formal rules of evidence imposed by the courts, for example, the inadmissibility of hearsay statements, as a further safeguard that the decision rendered is based on "clean" evidence. Most arbitration agreements relax rules of evidence, with many, for example, allowing hearsay statements and permitting the introduction of other evidence which may be prohibited in a court trial. The specific arbitration rules of the ADR provider should therefore be carefully reviewed in advance. Many arbitration rules can be modified if requested by both parties in advance of the hearing, i.e., to rule out hearsay statements, etc., so long as the modifications do not violate any applicable law.

LACK OF APPEAL RIGHTS. Parties who may be aggrieved by the decision of the arbitrator, but for rare exceptions, have no right to appeal the decision, as they may have in the court system.

LIMITED DEVELOPMENT OF THE LAW. A frequently made argument against the expansion of ADR throughout the legal system is the risk that ADR will stunt the development of law. Arbitration decisions are generally unreported and remain confidential. The common law is developed by litigation and reported decisions of the courts. Many feel that, particularly in high stakes or high profile cases, if such cases are

resolved by ADR, the law will not develop with its customary vigor, and that predictability and direction for the law will be undermined.

OTHER ADVANTAGES OF LITIGATION. Some cases *should* go to trial, and the following are some characteristics of cases in which litigation may be needed or desirable:

- Cases where a party has exercised bad faith and in settlement discussions may not be suitable for mediation or even arbitration.
- Where the claim on the other side is totally without merit and there is a 100% likelihood of winning.
- Where the delay inherent in litigation serves the business interest of the client.
- Where the visibility of litigation may serve the goals of the client.
- Where it is important for the client to establish a public record resulting from discovery and trial.
- Where it is important for the client to discourage other claims and establish a tough stance on specific issues.
- Where the client needs remedies that are available only through litigation (i.e., an injunction, attachment, or declaratory judgment).

MEDIATION: What to Expect / Recommendations to Users

Before the Mediation:

WRITTEN SUMMARY. Before a mediation convenes most mediators request a brief written summary of the case from each party. In personal injury cases, the summary should discuss the issues of liability, focusing on the key evidence in support of the parties' position, and on damages, discussing for example, such issues as the extent of disability, casual relationship, and the extent of special damages or economic loss. If the issues of liability or damages can be best highlighted by attaching pertinent portions of medical records, statements, or other documents, you may wish to do so in advance of the mediation to assist the mediator.

PREPARATION. Be prepared; carefully review your case before the mediation. Although mediation is informal, be prepared to discuss the facts of your case in detail. Identify and pull out all documents, or portions thereof, that may be helpful to show the mediator so as to avoid wasting time at the mediation by having to pull through a large file. Spend time with your client preparing him for the mediation. Determine who will speak and encourage the client to come with an open mind. Discuss in general terms what settlement options they feel may be acceptable to them *if* they became available at the session.

KNOW THE MEDIATOR. Spend some time finding out about your mediator and his or her background and experience. Discuss with your co-workers or references provided by the mediator as to how the mediator generally conducts his mediations.

THE PARTIES TO THE DISPUTE MUST ATTEND. Research shows that where the plaintiff, the defendant and/or any insurance representative or any individual with needed full settlement authority appear at the mediation, the chances of settlement increase dramatically. Be sure the opposing party, and not just their attorney or other representative, are going to attend the mediation. In the rare circumstance where the party is unable to attend, their representative should advise all parties of this before the mediation. At times, due to geography or other circumstances, a party or person whose authority is needed to settle the case may be unavailable. In such cases, with the assent of all parties, they may be able to participate by telephone or video conferencing during the course of the mediation session.

What Happens at the Mediation?

JOINT SESSION. At the start of the mediation session, most mediators bring all the parties, their counsel and/or representatives together in a large conference room for a joint session. The mediator generally will describe the process he intends to follow, and should emphasize his impartiality and that all communications made at the mediation are confidential. The parties, or their attorneys or authorized representatives, are given an opportunity, in an uninterrupted manner, to explain the facts and key issues in the case from their standpoint and also may state where the parties are in terms of any settlement discussion that may have taken place before the mediation. At times it may be advisable however, to reserve settlement discussions until in private caucus with the mediator, and a skillful mediator may in some cases encourage the parties to do so.

PRIVATE CAUCUSES. Often after a joint session, the mediator will have private caucuses (meetings) with each party to explore their position and flexibility for settlement. These private caucuses are also confidential, and as such, the parties may find it easier or more appropriate to discuss certain issues and/or their willingness to show flexibility in these private sessions. These private discussions should be kept in confidence by the mediator, and only those proposals that a party specifically authorizes a mediator to share with the opposing party should be divulged by the mediator. Parties to a mediation should insist that the mediator pledge that these discussions in private caucus will remain confidential. This confidential information is critical to the mediator since with this information in his mind he can begin to focus in on the true needs of the parties and possible terms or proposals for settlement.

TOOLS OF THE MEDIATOR. Mediators are trained to deal with many issues likely to arise at a mediation, including intense emotions, lack of trust, and communication

failures. A skilled mediator, particularly in private sessions, is likely to discuss with each party in the realities and alternatives facing them, for example, if they decide to go to trial, what the chances are of a verdict in their favor, what is a likely award, how long it would take to get to trial, and how much it would cost financially and emotionally to go through trial. Mediators may wish to focus the party on what weaknesses they may have in their case. Some parties are resistant to hearing such messages, even from their attorneys, and may have overly optimistic assessments of what a trial may result in should they decide not to accept settlement. The mediator can be effective, as an impartial and experienced neutral, in dealing with such unwarranted optimism.

Many skilled mediators will avoid indicating their opinion about the merits or value of the case, particularly early on in the mediation session, which distinguishes a mediation from a case evaluation or arbitration. Rather, mediators are experts in the *process* of settling the dispute. However, a good mediator will often make suggestions to the parties and, as the session proceeds, may raise settlement suggestions, most often in private caucuses, i.e., "What would your response be *if* the defendant expressed willingness to pay $5,000.00 and dismiss their counterclaim?"

CONFIDENTIALITY. The parties should be sure that the written mediation agreement contains a confidentiality clause, wherein the parties and the mediator agree that any communication made during the course of the mediation relating to the subject matter being mediated shall be a confidential communication and not be subject to disclosure in any subsequent judicial or administrative proceeding. This is to assure that if the case does not settle, their statements, offers, demands or other negotiations are not disclosed to a judge, jury, or arbitrator.

The Massachusetts Confidentiality Statute, M.G.L. ch. 233, s. 23C provides that documents exchanged in connection with a mediation and the substance of discussions in a mediation are not "subject to disclosure" in any judicial or administrative proceeding. However the protection of the statute only applies if the mediator has satisfied certain requirements of training and experience. Further, the statute has been little used or interpreted by the Courts, so that parties are well advised to embody their confidentiality agreement in a written mediation agreement.

SETTLEMENT OR OTHER ADR ALTERNATIVES. If settlement is reached at a mediation session, it is advisable to sign settlement agreements and/or written releases while all parties are present at the mediation. Although mediation is often referred to as "non binding", an agreement reached in a mediation is as binding and enforceable as any other agreement. Statistics show that the vast majority of cases (approximately 85% to 90%) submitted to mediation reach settlement. If settlement is not reached but progress has been made, it may be suggested that the parties return again for a second mediation. In many cases where the differences of the parties have been significantly

narrowed but settlement not reached, arbitration then is selected by the parties to reach a final resolution. The parties then may wish to take advantage of the progress made in mediation by agreeing to submit the dispute to binding high-low arbitration, setting a minimum and maximum award, for example, perhaps at or near where their negotiations reached an impasse.

Arbitration: What to Expect / Recommendations to Users

Before the Hearing:

DISCOVERY. Perhaps the most significant difference between arbitration and court proceedings is the limited discovery available in arbitrations. Indeed one of the advantages of the arbitration process is avoidance of the costs and time delays involved in open ended pretrial discovery, particularly in cases where an overzealous counsel is of the "leave no stone unturned" philosophy. Insurers and businesses are seeking ways to reduce litigation costs, scrutinizing proposed discovery tools of their counsel to assure that each step yields corresponding gains for them in either fostering a more favorable settlement or resulting in a trial advantage. What becomes important for ADR therefore is to provide a process that meets these legitimate concerns of the participants for discovery. So the question arises, how much discovery should be allowed in arbitration and what steps should participants consider to assure they have enough opportunity for discovery.

As a starting point, it is best to understand that *little to no* discovery is generally permitted once the parties submit a case to arbitration. Under the Massachusetts Uniform Arbitration Act (MUAA) an arbitrator has the authority to order document production and depositions of witnesses "*who are unavailable for the hearing or cannot be subpoenaed*". The arbitrator has wide discretion in this regard and the Courts have repeatedly declined to become involved in disputes over whether or not an arbitrator exceeded his authority in permitting or prohibiting discovery. Therefore, the issue of the extent of discovery permitted is left entirely to the determination of the arbitrator.

The diligent party therefore is well advised to either complete all necessary discovery *before* submitting a case to arbitration or to reach a **written** agreement with the opponent as to the discovery that will be permitted *before* submitting a case to arbitration. Even the right of an insurer to a "statement under oath" of an insured or one seeking recovery under the terms of an automobile insurance policy is *not* guaranteed to be allowed by certain arbitrators.

Many organizations providing ADR services have arbitration rules which will allow the arbitrator, in the event the parties are unable to agree on prehearing discovery, to

decide such matters and make discovery orders if requested by the parties. The written arbitration agreement should be carefully reviewed as to provisions relating to discovery.

INITIATION OF ARBITRATION. *When* a case is deemed submitted to arbitration differs among ADR providers. The arbitration rules should be closely examined in this regard. Some ADR providers deem that an arbitration is initiated by receipt of written submission forms signed by the parties. In cases where parties are bound by an arbitration clause in an ongoing contract, arbitration may be deemed initiated by serving a demand on the opposing party. It is important for the user to determine and be sure that the opponent has *bound* himself to arbitration however, since occasions arise when parties wish to opt out of arbitration at the last minute, and if a binding arbitration agreement is not properly signed, or already in place, the opposing party may have little recourse.

SELECTION OF ARBITRATORS, DISCLOSURE OF CONFLICTS OF INTEREST. The utmost care should be given to the selection of the arbitrator. The arbitrator is the decisive element in any arbitration. His or her ability, experience, and fairness are at the foundation of the arbitration process.

The most common method of arbitrator selection is from a panel offered by the ADR provider. The user should request biographical materials concerning each arbitrator available for selection. Inquire of co-workers, associates or references provided by the arbitrator as to the arbitrator's qualifications. If the parties cannot agree on an arbitrator, the arbitration rules of the provider often provide an alternative selection process. For example, the parties may be requested to number the proposed panelist(s) by order of preference and the ADR organization may administratively appoint the arbitrator most highly sought by both parties. If the parties cannot agree on an arbitrator, the Massachusetts Uniform Arbitration Act permits court appointment of an arbitrator upon request to the court.

Once selected, the arbitrator should disclose in writing to the parties any circumstances that would suggest a lack of impartiality, conflict of interest, or require disqualification. If, after full disclosure, a party fails to object to an arbitrator, the objection is generally deemed waived, and subsequent challenge to an arbitration award on these grounds will likely fail.

WRITTEN BRIEFS. Briefs may be submitted to the arbitrator both prior to and, at times, after the arbitration hearing. If the user wishes to submit a brief *after* the hearing, the arbitrator and the opposing party should be informed, since the arbitrator may hold his decision pending receipt of briefs, or allow the opponent a certain amount of time to file their brief. The arbitration rules should be carefully reviewed in this regard.

ADMISSIBILITY OF DOCUMENTARY EVIDENCE. Many ADR providers have arbitration rules that require a party who wishes to present documents at a hearing to produce them to the other side within a certain number of days in advance of the hearing, (i.e., 10 or 20 days). These arbitration rules should be carefully reviewed and complied with. Examples of documents that often are admissible in this fashion are medical reports, medical bills, experts reports, and affidavits of witnesses. If these documents are not produced in advance according to these rules, the arbitrator may prohibit their introduction, particularly if failure to produce them has prejudiced the other side in their ability to prepare for the hearing.

What to Expect at the Arbitration Hearing:

CONDUCT OF THE HEARING. All arbitrators do not all conduct the arbitration hearing in a similar manner. The arbitration rules should be carefully reviewed in this regard. If these rules are vague as to how the hearing will be conducted, as many are, the user should request further information from the ADR provider on the process to be used in advance of the hearing.

Arbitrations resemble trials. Usually they take place in a large private conference room. Parties can be represented by counsel or can represent themselves. Insurance claims representatives can appear on behalf of their insureds at the arbitration hearing, or they can have defense counsel appear, often depending on the value and legal complexity of the case.

STIPULATIONS. The arbitrator often starts by making introductory remarks and explains the process he or she wishes to follow during the course of the hearing. Any stipulations that can be entered into by the parties should be made *prior* to the commencement of the hearing. For example, the defendant may wish to stipulate as to liability with the only issue submitted to the arbitrator being the extent of damages. Or, the parties may be able to stipulate as to offsets that are to be taken from a gross award, such as for Personal Injury Protection benefits received by the claimant in an automobile bodily injury claim being arbitrated.

OPENING STATEMENTS. Usually both parties or their counsel or representative are given an opportunity to make a brief opening statement outlining the evidence they expect to present at the hearing.

PRESENTING THE CASE. The claimant presents his or her case first. The arbitrator is empowered to administer oaths to all witnesses and the witnesses generally testify under the direct examination or questioning of their counsel or representative first. The opposing party or his counsel or representative will have the opportunity then to cross examine each witness. At times, the arbitrator may also question the witnesses.

During the course of the claimant's case, all relevant documentary evidence may be submitted, such as, in personal injury cases, medical bills, medical records, lost wage information, and in certain instances, expert's reports or affidavits. Expert witnesses, such as doctors or engineers, may testify in person at the arbitration. As stated above, the arbitration rules must be reviewed carefully concerning admissibility of testamentary and documentary evidence so as to comply with all notice requirements well in advance of the hearing.

After the claimant submits his case, the respondent has the opportunity to present witnesses and submit documents in support of his case. The claimant, or his counsel or representative, shall also have the right to cross examine any witness presented by the respondent.

EVIDENTIARY OBJECTIONS. The user should make any objections they deem warranted to evidence that their opponent seeks to admit. The arbitrator shall rule on each objection. Although the rules of evidence are generally more relaxed at an arbitration hearing, objections have value in that they may alert the arbitrator to possible deficiencies in the opponent's evidence.

CLOSING STATEMENTS. After all of the evidence has been submitted by both parties, each party is generally allowed to make closing statements outlining their positions as to liability and damages, with the respondent going first and the claimant last.

FORM OF AWARD. Under the Massachusetts Uniform Arbitration Act, and under the terms of most written arbitration agreements, an arbitration award must be in writing and signed by the arbitrator(s). Some arbitration awards may be sparse and not contain detailed findings of fact or rulings of law, but simply state the result, such as the amount of damages to be paid by one party to the other, i.e., "The defendant shall pay the claimant the amount of $5,000.00". Most arbitration awards however do contain the arbitrator's reasoning in reaching their decision. The parties are nevertheless advised to clarify in advance with the arbitrator the type and form of award that they require and can be expected. Some disputes are such that the parties require such a reasoned award with specific findings. The parties should clarify in advance issues such as offsets from any award, i.e., for Personal Injury Protection benefits paid, findings of comparative negligence, etc., so that the written award that is rendered makes clear the precise net amounts that may be awarded, without need for further clarification.

PUNITIVE DAMAGES. Generally, punitive damages are not available under Massachusetts law unless authorized by a specific statute, however, an award of punitive damages by an arbitrator is not without precedent, though rare. Parties should *clearly* determine and ideally agree in the written agreement whether punitive damages

are an element to be submitted to the arbitrator. Multiple damages under M.G.L. 93A and 176D *can* be awarded by arbitrators unless the parties agree to the contrary.

ATTORNEYS FEES. In most cases, an arbitrator may not award attorney's fees unless authorized to do so by statute or by the parties arbitration agreement. Attorneys fees are expressly excluded from the relief available under the Massachusetts Uniform Arbitration Act, but, like punitive and multiple damages, these issues should ideally be discussed and agreed to by the parties *in writing* prior to submission to arbitration.

INTEREST. Pre-award interest is generally not available in arbitrations under Massachusetts law, unless the parties provide otherwise in their agreement. Interest is available, however, from the date of the award. Pre-judgment interest often plays a significant role in older cases submitted to *litigation*, since the Massachusetts statute presently calls for pre-judgment interest in tort cases of 12% from the date suit is initiated. Should such an older case be submitted to *arbitration*, the parties should clearly indicate in the written arbitration agreement whether the arbitrator is authorized to award interest.

MOTION TO VACATE OR REVIEW ARBITRATION AWARD. Challenges to arbitration awards are rare because the grounds for appeal are so narrow. The grounds for vacating an award under the Massachusetts Uniform Arbitration Act (MUAA) are limited to: 1.Corruption, fraud, or undue means, 2. Evident partiality of the arbitrators or misconduct prejudicing the rights of any party, 3. Arbitrators acted in excess of their power, 4. Arbitrators refused to postpone the hearing, upon good cause being shown, refused to hear evidence material to the controversy, or engaged in other misconduct at the hearing, which prejudiced the parties' rights, and 5. The absence of a written arbitration agreement, as long as the party seeking to vacate the award did not participate in the arbitration hearing without raising an objection.

The most common but *least successful* ground for challenging an arbitration award is that the arbitrator erred with respect to the facts or the law. The Massachusetts Supreme Judicial Court has stated however that, "if an arbitrator has committed an error or law or fact in arriving at his decision, a court will not upset the finding unless there is fraud involved. Even a grossly erroneous decision is binding in the absence of fraud."

ARBITRATOR IMMUNITY. Arbitrators enjoy the same immunity from civil liability as judges. This immunity extends to the organizations that administer the arbitrations. Arbitral immunity includes immunity from testifying about the reasons for the award or any other aspect of the arbitration.

CONCLUSION: We at MDRS hope that this guide assists you in understanding the processes of ADR and we encourage you to consider using mediation or arbitration rather than trial in the court system to resolve your disputes promptly, economically and fairly.

Please contact us should you have any questions that we can answer about our ADR services.