

From the desk of

John A. Crane

Resolving Disputes Outside of the Courthouse

It is said that we live in a highly litigious society. Many folks live in fear of being sued. They hear anecdotal horror stories about juries gone wild and suffer nightmares of bankruptcy and professional shame. Some may prefer the old west method of dispute resolution where you met the hombre face-to-face with a gun on your hip rather than watching savings dwindle as lawyers bill by the hour.

It is a fact that participation in any court proceeding can be very expensive if it requires representation by a lawyer. Clients used to watching court cases on TV conclude in less than 60 minutes are shocked at the time and the effort it requires to properly prepare a case for trial. Only in certain cases can you recover your attorney's fees and even then the judge may not award all that you have spent. Consequently, there has been increasing acceptance in recent years of alternative methods of dispute resolution.

Mediation. Mediation is probably the most common method employed. In fact, if you have a Travis County trial setting that is supposed to last more than a half-day, you are *required* to mediate the matter before trial. In my experience, even if the case did not settle, we often were able to narrow the issues in dispute and pave the way for a future settlement.

In a mediation, a trained mediator is hired to conduct a day of settlement discussions between the warring parties. Usually it begins with an opening meeting of everyone involved. Everyone sits around a conference table, glaring at one another, and listens while the mediator explains the purpose and rules of the mediation. Then each person, lawyer and client alike, has a chance to offer his or her own comments. Sometimes all a litigant needs is the chance to speak their mind and afterward they are in a much better mood to compromise. (Of course, there are times where the *last* thing I want my client to do is speak his mind because a brawl may break out.)

After the opening session, the parties and their counsel go to separate rooms and the mediator shuttles back and forth. A mediator's role is not to decide who is right or wrong, but a good mediator will play an active and strong role in exploring the risks each party faces by continuing the fight. (I don't like mediators who do little more than carry messages back and forth between sides.) Many mediators will say the best deal is one that makes nobody happy.

Arbitration. Arbitration is more like a court battle, but with a supposedly expedited and streamlined process. An arbitrator (sometimes a panel of multiple arbitrators) actually hears the case and renders a decision. Typically the parties agree to be bound by that decision and give up any right to appeal. In other words, if that arbitrator comes up with a decision that you consider to be absolutely idiotic, that's tough. You live with it.

Many businesses consider arbitration a more cost-effective approach. Others tout the fact that arbitrators can be chosen who have specialized expertise in the area of dispute. Bear in mind, however, that even in arbitrations the parties must often endure depositions, subpoenas, document production, and a variety of other procedures that cost money. In those cases, participants may find that they have traded away their appeal rights for very little cost savings. If the case lends itself well to a fast-track approach, however, I have seen good results obtained at a substantial savings to all involved.

Collaborative Law. A relatively new procedure on the scene is the "collaborative" approach to resolving disputes. I have no direct experience with it and it has really only taken root in divorce cases, but the approach may have good application to other types of disputes. In a collaborative divorce, the parties may still be represented by counsel and may take initially adverse positions, but they sign a detailed agreement setting forth a procedure requiring them to share relevant information while they work in good faith toward a reasonable solution. If things cannot be resolved, they are free to resort to the usual court battle but will have to hire new counsel to represent them.

From what I understand, the goal of the collaborative approach is to lessen the risk that emotional issues will escalate the battle. The agreement signed by the parties provides a detailed process to be followed in an effort to reach a reasonable result without the adversarial dynamics. This approach may also work well for family members engaged in a potentially emotional probate dispute.

The Crane Solution. Personally, my favorite method of dispute resolution would be for everyone to simply agree that I am right and they are wrong. I have seen firsthand how well it works for my wife. If I ever have any success with it, I will let you know.