

ARBITRATION OR MEDIATION: BEATS GOING TO COURT

By: Arlen Specter

With filibusters and gridlock in the U.S. Senate's confirmation process, there are many vacancies in the federal courts in Pennsylvania. In the Harrisburg District alone, half of the judgeships are open even though Senator Casey and I made recommendations to the President almost a year ago to fill those seats as well as vacancies in the Philadelphia and Pittsburgh Districts.

As our society has become more litigious, big backlogs of cases have resulted in long delays before parties get their day in court. The problem gets worse with fewer judges. Justice delayed is justice denied. De Tucqueville was correct when he said 150 years ago that almost every controversy in the United States seems to wind up in court.

A partial answer may be found in what is called alternative dispute resolution, such as arbitration or mediation. In arbitration the parties agree to submit their dispute to a person called the arbitrator who functions like a judge and issues a binding decision. In mediation, the parties select a person called a mediator who then seeks to bring the parties together and succeeds only when they voluntarily agree to a deal.

In arbitration, there is a trade-off giving up formalized rules of evidence and the right to appeal for simplicity where the parties can agree to procedures tailored to their unique situation. More importantly, the parties can agree on the arbitrator in whom they have confidence without getting whomever the court system assigns.

Mediation has the advantage of not being adversarial, so the mediator can meet with each side ex parte or individually to find out the parties' real "bottom line". Parties are understandably not willing to make concessions to the other side for concerns of weakening their bargaining position. But confidential disclosures can enable the mediator to find an acceptable compromise. Also, mediation can avoid contentious confrontations where the parties can benefit by preserving a future cordial relationship.

In addition to speed, these procedures can save litigants money. The costs of litigation have soared. Lawyers' hourly rates commonly run in the hundreds of dollars per hour. Expenses are high for pretrial motions, depositions, and interrogatories. To catch up on the changing legal world in the three decades since I was in the Senate, I went back to law school to study how to be an arbitrator and a mediator. I found these approaches very effective in getting to the heart of disputes and resolving them without the formalities and expenses of trying cases in court.

My interests in alternative dispute resolution goes back to my days as Philadelphia's District Attorney when I started a pretrial diversion program to remove about 7,500 cases a year from the criminal docket. A first offender on non-violent charges would have the record expunged if the person stayed out of trouble for one year. If not, that person would go to criminal court on both charges. That program became ARD and is now a national model.

Harvard Law Professor Lawrence Tribe made an astute observation about going to court when he said: "the results do not justify the costs: too much law, too little justice, too many rules, too few results." Arbitration and mediation offer a smart way out.