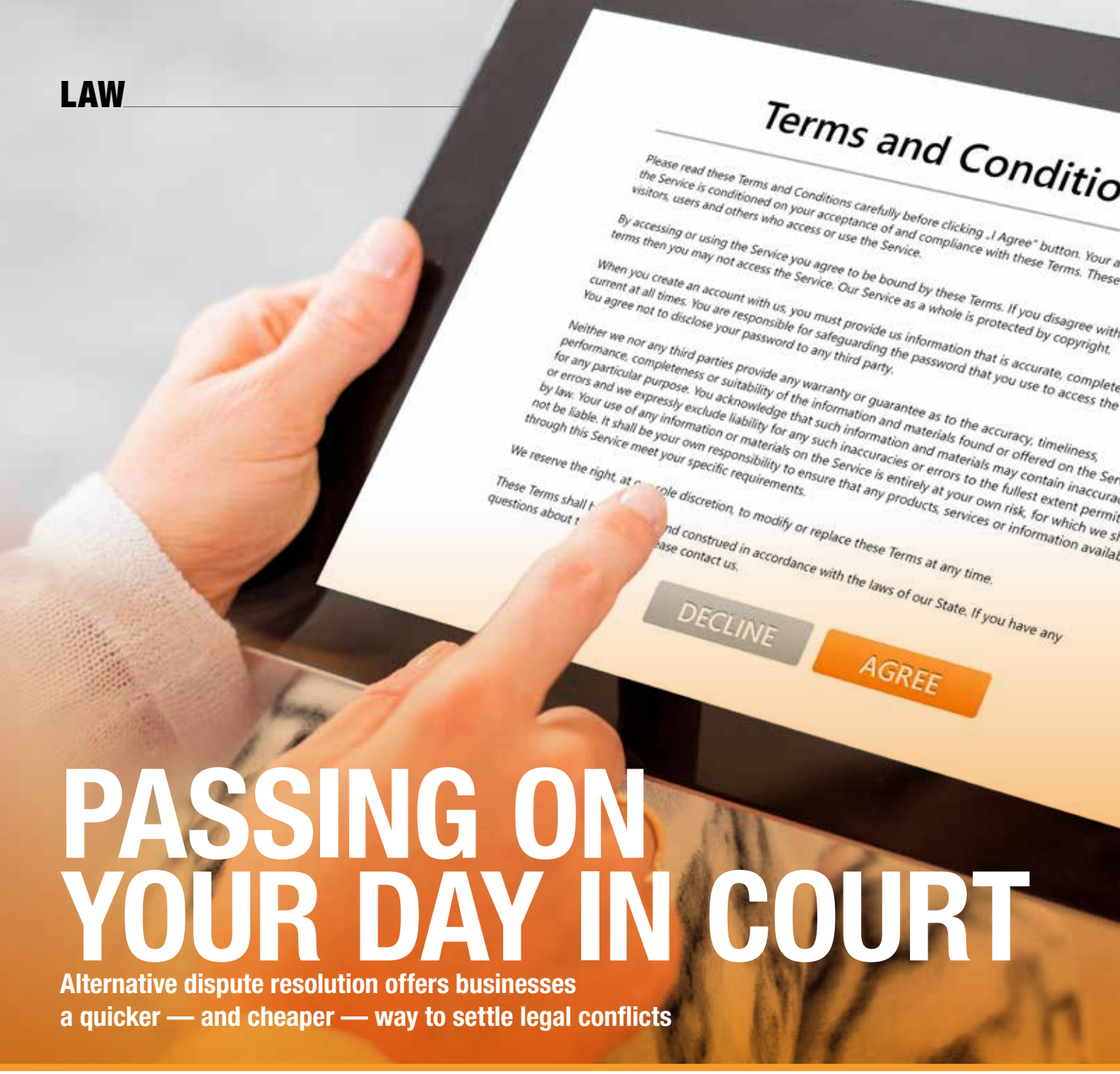


PASSING ON YOUR DAY IN COURT

Alternative dispute resolution offers businesses a quicker — and cheaper — way to settle legal conflicts

By KYLE BACKER

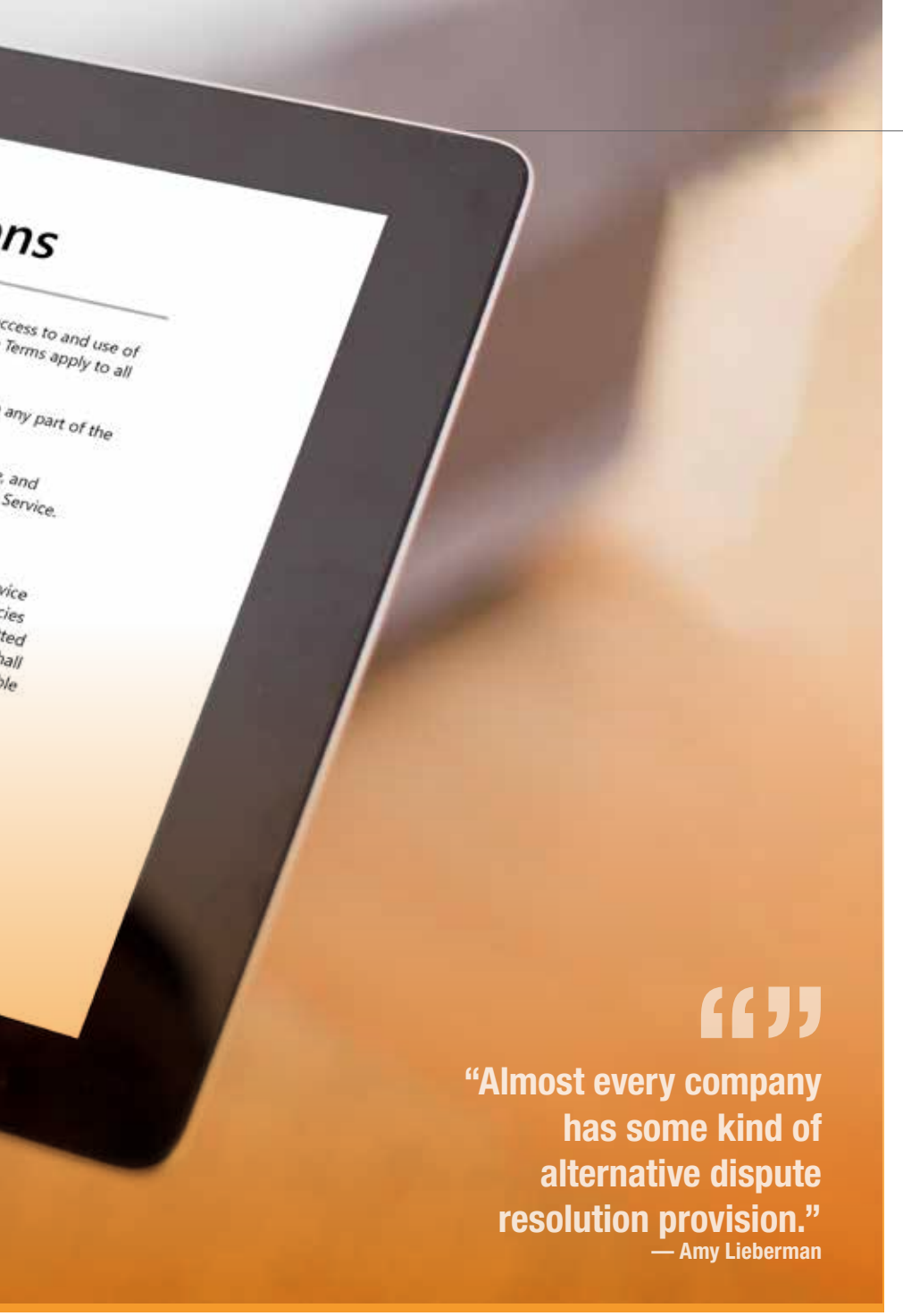
When people see the words "Terms of Service" on a computer screen, most tend to scroll down as quickly as possible so they can check the "I agree" box and move on. A common item included in the fine print is an agreement to engage in some form of alternate dispute resolution (ADR) — typically arbitration or mediation — rather than take the issue to court.

For example, the terms of service for vacation rental platform Airbnb — which can be accessed from its website — includes a requirement for users in the U.S. to agree that any disputes will be settled by binding individual arbitration.

"Almost every company has some kind of alternative dispute resolution provision," explains Amy Lieberman, executive director of Insight Employment Mediation. "If you're a business of any size, and have lawyers representing you in a deal, they're probably going to put an arbitration provision in the contract. Whether or not they have the foresight to put a mediation provision in there — which happens much more than it used to — most people are mediating anyway, even if it isn't required."

The two major reasons more companies are utilizing ADR in their business practices are closely related, according to David Tierney, shareholder at Sack Tierney.

"People often ask, 'Why should we use alternative dispute resolution as opposed to going to the courthouse?'" he says. "The first is that it's usually much quicker. These days, it's about 27 months



> **"Almost every company has some kind of alternative dispute resolution provision."**
> **— Amy Lieberman**

in Arizona's Maricopa County Superior Court system from filing until you get a hearing in front of a judge. It used to be a year, but our courts are really choked for a lot of reasons. Number two, it will likely be cheaper."

Utilizing ADR to resolve disputes has proven to save businesses big and small some of their most precious resources — time and money.

The escalation ladder

Since ADR comprises multiple resolution mechanisms, breaking down its constituent parts is warranted. A useful model in delineating different ADR methods is to think of an escalation ladder. The top of the ladder — meaning the highest level of escalation — is to take the matter to court. It also happens to be the alternative ADR seeks to provide.

The lowest rung of the ladder is negotiation.

"Lots of contracts include provisions that state if there's a dispute between the parties, then representatives of the parties will make good faith efforts to negotiate a resolution of that dispute," says Robert Roos, partner at Lewis Roca.

During negotiations, the opposing sides try to settle the issue without bringing in a third party. It's as simple as it sounds and comes with benefits for everyone involved.

"It's quick and the parties remain completely in control," Roos notes. "You don't have the cost of a third party or a lawyer, so all those expenses, whatever the time costs are, can be factored into whatever concessions are made."

An impartial intermediary

One step up on the escalation ladder is to engage in mediation. This stage brings in a third party to help facilitate the negotiation, but they do not hand down a decision that the disputants are required to abide by. Adam Lang, partner at Snell & Wilmer, describes mediation as "shuttle diplomacy." "[The mediator] is the adult in the room going back and forth trying to come up with a resolution that works for both sides," he says.

Ed Fleming, shareholder with Burch & Cracchiolo, notes that he started to see an uptick in pretrial mediation around 30 years ago. Sometimes this process is referred to as a settlement conference, depending on how the mediator is selected.

"A lot of the courts have judicial personnel — somebody who's not overseeing the case — who are willing to act as a settlement judge, or, in the case of private mediation, there's a whole host of different individuals who act as mediators," Fleming says.

As a private meditator, Lieberman notes that, in her experience, upwards of 90% of issues are resolved in mediation. This isn't, however, because the disagreements are mundane.

"You go to mediation because you think the other side is not being reasonable, and you need some help getting them to have realistic expectations," she says. "In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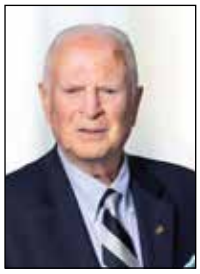
DAVID TIERNEY

my practice, 5% to 10% of cases don't resolve in mediation. If the parties have an agreement to arbitrate, then they'll go through arbitration if mediation fails."

Designated decisionmaker

Arbitration is yet another rung up the escalation ladder. This final alternative to litigation is similar to mediation in that a third party is involved, but the role of that individual is much different. Whereas a mediator attempts to broker an agreement, an arbitrator — or panel of arbitrators if the case is sufficiently complex — makes a binding decision. Unless there is misconduct involved on behalf of the arbitrator, there is no mechanism to appeal an award judgment once issued.

"You can't get that finality in the courthouse," Tierney notes. "It takes years to get through both the trial and appeals. It could take five years for courthouse litigation. It's not often the arbitration lasts more than nine months."

Moreover, arbitration tends to have more of a courtroom feel to it than mediation with rules governing proceedings. The Federal Arbitration Act was passed in 1926, something that Tierney describes as antiquated.

In 1965, the more versatile Uniform Arbitration Act became law in the Grand Canyon State, but Tierney points out that the Arizona Bar Association began a nine-year campaign in 2001 to convince the legislature to adopt the even-more robust Revised Uniform Arbitration Act. It's important to note that if an arbitration agreement doesn't specifically reference the Revised Uniform Arbitration Act, the default is to use the Federal Arbitration Act.

"It is a much longer and more complex statute," he says. "The Revised Uniform Arbitration Act adds all kinds of bells and whistles that the federal law and the old state law don't have. It allows for possibility of motion practice — which didn't exist in the old law — such as summary judgment motions or motions about discovery, enforcement of the award, subpoenas that can be enforced outside the state of Arizona — there are a million new good things rolled up in this Revised Uniform Arbitration Act."

How an arbitrator is chosen is typically laid out in a contract that the disputants have signed, Lang explains.

"Let's say you had some sort of a purchase agreement to buy a company. If there's a dispute resolution clause, it would say something like, 'In the event of a breach, default or dispute, the parties agree to go to the [American Arbitration Association] to arbitrate this case,'" he says. "Sometimes it'll say which forum to use, or it could just say an arbitrator will be appointed that everyone agrees upon."

One of the distinct advantages of arbitration of litigation is that an expert can be chosen who has more insight into a particular issue. Sometimes a judge or jury might have an elementary understanding of the matters they are making a decision about.

"I tried a case about 15 years ago," Roos recalls, "where the judge said, 'When you're asking questions of your witnesses, assume that my construction knowledge is limited to taking a hammer and pounding in a nail.' That's pretty common."

Another reason to consider arbitration is the privacy afforded to both parties.

"If you're in the courthouse, everything is transcribed and written down," Tierney explains. "Anybody can look into the public records and know that you're in litigation, who you're litigating with and can easily see the complaint. Exhibits may have important secrets for your business, so you really don't want to let that happen. Arbitration is much more private, exclusive and hidden from public view."

An ounce of prevention

For a business to reap the benefits of ADR, foresight is required.

"It's important that businesses consult with their lawyers and make sure that their agreements have appropriate provisions to address these issues before a problem arises," Roos suggests. "If the parties to the dispute had a contract, the contract is almost certainly going to control how a dispute is resolved. And it's much easier to reach an agreement with someone about how a dispute is going to be resolved before you're in the middle of the dispute."

Sometimes these contracts are structured in a way that moves up the escalation ladder rung by rung to avoid spending more time and money resolving an issue than necessary. Arbitration is quicker than litigation, but it still takes months to complete. Mediation can fix the problem in a single eight-hour session, though the parties might still have to bear the cost of hiring a private mediator. Sometime a good faith effort to negotiate between both sides can be the best course of action.

Disputants can also agree to take a step back down the escalation ladder.

"You can always be in the middle of the arbitration process and then choose to mediate later," Lieberman explains. "For that matter, you can go to court and be in the middle of a lawsuit and decide to mediate. You can decide to mediate anytime you want to."

Another option is also available for folks to step off the escalation ladder completely.

"There are many critical points in a case where settlement makes sense. Maybe before we file a lawsuit it'd be a good idea to have conversations with the opposing counsel for informal settlement discussions," Lang says. "You could settle before an arbitrator rules. Sometimes you could settle it after the arbitrator rules, because there still needs to be a confirmation of the arbitration award. There really is no timeline by which you have to settle a case."

Disputes will inevitably arise in any business. Tierney, who has practiced law in state and federal courts for 53 years, warns that allowing oneself to get wrapped up in courthouse litigation is a costly affair.

"The most important thing that a business person can do is deal with his lawyer and work out an enforceable ADR clause that calls for negotiation first, mediation next and then arbitration, so as to save the vast expense of going into the courthouse," he concludes. "You shouldn't write such a clause yourself; you really need a lawyer to help you. That's the bottom line here." AB

TOP 10 MEDIATION AND ARBITRATION LAW FIRMS FOR 2022

Here are the Top 10 alternative dispute resolution, mediation and arbitration law firms in Arizona, based on public voting for the 2022 edition of Ranking Arizona, the state's biggest and most comprehensive business opinion poll.

1. Sacks Tierney
2. Gust Rosenfeld
3. Snell & Wilmer
4. Jennings, Strouss & Salmon
5. Fennemore
6. Warner Angle Hallam Jackson & Formanek
7. Buchalter
8. Insight Mediation
9. Lewis Roca
10. May, Potenza, Baran & Gillespie