

Save Time, Money, and Aggravation with Alternate Dispute Resolution

• by Gregory P. Hawkins and Claude T. Hawkins •

Once upon a time, conflict resolution meant swords and armor, but those days are long past. Today, litigation masquerades as the more civilized version of trial by combat. But blood is still shed, in the form of time, money, and aggravation.

When factoring the costs of running a business, no one can dismiss the possibility that he or she may end up in civil court, either as a plaintiff or a defendant. With the world growing more complex each year, such a possibility edges ever closer to a probability, while the chances for an outright victory decrease. In most cases, the financial burden for mounting an attack or a defense must be shouldered up front.

Alternate Dispute Resolution (ADR) is an alternative to litigation that is less costly, less time consuming, and frequently less adversarial. Although ADR is becoming more common, especially among larger corporations, many small businesses are inexperienced with this growing phenomena. ADR has demonstrated an astounding track record in recent years, both for quick resolutions and relatively bloodless ones. Many times, the combatants not only resolve their differences but also—because many ADR methods soften the acid-producing hostility of

traditional litigation—continue a productive business relationship.

Historical precedent

The timeliness of ADR on the legal scene is unquestionable. Although the layman often views the legal system as monolithic, it is actually experiencing a constant evolution. On more than one occasion, the American judicial system has undergone a fundamental change.

By the middle of the nineteenth century, U.S. court procedures had become so unwieldy that a general outcry arose among all parties involved—litigants, lawyers, and judges. In 1848, New York became the first state to completely rewrite its procedures for trying civil lawsuits in its state courts.

Fifty years later, great legal thinkers like Roscoe Pound again called for reform. In 1906, he wrote, "Uncertainty, delay and expense, and above all the injustice of deciding cases upon points of practice, which are the mere etiquette of justice...have created a deep-seated desire to keep out of court, right or wrong, on the part of every sensible business man in the community." In 1938, Pound's successors succeeded in revolutionizing the system with the adoption of the Federal Rules of Civil Procedure.

With the exception that today a "sensible business man" could very likely be a woman, those sentiments echo the feelings of the modern businessperson. Even the highest levels of government are aware

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of the problem. In 1982, U.S. Supreme Court Chief Justice Warren Burger expressed the thought that many of the "conditions that caused the dissatisfaction in 1906 are still with us...The delays and high costs in resolving civil disputes continue to frighten away potential litigants, and those who persist and ultimately gain a verdict often see up to half of the recovery absorbed by legal fees and expenses."

Mediation

Of all the ADR options, mediation is usually the least complicated and least expensive.

The basic form of mediation pre-dates written history. Essentially, the involved parties agree to sit down and informally present their arguments to a neutral third party, often someone with legal and technical expertise in the field. The mediator functions as a facilitator and, if need be, a referee. Unless all sides reach an agreement, the suggestions and judgments of the mediator are non-binding.

Can anything so simple actually work? Mediation firms agree that a successful resolution can be reached about 85 percent of the time. Additionally, mediated settlements which result in a binding contract, are seldom broken, but if they are, they can be enforced like any other contract.

A closer examination reveals some logical explanations for this success. Businesses are familiar with the give-and-take of negotiation. They also want to be part of the decision-making process, instead of having decisions imposed by decree.

The support for a successfully mediated dispute is the mediator. An experienced mediator will have the ability to sense when the parties are ready to compromise, suggesting alternatives and moving the proceedings toward a mutually satisfying conclusion. Many



mediated sessions end in a win-win situation, often keeping a business relationship intact.

Mediation is also fast (generally concluded in one day) and private. Lawsuits can give a business the stigma that something has gone wrong. They can make clients, suppliers, and employees nervous and can possibly give competitors an edge. Unlike the public forum of court, mediation is a closed-session procedure.

With the cooperation of all sides, mediation can be appropriate for practically any civil dispute, big or small, including personal-injury cases, real-estate or landlord/tenant disagreements, partnership and commercial contract conflicts, employment disputes, and a multitude of others.

Arbitration

Despite mediation's high success rate, the limiting factor remains the willingness of opposing parties to consider the process. When former allies become adversaries, anger, frustration, and a sense of betrayal can overpower the desire for a practical resolution.

Litigation tends to calcify the negative emotion, reducing the potential for constructive resolution and pushing the possibility of future business relations out the back door. Although nearly 90 percent of civil lawsuits are settled before trial, by then, the damage may be done, and a great deal of time and money wasted.

Arbitration follows the same course as mediation; the parties

submit their dispute to a neutral third party (or parties, depending on the complexity of the disagreement). Unlike mediation, the arbitrator's judgments are normally final, and only

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under unusual circumstances can the decision be appealed, either to the court system or another arbitrator. Non-binding arbitration is also an option.

Arbitration works most efficiently when the dispute is one of fact: one party stepped beyond the boundaries of the contract, defaulted on a promised action, or broke a law. New questions of law are best left to the procedural and evidentiary safeguards of litigation.

Many corporations now include arbitration clauses in contracts as a matter of course. Smaller businesses are beginning to follow their lead. Including an arbitration clause in a contract can be relatively simple; conversely, in a complicated negotiation, such clauses can become cumbersome.

Because arbitration agreements are contractual in nature, the parties have broad power to specify all issues, terms, and conditions. They may even decide to exclude certain issues from arbitration. While state and federal statutes provide basic procedural guidelines for conducting arbitrations, the contract can delineate a multitude of specific provisions: how to notify each other of a dispute, where to hold the evidentiary hearings, selection of the arbitrator (the United States Arbitration Act calls for a single arbitrator but a panel of three is not uncommon), the arbitrator's qualifications, the extent of the arbitrator's power to decide and bind the parties to the decision, how cost will be apportioned, what jurisdiction's law will be applied, what appellate opportunities will be available (if any), etc.

For simple contracts, a general-purpose arbitration clause may provide adequate protection. If the intent of a contract clause is primarily to avoid lengthy and debilitating litigation a statement like, "Any disputes between the parties shall be settled by arbitration," may suffice. This language can be adequate to indicate that the parties intend to arbitrate differences and is usually sufficient to permit a court to enforce the intent.

Look before you leap

There is a trade-off for the speed, reduced costs, and efficiency of binding arbitration: you may lose the opportunity for

a complete judicial review of grievances.

With arbitration, the safeguards and protection provided by the judicial rules of procedure and rules of evidence are greatly reduced. These rules were developed to ensure that both sides receive a fair hearing and that justice is served. The best jurists and thinkers in this country have carefully developed these procedural and evidentiary safeguards through argument and deliberation for hundreds of years.

With this in mind, no one should assume that mediation, arbitration, or any of the presently evolving ways to resolve contractual disputes are magic beans. There are certainly cases when litigation represents the best alternative. Additionally, the different types of ADR are not always interchangeable with one another. Careful thought and the advice of experienced counsel should be exercised before any final decision. Still, few would disagree that ADR techniques are here to stay and can offer viable and often quicker, less expensive, and more gentle options to traditional methods. ●

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