

# ADR Options

## *An Infinite Spectrum of Processes*

There is a spectrum of dispute resolution processes, ranging from informal discussion to formal adjudication. The concept behind the development of alternative dispute resolution, or "ADR," is that the traditional adjudicatory model of dispute resolution is not always the best approach. Rather, the concept has developed that "the forum should fit the fuss," and not vice versa.

With time, ADR has come to have a new meaning, "appropriate dispute resolution." In light of the rapid growth of collaborative negotiation, mediation and other settlement processes, there is, in fact, nothing alternative at all about ADR today. We are finding collaborative negotiation and mediation processes adopted with increasing frequency in legal, governmental, business and family matters.

There are no limits to the types of dispute resolution processes that can be utilized. When it comes to settlement processing, "anything goes," both in terms of the process of reaching resolution and content of any resolution. The only key is that the parties (and assisting professionals) understand and agree to the same process. This concept of "informed consent to the process" permeates the ADR movement. Also common to the ADR processes is the concept of creating a settlement event, some shared experience that increases the likelihood of resolution. All ADR processes have the following effects:

- they motivate the parties and any representatives to fasten their attention the case and prepare for resolution;
- the parties have "their day in court," a "hearing" in which they have the opportunity to present their perspectives on the situation and their sense of a "fair" resolution;
- often for the first time, the parties have the opportunity to experience a capable presentation of the other side's case; and
- the parties have a window of opportunity to identify common interests and points of agreement, and the opportunity to fashion mutually acceptable settlement options to disputed issues.

The ADR processes differ in their formality and placement of decision-making power. If the process is mediation, the decision-making power will reside at all times with the parties. In adjudication and arbitration, the decision-making power lies with the third-party neutral.

## **The ADR Processes**

### **Adjudicatory**

**Adjudication** - the competitive presentation of evidence to a judge that results in an order, judgment or decree (win/lose decision). The decision-maker is selected by the community and rules according to community legal standards. There are formal rules of procedure and evidence. The judge's decision is appealable.

**Arbitration** - the competitive presentation of evidence to a decision-maker selected by the parties for an award (win/lose decision). The arbitrator is typically selected based upon the arbitrator's substantive expertise. The arbitration is held according to procedural and evidentiary rules the parties agree upon. Arbitration decisions typically cannot be appealed, except in situations of undue influence, bias, duress, etc.

**Court Annexed Arbitration** - Court-annexed arbitration is not true arbitration as parties have right to trial de novo (a trial as if no arbitration took place). Court-annexed arbitration is really a negotiation process, intended to promote settlement for designated classes of cases, such as property claims under \$25,000. There are often financial sanctions for proceeding to trial, if a party does not improve their position relative to the non-binding arbitration award.

**Private Tribunals (Rent a Judge)** - By statute in most states, parties can appoint any person as their judge, with full judicial powers. The private tribunal's decision is entitled to entry as a judgment and may be appealed.

### **Consensual Processes**

**Ombudsperson** - An official appointed by and paid for by an institution, who investigates problems, seeks to prevent conflict and assists to resolve disputes. The ombudsperson is not a true mediator due to the institutional affiliation which, to some extent, compromises his or her impartiality and neutrality.

**Fact-finding** - An agreed-upon neutral finds facts as an assist to some other processes - negotiation, mediation or adjudication. Fact-finding is often used in the labor management context. The fact-finder may make findings public, with the parties' consent, to increase pressure for settlement. Alternatively, the fact-finders' recommendations may, by the parties' agreement, be confidential and non-admissible in any subsequent contested hearing.

**Negotiation** - Communications for an agreement directly between the parties or through their representatives, intended to reach agreement for the future (transactional negotiation) or to resolve a past dispute (dispute negotiation). In negotiation, the desired objective is an agreement, which is typically, but not always, enforceable under law.

**Mediation** - Facilitated communications for agreement, resolving a past dispute and/or creating agreement for the future, with the assistance of an impartial facilitator. Decision-making power always resides with the participants in mediation. The desired result in mediation is agreement, sometimes, but not always, enforceable under law. Distinguish between voluntary mediation, mandatory mediation and muscle mediation (or med-rec). Also distinguish between early neutral evaluation and interest-based mediation.

**Conciliation** - Conciliation typically consists of independent communications with parties in their separate contexts (their home or work environment), either to improve relations or pave the way for some other process, e.g., mediation.

### **Mixed Processes**

**Med-Rec** - Mediation-Recommendation begins as mediation, but, if the parties do not come to agreement, the mediator makes a recommendation to the court or other decision-maker as to a recommended resolution.

**Med-Arb** - Mediation-Arbitration begins a mediation. If the parties fail to come to agreement, the process transforms into an arbitration with the former mediator assuming the role of decision-maker. The process may be modified so that parties may elect out of the process at the close of the mediation component, or the parties may select another arbitrator for their dispute.

**Mini-Trial** - While there are many types of abbreviated mock or mini trials, they usually include the abbreviated presentation of evidence to one or more expert neutral facilitator(s) and the presence of executives or others with decision-making authority. Following the summarized presentation of evidence and a questioning period, the decision-makers and facilitator will meet for confidential settlement discussions.

**Summary Jury Trial** - The Summary Jury Trial is another type of mock trial (really a settlement event) using one or more advisory juries. Summary jury trials usually include the abbreviated presentation of complex litigation to advisory juries who then render one or more advisory verdicts for executives with decision-making authority to consider in their settlement discussions, again typically facilitated by an expert advisor or facilitator.