



# ALTERNATIVE DISPUTE RESOLUTION (ADR) PRIMER

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## **ALTERNATIVE DISPUTE RESOLUTION**

ADR (Alternative Dispute Resolution) has progressed from an experimental movement to a revolution of remarkable success. The issue is no longer whether to use ADR but rather at what point in a case should it be utilized, and which procedure to use. ADR is meant to be utilized as an alternative to litigation, not direct negotiations. The time to use ADR, therefore, is after attempts at negotiations have failed, and prior to significant expenditures of time and money in litigation.

### **WHEN TO USE ADR**

- A. Liability is clear, but both parties cannot agree on the damages needed to settle the case.
- B. Damages have been agreed upon but the parties disagree on the distribution of liability.
- C. Parties have reached a point where it appears that significant additional time needs to be invested.
- D. Negotiations have broken down and settlement appears to be heading nowhere.
- E. Both parties wish to avoid costly discovery.
- F. Both parties want to keep the dispute private and out of the public eye.
- G. The cost of litigation could exceed the value of the case.
- H. The parties enjoy a beneficial business relationship, and even though a dispute has arisen, they do not want a lawsuit to destroy this relationship.
- I. Parties seek to maximize cost savings by focusing on cases recently placed into suit or those, which appear very likely to be filed.

## **MEDIATION**

Mediation is a voluntary, non-binding settlement procedure in which an independent Mediator attempts to assist disputing parties in reaching a settlement without incurring significant litigation costs.

### **IMPORTANT POINTS ABOUT MEDIATION**

- A. The Mediator does not render a decision or force the parties to accept a settlement. Each party must mutually agree upon an outcome for a settlement to be reached.

- B. All communications in a Mediation are confidential and the Mediator cannot be called as a witness in any subsequent litigation. Additionally, if settlement is not reached, any statements made during the proceedings are inadmissible as evidence in subsequent litigation.
- C. Any information disclosed to the Mediator by a party in private caucus will not be revealed to any other party unless permission has been given to do so.

### **PROCEDURE OF A MEDIATION**

The first part of the total time spent in a Mediation is done with all sides present. Each party will present the general outline of their case and discuss their position. After the Mediator has a general understanding for the basis of the dispute, the balance of the Mediation takes the forum of breakaway or individual caucus conferences. It is in these caucuses that the Mediator works with each of the parties to analyze their case, develop options for settlement, and break the stalemate.

### **WHY MEDIATIONS WORK**

- A. Meaningful negotiations between parties may not ever take place without the assistance of an experienced and skilled Mediator. The Mediator controls and directs the communications, which make the forum a productive environment for negotiations.
- B. Negotiations are often unsuccessful because the parties lack essential negotiation skills. Parties are sometimes interested in “posturing” rather than in resolving disputes. Often hard bargaining tactics are taken which emphasize the differences in position rather than seeking a common ground or settlement. Because a Mediator’s job is to act as a buffer and to keep both parties focused on exploring productive avenues to settlement, posturing and hard bargaining are reduced or eliminated.
- C. Mediation provides the opportunity for all parties to meet at the bargaining table for the express purpose of discussing settlement. All parties are able to focus their entire attention on resolving the dispute.
- D. During the Mediations’ opening exchanges, each party has the opportunity to educate and influence their opponents. Important issues are emphasized and facts are presented resulting in each side having a more comprehensive understanding of the opposition’s position.
- E. Mediation offers each party a “realistic” look at their own case and gives the parties an idea of what is likely to happen in court. This is particularly important if a plaintiff attorney has a difficult client and the Mediator communicates to them what to expect at trial. As it becomes clear to each party what they can expect to achieve, their position on settlement usually becomes more reasonable and flexible.

## **PRINCIPAL ADVANTAGE OF USING MEDIATION**

Mediation offers both parties incredible cost savings and quick resolution. Many times the expense of trying a case exceeds the potential award.

## **CONCLUSION**

Mediation is best considered when there is willingness for compromise on both sides. This forum works because it brings all parties to the bargaining table where they can realistically evaluate their positions and safely explore settlement options. National Arbitration and Mediation, Inc. (NAM) Mediators have been successful in obtaining settlements in over 80% of their Mediations.

## **ARBITRATION**

Arbitration is an informal hearing similar to a mini-trial. Generally, they can be concluded in less than three hours and in many cases in one hour. Parties present their case to an Arbitrator (in most cases a retired judge), who after reviewing evidence and hearing testimony renders a binding decision.

## **IMPORTANT POINTS ABOUT ARBITRATION**

- A. Arbitration is binding and final. The role of the Arbitrator presiding over a binding Arbitration is to consider evidence presented by each side and renders a decision regarding the value of the case.
- B. Arbitration is a streamlined process to settle disputes and as such does not entail comprehensive discovery. Written documentation such as IME's; depositions; medical reports; written estimates of value, damage to, cost of repair of, or loss of property; affidavits, etc. are acceptable as evidence. The goal is efficient and economical resolutions to disputes.
- C. In some Arbitration proceedings, High/Low parameters are negotiated prior to the hearing for a specific range of the award. The parties must agree to the maximum and minimum, which are written into the Arbitration contract. These High/Lows are not disclosed to the Arbitrator. If the Arbitrator's decision is within the set parameters, the award stands. If the decision exceeds the High parameter, the High dollar parameter is awarded. Conversely, if the decision falls below the Low parameter, the Low dollar parameter is awarded. This allows for a guaranteed resolution of a dispute and minimizes the risks.

## **PROCEDURE OF AN ARBITRATION**

Once parties verbally agree to arbitrate, a submission form is jointly executed. The form includes such pertinent information as names, addresses and telephone numbers of each party to the case, as well as, case file numbers where applicable. Also indicated is whether the hearing is to determine liability, damages, or both. In addition, the form notes any specific agreements between the parties. In the case of High/Low Arbitration, parameters are included. After the contracts are signed and received, all parties participate in the selection of the Arbitrator, date, time, and location of the hearing. All arbitrations are subject to NAM's Rules and Procedures.

At least ten days prior to the hearing, each party shall send to the other parties and NAM any pre-hearing papers including a list of documents to be submitted and witnesses to be presented. NAM will forward all papers to the Arbitrator. At the Arbitration, the parties have the opportunity to present their case in a manner similar to a non-jury trial in the public court system. Each side may present witnesses and exhibits and are permitted cross-examination and closing arguments. After deliberation, the Arbitrator will submit the decision to NAM within three weeks of the hearing. NAM, in turn, will forward to all parties.

## **CONCLUSION**

Arbitration is less formal than litigation, but more formal than Mediation. When the process is concluded the case is resolved. Most importantly, the time and cost savings are too significant to ignore.