

ALTERNATIVE DISPUTE RESOLUTION

Why Choose ADR?

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Over the past several years, many corporations and smaller businesses have abandoned the courts and traditional arenas of dispute resolution, to establish their own alternative systems. Normally, alternative dispute resolution (“ADR”) is accomplished through either arbitration or mediation. The primary difference between the two is that in mediation, the sole purpose is to have the parties reach a settlement, whereas in arbitration, an actual ruling or decision is made. A mediator acts as a settlement referee, and normally presents his or her conclusions on the ultimate outcome of the case only to the extent that they may advance the settlement process.

Since it is not binding on the parties, mediation is only successful if the parties can arrive at a mutually agreed result, with the mediator’s assistance. Arbitration can be required by a contract or other agreement, or can be agreed to by the parties after a dispute arises. Mediation can also be contractually required or done voluntarily. Generally, a contract sets out the basic type of arbitration or mediation by reference to a particular organization or method of alternative dispute resolution.

Arbitration can be binding or non-binding. Binding arbitration is similar to traditional litigation in that the parties present their cases and the arbitrator renders a decision on the merits. It is most useful where the parties have a legitimate dispute that both sides want to resolve quickly and efficiently. Binding arbitration is most effective when it is implemented from the beginning of the dispute, because in that situation the full advantages of reduced time and cost can be recognized. Non-binding arbitration also includes the presentation of a case, but the arbitrator’s decision is not binding on the parties and is more of a guideline to help the parties arrive at a settlement. It usually only helps in limited situations.

There are several reasons for adopting an ADR program, including: (1) speed and reduced litigation costs; (2) privacy; (3) the absence of a jury (and their sometimes emotionally-driven verdicts); (4) the “expert” status of most mediators or arbitrators, which allows them to bring their own experience to the resolution of a dispute; (5) the increased potential for settlement that results from most mediators’ or

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arbitrators' direct involvement in the process; and (6) greater informality, which allows parties to get to the heart of an issue. Particularly in mediation, the parties and the mediator have the ability to fashion remedies or results that could not be achieved through litigation or arbitration.

Another advantage to arbitration, and to a lesser degree mediation, is that the parties can develop their own ground rules. The parties can agree to specific discovery and timelines, exchanges of witness lists and exhibits, and other aspects of the arbitration. The only caveat here is that courts will view one-sided agreements with suspicion, especially those that limit or curtail parties' rights, which they might have otherwise had in traditional litigation.

Another advantage is flexibility. Since the parties are paying the arbitrator, he or she is generally more willing to accept agreements between counsel on scheduling or other related issues. Similarly, the parties typically can agree, with the mediator's assistance, on the procedures for the mediation. Alternative dispute resolution is also advantageous where one or both parties do not want to set precedent or "make law." In mediation, the parties and the mediator have the ability to fashion remedies or results that could not be achieved through litigation or arbitration.

ADR is being used more and more to avoid what is perceived as the courts' inability to efficiently resolve disputes. Since the vast majority of cases settle before trial,² it makes sense to attempt to resolve the case early, rather than on the eve of trial. Similarly, for those cases that would otherwise go to trial, binding arbitration generally can achieve a final resolution more quickly and inexpensively than the courts. In many instances the use of ADR simply makes sense, particularly in the employment area, where continuing relationships and workplace harmony are keys to productivity.

² A recent survey in Dallas County reflected that 97% of all cases never reach trial. Of these, fully 80% settle through mediation or arbitration, or some other form of ADR.