Overcoming the Pathology of Litigation: An ADR Primer for Executives

Wyatt McDowell and Lyle Sussman

The desire to seek financial or judicial redress need not automatically lead to a court of law.

The Historical Background of ADR

Alternative Dispute Resolution is an encompassing term that refers to using alternate methods—other than formal court litigation—to resolve a dispute or controversy. ADR methods commonly employed to resolve disputes include mediation, arbitration, summary jury trial, mini-trial, and moderated settlement conference.

ADR is deeply rooted in human history. One of the most notable applications of its use is reflected in the ancient, biblical story about King Solomon. The dispute involved two women who petitioned the king to resolve their child custody conflict. Both women had given birth to a child at about the same time, but one of the children was suffocated by the mother, who had inadvertently rolled onto the child during the night. Upon wakening and finding the dead child, the mother laid claim to the other child as her offspring. When confronted with the claim of each mother,
King Solomon decreed that the guards settle the dispute by cutting the child in half so that each woman could be given half. King Solomon's wisdom brought a constructive resolution to the dispute because the real mother chose to renounce her claim to the child rather than witness his murder.

Other references to ADR can be found in ancient histories, biblical texts, and other early reports throughout Anglo-American traditions. The historical applications of ADR have been endemic in the conflict resolution processes of tightly knit religious and ethnic groups: the Puritans in the 1600s, the Dutch in New Amsterdam, the Jews on Manhattan's East Side, the Scandinavians in Minnesota, and the Chinese on the West Coast.

ADR became formally institutionalized in the United States in 1922, when business leaders established a new educational organization called The Arbitration Society of America. This organization was a prime lobbying force in creating the passage of the Federal Arbitration Act of 1925, which made arbitration clauses in interstate contracts enforceable and created the framework upon which modern business arbitration agreements are structured. Through the organization's merger with the fledgling Arbitration Foundation, founded in 1924, the American Arbitration Association (AAA) was formed in 1926. Since its inception, the AAA has played a seminal role in creating the "American" style of commercial arbitration, maintaining standards for arbitration competency and training, and protecting the arbitrator immunity from liability.

In the time since ADR became institutionalized in the United States and was championed by numerous agencies, notably the American Arbitration Association, the methods for resolving conflicts and disputes have undergone a number of refinements. Out-of-court techniques have been used to resolve family controversies, warranty claims, patent disputes, building design and construction problems, organizational conflicts, massive tort actions, security/investment firm malpractice cases, and hazardous waste cleanup controversies. The dramatic role the AAA has played in facilitating ADR processes is perhaps best reflected by its impact. Of the approximately 60,000 cases administered by AAA, nearly 90 percent were settled out of court rather than through formal litigation.

Who Uses ADR And How Credible Is It?

Consumers, lawyers, clients, and the judiciary system greatly value ADR for a number of compelling reasons. As stated by the noted Harvard law professor, Lawrence Tribe, ADR is preferred over litigation because the latter entails "too much law, too little justice, too many rules, too few results." In 1976, the late Chief Justice of the United States Supreme Court, Warren E. Burger, voiced prophetic concern about the irrelevance of our formal legal system to the problems of most Americans:

We may well be on our way to a society overrun by hordes of lawyers, hungry as locusts, and brigades of judges in numbers never before contemplated. . . . We have reached the point where our system of justice—both state and federal—may literally break down before the end of the century.

Justice Burger's concerns were indeed prophetic when compared with contemporary realities. Data indicate that our state court systems handled more than 93 million cases in 1991. And the pattern does not seem to have abated.

The most extensive use of ADR has been in the labor management arena, with almost all unionized contracts having some form of binding dispute resolution, principally arbitration. ADR has also been a prominent means of dispute resolution in major league sports, particularly the resolution of individual contractual disputes, in which salary arbitration has been used. For example, ADR played a dominant role in the resolution of the polarizing major league baseball strike of 1994.

ADR is gaining additional momentum in the financial and banking world. In the case of Badie v. Bank of America (San Francisco Superior Court 1994), a California court upheld the binding contractual obligation of parties to credit card controversies to submit such matters to binding arbitration at the request of either party. ADR also attained added prominence when the American Bar Association established a Section of Dispute Resolution in 1993. The significance of this development is far-reaching in that emphasis is placed on ADR to resolve international disputes, including contractual disputes, cross-cultural negotiations, and general business and environmental disputes. The emphasis comes from a group of stakeholders (attorneys) who have a vested interest in protracted litigation.

The judicial system has also incorporated ADR. Seventeen states have adopted court-sanctioned ADR programs, which provide for the courts to refer matters to ADR rather than afford
the parties a trial in the first instance. Moreover, the federal government has also supported ADR initiatives. The Civil Justice Reform Act of 1990, the Negotiated Rulemaking Act of 1990, and the Administrative Disputes Resolution Act of 1990 target efforts to reduce the expenses and the delays associated with litigation. This last act requires all federal agencies to develop policies providing for the voluntary use of ADR.

Many major industries and businesses have reported vast expansion in the use of ADR. Brokerage and security firms have used it (primarily arbitration) for a number of years. The National Basketball Association, the National Football League, and major league baseball use only ADR to resolve individual contract matters between management and players. A number of automobile manufacturers, including foreign firms, are using ADR to resolve disputes with dealers and satisfy warranty claims with customers who allege product failures and defects.

What are the Major Advantages and Disadvantages of ADR?

McCarty and Bagby (1993) discuss the most significant and positive advantages associated with the uses of ADR versus the litigation process usually employed. These include:

- It takes "less time to resolve the dispute from the beginning of the controversy." Litigation can take upwards of two years or more to obtain resolution, whereas ADR provides for a quicker resolution with a modest window of time—on average, from six months to a year.
- There is "less cost because of attorney fees, less time away from work by corporate employees, [and] lower 'court' costs for [the prevailing party]." The cost is diminished simply because less time and fewer resources are committed to obtaining resolution by corporate employees and attorneys representing the parties.
- "Parties can select a more experienced decision-maker or facilitator rather than being randomly assigned to a judge." On the basis of a profile or knowledge of the potential decision-maker, the parties themselves decide who will preside over the matter. With litigation, the clerk of court makes a random assignment and the person selected may or may not have the essential knowledge to handle the matter properly.
- "Parties select where the dispute will be heard; they are not bound to use the court system where each party does business." The court usually has a rigid calendar that is influenced by a number of forces over which the judge may not have any control. For example, a case expected to last two weeks may go on for seven. Consequently, there is a ripple effect delaying the calendar of cases that follow.

- "The nonadversarial nature of ADR makes it easier to do business in the future with an opponent." The parties are actively involved in solving a problem and are not passive participants. Parties who are able to solve their problems without major confrontation are likely to view the experience as positive and not be reluctant to engage in contractual relationships in the future.
- "The informality of ADR methods is less formidable than are the evidentiary rules governing court procedures." ADR processes are usually not bound by the strict rules of evidence. Therefore, the ability to put all the facts on the table for exploration of settlement enhances resolution of disputes.
- "ADR is more confidential than litigation, which becomes a matter of public record." Hearings are not open to the public, and the public has no right to be present. Accordingly, the parties often restrict participation in the proceedings to those people invited to attend by the respective disputants.

The key drawbacks and disadvantages of ADR, continue McCarty and Bagby, are:

- "The longer time frame for litigation may be advantageous to one of the parties if it will have to make a payment to the other party once the dispute is resolved." For example, disputants who are without money and are likely to have the obligation of making the monetary payment to resolve a dispute would naturally defer settlement until they have the wherewithal to pay. Accordingly, passage of time naturally decreases both the cost to the defendant and the value of the plaintiff’s recovery.
- "The use of discovery in litigation allows each party to obtain valuable information from the other party." For example, when the lawsuit is filed, the other party may uncover crucial data about a company, its products, and its financial status. Many companies may find this to be invasive because such information, obtained in the legal process, is then a matter of public record.
- "The rule of law generally governs the dispute; if the law is on one party’s side, the case is more likely to be decided in that party’s favor." For example, a major league baseball player who is under contract with a specific team cannot arbitrarily elect to play for another team on his own, without being traded or his rights being sold to the other team. He is bound to the team like cattle unless traded or otherwise released by the team.
- "Only courts can establish precedent. If a party has concern about future cases as well as
the present controversy, litigation may establish the needed precedent." For example, if the language in a contract is unclear and the parties in dispute need formal clarification to direct their future conduct, the use of ADR is probably not the best vehicle for achieving the desired outcome.

- "Litigation is generally preferred if the case involves new or complex legal theories." For example, if the case involves an intellectual property issue related to CD-ROM technology, and there is no case law to provide guidance on how the settlement should be explored, this matter would be a likely candidate for establishing a legal precedent.

- "Litigation is more public and thus may be used to let other parties know that disputes will not be settled for their nuisance value." For example, when a lawsuit is initiated, it becomes a matter of public record by law. Any interested party may therefore appear at the hearings, acquire at cost a copy of all formal pleadings and motions, and actually observe most of the maneuvering of the parties toward resolution of the dispute. Consequently, litigation waives privacy. A party having to present its story, which is deemed to be meritorious, is less likely to settle, even for a considerable sum of money.

**What Are The ADR Options?**

There are eight common ways in which to use ADR. Each will be discussed in turn.

1. **Negotiation** is a process by which the disputants discuss their differences and move toward a settlement that is acceptable to all parties. It is the least costly resolution technique because the parties themselves control the process and voluntarily reach a solution. Negotiation may occur at any time—before litigation is instituted and if formal litigation is undertaken, even after a judgment has been rendered in court. There are two principal strategies to obtain the desired outcome: "competitive" and "collaborative." In competitive negotiation, one party seeks to maximize its own gain, generally at the expense of the other. In the final outcome, there is usually a winner and a loser. In collaborative negotiation, the approach is oriented toward mutually equitable problem solving with the outcome expected to be "win-win." This type of negotiation customarily features using the creativity of the parties and exploring each one's responsiveness to compromise.

2. **Conciliation** is a variation of negotiation in which a third party is used to bring the disputants together. Although the communication pattern may at times resemble negotiations, the conciliator does not take an active role in the negotiations. Rather, the role of the conciliator is helping the parties limit and control their passions and negative rhetoric. Conciliation is a constructive and facilitated form of negotiation. For example, even though the parties themselves decide on the nature of the resolution of the dispute, the conciliator helps them stay focused and not digress into collateral, unrelated issues.

3. **Mediation** is a structured and voluntary problem-solving process. An impartial third party is engaged by the disputants to assist them in directly negotiating their own solution to the decision or to solve the problem for them. The role of this mediator is to facilitate discussion, solicit honest evaluation of the dispute, and foster an atmosphere conducive for equitable settlement. The key to the success of mediation is the ability of the mediator to engender trust so that the parties will confide in him. The most sensitive and successful form of ADR is in terms of engendering settlements among disputants, mediation has a lengthy history. The early Roman Catholic church used mediation processes for years in its tax collection disputes.

4. **Arbitration** is the best known and most formalized alternative to a formal court trial. It is a process whereby the parties submit their dispute to a neutral third person for final disposition who is usually an expert in the area of dispute. Arbitrators are chosen by the disputing parties on the basis of their expertise and past record of opinions. Their decisions, known as "awards," are routinely binding on the parties, unless the latter previously agreed to non-binding arbitration. The features of this process are very much like court deliberations. Usually the parties are represented by legal counsel or some other individual who possesses expertise in this area. There are five basic steps followed in the process of arbitrating a dispute: (1) selection of the arbitrator(s); (2) preparation for the hearing; (3) the hearing; (4) the award; (5) the appeal. A matter is deemed appropriate for arbitration when the parties agree by virtue of a contractual relationship to have matters of dispute submitted to arbitration. On the basis of this agreement, one disputant may make a "demand for arbitration" in accordance with the provisions of the contract. If no contract exists, arbitration may still occur if by mutual agreement the parties sign a document known as a "submission to arbitration agreement."
5. **Mediation/Arbitration** is a two-step process designed to bring the benefits of both mediation and arbitration together in resolving a dispute. Traditionally, the two processes have been distinctive in application. However, this hybrid form of ADR was developed to promote finality in matters of dispute before the mediator/arbitrator was chosen. Arbitration is therefore deferred until mediation proves to be unsuccessful. If this occurs, the parties are notified of the mediator’s decision to have the matter proceed to arbitration, and the arbitrator, upon hearing the presentation of both parties, renders the award. A dissatisfied party or parties may then appeal the matter to a full-scale court hearing. There is a winner and a loser when the latter phase of the process is used. Moreover, the parties only use this option when there is high respect for the mediator/arbitrator’s skill, expertise, and reputation for fair play and integrity. The reasoning is that the mediator may become the arbitrator if the initial phase is not productive, and so must be capable of handling information from the initial phase without bias or predisposition when making the final determination. Mediation/arbitration is becoming popular in commercial and business disputes in which the parties are committed to resolving the dispute outside of court. It is also being used in an increasing number of court jurisdictions that require mediation of domestic relations cases. One important drawback is that confidentiality may be breached by the mediator, who subsequently becomes arbitrator after hearing confidential information from either or both parties. Trust and impartiality are the hallmark considerations in determining whether the neutral hearing officer can be fair and effective.

6. A **mini-trial** is a structured settlement process designed to bring the focus of disputants into a final decision generally made by a panel of senior corporate executives from the disputing organizations who are not personally involved with the dispute. After both parties briefly present their versions of the case to the panel, the executives caucus privately, usually with the help of a third neutral person, to negotiate a resolution. They then issue an advisory opinion regarding the merits of the case, which the disputants use as a basis for additional negotiations and settlement. Mini-trials are voluntary and non-binding. The parties have no obligation to settle through the senior executive officers. However, this technique has experienced a high degree of success in resolving high-profile commercial and business disputes, particularly when the relationship must be maintained after the dispute is resolved. For example, in a number of disputes involving large amounts of money and corporations of significant size and stature, people have opted to use this form of ADR to maintain privacy, control litigation costs, and avoid doing irreparable harm to their relationship.

7. **Private judging** is a process whereby the disputants engage a neutral third party, such as an attorney, former judge, or non-lawyer expert, to perform as judge or referee. In the states where private judging is authorized (approximately half of them), the judge or referee has the full authority of a regular judge in a court of law, except for the power to find someone in contempt. The proceedings are identical to trial proceedings, and the rules of evidence are enforced. A record is maintained of the proceedings for the purpose of appeal, and the parties bear the associated costs. A major advantage of private judging is that the case is not subject to the regular court calendar. Consequently, a case can receive more expeditious treatment. On the negative side, this ADR option is very expensive, and generally only wealthier parties are able to afford to use it.

8. In a **Summary Jury Trial (SJT)**, lawyers for the respective parties present a brief synopsis of their case to a jury that, after deliberations, makes a non-binding, advisory decision. It is a court-supervised proceeding whose purpose is to provide the parties with a “simulated verdict” and a sense of how a typical jury might rule on the matter under dispute. The advisory verdict rendered by the jury is often sufficiently powerful to break any deadlock in negotiations between the parties and bring about a settlement. The SJT usually lasts about four hours, and there is no examination of the members of the jury as to their suitability for service. The attorneys are usually given one hour to present their case, with limitations on the amount of evidence each party may present. Witnesses are usually excluded from SJT proceedings and the verdict of the jury is consensus rather than unanimous. A party who is dissatisfied with the verdict may reject it and proceed to a normal trial.

**Is ADR Binding On The Participants?**

As Yogi Berra, the Hall of Famer and former New York Yankee catcher, said, “It ain’t over ‘til it’s over.” In most circumstances, the enforceability of ADR agreements is binding without question. This is largely because the legislative and judicial branches of government welcome contracts with ADR provisions because the parties have the potential to solve their own problems without unnecessarily burdening the courts.
ADR has two forms by which parties seek to resolve the dispute: binding and non-binding. In most instances, negotiation, conciliation, and mediation are non-binding unless the parties enter into some kind of binding agreement before commencing the process. The usual strategy associated with these options is for the parties to reach an agreement and thereafter enter into a binding contractual arrangement by cementing their agreement in writing.

On the other hand, arbitration, mini-trials, and private judging are far more formal, and the parties may provide for a binding agreement before initiating ADR. Then, if a written agreement is instituted at the time of settlement, the parties are usually precluded from additional adjudication of the matter, unless the agreement is obtained by fraud or if some other technical or legal deficiency exists.

In a number of instances, when binding written agreements have been challenged or there is a failure of one or both parties to abide by that agreement, courts have generally enforced such agreements. The exception, again, is when some legal deficiency would compel a reversal of the award or abrogation of the agreement.

When Should ADR Be Used?

ADR should be the settlement method of choice for any or all of the following reasons:
- to avoid the zero-sum game, in which one party wins and the other party loses;
- when lawsuits have the potential to shatter business relationships that, by contract, cover a significant length of time;
- when a court resolution will only resolve the legal issues and not the underlying causes;
- when formal litigation will be severely disruptive to the business and is apt to absorb a large amount of administrative time and concentration;
- when parties want a simpler, less structured way of resolving their disputes;
- when both parties need a genuine and sincere interest in resolving the dispute;
- when both parties have a historic and/or ongoing relationship and the preservation of that relationship would be mutually beneficial;
- when the cost of litigation is either prohibitive or will exceed the amount of damages involved in the controversy;
- if the matter needs to be resolved quickly;
- if there is no need to establish a precedent regarding the matter;
- in the face of a compelling need for both parties to keep the dispute private and confidential; and
- when fairness and justice will likely be best obtained by using this option.

What Role Should Legal Counsel Play?

Legal counsel is important in ADR cases. Attorneys often convince their clients to use ADR, are active in drafting agreements for its use, often craft the ground rules, and may play a vital role in writing the final settlement agreement.

The use of legal counsel and the extent of its involvement vary, depending on the ADR option employed. In negotiation and mediation, where the parties themselves are very active and dominate the process, the use of legal counsel is limited and legal fees are minimal. When the more formal, quasi-judicial ADR options are used, such as mini-trial, private judging, and arbitration, the role of legal counselor is dramatically expanded and legal fees usually reflect the scope of this involvement.

Because the primary focus of ADR is getting the parties involved enough in the process to resolve their dispute personally, the use of legal counsel should be secondary to the overall objective. Accordingly, it should be viewed as a "support resource" to provide expertise as needed. Any other strategy for using legal counsel other than direct advocacy in private judging or arbitration is counter to the ultimate value of ADR.

Who Are The Professional ADR Service Providers And Organizations?

The rapid growth in service providers is comparable to the expanded use of ADR in our society. The more prominent providers are:
- the American Arbitration Association, with headquarters in New York City;
- ADR, Inc., based in Boston;
- Arbitration Forums, Inc. of New York City;
- JAMS/Endispute, Inc. of Cambridge, Massachusetts;
- Judicate, with headquarters in Lake Success, New York; and
- United States Arbitration and Mediation, Inc., based in Seattle.

The services provided by these organizations cover the entire range of ADR options. The fee for any case currently ranges from $300 to $2,000 per day, which is substantially less than the cost of litigating a case in court.

Other service providers are associated with universities, where dispute resolution centers have been established throughout the country. The most notable and reputed centers are located at Harvard University, Cambridge, Massachusetts, Pepperdine University, Malibu, California; and Capital University of Columbus, Ohio. They provide a broad range of services, including court-annexed and community service programs.

School systems in many major cities have established ADR programs using "peer-involve-
ment” processes to settle disputes between students as well as between students, teachers, and administrative personnel. The character of these disputes is broad in scope and often encompasses cross-cultural and ethnic considerations.

Benjamin Franklin once said, “There never was a good war, or a bad peace.” Most disputes arise between individuals, institutions, or businesses whose actions are not intended to defraud or injure but nevertheless result in parties feeling defrauded or injured. For example, an automobile accident or a securities purchase conflict may give rise to a contractual dispute. In these cases, ADR may be a more pleasant and expeditious way of resolving the dispute, if a provision is included in the contract making the use of ADR mandatory.

A number of individuals and organizations have been reluctant to use ADR, perhaps because of their lack of understanding about its efficiency and effectiveness. Moreover, there tends to be an abiding fear that if they opt to use ADR they have forsaken their opportunity and right to litigate the matter. However, many forms of ADR do allow for litigation, as previously stated, if the options are kept open by the ADR provision incorporated into the contract.

Alternative Dispute Resolution is a superlative way to resolve conflict, maintain options for formal litigation, and use resources efficiently. The wisdom of Solomon may have died with Solomon. Yet his fairness, objectivity, and pragmatism are goals that disputants can still experience today. Litigation is one way to achieve these goals. But ADR presents other alternatives that are potentially far less costly and ultimately more satisfactory.

References


