

AIPLA

American Intellectual Property Law Association

Alternative Dispute Resolution Committee Bulletin No. 1: ADR Options

INTRODUCTION

This is the first of three bulletins intended to provide general reference information regarding Alternative Dispute Resolution Options. The second bulletin will be directed to ADR Considerations, and the third will address ADR Rules, Organizations, and Resources.

AIPLA's ADR Policy Statement provides that:

Each practicing member of this Association is encouraged to be knowledgeable about alternative dispute resolution processes, and where appropriate, is encouraged to advise the member's clients of the availability, values and characteristics of these alternatives to litigation so that clients can make an informed choice concerning the use of litigation or alternative dispute processes, or both, for resolution of disputes, whether present or prospective.

TYPES OF ADR PROCEDURES

Alternative Dispute Resolution (ADR) includes a variety of procedures designed to resolve disputes quickly, less formally and usually at lower cost than traditional court litigation. ADR's strength is its flexibility. It can be fashioned to accommodate a diversity of disputes and parties. ADR methods involve combinations of negotiation, mediation and adjudication. They may be thought of as being on a continuum from facilitative to adjudicative.

NEGOTIATION BY THE PARTIES

Negotiation by the parties (not just their lawyers) is the basis of ADR. Each ADR method, with or without a neutral third party, is designed to allow the parties to resume negotiations at any time. Effective participation in ADR requires preparation as thorough as, although different from, that required for litigation.

Settlement negotiations during litigation tend to produce settlements which are projections of the potential results of the litigation process, often discounted by the transaction costs.

The best settlement from a business standpoint, however, may be a result not available through legal process. For example, a disagreement over one contract or license may be resolved by modifying an unrelated transaction. It is a fundamental premise of ADR that ordinarily the parties—not just their lawyers—should be involved directly in the negotiations. The direct involvement of the parties in the negotiation process sometimes produces creative settlements which are outside the range of potential solutions found in litigation. The broad range of creative settlement alternatives offered by ADR may require, in many cases, that a business lawyer become involved in the negotiations.

ADR techniques are intended to give the parties and their lawyers a more objective view of the merits of a dispute, and, where desired by the parties, to turn the negotiations away from a litigation setting toward a business or deal-making setting.

MEDIATION

Mediation is a well-known ADR process near the facilitative end of the continuum introduced above, in which communications between the parties are facilitated by one or more mediators.

A mediator usually meets briefly with the parties to obtain an overview of the dispute, then meets separately with each party to obtain their view of the facts and their position on the dispute. Following the initial meeting, the mediator shuttles back and forth between the parties seeking a mutually acceptable compromise. Some mediators work in teams, with a separate mediator for each party. In team mediation, separate mediators work with each party to gain the confidence of that party, and determine that party's realistic "bottom line" by ensuring non-disclosure to the other party. The mediators may exchange information among themselves to determine how close the parties are to resolution, in order to advance the mediation process.

Under many state statutes and case law, what is said during mediation and any documents prepared for the

purpose of mediation are generally not admissible into evidence. Successful mediation results in an agreement between the parties either to end the dispute immediately or provide for further actions to end the dispute.

ARBITRATION

In contrast to mediation, arbitration is a complex ADR procedure near the adjudicative end of the continuum introduced above. Arbitration can be administered by an administering agency, such as the American Arbitration Association, or it can be non-administered (administered by the parties). Parameters of an arbitration include: 1) the number of arbitrators; 2) the place of the arbitration; 3) the rules of the arbitration; and 4) the language of the arbitration.

Arbitration can be binding or non-binding on the parties. Arbitration results in an “award,” usually without a written opinion of the rationale for the award. One of the purposes of arbitration is to minimize appeals, and therefore, the absence of a written opinion provides fewer grounds for appeal. Arbitration is favored in international business dealings, because neither of the parties wishes to be subject to proceedings in the courts of the country of the other party. In arbitration, a number of arbitrators, from one to three, determines pre-hearing procedures, and then conducts a hearing, usually following generally accepted procedures for introducing evidence, but not strictly adhering to all evidentiary rules unless the parties so agree. The hearing may last from several days to several weeks, much like a court proceeding. The parties bear the costs of the arbitration and the arbitrators’ fees, which are generally at significant rates per hour.

At the end of a binding arbitration, one party “wins” and one party “loses,” and in this respect it is often similar to court litigation. A non-binding arbitration generally forms one stage of a hybrid ADR procedure involving further settlement negotiations or mediation.

MINITRIALS

Parties have invoked new forms of ADR over recent years in keeping with the flexible nature of ADR. A minitrial is a much more summary procedure than arbitration for presenting the issues in a legal context. A minitrial may then lead either to mediation and settlement discussions in a non-adjudicative mode, or may lead to some form of binding or adjudicative results similar to arbitration. Minitrials involve presentations—usually through attorneys—which resemble opening statements and summations of the evidence in court trials. The presentations are usually made in one or two days to representatives of the parties (with settlement authority) and usually, but not always, to a neu-

tral third party.

For example, third party neutrals have made: (1) binding decisions on the merits of the dispute; (2) nonbinding decisions which, if rejected by a party who later fails to do better in court, result in sanctions of a stipulated amount; (3) nonbinding advisory decisions which, because of the neutral’s position and experience, may carry great weight with the parties; and (4) expert (binding or nonbinding) findings of fact on the key issues in dispute.

Most commonly, the third party gives the parties a nonbinding indication as to how their arguments would fare in court. The minitrial agreement can be framed to suit the particular needs of the parties. Minitrial agreements may include provisions that toll the statute of limitations, expedite discovery by limiting each party to a specific number of depositions and written discovery requests, and provide for strict confidentiality. Minitrial agreements may also provide for exhibits and live testimony.

SUMMARY JURY TRIALS

Summary jury trials are a form of judicial mediation aimed at shortening the litigation process. This procedure involves short presentations of fact and law by the attorneys to jurors selected from the court’s normal jury pool. Representatives of all parties are present and they must have authority to settle. There are no witnesses, and only limited objections, if any, are permitted. The jury’s verdict is nonbinding (unless otherwise agreed by the parties). The summary jury trial informs the parties of how a real jury views their arguments and may force more realistic appraisals of the likely outcome of a full jury trial.

The advantage of a summary jury trial is that both sides get an idea of what a jury may think of their case. In addition, there will be added pressure on the parties to settle the dispute within the range of the advisory verdict.

The disadvantages of summary jury trials are that, unlike most other nonbinding, nonadjudicatory alternative dispute resolution techniques, summary jury trials may not be entirely confidential. In addition, it has been said that summary juries may sometimes favor “slick” presentations which do not reflect the real evidence. Even though court-sponsored summary jury trials may be closed to the public (the issue is not clear), they are nonetheless part of the court record and cannot escape entirely from the public eye. To ensure confidentiality, however, the parties sometimes create their own private summary jury by hiring a jury service.

JUDICIAL SETTLEMENT CONFERENCES

Besides the more complex processes discussed above, there are simpler processes. Judicial settlement conferences are a simple form of mediation. Federal judges are expressly authorized under Rule 16 of the Federal Rules of Civil Procedure to use settlement procedures to resolve the case or controversy before the court. Local court rules often provide for mandatory settlement conferences during the pretrial proceedings. The judge handling the case may conduct informal settlement discussions with the parties, but in recent years, a practice has developed of assigning a judge or magistrate to conduct the settlement conference who will not be the judge to try the case if settlement is unsuccessful. This separates the roles of adjudicator and mediator.

In settlement conferences, the settlement judge acts much like a mediator, focusing the parties on the key issues, eliminating or minimizing peripheral issues, and getting the parties to evaluate the economic consequences of various possible outcomes compared to the realities of going forward in the litigation. The judge's position of experience and authority is very influential on the representatives of the parties.

The success of these conferences depends upon time. Judges have limited time to conduct such conferences, and therefore, the issues have to be capable of framing and resolution within this limited time.

EARLY NEUTRAL EVALUATION (ENE)

To promote settlement conferences in cases which are not close to settlement, a procedure known as Early Neutral Evaluation (ENE) has been instituted by many courts. The procedure is much like a settlement conference, except that the neutral evaluator is usually an experienced and well-regarded attorney, and in intellectual property disputes, an attorney with familiarity with intellectual property issues. Most courts specify that neutrals be selected from lists of court-approved, volunteer attorneys. The parties may select from the list, or can select from outside the list, subject to approval by the court. In some cases, the court or an appointee of the court makes the selection.

A difference from the settlement conference is that if the initial conference does not resolve the dispute, the parties may continue in a mediation with the neutral as the mediator, provided that the cost of the mediator is borne by the parties.

OTHER FORMS OF ADR PROCEDURES

The discussion of the above forms of ADR Procedures illustrates the continuum of ADR Procedures from facilitative to adjudicative. Many other ADR procedures are also available, and these are discussed in the *AIPLA Dispute Resolution Guide* available from AIPLA.

Related Bulletins:

- ADR Considerations
- ADR Rules, Organizations and Resources

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