No Need to Be Disagreeable About It

Alternative Dispute Resolution: What It Is and How It Works

A conversation with David J. Abeshouse, Esq.

One of the inevitable facts of life is that people do not always do what we expect them to do. Changing circumstances can short-circuit even the best intentions as people and organizations are forced to scramble to protect their own interests. Additionally, we all need and expect different things — and often fail to communicate those needs and expectations so that others "get" them. In our personal lives, this usually leads to arguments; in business it can frequently escalate to the point where the contenders face off in court. But this might not be most effective — or economical — way to move through the dispute and get back to business. We talked to David Abeshouse, attorney, arbitrator and mediator, about alternative dispute resolution.

1. *What are the types of alternative dispute resolution (ADR) and how do they differ?*

Essentially, there are two main types, arbitration and mediation. Arbitration is like a mini trial, and its outcomes are binding and fully enforceable by the courts. The difference is that it is much more streamlined than a courtroom trial, with less discovery, less motion practice and less overall time (and therefore legal fees) expended by the lawyers. The opportunity to appeal the results of arbitration are far more limited than those of a courtroom trial.

Mediation, on the other hand, is not adjudicative; it's almost like marriage counseling, where the aim is to achieve an amicable settlement and confirm it in a written agreement. Mediation allows the parties to customize the resolution of their dispute to meet their specific needs. When it works, mediation yields a win-win result that could never happen in a formal trial.

Other paths to ADR are much less well known and less used, including conciliation, early neutral evaluation and med-arb, a hybrid approach where the parties start in mediation but agree to move to arbitration if necessary.

2. *What are the most common misconceptions about ADR?*

I spend a fair amount of time talking to people about this. Some of the misconceptions have gotten so out of hand that they can reasonably be called myths!

1. **Arbitration is somehow more expensive than court.** This is a big one and it comes from the fact that arbitration costs are front-loaded. The parties have to pay for the ADR forum and the arbitrator up front. But there is a substantial reduction in overall costs since the lifespan of the case is shorter, bringing down attorney fees on both sides as well as lessening the impact on the businesses involved.

2. **Lawyers fear diminished legal fees.** Honestly, there are some who do, but I think they are being short-sighted. I'm also a litigator, so I've been on both sides of this one. I find that my clients who have been through ADR are generally more satisfied and refer more business than those who go through formal court proceedings, even though I have a pretty good win record there as well. From my personal perspective — and that of my business — it is far more efficient to have three ADR matters at one time than to have one litigation; I'm in greater control of my schedule and therefore better able to deliver what I promise my clients.

3. **Arbitrators merely "split the baby" and do not focus on the merits.** This one comes from people confusing arbitration and mediation. A compromise outcome is more likely in mediation because that's what mediation is about. Formal independent studies demonstrate conclusively that arbitrators rarely decide in that 50% range (there's actually a statistically unexpected dearth of decisions in this band). Modern arbitrator training incorporates many techniques for avoiding this natural human tendency.

4. **Arbitrators are arbitrary.** Arbitrator training is fairly rigorous and the scope of the arbitrator's authority over a given matter is predetermined by the arbitration contract. In fact, one of the few openings to appeal an arbitrator's ruling is when the arbitrator exceeds her/his authority under the contract. Since fewer than 5% of arbitration awards are appealed, and fewer than 5% of those few appeals are successful, this obviously does not happen very much.

5. **Mediators are not necessary.** It's always tempting for the parties to a dispute to think that they — or even their attorneys — have the tools to reach compromise on their own. If this were so, they probably would not have gotten into the dispute to begin with. Also, the presence of a neutral favorably alters the settlement dynamic. In addition, it's nearly impossible for most of us to divorce ourselves consistently from points of view that most favor our own positions. Mediators are trained to dig into matters and find out what is really causing a dispute (it's not always what it seems to be on the surface), as well as what it will take to satisfy both parties and let them get back to business.

3. ***We've already mentioned that you have a litigation practice. When do you advise your clients to choose ADR?***

Obviously, that depends on the specific circumstances. Three broad sets of circumstances make ADR an advisable path:

1) timely resolution of the dispute will benefit my client;

> ***"The pessimist sees difficulty in every opportunity. The optimist sees opportunity in every difficulty."***
>
> ***— Winston Churchill***

2) spending less money on attorney fees is important to my client;
3) having the evidence reviewed by someone with certain specialized expertise is likely to have a positive impact on my client's case.

Once we've figured out whether ADR makes sense, we need to decide on the type. As I've said before, mediation is kind of like marriage counseling in that you go with the intention of working things out; arbitration is more like a court proceeding.

Arbitration is the right choice when:

- Privacy is an issue (all but labor arbitrations are confidential).
- Jury trial is undesirable due to complexity or potential emotional issues.
- The parties want to have control over the ground rules, including what remedies the arbitrator can impose.

Mediation is a good choice when:

- One or both parties needs to "vent" (mediation sometimes offers a better "day in court" than an actual trial).
- Elements that cannot be considered in court are in play. These can include tax costs or savings; "soft dollars" (the swing between wholesale and retail pricing); and tangential agreements that are important to the relationship as a whole but not legally relevant to the matter at hand.
- Litigation is going badly.

Of course, there are still occasions when I would recommend litigation, for example, if my client has substantially deeper pockets than the other party, if extended discovery is likely to favor my client, or if there is some benefit to having the outcome of a matter become part of case law (*stare decisis* or precedent).

4. *How do businesses in dispute initiate an ADR proceeding?*

If the business — and its attorney — are smart, they will think about including an ADR clause in contracts from the beginning. Although you don't necessarily know what's going to happen down the road, ADR tends to be more flexible and you do usually know whether privacy and money are going to be issues for you. Also, it's better to formulate the dispute resolution clause while the parties are still getting along with each other. If that hasn't been done, the parties simply can direct their attorneys to develop a submission agreement, specifying where the dispute will be submitted, establishing the rules for selecting the neutral, framing how the proceeding will unfold and all those other details. Once the submission agreement is completed, it is submitted to the selected organization.

David J. Abeshouse, Esq., *is a business litigator, arbitrator and mediator based in Uniondale, NY and practicing in the Greater New York Metro area. He is a member of the commercial panel of neutrals of the American Arbitration Association (AAA), the International Centre for Dispute Resolution (ICDR), the National Arbitration Forum (NAF), the Institute for Conflict Management (ICM), among others.*

A prolific networker, David has been an active connector both within and outside the legal profession. One of his signature efforts is the Attorney Round Table (www.attorneyrt.com) a peer-driven practice development and support group consisting of 25 attorneys, which he co-founded and serves as webmaster. David is past chairperson of the Nassau County Bar Association Alternative Dispute Resolution Law Committee, and is a member of the ABA's Dispute Resolution Section, the New York State Bar Association's Dispute Resolution Committee and the New York County Lawyers Association Dispute Resolution Committee. He has also served on several nonprofit boards and regularly volunteers time as pro bono counsel, in addition to writing and speaking frequently on topics related to business law.

David is a classically-trained musician who played professionally until the jealous mistress that is the law claimed his full attention. He is proud of his Australian heritage — his father hails from Sydney and David has gone down under 7 times, in addition to representing Aussie clients in the U.S. He would like everyone to know that, if you've met him in a courtroom, he is far more amenable in mediation and, if you've met him in mediation, he is much more irascible in court.

David and his wife Daryle make their home in Long Island. Their twins Harlan and Rachel have gone off to Colgate and Vanderbilt Universities, respectively. Candy the Canine, a rescued mutt who runs like the wind, is ensuring that they do not get lonely. David can be reached at ***516.229.2360*** *or by email at* ***davidlaw@optonline.net.*** *You can also learn more about him and his practice at* ***www.bizlawny.com.***

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