

Overcoming Resistance to Using ADR

Although mediation/alternative dispute resolution has grown rapidly over the past several years, there is still considerable resistance to it. There are a variety of reasons, and sometimes excuses, cited by attorneys for the failure to use mediation/ADR more widely. Here are a few:

Good Lawyers Can Settle Cases Directly

- To an important degree, this is true, but there are special advantages to coming fresh to a situation, appearing neutral to all sides, and having one's priority be to make peace and maximize benefits for everyone rather than obtain the best deal for a single player.
- ADR techniques have not been taught in law or business schools until recently. And just as sophisticated clients benefit from the outside perspective provided by a good lawyer, so even experienced negotiators can perform more effectively with the help of a mediator.

We Don't Yet Know Enough To Settle

- While it is true that parties need basic information about the merits of a case in order to settle it, experienced counsel and sophisticated parties, working together, can avoid lengthy discovery.
- The large amounts of time and money commonly spent on adversarial discovery are not often necessary to lay a foundation for a good settlement, and the information one gains through legal proceedings is not necessarily the most relevant for negotiations.
- Mediation often produces the best discovery of the participants' needs and interests, as well as the path to an effective settlement.

The Other Side Might Exploit Our Good Faith

- Lawyers often resist mediation because they fear that by expressing a willingness to mediate, they will signal the other side that their case is weak or that the client is anxious to settle. They also fear that their adversaries will exploit the process for delay or to obtain ammunition for trial.
- In most cases litigators do eventually manage to raise the issue of settlement with their opponents, although often late in the game after significant costs have been incurred and parties have become entrenched in their positions.
- Mediation makes beginning negotiations easier because the neutral can become the advocate for the settlement and each side can permit itself to be coaxed into staying at the table. Mediator can also impose ground rules to protect the parties from exploitative tactics.

Some Cases Have to Be Decided By A Court

- While some disputes are so novel and important that they require a public judgment or precedent that only a court can issue, such cases are rare.
- Even in high-stakes symbolic cases, the parties are often better off settling in an imaginative way than seeking the limited remedies available from a court.
- Also, perceptions can change during the life of a case, and the principled dispute that seemed too important to compromise initially, a year or two later may be viewed as a nuisance that should be disposed of as quickly and as cheaply as possible.

What Will Lawyers Do If Peace Breaks Out?

- The problem is less serious than trial lawyers may fear. Good lawyers do get good results in the mediation process, and most clients want legal representation when they mediate.
- Lawyers really do not want to try every case. They can use ADR to settle their questionable cases and put their energy into the cases they want to pursue in court.
- Whether or not ADR flourishes, conflicts will remain and there will still be a central role for advocates.