

Guest Column

Tips for maximizing successful alternative dispute resolutions

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Today's difficult economy and uncertainty about personal income and assets have created challenges for people who could be facing litigation.

Faced with diminished financial resources, increased costs of living and the burden of attorneys' fees, parties are increasingly turning to alternatives to litigation – called Alternative Dispute Resolutions. ADR is often an effective strategy for parties who are seeking solutions to cases such as business, personal injury, real estate disputes or separation and divorce. Four popular methods of ADR are neutral case evaluation, mediation, collaborative practice and arbitration. Research has shown that successful ADR can have profound implications. For example, in the area of child custody, a University of Virginia study by Dr. Robert Emery found that non-primary parents who participated in just five hours of mediation had much more time with their children 12 years after the mediation; more importantly, the former spouses respected one another more when asked



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about the other's ability to parent.¹

Neutral case evaluation

When participating in a neutral case evaluation (NCE), an experienced, neutral attorney is selected by the parties and their attorneys to give an opinion on outstanding issues. After reviewing written statements by attorneys summarizing evidence to be offered if the case were to go to trial, relevant documents, stipulated agreements of the parties, settlement offers shared with the other side as well as confidential settlement offers, the attorney serving as an NCE tells the parties how he/she thinks a judge will rule regarding identified disputes.

Neutral case evaluations are most effective when the parties' positions are quite far apart, and when those positions are hardened and/or unrealistic. Hearing an unbiased, experienced and well-respected lawyer give an opinion on these specific issues usually results in a more realistic picture of possible court outcomes, allowing the parties and attorneys to narrow their differences and ultimately reach a fair and equitable agreement.

Most NCEs require that both parties attend the NCE session(s) with their respective attorneys.

In some jurisdictions such as Fairfax County, the Circuit Court has an NCE program whereby attorneys are appointed to serve as NCEs at no cost for cases that have been filed and set for a final hearing.

Many attorneys, in order to save their clients the money (not to mention the stress) of litigation, advise their respective clients to retain and pay for an NCE before filing any action in court, with the hope of reaching an agreement and avoiding contested litigation.

Mediation

With mediation, the neutral professional works with both parties to fashion an agreement. Attorneys may be present, or

the parties may attend the session alone and then discuss the various settlement proposals with their respective attorneys outside of the mediation session. A mediator does not decide the case. Instead, the mediator works with the parties to reach an agreement. There can be no agreement without the consent of both parties.

Sometimes the mediator may also serve as a neutral case evaluator and give an opinion as to court outcome, but this is usually done only when the attorneys for both parties are present during the NCE/Mediation session and all parties and attorneys desire the mediator to give a neutral evaluation of the case.

Collaborative practice

While collaborative practice is most commonly used in divorce cases, it can also be used to resolve non-family law disputes. A major component of collaborative practice is a contract signed by both clients with a commitment to try to settle the issues and if an agreement is not reached, the collaborative lawyers will not represent the clients. The clients must then obtain new counsel to represent them during litigation.

In collaborative practice, clients and their attorneys meet in four-way meetings with mental health and/or financial experts sometimes involved to "coach" the parties about ways to maximize positive interactions between parties and, in the case of separation and divorce, develop specific plans for custody of children, division of property, and options for payment of child and spousal support. Unlike traditional attorney to attorney negotiations, legal advice may be openly shared with all attorneys and parties.

Arbitration

Unlike NCE or mediation, the neutral attorney in arbitration actually makes a binding decision after hearing evidence from the parties and their witnesses and the arguments presented by counsel. There are some advantages of arbitration over litigation. The parties can select an arbitrator who is knowledgeable about the issues in dispute; there may be more flexibility in scheduling hearing dates; and the rules of evidence may not be so strict.

Tips

Here are a few tips offered to make your ADR session more likely to succeed.

1. Initiate the ADR process early.

When the NCE/mediation/arbitration is initiated early and, if possible, before litigation starts, the cost savings of legal fees are maximized, the parties' positions may not be hardened, and there is often a better chance that an early settlement will be reached without the emotional and financial pressures of litigation.

2. Mindset: Be creative, be prepared to compromise and be prepared to make decisions.

Research has found that when parties draw up the details of an agreement themselves through ADR, they are more likely to adhere to the agreements, the likelihood of future litigation is reduced, and the parties are more satisfied with the process.²

A major advantage of NCE and mediation is that the parties are making their own compromises rather than delegating decision-making to a judge or arbitrator.

These ADR methods typically provide a more positive approach that will work best for all parties involved.



Creativity and flexibility are major assets in helping to develop successful ADR agreements.

Prior to beginning the NCE/mediation process, attorneys and their clients need to discuss alternative solutions. Unlike judges and arbitrators who have limited authority in what they can order, parties in mediation and NCE can agree to almost any provision.

Everyone must be prepared to commit to a resolution and invest in the process. There is a better chance that ADR will succeed when everyone believes it will succeed and is prepared to do what it takes to resolve the issues in dispute.

3. Be prepared.

Make sure that all informal discovery is completed and all documents/proffers requested by the neutral professional are produced in a timely fashion and are easily accessible. Full disclosure of all relevant matters is essential. The preparation of notebooks with indexes helps clients and attorneys prepare for the ADR session while maximizing the time and ability of the neutral professional to guide the parties towards resolution of the dispute.

4. Schedule the appropriate amount of time for the ADR session(s).

There is nothing worse than being in the final stages of negotiations when someone has to leave early because of other commitments. The momentum for settlement is lost – sometimes irrevocably.

NCEs, mediations with attorneys present, and arbitrations are usually a one-time event with the goal of resolving multiple issues at one session. To have the best chance to finalize an agreement at the conclusion of any ADR, block off the full day (including evenings) or even multiple sequential days to resolve the disputes. Counsel and the parties need to be prepared and encouraged to patiently complete the session, which will be rewarding when an agreement is finally signed.

In contrast, when attorneys are not present in mediation sessions and in collaborative practice meetings, the sessions are usually shorter (about two to three hours) and held over a longer period of time, giving the parties the time to obtain legal advice from their respective counsel.

5. Bring written settlement agreements.

It is important to always put an agreement in writing. Everyone must sign at least a memorandum of what has been agreed upon and, if possible, sign the full agreement.

Bringing a comprehensive settlement agreement with blanks in provisions that are in dispute maximizes the chances of a comprehensive agreement being signed at the end of the ADR session. This will minimize future conflicts between parties about what has been agreed upon.

6. Bring your laptop.

Bringing a laptop not only facilitates making revisions to a draft settlement agreement, but also allows for instant access to current information regarding bank account balances, real estate and personal property assessments, and other important information.

The benefits of ADR are numerous, and with the current state of the economy, neutral case evaluation, mediation, collaborative practice or arbitration are often the best solutions for resolving disputes. These methods typically provide a more positive approach to identifying a resolution that will work best for all parties involved, while minimizing legal fees and related challenges among the parties in the future.

ENDNOTES

1. "The Pluses and Minuses of Voluntary Mediation Sessions by Abby Tolchinsky and Ellie Wertheim, *The Matrimonial Strategist*, Vol. 26, Number 10, October 2008, page 1

2. ADR, Technology & New Court Rules by Elizabeth Kruse, *Journal of the American Academy of Lawyers*, 2008, Vol. 21, No. 1, p. 207

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