

How to Keep Your Company Out of Court: **New Methods of Dispute Resolution:**

By David A. Hoffman

Case A: Your company has purchased a multi-million dollar computer system which has failed to perform. The hardware and software manufacturers point the finger at the equipment installer; the installer blames management of your company for specifying the wrong equipment. A multi-party law suit looms.

Case B: An internal audit has revealed that the CFO of your company has invested company funds in an insurance venture in which his relatives have a substantial stake. The CFO believes there was nothing improper about the investment, but your general counsel disagrees.

Case C: The country's largest public pension fund believes that one of your company's business units should be divested to make the corporation more profitable. Management and the board disagree. The fund is considering an effort to get other funds to join in forcing through the divestiture, possibly through a proxy fight.

Case D: A consumer publication reports that one of your company's products is defective. Several thousand law suits, and possibly a class action, appear likely,

What do these diverse scenarios have in common? Perhaps only one thing -- they paint a picture only a litigator could love. In 1994 approximately 18 million cases were filed in our nation's courts, at an estimated cost of \$300 billion. Is there a better way to resolve these disputes? Can it be done with less expense, more quickly, and with less damage to the reputations and fortunes of the disputants?

A growing industry of providers of alternative dispute resolution (ADR) services says the answer to these questions is "yes."

ADR -- an array of non-court dispute resolution processes, such as mediation, arbitration, and case evaluation -- is not entirely new. Arbitration is a well established method of resolving certain kinds of disputes -- e.g., construction and labor-

management disputes. Mediation has been used to an increasing extent in divorce cases, where the parties cannot afford, or do not wish to use, lawyers to negotiate the terms of their separation.

What is new -- indeed, some would call it revolutionary -- is that lawyers, business people, and other professionals are beginning to see the possibility of using non-court methods to resolve virtually any type of dispute. This article attempts to answer some of the basic questions about ADR -- what it is, why it is being used to an increasing extent, what kinds of cases are appropriate for ADR, and how to go about using it.

What is ADR? The term encompasses a broad spectrum of dispute resolution methods. At one end of the spectrum is *mediation*, a voluntary process in which a trained neutral assists the parties in reaching a negotiated settlement. The parties are free to walk away from the table at any time, but once they reach an agreement, it is as enforceable as any contract. The mediator does not impose a solution but instead explores the barriers to settlement and the parties' underlying interests.

At the other end of the ADR spectrum is *arbitration*, a form of private adjudication, in which a neutral arbiter (or in some cases a panel of three arbiters) listens to presentations of evidence and then decides the case. The process is not unlike a trial, except that it is more informal (arbitrations are ordinarily conducted in a conference room) and the rules of evidence usually do not apply. Arbitration is ordinarily a creature of contract -- that is, the parties have agreed, either in a contract

executed before the dispute arose, or in a submission agreement after the dispute arose, to submit their differences to a binding decision on the basis of an arbitration hearing. Once the dispute is submitted, the decision of the arbitrator (or sometimes a panel of three arbitrators) is virtually unchallengeable -- i.e., there are few legal grounds for overturning an arbitrator's decision.

In addition to these fundamental methods of ADR, various hybrid methods have developed. In *case evaluation*, a third party listens to a summary of each party's case and renders a non-binding opinion as to the likely outcome if the case goes to trial. In *med/arb* (mediation/arbitration) the parties participate in a mediation, but they agree in advance that if the case is not resolved there, they will submit the matter to arbitration for a final and binding decision. In *tailored arbitration* the parties agree to arbitrate their case, but with the outcome determined in part by the parties -- for example, by a high/low agreement, establishing a maximum and a minimum amount to be awarded by the arbitrator.

Why Use ADR? Business people and lawyers have helped clients settle disputes for many years without ADR methods, primarily through direct negotiations. Why bother using third parties? The short answer is that ADR methods are not needed when negotiation works. It is when negotiations break down, and the only alternative is litigation, that a mediator can help the parties identify and overcome obstacles to settlement. If there is a factual dispute that keeps the parties from settlement, the matter can be presented to an arbitrator or fact-finder.

The key advantage to using ADR over litigation is that it enables the parties to design a process that makes sense for the particular circumstances of the dispute and the parties' resources. Too often in litigation the overall cost to each of the parties (primarily, attorney's fees, but also disruption of the parties' businesses) exceeds the amount in controversy. Under those circumstances, going to court is no solution at all because even the winner loses. There is also little certainty as to when the dispute will be resolved. Many cases take years to wend their way through trials and appeals -- all with an uncertain outcome.

What cases are suitable for ADR? Virtually every dispute where the stakes are high enough (either in money, reputation, or other considerations) to warrant the cost of bringing in a third party is a suitable candidate for ADR if negotiation has failed to resolve the problem. Indeed, it is easier to answer the question in the reverse: what cases are not suitable for ADR? There are a few generic categories of such disputes -- namely, cases involving (a) issues of principle, where an opinion from a court is necessary to establish what the law is; and (b) reputational interests, such as a defamation case or a product liability case in which the defamed party or product manufacturer wants public vindication. Even in such cases, however, ADR is sometimes used successfully. Indeed, in cases involving damaged reputations, ADR is often preferable because trial publicity might harm both parties, whereas a mediation enables the parties to craft a solution in which the damage is repaired (e.g., through a negotiated press release or confidentiality agreement).

How to use ADR? There are two vital decisions to be made in the ADR process: first, which process to use; and second, the choice of mediator, arbitrator, or other ADR provider.

The choice of process turns primarily on the objectives of the parties. Are they looking for a quick and final answer from a third party? If so, arbitration is indicated. Are there opportunities for joint gains and an ongoing relationship between the parties if negotiations succeed? In that case, mediation might be preferable.

ADR providers often can assist parties in designing a process appropriate for their case. Throughout the United States there are more than 50,000 individuals and firms providing ADR services. A nation-wide directory of ADR providers, with information about the providers' experience and background, has recently been published, and the American Arbitration Association, the largest dispute resolution organization in the United States, maintains panels of arbitrators and mediators in a variety of fields, as does the New York based CPR Institute of Dispute Resolution, a non-profit organization which assists corporations seeking to use ADR.

ADR provider organizations can be contacted directly by either or both of the parties to the dispute, and they can often be helpful in designing an ADR process appropriate for the case. It is not inappropriate to ask for references; indeed, it is often a good idea. Some ADR providers are better for one kind of case than another. In some cases, for example, it may be desirable to have a provider with expertise in the

subject matter of the dispute -- e.g., someone knowledgeable about computers (for case A), corporate law (for cases B and C), or product liability (for case D).

In each of those cases, there is an opportunity to craft a non-litigation dispute resolution process that will likely save the company time, money, and disruption of its operations. The ADR tools for such a process are now readily available for well informed managers and directors to use.

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