The ABCs Of ADR:
A Glossary Of Dispute Resolution Methods

By David A. Hoffman

Alternative dispute resolution is a term used to describe the entire array of dispute resolution methods other than litigation in the courts. Some commentators have suggested that ADR should stand for appropriate dispute resolution, since a principal advantage of ADR is its inherent flexibility, giving lawyers the ability to tailor the dispute resolution process to the circumstances of the case and the needs and preferences of the disputing parties.

Although some of the terminology used in the field of ADR is familiar (e.g., arbitration, mediation), much of it is relatively new. Moreover, even the well-known terms such as arbitration and mediation are often used interchangeably (and thus incorrectly) by people not familiar with ADR procedures. The following is a glossary of terms used by ADR practitioners, in alphabetical order.

Adjudication. Adjudication is a generic term for the rendering of a decision on a disputed matter by a neutral party or panel. Although the term is most often associated with decision-making by a court, governmental agency, the rendering of a binding decision after the presentation of evidence and arguments in a private, governmental setting (such as an arbitration) is also an "adjudication.

Arbitration. Arbitration is a form of adjudication which is generally private and less formal than litigation in court. The decision-maker is usually an individual or panel of three individuals selected by the parties or a neutral agency; in some cases involving three arbitrators, each party selects an arbitrator and those two arbitrators select the third. In most arbitrations, the rules of evidence are relaxed and there is little pre-hearing discovery. The ruling of the arbitrators is rendered in most cases without an opinion. Under both Massachusetts and federal statutes governing arbitration, arbitration awards can be appealed only on a narrow range of grounds (such as fraud or the refusal to hear evidence material to the controversy), and therefore awards are generally more final than a trial court decision, which can be appealed for errors of law or fact. There are many varieties of arbitration, including court-annexed, non-binding and structured arbitrations in which the range of possible awards is limited by agreement of the parties (e.g., "baseball" or last-offer arbitration, or bracketed arbitration).

Case Evaluation. Case evaluation is a process in which the parties or their attorneys present a summary of their case to a neutral third party for an opinion as to the likely outcome if the case is adjudicated. When this process occurs in the early stages of the dispute, it is often referred to as Early Neutral Evaluation (ENE). The opinion of the evaluator is not binding on the parties. Its value is to encourage settlement by indicating the likely determination of a court. The process can be part of a court-annexed program (e.g., a "multidoor courthouse" program) or a private ADR service. Generally the neutral is someone with experience in the field of the dispute—often an experienced attorney or a retired judge. In some instances, case evaluation services will be used by only one party in order to get a "second opinion" about the value of a case.

Civil Appeals Management Plan (CAMP). A Civil Appeals Management Plan has been established in the United States Court of Appeals for the First Circuit and several other circuits in order to reduce appellate caseloads by encouraging early settlement. The CAMP program has been implemented by appointing "settlement counsel" who reviews each case that is docketed and, in appropriate cases, conferences with the parties' counsel to discuss settlement.

Community Mediation. Community mediation programs involve the use of volunteer mediators, usually drawn from the local community, to resolve cases pending in the district courts (such as small claims matters, landlord-tenant cases and commercial disputes) and local disputes involving schools, neighborhoods and, in some cases, domestic relations matters. In some instances, minor criminal matters may be referred for mediation.

Conciliation. In several counties, the Superior Court schedules cases for conciliation conferences conducted by retired judges and/or members of the bar in order to assist the parties in settling the case or resolving any discovery or procedural matters that need to be addressed to ready the case for trial. The parties are often required to prepare for a conciliation session by submitting a summary of factual and legal issues in dispute, a list of witnesses and exhibits, and an estimate of the time needed for trial. Conciliation sessions differ from mediation in that exploring the possibility of settlement is only part of the conciliator's agenda; the conciliator must also explore what steps, if any, remain to be taken so that the case is ready to be tried.

Confidential Listening. If the parties to a dispute want to determine whether settlement is possible, they can retain a third party or "confidential listener" to whom the parties communicate their settlement positions. The third party does not disclose the opposing party's settlement position, but reports to both parties in accordance with pre-arranged instructions, whether the parties' positions overlap or are within a specified range of each other. (The parties may agree that if their positions overlap, they will settle at a figure that splits the difference.) This procedure can be combined with mediation if the parties request the third party to assist them in bridging the gap in their settlement positions.

Court-Annexed ADR. Many courts have adopted ADR procedures for pending cases on either a mandatory or voluntary basis. Court-annexed ADR procedures may be staffed by court-supervised personnel or independent agencies. For example, mediation programs in the Suffolk and Norfolk Superior Courts are staffed by non-court...
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Mediation. Mediation is a voluntary process in which a neutral third party assists the parties in resolving their dispute. The mediator has no authority to impose a settlement and the parties are under no obligation to reach an agreement. Any settlement achieved in a mediation is therefore voluntary. The mediator may, but need not, suggest settlement terms. Mediation proceedings are generally private and confidential, and the substance of the discussions in a mediation are generally privileged under G.L.C. 233, §23C.

Med-Arb. Med-Arb is a combination of mediation and arbitration, in which the parties agree in advance if the dispute is not resolved through mediation, they will turn to finding arbitration. In such cases, the mediation may resolve some, but not all, of the issues in dispute and thus will narrow the focus of the arbitration.) The mediator determines in advance whether the same individual will serve as arbitrator if the dispute is not entirely resolved through mediation. Although the use of the same individual will usually be more efficient, some mediators are reluctant to arbitrate a case in which they have conducted as part of a previous dispute.

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Under both Massachusetts and federal statutes, arbitration awards can be appealed only on a narrow range of grounds. Awards, therefore, are often final more than a trial court decision.

Even if the parties are heavily represented and the arbitrator is perceived as an able neutral, arbitration can often take months or even years, making it a less attractive option for those who need an outcome quickly. In addition, the confidentiality provisions of most arbitration agreements may prevent the parties from sharing information with others, which can be a disadvantage in certain situations.

Even though arbitration is often seen as a more informal and less costly alternative to litigation, it is not always the best option for all parties. It is important to carefully consider the specific circumstances of each case before deciding whether to use arbitration or another form of alternative dispute resolution.

Endnotes: