Bandwagon is Rolling: ADR Demands and Thrives on Lawyers Creative Thinking

Christine D. Ver Ploeg
Mitchell Hamline School of Law, christine.verploeg@mitchellhamline.edu

Publication Information

Repository Citation
http://open.mitchellhamline.edu/facsch/110
Bandwagon is Rolling: ADR Demands and Thrives on Lawyers Creative Thinking

Abstract
The ADR (alternative dispute resolution) bandwagon is rolling. Clients are becoming disenchanted with traditional litigation, and they're hearing about ADR. ADR has three broad categories: mediation, the mini-trial, and arbitration. Attorneys can provide a real service to clients by being familiar with and developing skills in ADR.

Keywords
ADR, alternative dispute resolution, settlements, mediation, arbitration, conciliation, mini-trials, court-annexed arbitration, litigation

Disciplines
Civil Law | Dispute Resolution and Arbitration

This article is available at Mitchell Hamline Open Access: http://open.mitchellhamline.edu/facsch/110
IN SUMMATION

‘Bandwagon is rolling’

ADR demands and thrives on lawyers’ creative thinking

BY CHRISTINE D. VER PLOEG

For over two years now you have been defending a major manufacturer of steel trusses used in the construction of a major office building that collapsed before it was completed. Your client is one of many being sued on negligence and strict liability theories. Your defense includes claims of act of God, assumption of risk, contributory negligence, and misuse of product.

Trial will begin in six months, and you are now on the front lines of a dispute that has escalated into full-blown war, not only with the plaintiff but also with your co-defendants.

Today you’ve received a call from opposing counsel. His client recently read an article about alternative dispute resolution (ADR) and would like to explore this route with defendants to see if this case can be settled out of court.

You perk up at the word “settle” coming from your opponent’s camp. This can only mean they’re getting cold feet. You’re pleased. However, you realize that although you’ve heard of ADR, you haven’t the slightest idea how it works or what it has to do with this case. From the beginning you have been aware that win or lose, jury trial or out-of-court settlement, the legal battle will have taken a tremendous toll on both sides by the time it is all over. As a lawyer who genuinely cares about her client’s best interests, you conclude that you have a duty to explore alternative dispute resolution.

You are surprised at the variety of ADR approaches that have been developed. These alternatives are not attempts to restrict or supplant traditional formal court processes. They exist as options for cases in which litigation is not the most appropriate route. Or they can be used in conjunction with litigation when parties on a litigation track agree to explore other options but remain free to return to the traditional court process at any point.

“Empirical evidence suggests that mediated agreements enjoy greater compliance than adjudicated decisions.”

You discover three broad categories of alternative dispute resolution: mediation, the mini-trial, and arbitration.

MEDIATION: Mediation — also know as conciliation — is the fastest growing of the alternatives. Simply stated, it is facilitated or mediated negotiations with a skilled third party. It depends upon the commitment of the disputants to solve their own problems. The mediator never imposes a decision upon the parties. His or her job is to keep the parties talking and to help them through the more difficult points of contention.

The mediator typically takes the parties through five stages: First, the mediator facilitates agreement on procedural matters, which include such things as establishing that the parties have voluntarily agreed to participate, setting the time and place for future sessions, and executing a formal confidentiality agreement. One valuable aspect of this stage is that the parties, who often have been unable to agree on anything, begin a pattern of saying “yes.”

Second, the parties exchange initial positions, not by way of lecturing the mediator, but in a face to face interchange. Third, if the parties have agreed to a caucusing procedure, the mediator meets with them in confidential private meetings and begins exploring settlement alternatives, perhaps by engaging the parties in some “reality testing” of their initial proposals. “Shuttle diplomacy” often produces areas of flexibility that the parties would have been uncomfortable putting forward officially.

Fourth, when the gap between the parties begins to close, the mediator may carry offers and counter offers back and forth between the parties, or the parties may elect to return to a joint session to exchange their offers. Finally, when the parties agree upon the broad terms of a settlement, each is asked to reaffirm their understanding of that settlement, details are completed, and a settlement agreement is signed.

Mediation permits the parties to design and retain control of the process at all times and, ideally, eventually strike their own bargain. Empirical evidence suggests that mediated agreements enjoy greater compliance than adjudicated decisions. And when a settlement is reached, the dispute is over — no appeals, delays, continuing expenses, or unknown risks. The parties can begin to move
forward again. Michael Landrum of Americord, Inc., an ADR firm in Minneapolis, says: “Unlike litigation, which focuses on the past, mediation looks to the future — ‘Where do we go from here’ — to find innovative and creative solutions. It permits linkages with concerns and needs of the parties which may well go outside the narrow technical boundaries of legal issues, processes and remedies.”

THE MINITRIAL: The mini-trial, a more recent development in ADR, is finding its greatest use in resolving large-scale disputes involving complex questions of mixed law and fact, such as products liability, massive construction disputes, and antitrust cases. In a mini-trial each party presents its case as in a regular trial, but with major differences. Most notably, the case is “tried” to the parties themselves, and the presentations are dramatically abbreviated.

Typically, lawyers and experts present a condensed version of a case to top management of both parties. Often a neutral advisor — sometimes an expert in the subject area — sits with management and conducts the hearing. Following these presentations, management — by now more aware of the strengths and weaknesses of each side — attempts to negotiate resolution of the problem. If they are unable to do so, they often turn to the neutral advisor for his or her best guess of the probable outcome of the case. They then resume negotiations.

The key to the success of this approach is the presence of both sides’ top business officials at the exchange of information that takes place during the mini-trial. Too often pre-litigation work has insulated top management from the true strengths and weaknesses of their case. Mini-trial presentations allow them to see the dispute as it would appear to an outsider and set the stage for a cooperative settlement.

ARBITRATION: Arbitration more closely resembles traditional litigation in that a neutral third party hears the parties’ arguments and imposes a final, binding decision that is enforceable by the courts. The difference is that in arbitration the disputants generally work together to determine who shall hear their case, and proceedings are typically less formal than in a court of law. This route often holds advantages in time and cost and sometimes in the greater expertise of the trier of fact. This form of arbitration has historically been utilized in labor/management disputes, although recent years have witnessed growing enthusiasm for its use in the commercial world as well.

Recently a new form of arbitration known as court-annexed arbitration has emerged. Many variations of court-annexed arbitration have developed throughout the country. A few years ago, the Hennepin County District Court adopted a program whereby civil cases involving less than $50,000 are subject to mandatory, nonbinding arbitration. The results of the program have been encouraging. The National Center for State Courts estimated that the Hennepin County Court system has itself — not counting the parties — saved more than $300,000 since the implementation of this program. So encouraging are these statistics that legislation has been enacted that now permits judges in Hennepin County to direct that certain suits over the $50,000 threshold also be channeled through an ADR process before they can be heard in the courts.

Your quick review of recent and extensive literature about ADR is intriguing and you want to know more. But is it right for your case?

Trial begins in six months, and you see two ways to go with this case: (1) fight it all the way through the jury trial, and prepare your client for likely appeals by either side, or (2) hang tough until the eleventh hour, at which time everyone will get down to serious settlement talks.

Going to trial presents the obvious risk that the jury will decide the case against your client, and might then get carried away on damages. Another, less obvious, consideration is your growing concern that even if you ultimately win this case for your client, it will be a Pyrrhic victory. The legal pigeonholes into which this case has been forced hold little or no room for such concerns as your client’s desire to reverse rapidly deteriorating business relationships with several of the parties or the plaintiff’s obvious need to get an office building up and rented as soon as possible.

Settlement talks, on the other hand, will still find everyone arguing their positions based on the legal theories, most of which miss the parties’ real needs. It’s easy to see that settlement strategies will simply extend the litigation mode of thinking, which emphasizes winning, not resolving the dispute.

Clearly, successful resolution of this dispute, short of traditional litigation holds real advantages. You decide that you and your client risk nothing by considering some of the ADR options.

The ADR bandwagon is rolling. Clients are becoming disenchanted with traditional litigation, and they’re hearing about ADR within their own professional and trade organizations.”

“The ADR bandwagon is rolling. Clients are becoming disenchanted with traditional litigation, and they’re hearing about ADR within their own professional and trade organizations.”