A Common Sense Approach to Alternative Dispute Resolution

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When confronted with conflict, what is your response? Are you a catalyst for reconciliation or a proponent of discord? Do you act first and think later? Or are you calm and encourage resolution?

For many, alternative dispute resolution (ADR), especially mediation, is an everyday affair. In some cases, right of way professionals work in states where mediation is encouraged by state and local government. In other cases, mediation can be a daily process when dealing with property owners. When person-to-person negotiation breaks down, it is good to know when to call in a mediator and what to expect from the process.

Any kind of conflict calls for a cool head. We all have natural immediate responses that need to be in put check before engaging in a dispute that could lead to a long and expensive lawsuit. In the end, it is often hard to determine who even won the lawsuit given the emotional stress, lost work time and legal fees that follow. At trial, if a judge cannot determine a clear winner, it is not uncommon to use whatever judicial discretion available to "split the baby" in hope of appeasing both sides. Many times, neither party is satisfied.

Of course, there may be times when a lawsuit is necessary to right a wrong or to enforce or change a law. However, more frequently, ADR can reach the same compromise that a judge may impose without the costs associated with a lawsuit and trial.

Neurological Responses to Conflict

Disputes are an inevitable part of life and are often not under our control. However, what we can control is how we respond to conflict. Our "fight or flight" response is a natural, neurological response that the body experiences when confronted with a challenge.

According to Dr. Chris Carr, a sports psychologist at St. Vincent Sports Performance Center in Indianapolis, Indiana, "The 'fight or flight response' is based on our sympathetic and parasympathetic nervous system that helps protect humans from harm. In situations where there is a real or perceived threat, this response is accompanied often by increased muscle tension, narrowing of concentration ability, feelings of anxiety or fear and cognitive responses associated

with a threat. It is a helpful, survival response in that it strives to keep us alive. However, in relationship management, this response can create negative consequences to both parties."

Understanding our internal response system may help change the way we respond to conflict. Let's say someone calls and accuses you of damaging their property. Which would be your response?

a) Hang up (the flight mechanism).

b) Put off making the return call (the flight mechanism).

c) Answer with: *Yeah, well your property looks like a junk yard anyway!* (the fight reaction).

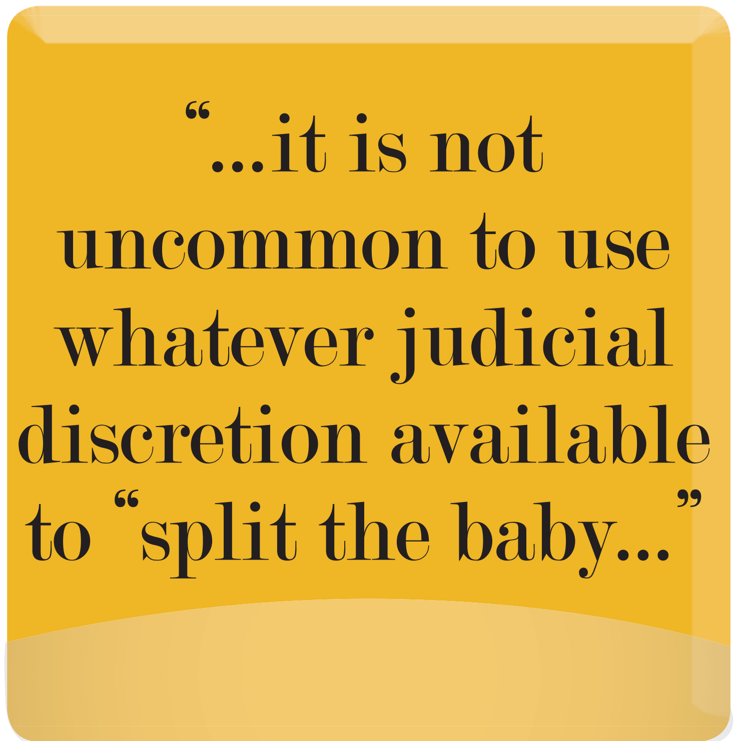
d) Tell them to: *Go pound sand! Call your lawyer and sue us!* (the fight reaction).

Understanding how the body's neurological responses can stimulate physical reactions may help lead to a different tact. Instead of reacting with a standard response, we can learn to plan and practice a different approach. For instance, try taking a deep breath, bite your lip, put your hand over your mouth and wait a minute. Tell the client you want to check the records and that you will call them back in a minute. This gives you a chance to become informed about the issue and to gain your composure. Keep in mind that changing normal reactions to situations can be a long and challenging process for many of us. This makes practice imperative, so you might want to engage a co-worker, spouse or someone else in role-playing conflict situations.

Alternative Dispute Resolution

Although the legal process is centuries old, it is not always the best way to resolve a conflict. There are other means that should be exhausted first before sending that off-putting letter that leads to a lawsuit. In ADR, a mediator (or arbitrator) asks questions of all parties and lays out a scenario of how the problem can be resolved. Each party should be open to negotiation led by the mediator, who may carry messages to each party or facilitate meetings where parties can talk face-to-face.

This kind of dispute resolution has been an accepted alternative to trial courts for at least 25 years. However, consider that even President Abraham Lincoln encouraged lawyers to "persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a real loser…in fees, expenses and waste of time."

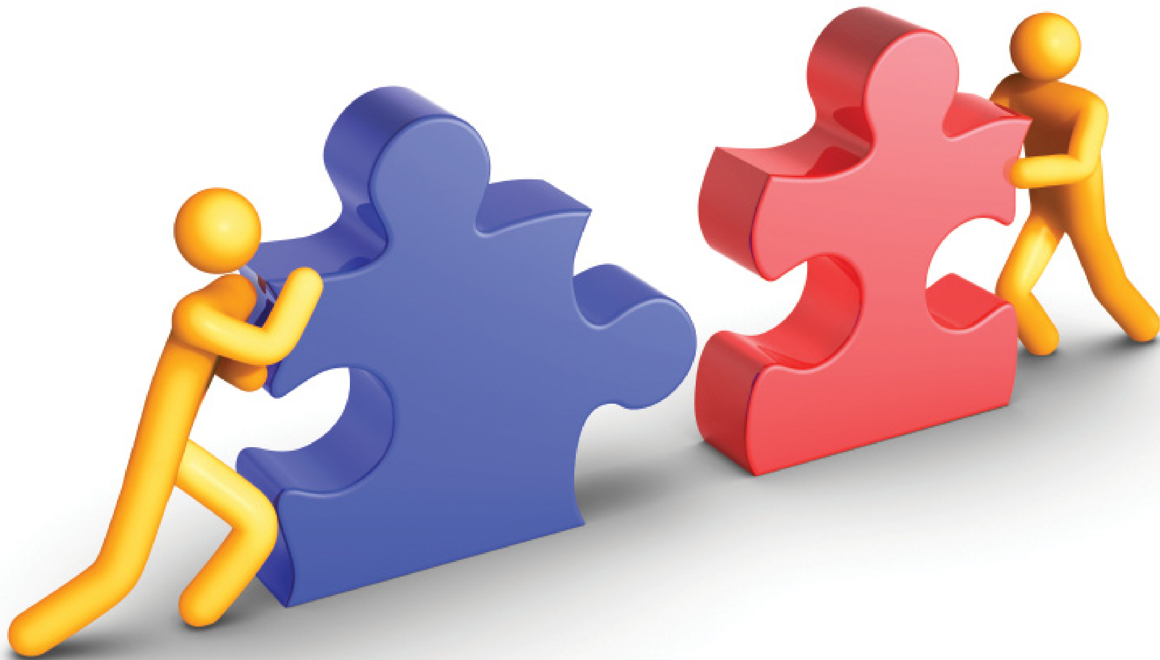


An arbitrator has no emotions tied up in the dispute and is able to focus the conversation on what needs to be done to resolve the situation. With ADR, you may be able to help resolve conflicts for your company, clients and even competitors while minimizing costs.

Weighing the Options

One reason for using ADR is that litigating a case before a judge or jury carries the inherent risk that you will not prevail in the dispute. While it is true that a judge or jury must apply the law to the facts, they often view the facts quite differently. Jurors will infer facts from evidence, such as testimony or documents, which may or may not be accurate. In the case of a bench trial held with only the judge, they may use discretion in a way that ends up with you losing. It is this risk at trial that generally encourages parties to consider ADR.

The premise of mediation is that the parties can fashion a remedy (with the assistance of a mediator) and avoid the imposition of a ruling by an outside third person (such as a judge or jury) that may disappoint both litigants. Mediation focuses on problem-solving; litigation is inherently adversarial and focused on producing a winner and a loser. Both parties have the best chance of meeting their interests if they decide the outcome. After all, who understands what you want or need better than you!



Party-to-Party Negotiation

When dealing with your own disputes, the most direct and least costly method of ADR is to swallow your pride, get control of your internal defense mechanisms and try to negotiate an acceptable agreement. Try talking to the offended party and see what it would take to negotiate a resolution that both of you find acceptable.

Often times, reconciliation is as easy as letting the outraged party blow off some steam. While listening to the outraged party, think about the ramifications of a long, expensive, drawn-out legal battle. By encouraging them to express themselves fully (without interrupting or being dismissive or sarcastic), you show that you are willing to listen to their concerns. This can go a long way in paving the way for a solution.

Assisted Negotiation Mediation

When direct, party-to-party negotiation breaks down, consider bringing in an objective third party to help with the process. This person should be someone who is objective and understands the nature of the dispute and has expertise in the area. This might be a manager, business owner, a respected competitor or a trained mediator. And even if mediation with a third party requires some expense, it can often save time and the expense of a lawsuit.

Sometimes, parties choose another type of mediator — someone who may not have the specific knowledge about the subject matter, but is an expert on the process of negotiation and litigation. Because of the ever-increasing caseloads in the court systems in many cities, some courts require that parties in a lawsuit try ADR before allowing the case to be set for a trial.

Traditionally, lawyers for each side use their negotiation skills to get the case settled before it goes to trial. During the past 20 years, more and more lawyers have sought the assistance of a neutral third-party or mediator to help settle a case. This person is often another lawyer who is skilled in the art of negotiation and works as a full-time mediator.

There are a variety of styles of mediation, but the most common ones are a form of facilitative or evaluative style. Facilitative mediators try to encourage a dialogue among the parties to help all sides know each other's interests. An evaluative mediator goes a step further. This mediator will let each side know the strengths or weaknesses of the case, and perhaps, even what each believes to be a fair and reasonable result in the case.

Choosing a Mediator

In many states, a mediator can be any person each party mutually agrees upon to assist in settling the dispute. If the parties have a good understanding of the nature of the dispute, they may be best served by using a person who is skilled in the art of negotiation and the process of mediation. Sometimes the parties need the assistance of a person with particular skills to help them navigate through the more technical questions. Some parties choose to use this expert as an advisor to the mediator as he or she assists the parties in negotiating an agreement.

The mediation may take place in a formal setting, such as the mediator's office, or it may take place at the site of the dispute. Whomever you select, the mediator must strive to remain objective, unbiased, neutral and professional. A mediator should insist that each party be allowed to explain his or her position, whether in writing or in person, and that each party read or listen to the entire narrative before offering a counter position. Difficult situations are often resolved simply when both parties meet face-to-face to air their differences. The personal interaction can often bring closure and a satisfactory resolution because each party was part of the process.

Although it is not required, many people choose to use a lawyer to assist them in mediation. This is fine, as long as the mediator always remains neutral and works to help both sides reach an agreement. Most lawyers are quite familiar with the mediation process, know local mediators and can help their clients navigate through the process. Many states have regulations that govern the mediation process and the mediator, so always check the rules for what applies in your case.

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Written Agreement

Whether it is required to put an agreement in writing depends on the rules in your state or if there is a case pending in court. However, it is always best to put an oral agreement into a written form to make sure each side understands precisely what is specified. Signing the agreement can be viewed as a commitment to action.

Most states' rules provide that a mediated agreement that is in writing and signed by the parties is valid and enforceable in a court of law, provided the agreement resulted from an inherently fair and voluntary process of negotiation.

Arbitration Alternative

Arbitration, which is comparable to a private court system, is another method of ADR. The arbitrator can be selected by agreement of the parties or by court appointment. Sometimes the parties use an established ADR firm to supply an arbitrator, someone who has been pre-qualified to hear and decide your case. Once an arbitrator has been selected, a case management plan is put in place, which includes timelines for preparation and submission of evidence. The formal rules of evidence that are used in a court of law are relaxed, and the arbitrator, like a judge, generally accepts oral testimony and written documents as evidence.

Following the completion of the hearing, the arbitrator will issue a decision. Depending on the arbitration agreement, the decision may be binding and enforceable in court, or it may be advisory and used to inform the parties how the dispute would likely be decided if tried in a formal court proceeding. In either event, the costs are often reduced and the process moves more quickly than if the case was pending for trial. The parties pay the costs of the arbitration, including a fee for the arbitrator's services, and such costs are often divided equally, in accordance with the agreement.

Summary

In mediation, the parties are the decision makers. The mediator, whether more facilitative or evaluative in style, works with the parties to help them decide the outcome. Most forms of ADR are non-binding and voluntary, unless the parties specifically agree otherwise or enter into an agreement that is declared a judgment in a court of law. This means that either party can decide to terminate efforts to settle the case through ADR and go to court instead. However, before abandoning ADR efforts, consider the time and cost associated with taking a case from start to finish. You may find that negotiating a resolution is a lot more appealing! ✪