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ADR

When ADR works and when it doesn't



By [Marvin J. Huberman](#)

“ADR” is an acronym for “Alternative Dispute Resolution.” It’s a term that encompasses a wide range of techniques that may be used to attempt to resolve a legal dispute without having to proceed to more traditional adversarial and adjudicatory processes such as litigation, hearings, and appeals.

These include consensual or non-binding procedures such as negotiation, neutral listener proceedings, early neutral evaluation, advisory opinions, the use of an ombudsperson, settlement conferences, peer review, mediation, the mini-trial, the summary jury trial, conciliation, neutral expert fact-finding and non-binding arbitration. It also includes binding adjudication such as arbitration and private judging.

More recently, “ADR” also stands for “Appropriate Dispute Resolution,” which takes a systems approach and considers all of the responsible dispute-resolution options, including the courts and traditional adjudication, for people who are in conflict. It is hoped that the most appropriate method for resolving a particular dispute between or among specific disputants will be selected.

ADR Goals

The goals of the various forms of dispute resolution have been described by ADR gurus Stephen Goldberg, Frank Sander and Nancy Rogers as follows:

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1. To reduce court caseloads and expense;
2. To reduce parties' financial and time expenditures;
3. To provide speedy settlement of disputes disruptive to the community and the parties' families;
4. To improve the level of public satisfaction with the justice system;
5. To provide for resolutions tailored to the parties' needs;
6. To increase voluntary compliance with case resolutions;
7. To restore the influence of neighbourhood and community values and the cohesiveness of communities;
8. To provide accessible forums to parties; and
9. To teach the public to try more effective processes for dispute resolution than violence or litigation.

ADR's Tremendous Potential

ADR has been hailed as a way to lessen costs, save time, reduce stress, build and strengthen relationships, provide more flexible processes and more party-sensitive and complex solutions than a traditional litigated outcome. It is also intended to provide a structure for "win/win" solutions.

It recognizes that often the winners of lawsuits are losers in terms of fees, frustration, wasted time and other factors not measurable in monetary terms, such as ruined relationships. The French philosopher Voltaire said: "I was ruined but twice — once when I lost a lawsuit and once when I won!"

ADR has been accepted and is increasingly used internationally in the context of civil litigation in order to capture the potential advantages of ADR — and its use as a flexible and multi-purpose tool in preventing and resolving disputes — over traditional adversarial litigation.

The five major outcomes from ADR identified in international literature are:

- Increased settlement;
- Improved satisfaction with the outcome or manner in which the dispute is resolved among disputants;
- Reduced time in dispute;
- Reduced costs in relation to the dispute resolution; and
- Increased compliance with agreed solutions

Disadvantages of ADR

Nevertheless, there is ongoing debate among proponents and critics of ADR concerning the nature and extent of its perceived advantages and disadvantages, and the merits, risks and potential problems of different ADR options. These include the concern that ADR — particularly mediation — delays dispute resolution and that it can increase costs, particularly when it comes to arbitration.

Furthermore, mediation is generally not considered suitable in cases of sexual harassment, violence, and other forms of abuse and power imbalance.

And, for some parties, litigation is the chosen and more appropriate dispute-resolution process, including where a binding judicial precedent is required or desired by the disputing parties, a substantial public interest component is at stake such as constitutional questions,



environmental lawsuits, occupational health and safety proceedings or class actions, or where a party needs or wants personal vindication, retribution to protect its name or reputation, or a public declaration of guilt. Such instances can include cases involving breach of fiduciary duty, fraud, and sexual harassment. There are also those who point out that, despite ADR, there has been an increase in lawsuits, legal billings, and damage awards.

The Key to Success

So, when does ADR work? The key to ADR success lies in its effective use. As professor Frank Sander of Harvard Law School proposed, one must “fit the forum to the fuss,” that is, analyze the particular dispute and then find the appropriate forum(s) to assist in facilitating resolution. The correct process for the specific dispute and the particular disputants must be selected. An appropriate neutral expert trained in ADR should be retained in order to custom-tailor and explore creative approaches to dispute resolution in order to maximize the chances for optimal innovative and mutually beneficial solutions — all with regard to the three P’s: the people, the problem, and the process.

Success in ADR requires the following from its stakeholders:

- Better awareness, education and training;
- Increased quality control of ADR trainers, mediators, and arbitrators;
- Commitment to ADR and its goals, values, principles and challenges;
- Changes in attitude and working assumptions with respect to settling disputes promptly and fairly;
- Greater clarity in expressing the parties’ needs, interests, and objectives in the event of a dispute and in understanding the barriers to settlement;
- A more intense focus on risk analysis and creative outcomes rather than on the legal strengths and weaknesses of each party’s position and settlement amounts; and
- A better understanding of the cost, availability, and the requisite qualifications of appropriate ADR providers.

The Future Looks Bright

ADR is a broad and elusive term embracing established and innovative techniques and concepts as a means of resolving disputes without formal adjudication. It is a mind-set which fosters creative and critical thinking, and the scrutiny of assumptions about traditional adjudication. ADR’s full potential, while recognized, has yet to be realized. Inventiveness and imagination will yield further ADR innovations and hybrid techniques and concepts. The process of evolution will continue.

ADR presents challenges and opportunities. It is a tool — offering variety, flexibility, adaptability, and practicality — which, if skillfully and appropriately used, promises to assist in fundamentally enhancing our justice systems, both private and public.

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