

Vocabulary of ADR Procedures

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ADR can be useful in litigating, but parties sometimes define terms differently. Here's a glossary:

The vocabulary of ADR is not uniformly used by all people. When people refer to a "mediator" is an "arbitrator," and to a nonbinding arbitration, likely as though it was much more similar to binding arbitration than is mediation, etc. However a characteristic of mediation is compromise, many think of arbitration as more characterized by compromise than court trials — a grossly erroneous assumption. Even a judge recently ordered the parties "to do one of those ADR things," not knowing really what he was talking about.

So let's set some framework about alternative modes of ADR and at least one informal vocabulary defining some of the infinitely variant procedures.

The better known forms and names of ADR are commonly referred to by the name:

1. Fact Finder

Typically meaning:

A neutral appointed to be assisted of an investigation (usually where the aid of scientists/engineers and their tests are needed) of a scientific or other inquiry into-continued to ascertain facts, which is/are once determined are likely to decide the case in the minds of the parties or at least be very important to the decision.

A key scientific determination has itself disposed of more than a few cases with more stability than, and at a small fraction of the cost of, a court determination of the same fact.

1. Mediated settlement conference

Typically meaning:

(a) An informal case presentation, by/without much by way of evidence, witnesses or affidavits or very much reliance on documents.

(b) In substantial cases commonly presented exclusively by counsel/argument (after their client, followed after a neutral's evaluation report, by client participation in discussions).

(c) Presented to a panel of one to three neutrals, almost always lawyers (hopefully with some background in the subject matter.)

(d) Panel members hear the presentations, report their evaluations, and participate as facilitators in further settlement discussions influenced by how the case "played" to them.

(e) Private communications between a party and the neutrals are usually not contemplated in this process, though the process may evolve into closed mediation with private caucuses as discussed in Paragraph 4 below.

Advantages in cases heavy in application of law centered evidence: mediation of lawyers/judges may dominate any court decision.

Composites is essentially a key feature of this process—a contract with binding arbitration where it is not.

2. Summary jury trial

Typically meaning:

(a) A fairly formal case presentation.

(b) Privately by counsel argument rather than by client or witnesses.

(c) Using primarily affidavit evidence and brief argument through sometimes live-examinations of a key witness or two — the jury considers

it all with essentially no evidence objections maintained.

(d) Presented to a regular jury impaneled and presided over by a magistrate or judge.

(e) The jury hears and decides the case in a nonbinding decision.

(f) Commonly, the jurors are available for interview by the parties afterward whereby their responses and reactions can be learned by the parties.

Advantages in cases heavy on facts and/or damages speculation where the response of a typical jury is likely to influence outcomes.

Knowing how a case "played" to a jury can be very helpful in many ways.

Excepting incident as to the case played to the jury is informative, this procedure generates no bias to compromise. It is as likely to make a party more firm in its low or high settlement offer as to more a party toward its attorney's view.

4. Mediation

Typically meaning:

(a) A highly informal case presentation by the mediator often spanning much direct conversation between the parties as well as their counsel, when present, in a common room.

(b) Presentation by client and/or by counsel.

(c) Usually without "evidence," though sometimes with a document or draw for reference in specific language.

(d) Discussions led by one, two or three neutrals in a private (not public) way in facilitating conversation between adversaries — these discussions characteristically including joint sessions and also private caucuses between the mediators)

*I note that while jury decision-making authority is normally granted into-process, the CEDR or even CEDR per se, commonly thought of as "required" to the stage "mediated settlement conference" as a case goes with the procedure normally termed a "summary."

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and the individual parties and a sort of outside diplomacy between them in hopes of bringing them together.

(c) The mediator facilitates communication between the parties essentially without any judgments or rulings, in aid of the parties arriving at their own agreement in lieu of any decision or judgment of any kind by a neutral, hardly is not the mediator's goal: party-agreement is.

Highly effective when both parties have a legal, economic and/or cultural incentive to get the case settled privately, or get it settled privately so that, having preserved their relationship, they can get on with other things together. Also more commonly effective than last, in other situations as well.

Often highly useful even when it fails, as a lead into a binding arbitration proceeding before the same neutral (termed "lead-into") or a different neutral.

Often resulting from instant-appeals after the award in a nonbinding arbitration, mediated settlement conference, or similar, where there are good to ask questions of the neutral and the neutral can move right into a classic mediation with.

Increasingly involving compromise, by contrast with binding arbitration where harsh results are at least as common as in most arbitrations.

5. Med-arb

Typically nonbinding.

Mediation as in Paragraph 4 above, followed by binding arbitration as in Paragraph 7 below, normally before the same neutral.

Softening the circumstances that some of the revelations in private mediation causes may influence the arbitration award — a circumstance worthy of bar in some situations but which has been found to be highly fruitful in many cases now.

This gives rise to the question: How much trust do you have in the mediator/arbitrator? If not much, then let the arbitration proceed before a different neutral than the mediator.

6. Nonbinding arbitration

Typically nonbinding.

(a) A moderately formal case pro-

cedure.

(b) Normally primarily by counsel with client inputs.

(c) With affidavits, deposition and documentary evidence reviewed and relied upon to the extent of its inherent credibility or relevance (rarely live witnesses).

(d) Presented in one or sometimes three arbitrators who initially preside in a judge over the proceedings, hearing evidence primarily in a passive role like a judge though also cross-examining parties here and there (often the absence here of any real focus on CMOs at top offices being present as in what is commonly called a "mediated" but for that this and sometimes consistent differences, "mediated" is merely an other name for a nonbinding arbitration used to target party-settlement).

(e) The arbitrator(s) make an "award," in the U.S. about as often without reasons as with any opinion or reasons, which award hopefully will target further settlement conversations in light of the neutral's opinion — how the case "played" to him.

(f) The neutral(s) often evolve after the award into a partially actively performing mediator as in Paragraph 4 above (a role for which he must be trained and prepared).

(g) Private communications between a party and the arbitrator are not normally contemplated (except perhaps in labor arbitrations where party-appointed arbitrators are sometimes not fully available) but that point is in need of explicit contract determinations.

(h) The term "mediated" developed in that popularity in context of procedures where the mediator and the post-award mediator process involve a passive and participation of CMOs or other very high corporate officials with full and its independent authority to decide.

Because the award is not binding and the arbitrator(s) of the neutral, the procedure is to aid the parties to make their own settlement, the arbitrator can be less in letting parties get outside their pleadings and/or other rolls of issues, and in striving, like by available evidence. He can exert the potential for mediant thereby target by conditioning his "award" (and subsequent mediation con-

ditions if any) with conditioning comments like, "Point A was not adequately proven by responsible evidence here, but if possible by solid evidence there the award would be X, if A is not responsibly proven, then the award would be Y."

7. Binding arbitration

Typically nonbinding.

(a) A fairly formal case presentation, as in a court trial, though as often held in a conference room or the like so in a borrowed courtroom.

(b) Presented primarily by counsel.

(c) With affidavits,¹ deposition and documentary evidence of its inherent credibility but without following strict Rules of Evidence.² Typically, in the U.S., with live cross-examination of witnesses on all major contested issues, less commonly so in non-English language countries; direct evidence is sometimes by live witnesses, sometimes by witness's sworn statements subject to live cross-examination in the hearing.

(d) In one or sometimes three arbitrators who initially preside as a judge over the proceedings, hearing evidence primarily in a passive role like a judge though also cross-examining parties here and there.

(e) The arbitrator(s) make a binding "award," almost as often without reasons as with them in the U.S., but with reasons in Europe and international arbitrations, which award is intended as the ultimate justice obtainable.

(f) Appeals in other court reviews may be contacted for, but it is most common as arbitration to provide for no appeals or court reviews of right.

(g) With the exception of some law arbitrations, mostly in the labor area, private conversations between a party and his nominated arbitrator as well as any other arbitrator are forbidden (this being a characteristic distinction between arbitration and mediation where private conversations are a characteristic part of the

¹ Affidavits tend to be reviewed and relied upon with respect to essentially uncontested issues, but should be considered inadequate proof of presentation unless corroborated by other evidence or by corroborating or consistent or at least subject to live witness cross-examination.

² The parties, of course, can contract for what they please in such matters.

cases are a characteristic part of the procedure.

In justice under the facts and law is the priority of the arbitrator, not party-agreement or compromise of the party's positions.

Because the award is binding and independent of party-agreement, the arbitrator must not be law in living parties get outside their pleadings and lay notice of issues, must not let the parties limit on him available evidence like uncorroborated witness-examined affidavits on contested issues, but he forget much injustice. He cannot, as he may in nonbinding arbitration, conclude his "award" with comments about weak evidence or the law. He must make a final decision as just as possible.

Mediators think well of compromise, but a proper arbitrator considers compromise only in terms of its justice under the law, which often provides for harsh remedies.

Three-courts of record, particularly courts of appeal, must consider whether their opinion is making changes in the common law or upswelling the common law, whereby lawyers will not be able to write reliable opinions for their clients, that consideration is totally absent in arbitrations where the arbitrator pursues justice under the law without regard to his influence upon the development of the common law.

8. **Ministrial**

Typically meeting:

(a) A mediatory formal case presentation more like a binding arbitration than any other, though typically held in a hotel or attic conference room or even honored courtroom.

(b) Presented solely by counsel.

(c) With affidavits, deposition and documentary evidence normally reviewed and relied upon to the extent of its inherent credibility but without following strict Rules of Evidence, sometimes including one or two key witnesses live and subject to cross-examination through more often attorney's arguments without live witnesses.

(d) Presented to party CEO type representatives with decision-making authority. That's the key

differentiation of this procedure over what is often termed "non-binding arbitration," where any decision maker can be present. It is presented also to one or sometimes three experts who initially:

(i) Preside as a judge over the proceedings.

(ii) Hear evidence primarily in a passive role like a judge, though also cross-examining points live and then.

(iii) Present a conclusion without joint private conversations with any party or party representative.

(iv) The ministrial make a ruling normally with reasons as with European and international binding arbitrations, which award (swearing as it does how the case "played") is intended as an aid to the parties further negotiation toward settlement.

(v) And, whereas it is planned that the award the ministrial shall become a fully performing mediator, commonly including shuttle-diplomacy between the parties, as in Paragraph 4 above (a) his for which he must be trained and prepared.

In terms of purpose-to-include-the-parties-to-witness, considering the award regarding areas of weak proof, tightness in pleadings, and resolving possibly irresponsible evidence, the ministrial is essentially the same as a nonbinding arbitration or the mediated settlement conference discussed above.

But the term ministrial is applied usually to proceedings with a very high focus on having CEO-type principles present and committed:

* To limit the case through the result of the adversary.

* To see their own counsel perform by comparison with the adversary.

* To pick up an evaluation of the resources and effort that carrying the case to trial will require if there is no settlement.

* To settle the case if it can be settled.

9. **Neutral as arbiter of ADR process**

When a license contract is entered into, it is customary to define the preferred ADR procedure with

great particularity and rigidity, because when controversy arises the ADR process contracted for may not be the preferred choice that fits the controversy best.

In contrast, when the controversy has already arisen or a suit has already been filed, then the contract to proceed by some form of ADR can and should be particular to a number of ways, including both the time of significant activities and — more importantly — an instruction that the arbitrator assume a personal initiative and responsibility for the management of the case for expeditious, efficient conclusion.⁴

And often the best procedure is to employ an experienced neutral and let him/her in consultation with the parties be the principal architect for the hybridization of three various procedures into a detailed process unique to your controversy, likely a process not completely or precisely within any of the definitions I have noted, and where in the award is explicitly instructed to assume case management initiative — a very important point.

A knowledgeable neutral with an affirmative commission and contract to take management initiative and control of the controversy, a neutral with a commitment that he shall expeditiously and responsibly and reasonably efficient resolution of a dispute, can produce shockingly marvelous results.

By contrast, if the contract to arbitrate permits him to assume a passive/reactive role or confine him to the reactive mode common to most judges (and very recently, where the arbitrator's other commitments cause delay or where the party's typically over-detailed counsel control the pace of the proceedings and budget scores of millions, requests for three times, etc., one very significant potential value in ADR will be lost, and lost to unconscionably.

⁴ As better developed elsewhere herein, the most important value of institutionalized judicial process — savings time and money — derives importantly from the arbitrator's knowing that it is impossible for the arbitrator or a protective case manager and lawyer team must to arrive and maintain by the parties. And both parties must know it as well, as by an explicit instruction in the contract of arbitration.

10. "Court-annexed" or "judicial arbitration"

As "judicial arbitration" a misnomer,⁷ for some sort of court-annexed proceeding, typically meaning:

A court-ordered ADR administered by arbitration or award, the award being subject to a timely request for court trial *de novo*, in the absence of timely demand for court trial *de novo*, the award being turned into a final judgment, settlement conversations and/or mediation divisions along the way being common.

In at least 22 states, the District of Columbia and 20 U.S. District Courts, had by 1990 adopted some form of "court-annexed" or "judicial" arbitration.

11. Rent-a-judge or "Private judging"

A conventional process available when statute or local court rules permit court referral of cases to neutral third parties typically meaning:⁸

(a) A fairly formal case presentation, as in a court trial often following traditional procedural and evidentiary rules.

(b) Presented by contract, witness, and documentary evidence.⁹

7. The arbitrator is not fully subjected by appointed arbitrator, and hence is not "judicial"; the fact that the award made is more subject to court trial *de novo* makes it not truly an arbitration.

8. See, for example, Cal. Civ. Proc. Code Section 70; Nev. Civ. Proc. art. 240.

(c) To a privately selected and privately paid neutral, usually a retired judge, who presides over the proceedings as a judge, and who has the same powers as a trial judge.¹⁰

(d) A record of the proceedings is usually made by a privately retained court reporter.

(e) The private judge reports his decision to the referring court and judgment is entered on the decision and the parties had been decided by a court.

(f) The parties' rights to appellate review and enforcement of the decision are the same as if the judgment had been entered by a district court.

In many respects, Rent-a-Judge is akin to binding arbitration where the parties have provided for appellate review of the arbitrator's award. However, because "Rent-a-Judge" procedures are usually controlled by statute and require a court referral, it is not clear that the parties can agree in advance to submit a case to a private judge under these statutes.

Retired judges privately serve as

9. Although the presentation is traditional in mode according to traditional procedure and rules of evidence, the parties may agree to relax or change the rules.

10. Under the Texas statute a private judge has the powers of a district-court judge, except that they can hold for contempt persons not attorneys before him.

11. Except perhaps for a court-annexed arbitration award.

neutrals in this procedure — hence the nickname "Rent-a-Judge." Because of this, the process closely resembles traditional litigation in form, although the expertise of the judge, the speed of decision, and the flexible rules and procedures may be different from those found in the courtroom.

Unlike awards obtained in most ADR procedures,¹¹ the award rendered by the neutral in this process becomes, in essence, a judgment of the court. As such, it is subject to the same processes (e.g., appeal, motion for a new trial) as a trial court decision.

Two key understandings have the nicknames and their definitions are not used in those not defined by statute, at least for the most part. To use any one of these terms without further definition is likely to be indefinite to others. Hence, such use is poor contract practice, but an intent to do one thing by either contract or command as a contract to do another.

Further, the parties can contract for nearly any procedure, evidence practice, discovery, injunctive or attorney-fee remedies, court review, etc., that they want, and can call it whatever they want as long as they state the substance of their contract clear.

And when they do call their procedures differently from what is outlined above.