



ADR Frequently Asked Questions (FAQs)

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ADR Frequently Asked Questions

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USING ADR TO RESOLVE DISPUTES (FAQs)

When is a dispute ready for a non-binding mediative process?

When sufficient information is available to assess its value

- discovery need not be complete
- limited, focused discovery can proceed by agreement, without full disclosure of full discovery if the process fails

Before entering any type of mediative process, enough information should be available to warrant an interest in settlement, and to assess the dispute's approximate settlement value. *A dispute is ready for a mediative process when the parties are ready to discuss settlement, or if settlement discussions have been or appear likely to be fruitless.*

Settlement is traditionally discussed at various junctures: after the pleading state, but before discovery; after certain essential or expert discovery is completed; after all discovery is completed; and just before trial. ADR can take place at any of these junctures, but also at any other time that the parties believe they know enough to approximately value the dispute.

Common Concerns

1. The Discovery Question

Should formal discovery always be complete or nearly complete before participation in an ADR process?

No-not necessarily.

In many simple, lower stakes cases, essential information can usually be obtained without need of formal discovery. If the formal discovery mechanism is used, it need do no more than establish the basic facts, the damage ranges, relevant documents, and theories of liability. In these cases, settlement value is based upon what is known recognizing the need to adjust the credibility of the disputant, key witnesses, or other factors that may become apparent.

2. Capturing A High Marginal Return On Discovery

Even where some discovery is necessary, 80% of discovery information is usually obtained for 20% of the cost

In higher stakes, complex cases, compiling more than just "bare bones" information is often worthwhile. Even secondary facts and witnesses may have a large dollar impact on settlement value.

The information need not be obtained through exhaustive formal discovery; however, it is often worth the cost to conduct limited and focused discovery, while delaying the balance of possible discovery actions. Where all parties have retained experts whose investigation and conclusions will determine the various settlement positions, some discovery should be completed on the technical issues.

One excellent solution is for all parties and counsel to agree upon an abbreviated deposition schedule of key expert and fact witnesses (for example, limit depositions to "x" hours), reserving the right to continue any deposition if settlement is not reached.

Streamlined, focused and cost-effective discovery is best accomplished by agreement and cooperation of the parties and counsel. Since this may be difficult while they are locked into adversarial litigation, the parties may want to suggest a tailored "discovery mediation" that focuses on the necessary exchange of information. For example, the parties may agree to have the mediator make preliminary findings.

The only risk of obtaining information within the ADR process is that the powers of the court are not available to compel full compliance. However, it is usually possible to build in reasonable safeguards to insure that accurate information is provided and can be relied upon.

3. Dealing With Consequences of Incomplete Information

Coming to the ADR table with incomplete information simply requires that the parties have the flexibility to address any surprises that may arise.

The disputing parties need to have the flexibility to adjust their valuations based on new or different information. In some instances, the opposing counsel may present sufficient enough legal or causation theory to require delaying the mediation so that there is time for more thorough review and investigation.

While there is a trade-off between cost and complete information, the risk of paying more for delaying discovery will often be more than offset by savings in continued discovery or expert work-ups, and detailed legal research.

4. Pending Motions

Should mediation be attempted before filing an important motion or while the motion is pending?

It depends on how much it will cost to file and respond to the motion.

Because preparing and responding to such motions can be very costly, the parties may be willing to take less, or pay more in settlement to avoid this cost.

It depends on how long the court will take before deciding the motion.

In some courts, ruling on a summary judgement motion may take a year or more. Fortunately, other courts are more prompt. If other litigation costs are mounting while awaiting the outcome, mediation may make sense.

It depends on the likelihood of success on the motion.

If the chance of success is not strong, it may be best to attempt to settle while the risk remains for the opposing party (before the motion is filed or decided). On the other hand, if likely to be successful, it may be appropriate to wait for decision before mediating. Or, mediation can begin while the motion is pending, factoring in to the case the likelihood of a favorable ruling. If both parties believe the motion is strong it may be an ideal time to attempt settlement.

When is the right time for a binding ADR process?

A dispute may be ready for a binding ADR process at any time

- The contract provision or state law may require use of a binding ADR process

Binding arbitration may be most cost-effective following a mediative process

- Issues and differences can be narrowed and focused

A binding ADR process should be chosen when the parties have decided that they prefer not to settle the dispute, but do not want to go through the public court system. A binding ADR process can be initiated at any time.

1. A Dispute Is Ready For Arbitration When ...

Most commercial arbitration is triggered by a pre-dispute contract clause. The arbitration clause may determine when the arbitration can be initiated, and may specify a limitations period. Some contracts require preliminary dispute resolution steps, such as good faith negotiation or mediation, prior to the initiation of arbitration.

Without a contract requirement, the parties may jointly initiate arbitration by executing a private arbitration agreement. If a suit is pending, the agreement will usually provide for its termination because the arbitration will be final and binding.

If entering a private arbitration agreement, parties can and should consider what formal or informal discovery will take place prior to the arbitration hearing. Given the flexibility to write any necessary discovery into the arbitration process, the status of the discovery prior to the arbitration agreement need not affect the decision to proceed.

2. A Dispute Is Ready For Private Judging When ...

Some states' rules of civil procedure or practice contain authorization for a private trial. Sometimes the authorization may specifically provide for the means and timing of initiating the private trial. In those states in which there is no specific authorization for a private trial, the parties have more flexibility as to the means and timing of such a process. The same issues relevant to the timing of an arbitration should be considered.

The Time For A Binding/Adjudicative Process May Be After Other Settlement Efforts

It is important to note that any binding ADR process can be initiated after a mediative process has taken place. For example, the mediative process may have succeeded in settling most issues in a dispute, or may have narrowed the gap between settlement positions. Rather than return to full-blown litigation, the parties can still agree to engage a binding process that is specifically tailored or streamlined to take advantage of the progress made in the mediation. In such a case, the parties could agree that only certain disputes or issues are to be arbitrated, could stipulate to bracketed limits, or could grant the neutral authority to choose from among the final settlement offers of the parties in mediation.