

ASSISTED NEGOTIATION
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The bright new associate, looking to impress his mentor, raises the possibility of using alternative dispute resolution to solve a complex contract dispute the firm is handling. Without hesitation the experienced counsel replies, "If opposing counsel would just take a hard look at the case, I know we could work out a settlement ourselves." The bright new associate returns to his present task, responding to a massive discovery request in the case. He is content that although his idea failed to impress his mentor, he will have no trouble getting in his billable hours this month.

Over the past two decades lawyers have fashioned a panoply of ADR approaches. Some of these approaches utilize complex procedures and are binding in their outcome. Other processes merely help the parties "take a hard look" at their dispute. Moving along a continuum, from minimal to total party control, ADR processes might be characterized as falling into one of three general categories: "assisted" negotiation, mediation and arbitration. In "assisted" negotiation processes, the parties and their counsel communicate directly with each other. These processes merely aid those communications through agreements to follow certain procedures or to permit limited input from a neutral party. Early settlement procedures, neutral evaluations, the use of a confidential listener, joint and neutral fact-finding and summary jury trials can be powerful tools to help the parties "take a hard look" at the case and move forward through their own negotiations.

Early Settlement Procedures

The early settlement procedure focuses the parties on direct negotiation early in the litigation. Here the process, as well as the outcome is entirely controlled by the parties and a neutral is not involved. The parties reorient away from adversarial postures toward a principled negotiation style. Negotiations commence with a stipulation to extend litigation time limits to pursue the settlement. The parties agree on the timing, scope and framework of a limited factual investigation. Both sides then engage in a realistic assessment of litigation risks. The parties identify their primary goals and commit throughout the process to address their interests, rather than simply take positions. The early settlement procedure usually works best where counsel have good rapport with each other and where the parties can wholeheartedly commit to resolution. The procedure is useful in a wide range of disputes and can accommodate both integrative and distributive strategies.

Neutral Evaluation

Where the parties desire input on valuation, but no assistance in the negotiation process, the neutral evaluation procedure can be considered. Neutral evaluation has long been an option available through federal district court programs in California. Here an agreed upon expert, usually in the subject area, is retained to provide an evaluation of the case based on the merits. The evaluation process is generally informal with counsel presenting their positions by way of discussion. The parties may submit briefs or make oral argument. The evaluator may be asked to address purely legal issues, or to render his opinion of likely jury outcome. The evaluator's task ends with the evaluation, which takes whatever form the parties desire. Neutral evaluation is especially useful where the parties need input on the strengths and weaknesses of their legal positions, but are confident they can directly negotiate a settlement thereafter.

The Confidential Listener

A confidential listener is a neutral engaged by the disputants where negotiations have taken place, but appear to be at impasse. The neutral obtains confidential proposed final settlement figures from each party. Without disclosing the numbers, the listener informs the parties whether the numbers are within a specific pre-set range. For example, the parties may set the range as “numbers within a certain dollar amount of each other” or “numbers which overlap”. In some cases the parties decide beforehand how they will divide the difference if the numbers overlap. The confidential listener process works best in a distributive bargaining situation where money is the only issue.

Joint and Neutral Fact-finding

Joint or neutral fact-finding is a technique employed to get past a negotiation impasse where it results from differing views of critical technical questions. Fact-finding is useful where the matter would result in a “battle of the experts” at trial. In joint fact-finding the parties designate representatives to work together to develop responses to factual questions. In neutral fact-finding the parties appoint a neutral third party to develop the responses. The responses may be arrived at after presentations by the parties, by independent investigation, or by informal meetings with each side. The parties generally determine in advance how these responses will be used. Fact-finding can be utilized to assist direct negotiations or as part of a mediation with the fact-finder selected by the parties or the mediator. It can also be used within an arbitration procedure, where the report can be either binding or advisory to the final decision makers.

Summary Jury Trial

A summary jury trial is a very structured, non-binding, abbreviated “mock” trial using a panel of actual jurors. These jurors may consist of experts in the field, a panel representative of the likely jury pool, or the parties may determine another way to select a jury. Rules of evidence are generally modified and the parties present summaries or key witnesses testify in abbreviated narrative form. A neutral chosen by the parties may preside. After a brief deliberation, the jury returns a consensus verdict on liability and damages. Counsel and the parties may then discuss the verdict with the jurors. Direct negotiations generally follow immediately after this procedure. This process has been lauded as giving a “dose of reality” or “a real sense of the jury.” While not binding, the jurors’ decision and their rationale can have a powerful effect on subsequent negotiations. The summary jury trial is well-suited for cases turning on credibility of witnesses on non-technical facts.

Many alternative approaches to resolving disputes exist, and the best approach on a given case will turn in part on the amount of control the parties desire to maintain over the process and its outcome. Where parties to a dispute are willing to communicate directly about the issues and realistically consider compromise, the use of an assisted negotiation procedure can provide those involved with “a hard look” at the dispute and increase the likelihood of success.