

Lessons from ADR: The Next Normal for Clients, Colleagues and Communities

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In July 2016, Michelle Obama said her now-famous catchphrase, “When they go low, we go high,” as a pragmatic approach to break an escalating pattern of conflict. How do Mrs. Obama’s words apply to the new normal that is impacting not just practitioners in the New York legal market, but also clients, colleagues and communities worldwide?

Today, as we grapple with “lows” in the form of overlapping pandemics from coronavirus and severe weather events to civil unrest and economic recovery, Ms. Obama’s mantra sets the stage for the use of alternative dispute resolution (ADR) as a means for both legal and nonlegal practitioners to address the ever-evolving, tough conflicts. Here are 10 lessons from ADR designed to help you navigate the next normal.

1. Mitigate risk by including mediation and arbitration provisions in your agreements. The pandemic closed courts in New York and beyond. When



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the courts reopened, the backlog put a huge strain on trial calendars. ADR can help the courts to eliminate backlogs and bring access to justice to litigants, making mediation and arbitration more attractive than ever before. On April 15, 2021, Myrna Barakat wrote in the *New York Law Journal* that the pandemic should motivate parties to include both arbitration and mediation provisions in their agreements in “The COVID-19 Case for ADR Provisions in M&A Agreements.” The guidance is to be clear in your provisions whether you are opting for mediation or arbitration.



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2. Value the person’s perspective. You do not have to agree with what a person is saying, but you should listen with the purpose of understanding (instead of listening to respond) where they are coming from and why they have that perspective. Why do they have this point of view? Does it impact their identity, emotions or power? When you are listening attentively, you have to tune in to the speaker’s emotions, what they are saying and their body language. Allow the speaker lead you to where they want to go. Remember: You don’t have to agree to reach an agreement.

3. Incorporate empathy.

Unconscious bias research suggests that often listeners offer empathy only if they or someone they knew had been through the same or a similar experience as the speaker. This is not the case when listening as a mediator. As a mediator, you must distinguish between empathy and sympathy. Sympathy is feeling sorry for someone. When you are empathizing as a mediator, you are acknowledging how someone feels as if you understand and share the feelings. Empathy is when you feel with someone. You do this not by sharing stories or saying, “I understand.” You show that you understand this by reflecting their emotions, summarizing what they said and validating their feelings. Imagine what they are going through. What must this conflict feel like for this person—and why? Put yourself in their shoes and lean in to what they are feeling.

4. Separate the person from the problem. At its core, most workplace conflicts have two foundational elements: (1) the people involved in the conflict and (2) the problem those people are seeking to address. In order to most effectively resolve a conflict, you have to separate (1) from (2). In *Getting to Yes: Negotiating Agreement Without Giving In*, Fisher, Ury and Patton devote an entire

chapter on this concept. Sometimes the problem itself is simple to resolve, but because of the people involved (including their philosophies, experiences and personalities), the resolution is not apparent or seemingly out of reach. As you enter the new year, pledge to stop conflating people and problems, and address each separately.

5. Understand the underlying interests, not just the stated positions, of the people in conflict. Emotions can cloud people’s ability to articulate the root of the problem. The distinction between *what* a person is saying they want versus *why* they want something is important to recognize and sometimes reveals that the underlying goals of the parties are more aligned than divergent. Once interests are known, positions often soften, and common ground can be reached.

6. Accept reality with a “Yes, and” approach. The “Yes, and” technique that is fundamental to improv has applicability off-stage. Essentially, this approach fosters a sense of cooperation because you are encouraged to listen and be receptive to the ideas of others regardless of whether you agree or disagree with the premise. How this translates to conflict resolution is easy. Saying “Yes, but” halts a conversation because once you say “but,” you negate everything

that preceded that word. “Yes, and” builds communication bridges that you can use to reach an understanding. By substituting one word, choosing “and” instead of “but,” you can open the door to engage in collaborative problem-solving.

7. Resolve with everyone at the table. Once the door is open, make sure you invite everyone involved in the conflict to the table. It is a waste of time to try to solve a conflict when a key person to the situation is not a part of the conversation. You cannot agree to acts, omissions or changes in behavior on behalf of someone else; the person in question must be involved. While we do not advise forcing someone to the table who steadfastly refuses to be involved, creative leaders can set the tone for the organization and properly incentivize all stakeholders to come to the table. Complex commercial disputes involving insurance may be the exception in some cases, depending on the stage of litigation. If the dispute is contentious and trial is imminent, the parties are often inclined to be more fully engaged when decision-makers are present.

8. Trust the process. Effective and durable change requires time, patience and flexibility. There will likely be challenges when you implement a well-thought-out conflict management plan, particularly if the

change of course is significant. Naturally, some participants in the plan may doubt it— e.g., “the plan will work too slowly” or “the plan is never going to work”— but as a leader you need to trust the process and encourage your team to do so. Plus, remember that plans are guidelines that can be revisited and adapted as your organization grows and changes.

9. Hire a professional conflict resolver. While the aforementioned road map will help you to think like a neutral, it is advisable to engage an ADR professional (mediator, arbitrator, ombuds, etc.) to help you navigate the conflict.

10. Plan for the future. Do you or your organization need an ombuds? An ombuds is an independent and neutral person tasked with helping people within an organization to identify and informally resolve individual, group and system-wide concerns. Ombuds professionals use their knowledge of conflict theory and organizational dynamics to identify the underlying causes of problems and disputes, and then provide tools and strategies to address them. This time last year, those who could were working remotely, and virtual meetings became the new norm. As we approach the fall season and the number of cases is spiking as the Delta variant is

spreading worldwide, some of us will find ourselves back in the office, hybrid or fully virtual (again). It is key to be aware that many individuals are and will be experiencing the same situation under varied circumstances. Tempting as it may be to just fire off emails to address every scenario, to minimize conflict, it is imperative to bring your humanness to internal and external communications. Before you fire off that email, ask yourself if there is perhaps a better form of communication for the message— voice recording, phone call, etc. Consider not just your intent as the writer/sender, but also the impact on the recipient.

The next normal requires new normalization of how we prevent and resolve disputes, as pandemic-related delays, among other things, have placed an insurmountable strain on the already overwhelmed judicial system. Many conflicts arise and escalate because people are unwilling to have a conversation about why the points in dispute exist. In the 1970s, researchers Kenneth Thomas and Ralph Kilmann created the Thomas-Kilmann Instrument, known as the TKI, which includes five major styles for conflict management: accommodating, avoiding, competing, compromising and collaborating. Conflict resolution techniques are being offered in some school districts

and community centers across the country to introduce children and community resource professionals to strategies to reduce and navigate conflicts. ADR, in different forms of conciliation, can be the solution at any age and in any context. Choose to go high.

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