

## ADR Process Design: Make the Process Fit Your Goals

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Now that the use of mediation, arbitration and special masters has become widespread in commercial dispute resolution, it is time to move alternative dispute resolution to the next level. Rather than simply selecting a standard ADR process for use in a case, innovative lawyers are looking for ways to combine and enhance traditional ADR processes.

Corporate counsel are ideally situated to take the lead in designing ADR processes that incorporate elements of different ADR processes and apply them to disputes in which their client is involved. Corporate counsel know their client's interests, culture and budgets, and understand the importance of the dispute to their

client. These factors inform the choice of a process.

The goal: a more expeditious and less costly means for resolving disputes. Mediation is very useful, but sometimes a case has issues that the parties simply cannot resolve without a binding ruling. Arbitration is binding, but sometimes there are cases or issues that can benefit if the parties have an opportunity to work with a neutral to better understand, narrow and even mediate the issues, either procedural or substantive, to position the case for efficient arbitration.

The solution: design an ADR process that combines elements of arbitration and mediation, and applies them to the different issues or stages of the dispute.



The spectrum ranges from, for example, mediators using nonbinding evaluation or mediator proposals as a means of encouraging settlement; mediators switching to the role of arbitrator in the course of helping resolve a dispute (med-arb), or arbitrators shifting to the role of mediator (arb-med),

and arbitrators trying to set the stage for settlement.

First, consider neutral analysis or neutral evaluation. Neutral evaluation refers to a range of non-binding processes in which one or more parties retain a neutral to deliver an evaluation. The evaluation can follow a written presentation, oral presentations with or without witnesses, or a mock trial or summary mock trial. Decision makers, executives or in-house counsel, attend and can follow up with negotiation or mediation with the other party, informed by what each party has observed and learned from the neutral evaluation. Neutral evaluations can be used for a discreet issue or an entire matter.

Second, try combining mediation and arbitration. Mediate some issues, arbitrate some issues. No one said the processes had to be exclusive.

Mediate, and if it doesn't resolve, figure out where the obstacle is, and ask the mediator to convene a short hearing, or decide on papers and rule on the issue.

Or arbitrate, and while the arbitrator holds the award in a sealed

envelope, mediate to try to reach a settlement.

Or proceed through med-arb, followed by a final mediation before the arbitrator issues the award.

Or select issues for mediation and arbitration. Mediate this; arbitrate that.

Caution: combining adjudicative and mediation processes requires care to ensure that all parties are in agreement, understand the pros and cons, and have signed the appropriate agreements to allow the neutral to switch hats from mediator to arbitrator and vice-versa. Having the same neutral serve as both arbitrator and mediator maximizes efficiency and minimizes expense. However, parties may be less candid about their positions in mediation if the mediator will be adjudicating the case if the mediation fails. In addition, the parties will not know what has been discussed by the opposing party with the mediator in the separate caucus sessions, and will not be prepared to rebut such information if the case does not settle and proceeds to arbitration.

ADR process design lets counsel move their case management beyond basic arbitration or mediation and provides the opportunity for innovative and strategic dispute resolution.

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