

A Guide to ADR Choices

*When to go to full mediation, when a
settlement conference is enough, and what
other ADR options are appropriate*

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Produced jointly by the ADR Committees of the Pennsylvania Bar
Association and the
Philadelphia Bar Association

Nearly everyone knows something about Alternative Dispute Resolution ("ADR"). However, even experienced lawyers do not always know about all the different ADR tools or when a specific ADR technique should be used.

Judges conduct settlement conferences and sometimes use lawyers to help settle cases. The lawyers will be called "settlement masters," "judges pro tem," or other terms. When judges or such lawyers try to settle cases, they sometimes say that they are "mediating" or acting as a "mediator."

However, this process is not true "mediation." Mediation refers to a more extensive process where the parties themselves are involved in the negotiations and a trained mediator does not so much suggest a resolution as help the parties come to their own resolution.

A settlement conference is very different. Although both mediation and settlement conferences can be valuable, some cases benefit most from mediation while others are better suited for a settlement conference.

This brochure discusses the differences between mediation and settlement conferences. It gives guidelines to help decide when mediation is most appropriate. It also outlines other ADR tools.

There are three sections:

- 1. The Differences Between Mediation and a Settlement Conference with a Judge or Settlement Master.** This section identifies the primary differences between mediation and settlement conferences.
- 2. Mediation Suitability Screen.** This check-list will help both lawyers and clients decide when they should seek to mediate a dispute.
- 3. Dispute Resolution Glossary.** This section describes the major ADR tools and suggests when each might be appropriate.

**THE DIFFERENCES BETWEEN MEDIATION AND A SETTLEMENT CONFERENCE
WITH A JUDGE OR A SETTLEMENT MASTER**

| Factor | Settlement Conference with Judge or settlement master | Mediation |
|--|--|--|
| Time available for the facilitation | Normally, a Judge or settlement master will only have limited time to spend with the parties. | A mediator will be able to spend the time needed, even if it requires several joint or individual meetings with the parties. |
| Role of the facilitator | Generally, the Judge or settlement master takes an active role, frequently suggesting a "settlement number." | Although approaches vary, a mediator frequently will be less evaluative than a Judge or settlement master. Instead, a mediator will seek to facilitate solutions and outcomes that the parties themselves suggest. |
| Role of the Parties | The parties generally do not participate in settlement conferences; their lawyers do most of the talking. | The parties are active participants in the mediation, whether or not their attorneys are present. |
| Costs of the process | Usually without cost. | A mediator generally charges an hourly rate that the parties share equally. |
| Concern about ongoing relationship of the parties | The Judge or settlement master generally seeks only to dispose of the case. | A mediator may consider possible continuing relationships between the parties. |
| Concern of the facilitator to get to the issues underlying the dispute | The Judge or settlement master generally focuses on seeking to resolve the dispute on the table. | A mediator frequently will look below the surface of the dispute to uncover the real interests and expectations of the parties. |

| Factor | Settlement Conference with Judge or settlement master | Mediation |
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| Ability of the parties to "vent" | There is usually no opportunity for the parties to vent. | A mediator generally will allow the parties, in both joint sessions and private caucuses, to participate actively and to vent. |
| Ability to fashion a solution | The Judge or settlement master generally will focus on the issues in dispute. | A mediator often will try to achieve an overall solution that deals with issues that are not part of the dispute. |
| Ability to deal with multiple issues | Because of time constraints, it sometimes may be difficult for a Judge or settlement master to have the time to consider and analyze all issues. | A mediator generally will have the time to look to all issues and to seek a "win-win" solution for the parties. |
| Ability to deal with complicated issues | Because of time constraints, it sometimes may be difficult for a Judge or settlement master to have the opportunity to delve into complicated issues. | The parties can select a mediator who will have both the time to spend with the parties; and the experience and expertise in the particular type of matter in dispute. |
| Comments on the case | A Judge or settlement master will comment on the case – generally in front of counsel for the parties. | The mediator generally will not make an evaluation of the case. Often a mediator will limit any comments about the dispute to private caucuses. |

| Factor | Settlement Conference with Judge or settlement master | Mediation |
|---|---|---|
| Satisfaction with the dispute-resolution process. | If a settlement conference with a Judge or settlement master occurs late in the litigation process, the parties may settle the case only after incurring substantial litigation expenses. | Because mediation can take place early in the litigation process, the parties may be able to settle their disputes before they incur substantial litigation expenses. |

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MEDIATION SUITABILITY SCREEN

The following chart highlights the issues that the parties and their lawyers should consider in deciding whether a dispute is appropriate for mediation. Disputes suitable for mediation typically entail many “yes” answers to the following issues:

| | Yes | No |
|---|------------|-----------|
| I. The Parties and Their Relationship | | |
| 1. The parties have had a long relationship. | | |
| 2. The parties need to maintain an ongoing relationship. | | |
| 3. The parties are likely to have significant contacts or relationships after the dispute is resolved. | | |
| 4. Representatives of the parties with authority to resolve the dispute can participate in the mediation. | | |
| 5. A presentation by one side – to all of the parties and the mediator – might promote a better understanding of the issues and a more realistic case assessment. | | |
| 6. The parties’ decisionmakers lack familiarity with the facts or merits of the dispute. | | |
| 7. At least one side is interested in settlement. | | |
| 8. Input from a skilled neutral would help the parties to assess their positions in a more realistic manner. | | |
| 9. A neutral facilitator would help diffuse hostility between the lawyers or the parties. | | |
| 10. There are multiple parties involved in the dispute. | | |
| 11. The parties have substantially comparable financial resources, business sophistication and litigation experience. | | |
| II. Interests That the Parties Are Advancing | | |
| 12. A speedy and inexpensive resolution of the dispute is important. | | |
| 13. The parties want to avoid publicity. | | |
| 14. The costs of litigation are onerous. | | |
| 15. The parties want to avoid burdensome, expensive or intrusive discovery. | | |

| | Yes | No |
|---|-----|----|
| III. Issues Involved and Outcomes Sought | | |
| 16. The dispute involves multiple issues. | | |
| 17. The dispute involves technical or complex issues. | | |
| 18. There is the possibility that the parties can each make trade offs as part of any settlement. | | |
| 19. One or more sides seeks a resolution that a court could not grant, such as a modification of the relationship between or among the parties. | | |
| 20. The parties want to explore a business solution of their dispute rather than an outcome resulting in money damages only. | | |
| 21. The parties want to control the outcome of the dispute by avoiding binding adjudication and the attendant risk of loss. | | |
| 22. Inflicting significant damage on the other side or securing public vindication is of less interest than promptly resolving the dispute. | | |
| 23. The parties need a speedy resolution. | | |
| 24. There are business issues collateral to the dispute that may also be resolved. | | |
| 25. A public victory will not deter future claims. | | |
| 26. There is little likelihood that a dispositive motion can quickly resolve the dispute. | | |
| 27. There is at least some merit to the claims and defenses of each side. | | |
| 28. The chances of winning at trial are unknown or uncertain. | | |

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DISPUTE RESOLUTION GLOSSARY

| TERM | DEFINITION | WHEN TO USE |
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| Alternative Dispute Resolution (“ADR”) | Ways of resolving disputes without going through trial. “ADR” generally refers to a broad category of “ADR processes.” These include arbitration, settlement conference, mediation, summary jury trial, minitrial and neutral case evaluation. All are defined below. | See below. |
| Caucus | <p>A meeting between an ADR intermediary and only one side of the dispute. During this private meeting, the ADR intermediary may seek to learn additional information that the party did not reveal in a joint session when the other party(ies) to the dispute were present. The ADR intermediary also may seek to discover the interests underlying the issues that the party raised and discussed in the joint session(s). Finally, the ADR intermediary may seek to have the party agree upon a proposal that the ADR intermediary then can convey in a caucus with the other party(ies).</p> <p>Unlike the joint session, the caucus is a private meeting. Accordingly, the caucus allows a party to be more open and frank with the ADR intermediary.</p> <p>The ADR intermediary holds in confidence everything that he or she learns during the caucus unless the party voluntarily and expressly agrees that the information can be shared with the other party(ies).</p> | |

| TERM | DEFINITION | WHEN TO USE |
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| Arbitration | <p>An adversarial process in which one or more voluntarily selected persons – the arbitrator or arbitrators – hear the dispute and then make a decision. At the parties’ option, the arbitrators’ decision can be final and binding so that it can be enforced as any judgment. Or the decision can be only advisory, thereby helping the parties to evaluate and settle their dispute.</p> <p>Arbitration may be court-annexed or private. If court-annexed, the parties are subject to the rules of the court-annexed arbitration process; however, they will be free to reject the arbitration award and proceed to a <i>de novo</i> trial.</p> <p>If the arbitration is private, the parties decide upon their own procedures to resolve the dispute. For instance, they alone choose whether the arbitration award will be final and binding.</p> | <p>Arbitration is desirable if the parties want a quick, inexpensive and non-public dispute resolution process. Arbitration also has the advantage of letting the parties pick the person(s) who will adjudicate their dispute. Arbitration is particularly useful if the parties want the binding or non-binding decision of a third party – the arbitrator – rather than help in negotiating a settlement to the dispute.</p> <p>Arbitration is less desirable if (a) there are multiple disputed issues; (b) there is the possibility of a continuing relationship between the parties so that a satisfactory resolution must go beyond the dispute at hand; (c) one or more parties needs to establish a legal precedent; or (d) one or more parties needs substantial discovery.</p> |
| Settlement Conference | <p>A process in which the attorneys for the disputing parties present their respective clients’ positions to a Judge or settlement master who then suggests ways to settle the dispute. The Judge or settlement master can give informed opinions about how the case might be decided at trial; and may even provide the parties with a recommended settlement figure. The Judge or settlement master often has experience in valuing the type of case.</p> | <p>When it is compulsory, parties must attend a settlement conference.</p> <p>A settlement conference is most effective if it takes place close to trial so that the parties have had enough time to learn their case and to be ready to talk turkey. A settlement conference also is effective if the parties jointly respect the</p> |

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| | <p>Generally, the parties are not present at settlement conferences, although Judges and settlement masters sometimes may require their presence or their availability by telephone. The parties participate, if at all, through their attorneys. Even if the parties are present, they generally let their attorneys do most of the talking; the parties are present to authorize settlement offers or demands.</p> <p>Although the Court sometimes may mandate settlement conferences, the parties themselves may agree on a Judge or settlement master to conduct a settlement conference.</p> | <p>Judge or settlement master who will conduct the conference.</p> <p>If the parties view the settlement value of the case very differently, an independent evaluation can be helpful.</p> <p>Settlement negotiations sometimes can get stalled before the parties even come close to their bottom-line settlement positions. Neither party wants to move, fearing that a move would show weakness and skew the final settlement amount in favor of his or her adversary. Placing a settlement value on a case, in the course of a settlement conference, can revive these stalled negotiations.</p> <p>If the amount in controversy is not large, a settlement conference avoids the costs of full-scale mediation.</p> <p>A settlement conference may not be effective if there are multiple issues to negotiate, since the time at a settlement conference is sometimes limited.</p> |
| Mediation | A confidential, private, voluntary, informal and non-binding | Mediation is most effective when there is the |

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| | <p>process in which a trained neutral person – the “mediator” – helps disputing parties to resolve their disputes. Although counsel may be present, the parties themselves actively and directly participate.</p> <p>The mediator helps the parties to come up with solutions that satisfy their interests and needs. The mediator does not provide legal advice and usually does not recommend the terms of a settlement agreement – except as he or she feels necessary as part of a “last chance” settlement effort. Nor does the mediator make decisions, or impose solutions or a settlement on the parties.</p> <p>Instead, the mediator helps the parties to communicate, to overcome barriers to negotiated resolutions, to identify their real interests and expectations, to narrow issues, and to identify creative options that the parties themselves may not have been able to uncover or to propose.</p> <p>Mediation often takes place before the parties have invested substantial money, time and energy – and before they are stuck in their positions. Mediation therefore can help to resolve disputes early in, or even before the start of, the litigation process.</p> | <p>possibility of a continuing relationship among the parties, there are multiple issues involved, and the parties need or want to “vent.” If there are many disputed issues, the parties can concede the ones that mean the least to them, leading to a “win-win” negotiation.</p> <p>Employment, construction, insurance coverage, securities, intellectual property, commercial and family cases are all appropriate for mediation.</p> <p>Personal injury cases generally do not involve continuing relationships between the parties. Nor do they present the possibility of multiple “bargaining chips” in settlement negotiations. Consequently, personal injury cases are not always prime candidates for full-blown mediation. Nevertheless, mediators report high success rates in mediating personal injury cases.</p> <p>In complex personal injury cases, moreover, many preliminary issues often can be narrowed through mediation, even if the parties are unable to reach an overall settlement.</p> <p>Mediation is not effective where (a) there is a power imbalance between the parties; (b) a party needs to establish precedent; (c) because of an</p> |

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| | | <p>inability for a large organization to make a decision regarding settlement, the organization needs a decision from a neutral third party and hence is unable to settle the dispute; or (d) each party so distrusts the other that all communications between the parties – even if facilitated by the mediator – will be tainted.</p> |
| Med-Arb | <p>A process that blends mediation and arbitration. The parties initially go to mediation, but with the understanding that they will immediately proceed to arbitration if the mediation does not result in a settlement. Unlike mediation, therefore, the mediator can become an arbitrator and make a binding decision.</p> <p>Sometimes the same person serves as mediator and arbitrator; sometimes there is a different arbitrator. If the same person acts as mediator and arbitrator, he/she in arbitrating the matter is not supposed to use confidential information that he/she learned while acting as mediator.</p> <p>Insurers sometimes set up med-arb programs to dispose of numerous cases – often with the same plaintiff law firm. The insurer has a representative with settlement authority so that settlement decisions can be made on the spot.</p> | <p>Med-arb works well when the case is not very large or complex. Further, it ensures a speedy disposition; the parties know at the outset that their dispute will be fully and finally resolved.</p> <p>However, the efficiency of med-arb comes at a cost. A party may not be frank and open during the mediation portion if he or she knows that the mediator could arbitrate the dispute; the party may fear that the arbitrator will consider unfavorable information that the party provided in confidence during the mediation phase of the med-arb. To avoid this fear, the parties may agree in advance that the mediator and arbitrator will be different persons – although having a different arbitrator will delay the final resolution of the dispute.</p> |
| Summary Jury Trial | A nonbinding and informal process in which mock jurors hear abbreviated case presentations from each party. The parties | Summary jury trials are appropriate in complex cases that will take a significant amount of time |

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| | <p>usually agree to follow modified rules of evidence; this allows the parties expeditiously to present their cases. In fact, the attorneys sometimes may “present” all of the evidence without any witnesses.</p> <p>A Judge typically presides over the presentation. However, the parties may agree to have a third party preside.</p> <p>At the end of the case presentations, the mock jurors meet and deliver an advisory verdict. The parties then use the “verdict” as the starting point for settlement negotiations. In order to help them better understand the strengths and weaknesses of their cases, the parties can extensively question the “jurors.”</p> <p>If the parties do not reach a settlement, they go to trial.</p> | <p>and money to litigate.</p> <p>Summary jury trials are also appropriate in (a) unique cases that are difficult to evaluate; (b) “bet the company” cases where a verdict in favor of the plaintiff could bankrupt or otherwise have a materially adverse financial effect on the defendant; or (c) cases where the parties are totally at odds over what a jury is likely to find.</p> <p>Summary jury trials enable the parties to learn how various issues will play before the finder of fact, and how witnesses will appear before the jury.</p> |
| Minitrial | <p>A structured process where the attorneys for the disputing parties present an abbreviated version of their clients’ cases – often through affidavits or argument alone and with no other evidence – before both a neutral person <u>and</u> high level representatives of each party with full settlement authority. During the presentations, the neutral may ask questions and comment on the “evidence.”</p> <p>After the attorneys complete their presentations, the party representatives meet to negotiate a settlement. During this phase of the process, the neutral often acts as a mediator; unlike</p> | <p>A minitrial provides each side with the opportunity to learn the strengths and weaknesses of its case and the other side’s case. A minitrial is therefore appropriate if one or both sides have an unrealistic assessment of its position.</p> <p>A minitrial also is appropriate if the principals of the parties are going to make the ultimate settlement decisions and not just adopt the recommendations of their respective attorneys.</p> |

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| | <p>a mediator, however, the neutral may actively provide the parties with his/her views on the claims and defenses.</p> | <p>However, a minitrial will be fruitful only if the principals are able not only to understand the often-complex issues in dispute, but also to negotiate in a creative and flexible fashion.</p> <p>Finally, a minitrial is appropriate where the parties will benefit from having a neutral expert evaluate the dispute.</p> |
| <p>Neutral Case Evaluation</p> | <p>A process in which the parties present their views, at a confidential and private nonbinding session, to a “neutral evaluator.” The neutral evaluator usually has substantial knowledge or experience with the disputed factual or legal issues. Often, the evaluator will have a more technical expertise than a mediator – but less experience in the psychological aspects of mediation.</p> <p>After hearing each side’s presentation, the neutral evaluator evaluates the dispute, explores the possibility of settlement, and – if the parties themselves cannot reach a settlement – expresses a non-binding opinion about the most likely outcome in Court. The neutral evaluator generally will be more active than a mediator in evaluating the case and giving the parties his/her assessment of the strengths and weaknesses of each party’s position.</p> <p>The parties can use the neutral evaluator’s opinions to reach a</p> | <p>Neutral case evaluation is a hybrid between a settlement conference and mediation. It often is a helpful settlement technique early in the litigation, before each side has incurred substantial litigation expenses. Because the “neutral evaluator” can help the parties to streamline discovery and motion practice, neutral case evaluation is particularly appropriate where the dispute likely will involve extensive motion or discovery practice.</p> |

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| | settlement. Even if the parties do not reach a settlement, the neutral evaluator can help the parties streamline discovery and motion practice so that the parties can prepare their cases more efficiently, if the parties are willing to follow the neutral evaluator's guidance. | |

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