INSIDE THE MINDS

# Preparing for Alternative Dispute Resolution Cases

*Leading Lawyers on Best Practices for Mediation and Arbitration, Analyzing When to Settle vs. Litigate, and Determining Financial Liability*

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# Practices of a Successful Negotiator

John J. Bouma
*Chairman*
Snell & Wilmer LLP

**Mediation, Arbitration and Other Alternatives**

Mediation is a step often taken by the parties to a dispute when they have been unable to resolve the dispute among themselves through negotiation. Oftentimes, it is helpful to then seek the assistance of an uninvolved third party, i.e., a mediator. A mediator's purpose is to bring the parties together in a negotiated resolution that more or less satisfies everyone's goals and resolves the dispute. Mediation is a process in which the parties voluntarily participate with the hope that they can agree upon a negotiated resolution. If the parties do not agree to resolve the dispute, the mediation terminates. The mediator has no power to require the parties to agree to terms, no matter how strongly the mediator and/or one party might believe the terms are fair.

If the parties cannot negotiate the resolution of a dispute, they might choose arbitration. One or more arbitrators, serving as fact finders and decision makers, hear evidence in either a semi-formal or informal setting. In arbitration, the parties typically present through their respective attorneys and, working within the rules of the arbitration and the understanding of the parties, the arbitrator(s) makes a binding decision. The parties may ask for a written opinion from the arbitrator, but arbitration decisions are not usually subject to appeal. One advantage of arbitration is that it can be conducted privately as opposed to working through the court system.

If structured appropriately, arbitration can be far less expensive than litigation through the court system. Although paying for a mediator or arbitrator is more expensive than paying for a jury, assuming the arbitration is structured appropriately, the opportunity to limit discovery can substantially lessen the expense of resolving a dispute. Moreover, arbitrations can be conducted without the interruptions related to a judge's calendar, and may be scheduled and conducted within more compressed time periods, impacting favorably both time and expense. In litigation before the court, the parties not only have less control of the scheduling and the procedures involved, but they have less control over who will resolve the dispute; an elected or appointed judge or a jury finds the facts and resolves the dispute.

Mediation allows parties to reach a negotiated resolution among themselves outside the courtroom. Usually, the parties consider mediation only after negotiations have failed to resolve the issues. Since negotiations often fail because the individuals who created the dispute or who are invested in the dispute are the individuals controlling the negotiations, some contractual ADR agreements require that before mediation is undertaken, the dispute must first be referred to each party's respective CEO or a similar high-level decision maker not previously involved in the dispute. Involving high-level non-vested parties such as CEOs or managers prior to mediation is quite often effective especially because oftentimes once individuals adopt and adhere to positions with respect to the issue at hand, they are unwilling to deviate from those positions. Not only can such managers be helpful in providing outside perspectives that help the vested individuals break free of rigid thinking about the dispute, the vested individuals will often more critically analyze their own position and will often work harder to effect a compromise rather than involve a high-level executive in their dispute.

Rather than mediation, some disputes are more suitable for a mini-trial. A mini-trial might involve a high-level uninvolved person from each party sitting with a neutral who serves as a facilitator. Mini-trials are particularly effective when there are differing views of the facts because each side has the opportunity to hear and evaluate the opposing position. A mini-trial would be structured as a hearing with each party's attorney informally, through exhibits and witnesses, putting before the executives and the neutral the evidence and arguments that support their client's position. The executives then, based upon the evidence and arguments that hopefully demonstrate the strength and weakness of each position, attempt to agree upon an appropriate resolution. The neutral serves the role of facilitator and mediator.

Such a process allows the parties the opportunity to arrive at a negotiated solution resulting from a structured hearing designed by the parties themselves, with attendant savings in discovery, expense, and time. The outside neutral serves both to question the assumptions upon which the dispute is founded in order to move forward and find a resolution, and to provide the parties with a realistic perspective on the cost and hazards of taking the matter to court. A variation of this procedure is a summary trial,

with an "advisory jury." Again, depending upon the structure agreed upon, summaries of evidence and arguments are presented to a panel of jurors over which a judge presides. The jurors hear closing arguments, consider the evidence presented and the law as instructed by the judge, and then render a "verdict." That verdict gives the parties a good idea of how the case might come out were they to go through all of the time and expense to present the evidence in the typical fashion. Following the summary trial, the parties attempt to negotiate a resolution.

When the parties have failed to resolve matters among themselves, and must turn to a third party to resolve the issue, they may choose between arbitration and trial. Arbitration has the advantage of providing a nonpublic forum, the opportunity to have some input as to who will judge and resolve the dispute, and the ability, in some cases, to place limits on discovery and the time for presenting evidence.

Often parties are subject to contractual agreements that include provisions requiring arbitration of disputes arising from the contract. Those provisions usually designate the AAA, CPR International Institute for Conflict Prevention & Resolution, or some other arbitration servicing organization as the organization to be used, or whose rules are to be followed. Depending upon the organization selected, and the rules or guidelines that therefore might apply, discovery by deposition or other means may or may not be allowed. Parties may also choose to engage a private arbitrator who is not affiliated with a servicing organization and define the rules that will govern their arbitration proceeding, allowing additional flexibility and less administrative expense.

Arbitration is often touted as an inexpensive and expedient method of resolving disputes. Discovery takes time and costs money. It is important that the parties select arbitrators who will set clear limits on discovery and delineate timelines so that the process moves along. If discovery is not carefully limited and controlled by the arbitrators, the process may be neither more expedient nor less expensive than litigation. In fact, given the absence of the Rules of Civil Procedure and the related case law, discovery in arbitration may become prolonged, oppressive, and expensive. It must also be recognized that although there are advantages in terms of time and

expense to the less formal presentation of evidence to the arbitrators, the safeguards developed over the years embodied in the rules of evidence are absent. Evidence is often presented in arbitrations which would not be admissible in court.

**Adding Value for the Client**

An ADR attorney adds value for clients in a variety of ways. First, an adept ADR attorney must be familiar with all alternative processes to resolving disputes, from mediation through mini-trials and arbitration to court proceedings. Second, a good ADR attorney must be familiar with the reliable arbitrators and mediators so that clients can engage the best possible neutrals to resolve their disputes satisfactorily and effectively. An ADR attorney must also be able to advise on the best way to proceed given the dispute at hand. The ability to gather information and present it appropriately is critical in providing value for clients. Without information gathering skills, an ADR attorney cannot effectively mediate or arbitrate a dispute. Likewise, the attorney must be able to present that information effectively to ensure the optimal outcome for the client. Effective ADR attorneys add value for clients by providing the client all necessary information and training to prepare the client for the tasks and activities in which the client will engage throughout the proceedings. Clients must understand what is to be achieved, and the alternatives for getting there. All of the elements mentioned above are critical for success in ADR law.

The primary ADR issue to be confronted is whether ADR is appropriate for the dispute at hand. Often, even sophisticated clients do not realize what their options are, and can have inaccurate ideas or perceptions of the best option for their particular case. The ADR attorney helps the client determine which method is the best way to proceed. To do this, it is helpful for the attorneys to work through the alternative processes with the client, discussing whether information will be exchanged or presented confidentially to the neutral, the kind of information that should be exchanged to have a meaningful process, whether discovery is appropriate and, if so, the extent thereof, the kind and amount of evidence to be presented, the form or method by which the evidence might best be

presented, an appropriate timeline, and how the timeline might vary depending upon the factors mentioned above.

Certainly the ADR attorney's familiarity with these considerations is crucial to negotiating whether to agree to ADR at all, and the terms and conditions of any such agreement.

**How to Get Where You Want to Go**

*Understand Your Client and Your Case*

The art of negotiation is central to ADR law. There are several factors involved in effective negotiation. First and foremost, an ADR attorney must be thoroughly familiar with the client; knowing the client's background, perspective, and goals are crucial elements in successful negotiation. Without this information, an ADR attorney cannot hope to successfully negotiate the client's case. In addition to knowing the client, the attorney must know the facts, making sure that all pertinent information has been developed and is organized. Negotiation is the key to successful resolutions; ADR attorneys must be well prepared with all information about the client and the case to effectively engage in the process.

Preparing for a negotiation requires gathering facts, organizing information, and learning all one can about the parties involved. Essentially, preparing for a negotiation is like preparing for any case for trial because the goal in both instances is to arrive at the most favorable resolution of the dispute. In mediation particularly, the attorney must also educate the client on what to expect, the appropriate attitude to take, the purpose of the mediation, and what is reasonable to expect as the outcome. Encouraging the client to remain flexible in the negotiation process is important because the proceedings can take unexpected turns. Being able to troubleshoot and quickly come up with new ideas for resolution is essential to being effective. To this end, thinking ahead and having backup plans for likely scenarios is crucial.

*Understand Your Adversary*

In mediation, the attitudes of the attorneys and the parties involved are often the key to a successful negotiated resolution. Each party typically appears and participates through an attorney, and these attorneys must truly hear what each party has to say, whether through a written position statement, opening statement, or communications through the mediator. While the attorney representing a client is normally considered to be the advocate, the attorney must combine that advocacy with recommendations and decisions about the manner in which the matter to be resolved is to be approached. In some instances, a hard-hitting position statement to be exchanged with the other party or an aggressive opening statement at a joint session of the parties to begin the mediation will bring a useful sense of reality to the other parties and their attorneys. In other instances, the exchange of positions, the joint sessions, or the argumentative opening statement may, in essence, stop the proceedings before they even get started.

If the parties thoroughly dislike each other but nevertheless want to get their issues resolved and behind them, having succeeded in getting them to the forum, it is not the time to do something that will cause further aggravation.

Mediations are often the opportunity to clean up misunderstandings. An ADR attorney needs to understand what dynamic is likely to work. If a rather apologetic statement explaining away a "legitimate misunderstanding" is likely to go further than a statement demonstrating that you believe that the opponent is simply a greedy overreaching jerk, the ADR attorney has to structure the proceeding, any statement, and communications to the greedy jerk in an apologetic, misunderstanding mode.

*Assist the Neutral*

An ADR attorney must help the mediator ascertain whether the position asserted by the opponent is being overly aggressively presented by a tenacious attorney who, as an advocate, is persuaded by her own rhetoric,

or whether the attorney is having difficulty moving the client off a firmly held position and toward a resolution.

In short, ADR attorneys serve an important function when they are able to assist a mediator to analyze each dispute situation to learn who the key decision makers are and how much they are willing to work with and respond to the mediator. An ADR attorney must also determine whether the parties will best interact on their own or through their attorneys. While in most instances, parties work through their attorneys, once certain obstacles are overcome or primary understandings reached, it may well be that a discussion between the parties, either alone or in the presence of the mediator, will lead to a resolution.

Typically, during the course of a mediation, the client and attorney discuss the issues and tactics in response to the mediator's observations and then the attorney presents the outcome of that discussion to the mediator. There are times, however, when the ADR attorney might feel it helpful that the mediator meet separately with one party or the other, without the attorney representing that client. This can be appropriate when a client is not, or does not appear to be, following his attorney's advice, or when it appears that an attorney is "pushing too hard" to get a resolution on terms to which the clients will never agree. Identifying situations like this is where an experienced ADR attorney adds value.

As in any form of representation, for ADR attorneys to get the best results for their clients they must, above all else, be completely prepared to present a persuasive case. If this is successfully done, the neutral will understand and, hopefully, agree with the attorney's evaluation, and may be more willing to take the attorney's suggestions of how the case should be resolved. Gaining the confidence of the neutral is one essential way in which ADR attorneys add value for their clients. Preparedness and persuasiveness give the neutral confidence in the facts presented by the attorney. With all the facts, the neutral can present the most accurate and appropriate information to both parties, thereby bringing about the best possible outcome for the dispute at hand. By providing accurate information, attorneys can help even the best neutrals act more effectively.

**Salvaging a Failed Mediation: Advice and Perspectives**

While good ADR attorneys who want to make a mediation work can usually arrive at a resolution regardless of the skill of the mediator, in most mediations the effectiveness of the mediator is key to arriving at a negotiated resolution. To my observation, mediations fail more often than not because of ineffectiveness of the mediator—not being aggressive enough, not being imaginative enough, or not having really understood the facts and positions to the point where the mediator has gained the confidence of both parties. If people go to a mediation to get something resolved and the mediator can demonstrate a clear understanding of the whole dispute and can point out the pros and cons of each position to each of the parties, usually the parties can arrive at a resolution. Sometimes you get close, but you can't resolve every point. I have been in situations where the parties have been able to resolve the major points but were stuck on a point or two. We felt that the mediator understood the issues; we decided to let the mediator make a decision as to how those points should be resolved; we had all spent the time in mediation helping the mediator understand those issues, and if we couldn't resolve it and would therefore have to go to court, it really made sense to get the dispute resolved by someone in whom we had made the investment and in whom we had confidence.

Most mediations result in settlements. The settlement may not occur before the scheduled session is over. Mediators often continue to try to bring about a resolution even if not accomplished on the first try. E-mails, telephone calls, *ex parte* conferences, subsequent joint meetings—all are used to bring together parties who walked away from the scheduled session.

If it is apparent that a mediation is not going to bring about a negotiated resolution, an ADR attorney must consider and perhaps suggest some alternatives. These might include the mediator picking an appropriate settlement figure, and seeing if each party, without knowing what the other has done, will agree to it—agreeing not to disclose what the parties decide unless both agree. Another suggestion might include a form of baseball arbitration—i.e., resolving the dispute on the number of the party that gets closest to the mediator's number. Other alternatives include determining

whether the parties can at least take advantage of any points on which they could agree, or the narrowed gap in the monetary demands and offers, and resolving the remaining issues by another procedure, such as a mini-trial or an arbitration with a high-low, or simply asking an attorney in whom each of the parties has confidence to hear the evidence on a narrow key point or two, and resolve those points—essentially a mini arbitration.

The options are limited only by one's imagination; parties who want to resolve differences without undergoing the time, expense, and uncertainty of litigation in the courts or full-blown arbitration will ordinarily find a way.

Some parties go into mediation primarily to learn more about the opposing party's case. Some parties go to mediation knowing that they are not going to disclose much of their own case. Some parties go through non-binding arbitration with little intention to abide by the result, but rather to run up the expense and delay their adversary. An experienced ADR attorney can generally determine early on whether the opposition's game plan includes these elements, and can appropriately advise regarding countermeasures.

On the whole, however, the purpose of the great majority agreeing to mediation is to find a solution to a dispute outside of court that both parties agree upon and this is, essentially, a settlement. Parties typically enter into mediation with the goal of resolving the dispute, which in many instances means that some amount of discovery has been done and the parties simply might have different thoughts on what the settlement should be. Whether or not discovery has been done in either mediation or a mini-trial, the attorneys must make sure that each party has adequate information about the facts and the positions of the respective parties to make an informed decision on the best way to attempt to reach a settlement. There are times when one party has information that it does not wish to share with the opposing party. In these instances, the mediator keeps this information confidential. This information is nonetheless used by the mediator in evaluating the case and helping direct the parties to a reasonable settlement.

As noted above, litigation is time consuming and expensive. For most businesses, it has become an unwelcome part of life. Disputes are better resolved by the certainty of a negotiated settlement than through the

vagaries of a jury. Businesses, therefore, are usually quick to embrace various forms of ADR. Not only do businesses consider litigation a waste of resources, but ADR provides an opportunity to avoid the public process of court proceedings.

**Skills and Qualities of Effective ADR Attorneys**

Perhaps the three most important factors that make a negotiator successful are the ability to listen, being thoroughly prepared, and maintaining the belief that an attorney's job is to solve problems. Listening to clients to understand their motivations, goals, and perspectives is critical to an attorney's ability to negotiate effectively on behalf of the client. Discovering who the key players are, from the most passionate to the most disinterested, is often done through listening to the clients and others. Gathering this critical information is also part of preparedness, as is knowing the facts on both sides of the dispute. Flexibility and the ability to come up with several possible strategies based on various scenarios is an important part of preparedness. Helping move the ADR process along a clearly delineated timeline is part of maintaining the belief that the job of the attorney is to solve the client's problems; efficient execution of well thought-out strategies is a critical element in applying that belief to the case at hand.

The best advice that attorneys can offer clients with respect to negotiation and settlements is to make certain that they provide all pertinent information. This is very important because, as mentioned above, information that the attorney provides to the neutral directly affects how the neutral decides upon a reasonable resolution. Clients should engage their attorneys in discussions about all aspects of their perspective, including motivating factors and concerns. This is information that makes the attorney more effective in deciding upon the most optimal resolution for the client.

In order to maintain their edge, attorneys must constantly keep abreast of changes and trends in the field. Active involvement and continuing education is an important part of this, as is reading the key cases and the literature. I am a listed arbitrator on The Large Complex Case Dispute

Resolution Program of the AAA, and participate in the AAA's legal continuing education component as well. I am on the Panel of Distinguished Neutrals for the CPR International Institute for Conflict Prevention & Resolution. I am a member of the editorial board of their magazine, *Alternative*, which provides current information on happenings in the field. There is a substantial litigation component in our firm, so I often provide lawyers and clients advice on various forms of ADR, including appropriate alternative and effective techniques. I have been actively involved in the ADR Section of the ABA, served as a member of the ABA Board of Governors, and continue to serve in the ABA House of Delegates.

*John J. Bouma's practice concentrated in complex commercial litigation, including antitrust, commercial and business torts, financial institutions, professional malpractice defense, and alternative dispute resolution.*

*Mr. Bouma has been listed in the 1983 to 2007 editions of* The Best Lawyers in America®. *He received the University of Iowa Distinguished Alumni Service Award in 2003 and was featured in the August 2000* American Lawyer *article "The Valley of the Sun King." In 1998, he received the Walter E. Craig Distinguished Service Award, the Community Legal Services Decade of Dedication Award, and the Arizona State University College of Law's Distinguished Achievement Medal. He was recognized in the* National Law Journal *as one of the "100 Most Influential Lawyers in America" in 1997 and has been in* Who's Who in America®, Who's Who in Arizona®, Who's Who in the World®, Who's Who in American Law® *and* Who's Who of Contemporary Achievement®. *He received the Certificate of Merit from the Iowa State Bar Association.*

*Mr. Bouma is admitted to practice before the Supreme Court of Arizona, Supreme Court of Wisconsin, Supreme Court of Iowa, United States Supreme Court, United States Court of Appeals, Ninth Circuit, United States Court of Appeals, Tenth Circuit, and United States Court of Appeals, District of Columbia Circuit. He is a fellow with the American College of Trial Lawyers, delegate-at-large with the American Bar Association, and chairman of the board of directors of the Attorneys' Liability Assurance Society (ALAS).*

*Mr. Bouma received his B.A., with high honors, and his J.D., with highest honors, from the University of Iowa where he was editor-in-chief of the* Iowa Law Review.


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