Alternative Dispute Resolution: A Modern Approach to Conflict

Alternative Dispute Resolution (ADR) refers to procedures for settling disputes by means other than litigation, including negotiation, arbitration, and mediation. These approaches are typically less costly and more expeditious than traditional court proceedings. While litigation remains an option, ADR has become increasingly popular as courts have become more complex, clogged, and costly. Disputants now actively seek fair, timely, and relatively inexpensive means of resolving their claims.

The rise of ADR represents a fundamental shift in how Americans resolve conflicts. Today, nearly every state and federal district has some form of ADR program in place, a dramatic increase from 1985 when fewer than half the states had instituted such programs. Whether through mandatory court programs or voluntary agreements between parties, ADR has transformed the legal landscape. The traditional notion of suing over a claim and having it settled by a judge and jury is fast becoming the exception rather than the rule.

Courts, insurance companies, attorneys, and individual litigants are all driving demand for faster, cheaper options that don't sacrifice fairness. Some programs require parties to attempt mediation before trial, while others make arbitration or mediation available but not mandatory. The common goal across these varied approaches is to help parties reach speedier, less costly resolution while reducing the burden on already-overwhelmed courts.

The Three Pillars of ADR

Negotiation

The back-and-forth process by which parties reach agreement, either between parties with no current conflict or those currently at odds. Occurs throughout legal proceedings at various points.

Mediation

An independent, neutral mediator helps parties arrive at mutually satisfactory agreements. The mediator has no power to compel actions—it's a private process outside court boundaries.

Arbitration

An independent arbitrator renders a binding decision on the case. May be voluntary or compulsory, and parties can agree in contracts to settle future disputes through arbitration.

Ancient Roots, Modern Application

ADR has deep historical roots extending back to ancient Greece, with Plato and Aristotle documenting arbitration practices. References appear in biblical texts and throughout Anglo-American legal tradition. Formal U.S. procedures began over 80 years ago with the Federal Arbitration Act of 1925, signed by President Calvin Coolidge. The Uniform Arbitration Act followed in 1955, with many states using it as a model for their statutes.

Mediation also has extensive formal history in the United States. The Arbitration Act of 1888 included provisions for mediating labor disputes, and by 1913 a Board of Mediation and Conciliation was established. The famous Taft-Hartley Act, passed despite President Truman's veto, created the Federal Mediation and Conciliation Service. However, mediation was historically limited primarily to labor disputes until approximately 30 years ago, when it began gaining popularity across a wide range of conflicts.

Understanding Negotiation and Mediation

This flexible process can occur at any point during a legal matter, with attorneys negotiating at various stages depending on their clients' wishes.

Negotiation: More Than Settlement Talks

A common misconception is that negotiation is useful only when parties stand in non-confrontational relationships. However, every settlement agreement in a lawsuit is preceded by negotiation. This process is far richer and more diverse than popular culture suggests. Negotiation can occur at any time in a lawyer's career—with or without conflict, with or without a court case. There's always room for negotiation.

Professor Robert Mnookin of Harvard Law School notes in "Bargaining With The Devil" that there are rare occasions when negotiation isn't the best course of action. Examining conflicts including Winston Churchill's decision to reject negotiations with Adolf Hitler and Nelson Mandela's decision to initiate discussions with South Africa's apartheid government, Mnookin provides tools for confronting harmful adversaries and understanding when to negotiate versus when to fight.

Mediation: The Middle Ground

Mediation sits perfectly between negotiation and arbitration. Like negotiation, the ultimate goal is to negotiate a settlement, so all strategic concepts about cooperation versus competition apply completely. Like arbitration, there's a neutral party involved—but unlike arbitration, the mediator has almost no power. If parties cannot reach agreement, mediation simply ends with nothing settled.

The mediator functions as peacemaker, translator, and buffer rolled into one. In mandatory mediation programs, courts cannot force parties to agree but can require them to try in good faith. Even when mediation fails, something is often gained or lost. While proceedings are generally confidential, parties learn about each other during the process. Information disclosed during mediation, though not directly usable in court, can inform legal strategy for subsequent trials.

Classic mediation involves a neutral facilitator helping parties reach settlement agreements they might never have achieved on their own. These agreements look very much like settlements negotiated without a mediator, but the key distinction is the mediator's role in bridging gaps and facilitating communication between parties who may be unable or unwilling to negotiate directly.

Key Principle

Mediation requires good faith effort—an honest desire toward completion without intent to secure unfair advantage. This doesn't require accomplishing the task at all costs, but it's not met by perfunctory attempts either.

Arbitration: Binding Resolution

Arbitration is the most formal ADR process, distinguished by having a neutral party who settles matters for the parties involved. Similar to a court, the arbitrator has power to decide who shall pay and how much, and parties are bound to that decision. This binding nature represents the most significant difference from mediation—in arbitration, disagreement doesn't end the process; the arbitrator makes the final determination.

Types and Variations

Arbitration can be entered voluntarily after conflict arises, or parties can include arbitration clauses in contracts, agreeing to arbitrate any future conflicts. Many permutations exist today, from experimental approaches to commonplace procedures.

Court-annexed arbitration (judicial arbitration) diverts certain cases to arbitration rather than trial. Most court systems today have such programs in place. **High-low arbitration** allows parties to set minimum and maximum award amounts, providing predictability while maintaining the arbitration process.

Despite its binding nature, not all arbitration proceedings end disputes with finality. Court-annexed arbitration often permits parties to seek trial after arbitration, and procedural or substantive irregularities can give rise to lawsuits over the arbitration itself.

1

Voluntary Entry

Parties agree to arbitration after conflict arises

2

Contractual Agreement

Arbitration clause included in original contract

3

Court-Mandated

Court diverts certain cases to arbitration programs

Constitutional Challenges: State and federal courts have recently heard challenges to certain ADR programs' constitutionality. In Nevada, Wells Fargo challenged the statewide foreclosure mediation program because courts can block foreclosure if banks don't participate in good faith. In Delaware, the Coalition for Open Government is challenging the Chancery Court's arbitration program where judges sit as private arbitrators instead of public judges in certain cases.