
ADR – Alternative Dispute Resolution

A Client's Guide to the Language and Procedure



BAKKE ♦ NORMAN
LAW OFFICES

❖Welcome

We are pleased you have considered Bakke Norman, S.C. to represent your interests. This guide discusses alternative methods to resolving disputes. If you are involved in a dispute situation and would like to avoid a lawsuit, or if you wish to provide for future alternative dispute resolutions, we are prepared to assist you.

BAKKE❖NORMAN
LAW OFFICES

ADR – Alternative Dispute Resolution

There are almost 20 million lawsuits filed every year. A very large percentage are settled before trial. But, while only a few suits are actually tried, the individuals and businesses that are involved in litigation — even in a suit which eventually settles — know that the time, expense and emotional impact exact a costly price.

❖ An Alternative To A Lawsuit

Recently some courts and law firms have started to put more emphasis on alternative methods to resolve disputes. The wide variety of alternative dispute resolution mechanisms are collectively referred to as ADR. There are many potential advantages to ADR including reduced costs, faster resolutions, less emotional stress, the ability to construct solutions that are outside of the courts' authority and, in some cases, the opportunity to preserve personal or business relationships that might be shattered by a trial.

ADR occurs in many different contexts and encompasses various specific methods. ADR may be mandated as the settlement option in a written contract — construction contracts and securities brokers' agreements frequently contain a mandatory arbitration clause. Even if there is no contract requiring arbitration or other ADR effort, ADR can be agreed to by the parties or ordered by the court. Party-initiated ADR can happen at any time and can use any method and procedure the parties find helpful. There are two basic types of court-sponsored ADR. The first

occurs early in the legal process and is designed to avoid many common procedural steps and costs. Most court-ordered ADR occurs much later in the legal process, frequently after discovery is completed and final trial preparation has started. This last use of ADR is currently most common in Wisconsin, although the other examples are rapidly gaining acceptance nationwide.

ADR methods include binding arbitration, nonbinding arbitration, mediation, summary trial, moderated settlement conference and a number of other creative procedures designed to facilitate a fair and reasonable settlement. Any method may have several variations, as is discussed later. In almost every context, the parties can use any standard method that they choose, or invent their own procedure designed to meet their unique needs.

ADR can be conducted with or without attorney representation on either side. If participants are represented by attorneys, the ADR sessions can involve the attorneys or can be conducted by the parties without counsel present. ADR is not a "one-size-fits-all" proposition. The method and setting should be carefully selected to optimize the chances of a successful resolution of all disputed issues.

Cost savings by using ADR will depend on the complexity of the case, the timing of the ADR efforts and the method used. Savings are also dependent on the successful conclusion of a settlement. An early ADR resolution can save months of attorney fees, preparation costs and emotional stress. Even if ADR is used just before

trial, the saving of attorney fees and costs can be substantial if a trial is avoided. Equally important are the nonmonetary benefits that can come from an opportunity to craft a settlement of your own design.

It is important to note that cost savings are not always realized. In some instances, the cost of the ADR procedure may equal or exceed the cost of litigation. More importantly, if time and resources are expended on an ADR attempt that is ultimately unsuccessful, the ADR costs are added to the litigation costs, thereby increasing, not decreasing, total costs. In order to maximize the probability of cost savings, both parties should be genuinely interested in an early and fair resolution of the dispute, and the type of ADR, as well as the selection of the facilitator, should be carefully chosen to fit the needs of the situation.

Typically the cost of the ADR process is shared equally by the parties, but that can be varied by contract or by other agreement.

❖ Types Of ADR

The common ADR forms are discussed below.

Arbitration

Arbitration is familiar to most because it has been used in the context of labor disputes and construction contract disputes for years. The essence of arbitration is that a third party renders an opinion about how the dispute should be settled. The arbitration award can be binding or nonbinding, depending on the contract or other agreement of the parties. In binding arbitration, the parties select an arbitrator or panel of arbitrators who help design the arbitration process, conduct a hearing, evaluate

the evidence and make an award. The award is then binding on the parties and may be entered and enforced as a judgment by the court. There is very limited opportunity to appeal an arbitration award.

Nonbinding arbitration is identical to binding arbitration except that the parties are not bound by the result and either party still has the option to proceed to court if either party does not accept the arbitration award.

Arbitrators are usually selected on the basis of their expertise in the area of dispute. For example, an arbitration panel for a construction contract dispute might include an engineer, a contractor and an attorney.

In reality, arbitration is a modified form of trial which does not use a traditional judge or jury; therefore, the cost and time savings are usually not as significant as the savings provided by other forms of ADR.

Parties can contract to limit or specify the authority of the arbitrator. The possible contractual modifications are limited only by human ingenuity. A typical example of these special rules is baseball arbitration, where the arbitrator must select either the final offer of the owners or the final demand of the players and is not permitted to compromise between them.

Mediation

Mediation is fundamentally different from arbitration. In arbitration, a third party decides how the case should be settled. Whereas, in mediation, the mediator has no authority to settle the case and, under most circumstances, will not let the parties know his or her personal opinion about settlement. The mediator's role is to guide and assist the parties to fashion their

own settlement, serving as a facilitator to help the parties reach the desired goal of a resolution of their conflict.

Mediation has been mandated by the courts for custody and visiting disputes of divorcing couples for many years. It is gaining momentum now in other areas as well.

If both parties are prepared to negotiate and compromise in good faith, mediation can be one of the least expensive and most effective ADR methods. In addition to the cost benefit of mediation, there are many benefits that flow from a creative solution crafted by the parties themselves. Understandably, parties are more likely to abide by an agreement that they helped negotiate and, frequently, their business or personal relationship is left intact to allow future constructive dealings.

Direct Negotiation

Direct, face-to-face negotiation between the parties, without the use of a third party, involves the exchange of offers and counteroffers and a mutual discussion of the strengths and weaknesses of each party's position. This method is usually most effective if the parties are represented by skilled and knowledgeable counsel, and if both have an incentive to reach an agreed settlement.

Early Neutral Evaluation

The concept of early neutral evaluation is usually applied to suits which have already been filed. It is a dispute resolution process in which a neutral third party evaluates short written or oral presentations of each side's position and then provides an initial appraisal of the merits of the case and suggestions for resolving the case.

Focus Group

A focus group is a panel of citizens selected in a manner agreed by the parties. The group receives the parties' presentations, deliberates, renders an advisory opinion about how the dispute should be resolved and discusses the opinion with the parties.

Mini-trial

A mini-trial is a process whereby the parties make a presentation to a panel of neutral persons who consider the legal and factual issues and attempt to negotiate a settlement.

Summary Jury Trial

A summary jury trial is conducted by a judge and involves an abbreviated presentation by both sides to a small jury selected from the county's regular jury panel. The jury renders an advisory verdict, which it then discusses with the parties.

Other ADR Methods

The parties and their attorneys can, by agreement, modify any of the above methods to provide either binding or advisory opinions. The ADR method, procedure, role of the neutral party, limits on the award and effect of the opinions can all be negotiated to fit a particular situation.

❖ Selection of a Neutral ADR Facilitator

The selection of an appropriate neutral party to conduct ADR can be equally or more important than the specific type of ADR which is chosen. The mediator, arbitrator or other neutral third party must have the parties' trust and must

conduct a proceeding which is perceived by all to be fair and unbiased. Although cost is increased if more than one arbitrator or mediator is used, there are times when more than one is warranted to assure that there is a balance of various interests represented by the neutrals. Special mediation skills and training can be essential, and specific expertise in the area of the dispute can be a major plus in many circumstances.

American Arbitration Association

The American Arbitration Association has been providing arbitration services for many years. It has trained arbitrators and standard costs and procedures to apply to a variety of disputes. It has been used extensively by the construction industry for years and many standard-form architectural, engineering and construction contracts contain a specific clause mandating arbitration under the rules of the American Arbitration Association.

Private ADR Groups

There are many private businesses offering a variety of mediation, arbitration or other ADR services. These are frequently owned or staffed by retired judges, attorneys or mental health professionals.

Respected Attorneys

Most court-ordered ADR will use an experienced and respected attorney as mediator or arbitrator. The advantage of an attorney as facilitator is that an attorney will have an understanding of the need for proper procedure and an ability to structure both the process and the result. The disadvantage of an attorney facilitator, as opposed to an expert in the disputed field, is that more time may be necessary to educate the attorney to the specifics of

the particular dispute. For instance, if the dispute involves an issue regarding the strength of concrete provided for a construction project, an engineer may take less time to understand the technical details, if those details are important to understanding the issues.

Experts in the Disputed Subject

Depending on the issues, ADR facilitators can include engineers, contractors, surveyors, psychologists, accountants or any other individuals with special knowledge or experience in the subject of the dispute.

❖ Wisconsin Supreme Court Rules

The Wisconsin Supreme Court has created section 802.12 of the Wisconsin Statutes which authorizes all trial courts to order parties in a lawsuit to participate in an ADR alternative. The court cannot order arbitration or summary jury trial, but the parties may choose one of those options by agreement. In divorce and other family law cases, focus groups, mini-trials and summary jury trials are not available alternatives.

The new statute contains many specific rules and limitations about the use and effect of various methods in different situations.

❖ ADR Considerations For Your Contracts

The best time to consider ADR alternatives may be before any dispute arises. A mediation or arbitration clause in your contract form can be an effective method to assure a prompt and

less-expensive resolution of future conflicts. Although ADR is not a cure for every dispute, and a failed ADR attempt may increase rather than control costs, there are many situations where it is the best available alternative.

❖ Notes

❖ Bakke Norman's Role In ADR

The attorneys at Bakke Norman, S.C. support and encourage the use of ADR in a wide variety of situations. We are prepared to assist clients in making an intelligent selection of the ADR method to be used, and to help select an appropriate neutral individual or panel of individuals to facilitate the settlement process. We also will help design an ADR strategy and advise on specific tactics to help facilitate an early settlement whenever possible.

BAKKE❖NORMAN

Local Lawyers ~ Statewide Reputation

Business Planning & Development

Business Succession

Estate Planning/Probate

Tax Planning

Debtor/Creditor Relations

Employment Law

Real Estate (Commercial & Residential)

Municipal Law

Business Litigation

Divorce & Family Relations

Criminal/Operating While
Intoxicated (O.W.I.)

Personal Injury

Mediation/Arbitration
(Alternative Dispute Resolution)

314 No. Keller Avenue • Amery, WI 54001 • Phone: (715) 268-7360 • Fax: (815) 927-0411

990 Main Street • P.O. Box 54 • Baldwin, WI 54002 • Phone: (715) 684-4545 • Fax: (815) 927-0411

212 Commercial Street • Hudson, WI 54016 • Phone: (715) 386-3909 • Fax: (815) 927-0411

2919 Schneider Avenue • P.O. Box 280 • Menomonie, WI 54751 • Phone: (715) 235-9016 • Fax: (815) 927-0411

1200 Heritage Drive • P.O. Box 308 • New Richmond, WI 54017 • Phone: (715) 246-3800 • Fax: (815) 927-0411

304 Third Avenue • P.O. Box 5 • Osceola, WI 54020 • Phone: (715) 294-4480 • Fax: (815) 927-0411

S233 McKay Avenue • P.O. Box 399 • Spring Valley, WI 54767 • Phone: (715) 778-5516 • Fax: (815) 927-0411

www.bakkenorman.com