

Avoiding the Courtroom: Tools of Alternative Dispute Resolution



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WELCOME

RESOLVING DISPUTES WITHOUT (FURTHER) LITIGATION

Dear Users of ADR Services:

I have practiced law in a business environment for almost 40 years, with a specialty in labor and employment law. During that time, I have litigated cases in a variety of forums: state courts; federal courts; appellate courts, administrative agencies and private arbitrations. But my foundation in working with parties who must find a way to work together every day has led me to the mediation practice I have enjoyed enormously over the past 15 or so years.

As you consider using ADR and your potential selection of a mediator, you are entitled to know not only my view of the process, but what I bring to it, as well:

- Any attempt at a negotiated resolution of your dispute is unlikely to be fruitful unless all participating parties are legitimately motivated to reach agreement. That certainly does not mean those parties must come to the process already in agreement; it simply requires each party to approach the negotiation with a sincere willingness to examine, consider and evaluate not only its own position, but that of the other party(ies), as well.
- If you just want a messenger who will shuttle messages and proposals back and forth, hire someone else. I am an active participant who seeks to understand each party's position and the underlying interests, and I am an active participant in any discussion and analysis of both...particularly when in individual caucus sessions. I try not to pontificate or dictate, but I do ask a lot of questions and I am not afraid to offer commentary born of my experience.
- I am flexible in my approach to any negotiation. I find all negotiations to be situational, so I try to listen carefully to the parties and adapt both my style and methodology to what I judge would be most useful to them.
- I am determined. While I see no point in asking the parties to "beat their heads against the walls," as long as I see any chance of common ground between them, I'll stay at it...no matter the time.
- I am not a full-time neutral. I continue to represent private parties in business disputes and other contested matters. So simply stated, I get it, and I also get the often profound non-monetary value of resolving those disputes.

Thank you and best of luck in both resolving your disputes once they occur and avoiding them in the first place!

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Tools of Alternative Dispute Resolution

Settling legal disputes outside of a courtroom can be advantageous for everyone involved. Alternative forms of dispute resolution are less expensive, less time-consuming, and less contentious than litigation. They offer flexibility and allow disputing parties to create a problem-solving method that is right for their unique circumstances.

In addition to creating a path to the best solution for a current problem, alternative forms of dispute resolution also support organizations, businesses, and individuals in avoiding similar disputes in the future. By improving parts of a process or settling deeply rooted issues at the heart of a dispute, disputing parties are better able to move forward with their relationships or simply be better off overall.

The most effective ADR facilitators bring more than just advice and creativity in solving a problem; they listen carefully and mold their approaches to the situation at hand. At their very best, they and the ADR process build bridges.

What are some options for disputing parties that wish to use alternative dispute resolution?

Private Mediations

There are cases in which a court mandates or the parties agree to mediation before moving forward with litigation. Disputing parties have both more control and more responsibility in private mediation. On the one hand, they have the opportunity to choose the mediator, the location and time of mediation, and ultimately, whether to agree to the proposed terms of settlement. On the other, they must prepare adequately for the mediated negotiation, participate meaningfully during the negotiation, and of course, pay for the mediator and any other costs associated with the mediation.



Court Rule Mediation

Court rule "mediation" can take either of two forms: facilitative mediation much like private mediation, except the court mandates it; or case evaluation, in which a panel of typically 3 independent attorneys consider the parties positions and then render an award, which the parties must then accept or reject. Mediators and Evaluators are most often experts in the subject matter of the parties' case, and understand the applicable laws related to the case, so the parties' presentation of the facts of a particular case becomes of paramount importance.

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Ombudspersons/Dispute Resolution Advisors

Dispute resolution advisors, sometimes called ombudspersons, are independent third parties that are neutral and appointed by an organization to represent and defend the interests of both the organization or entity and its disputants. They are typically responsible for investigating and resolving complaints concerning public and private organizations, as well as advising those organizations concerning the handling and remediation of such complaints.

It is the responsibility of the ombudsperson to consider and apply the goals and objectives of the organization, so any advisement is made in the best interest of that organization. Organizations working with ombudspersons should be open to self-criticism and change. The ombudsperson is interested in the nature of a dispute with the goal of changing corporate or institutional policy from the top. He or she is instrumental in resolving not just one grievance but all future grievances by recommending structural policy changes. In addition to focusing on the issue at hand, a skilled ombudsperson will consider what must be changed to avoid the same type of dispute in the future.



Organizations working with ombudspersons must offer resources and permit investigations without hindering the process. Their goal is not assigning fault, but making recommendations to both improve processes and policies, as well as resolve and avoid problems. At the end of the process, it is not atypical for the organization to receive written recommendations which are accessible to the public.

Pre-Dispute Facilitation (Meet-and-Confer)

Many organizations, companies and contracts create a pre-dispute facilitation arrangement. This ensures litigation is postponed and in many cases avoided altogether by requiring that the parties attempt to resolve disputes before a lawsuit is filed. This type of arrangement is common in business, and is often used by parties as diverse as insurance companies, cell phone providers, and business partners.

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Mini-Trials (Non-Binding)

Mini-trials can be either binding or non-binding, jury or non-jury, depending upon the agreement of the parties. Non-binding trials involve a summarized presentation of evidence to a judge, a panel composed of neutrals familiar with the subject matter, or a six-person jury. Usually, the evidence is presented as it would be in a regular trial and arguments are made by both sides based on this evidence. Mini-trials are often worth considering for cases in which a trial far more lengthy than justified by the money at issue is anticipated. At very least, mini-trials are informational and may be used to assist in valuation of the claim or for designing a trial strategy.

Early Neutral Evaluation

Early neutral evaluation is a confidential form of alternative dispute resolution designed to enable quicker settlements in cases. Early neutral evaluation can be used in family law, such as divorce and custody cases, or in civil or business law cases. The goal of early neutral evaluation is to move a case through court as quickly, fairly and affordably as possible. The process also reduces the hostility between parties, so advantageous relationships might continue once a dispute is resolved.

Hot-Tubbing

As one might suspect, "hot-tubbing" is used to describe a process in which two competing parties or more often, advocates, are literally forced to talk with one another about their respective opinions and position on a given contested matter. It can be particularly effective with the competing expert witnesses identified by the parties to a particular dispute. Even if the "hot-tubbing" fails to resolve the case, it can very often streamline the parties' presentations at later settlement negotiations or even trial of the matter.

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Are you involved in a dispute? If so, **Dick Hooker** can help. Mr. Hooker has significant experience in traditional labor relations, state and federal agency work, employment and other civil litigation, unemployment insurance taxation matters, and arbitration of employment disputes. He is a facilitative mediator for the U.S. District Court, Western District of Michigan and the Michigan Courts, and he is listed as an arbitrator and mediator with National Arbitration & Mediation, Inc., the American Settlement Centers and the National Arbitration Forum.

Mr. Hooker has years of experience dealing with various areas of law for corporate clients and brings a high level of understanding and a wealth of resources about applicable laws and legal precedent. Over the years, he has facilitated mediations, appeared on arbitration panels, and acted as sole arbitrator in cases. As an advocate, he has coached numerous clients through the mediation process and has seen from all sides what makes mediation successful or unsuccessful.

To learn more or to schedule a consultation that will help you determine your next step, contact Mr. Hooker at **248.567.7403** or by email at rahooker@varnumlaw.com.

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