

ADR: Alternate Dispute Resolution

What you need to know!

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The alternate resolution of disputes . . .

Many disputes in today's world are settled outside of the courthouse by the parties themselves – but in other instances, the parties submit their disputes to third parties who are termed 'neutrals.' These neutrals serve as mediators or arbitrators and usually hold an informal hearing at which each party presents his or her case.

If the matter is mediated, then the mediator offers an advisory opinion – or if the matter is arbitrated then the arbitrator issues an award. These methods of alternate dispute resolution have the advantage of being more informal than a trial. They are quicker, less strict in terms of evidentiary requirements, and are usually less emotionally taxing, and, most often, significantly less expensive than a court trial.

History of Alternative Peaceful Dispute Resolution. Historically, the basic form of peacefully resolving disputes between parties is by trial. Trials remain as the last resort of dispute resolution. However, over time, alternate methods were sought. The American Arbitration Association was founded in 1925 after the Federal Arbitration Act was passed by Congress. The goal of that legislation was to provide arbitration as an out-of-court solution to dispute resolution. In 1993, by Order of the Wisconsin Supreme Court, alternate dispute resolution was formally expanded beyond interstate business disputes.

Wisconsin Law. Sec. 802.12 of the Wisconsin Statutes sets out the basic rules for alternative dispute resolution, which include mediation and informal and formal arbitration [which can either be binding or nonbinding]. In mediation, arbitration or other settlement alternatives, a neutral person [who is not a party to the matter] serves as mediator, arbitrator, or advisor.

Types of alternate resolution of disputes . . .

Mediation. Mediation is a dispute resolution process in which a mediator works with the parties to assist them to reach a mutually agreeable agreement. The mediator helps the participants to exchange information which then brings about a focus on the key issues in a disputed matter. The mediator can then explore options and emphasize the benefits to each party for settlement. Mediators have no power to impose a decision if all of the parties do not agree to settle the case.

Non-Binding Arbitration. In nonbinding arbitration an arbitrator is legally authorized to render a nonbinding decision. The arbitrator may be asked to decide only one issue in a complex matter – or the arbitrator may be requested to issue a decision which encompasses all of the issues and ultimately resolves the matter. If the arbitrator is to decide only one issue, that decision may serve as a basis for subsequent negotiation between the parties. In arbitration the parties present evidence and examine witnesses under the rules of evidence agreed to by the parties or determined by the arbitrator. In nonbinding arbitration the parties do not have to comply with the decision.

Binding Arbitration. However, in binding arbitration the parties must comply with the arbitrator's decision. If they do not, then the arbitrator's decision may be filed with a Circuit Court Judge who will render an Order of Judgment. In order for binding arbitration to occur, a number of conditions must be met.

- First, all of the parties must consent to binding arbitration.
- Second, the arbitrator must be given the authority to render a decision that is legally binding.
- Third, the parties must have the ability to present evidence and examine witnesses.
- Fourth, the rules of evidence are set out in an agreement, or by a Court Order to arbitrate.
- Fifth, the award is subject to judicial review.

Additional Alternate Dispute Resolution Alternatives. Other options to settlement alternatives include

- Direct Negotiation,
- Early Neutral Evaluation,
- Focus Group,
- Mini-Trial,
- Moderated Settlement Conference, and
- Summary Jury Trial.

Generally, all of these methods incorporate the presentation of the case facts by testimony and other evidence. Thereafter, the neutral presents his or her opinion which

assesses the presented demonstration by each party. The goal of every alternate dispute resolution option is to settle without the expense of a court trial.

Obviously, the parties can always engage in direct negotiation with each other by exchanging offers and counteroffers, and by discussing the strengths, weaknesses, and / or the merits of their respective positions. However, the benefit of a third person, i.e., a neutral, offering an independent opinion is that this often assists in resolving the dispute. It is particularly helpful if the mediator or arbitrator has experience in litigation or is a subject matter expert in the field of the dispute.

Considerations . . .

Court Ordered ADR. Alternate dispute resolution has succeeded so well in Wisconsin that a judge may order the parties to submit to alternative resolution to promote settlement. As part of the court order the judge may require that the parties participate personally in the settlement process. The judge can order the least costly settlement alternative which the judge believes will bring the parties together for possible resolution. A judge may appoint any mediator or arbitrator who the judge believes has the requisite ability and skills. In addition, the judge can order that the parties pay reasonable fees and expenses of the mediator, arbitrator, or other neutral person who will provide the settlement alternative. In the absence of a written prior agreement between the parties, a judge cannot order binding arbitration. The reason for this is to preserve the constitutional right of a jury trial. Nor may the judge order any process which is a more costly settlement alternative.

Review By a Court If Misconduct by a Neutral. A binding arbitration award can be vacated by a Judge if there is a finding of corruption, fraud, misconduct, misbehavior, or prejudice. Another option that a Judge has is to order a rehearing by the arbitrators.

Presumption in Favor of an Arbitrator. Because alternate dispute resolution is a preferred method of case settlement, the Wisconsin courts have held that there is a presumption of impartiality among all arbitrators. This presumption applies whether the parties choose the arbitrator, the arbitrator is named by contract, or appointed by the court. In one court case, where a party sought to vacate an award, the judge ruled that since the arbitrators had a reasonable basis for not following case law, the court would not interfere with the arbitrators' decision.

Court Confirmation or Modification of an Award. In some matters, a court, instead of vacating an arbitrator's award in a binding arbitration, may modify it. The court can do so if there was a miscalculation of numbers, or a mistake in the description of any person or property referred to in the award. The court can also modify an award if arbitrator has decided an issue not submitted to him or her, or if the written award is imperfect in form.

Sample Contract Provision. [NOTE: I HESITATE TO PRESENT A SAMPLE OF A PROVISION MANDATING BINDING ARBITRATION, HOWEVER, IF THE READER IS NOT AFFORDED THE OPPORTUNITY TO READ ONE, THEN I WOULD CONSIDER THIS INFORMATIONAL BOOKLET TO BE INCOMPLETE. PLEASE REMEMBER EVERY CONTRACT IS DIFFERENT, AND YOU SHOULD SEEK COMPETENT LEGAL COUNSEL BEFORE INSERTING SAMPLE LANGUAGE WITHOUT KNOWING THE UNINTENDED CONSEQUENCES.]

There are many different agreements which set out mandated alternate dispute resolution. This is just one example of a short version of a provision mandating binding arbitration:

Any differences, claims, or matters in dispute arising between [Person or Entity One] and [Person or Entity Two] out of this contract / agreement / or connected herewith shall be submitted by them to binding arbitration and the determination of the Arbitrator shall be final and absolute.

The parties agree that they may mutually agree in writing to employ any other arbitrator or mediator.

The Arbitrator shall be governed by the duly promulgated rules and regulations of the American Arbitration Association or any other employed mediator or arbitrator, and the pertinent provisions of the laws of the State of Wisconsin relating to Arbitration.

The decision of the Arbitrator may be entered as a Judgment in any Court of the State of Wisconsin or elsewhere. The costs and charges of Arbitration shall be borne and paid for equally by the parties.

The parties agree that if it is not possible under the law to use an arbitrator or mediator, then this Section only shall be null and void and shall not affect any other Section in this contract / agreement. The parties agree that the sole purpose of this Section is to employ all good faith Alternate Dispute Methods.

Caveat. The above example was set out to give an idea of an agreement. As in all cases, consult with a lawyer familiar with contracts as you are giving up a wealth of rights when you sign every contract!

In Close. Some people believe that avoiding binding arbitration is preferable and prefer a trial by jury or judge. However the costs of trial are so expensive – and the time lines are often very long -- that binding arbitration may be a better alternative. You should also consider mediation because you can learn of options, and even if your case cannot be resolved, at least you will have had the opportunity to make your presentation which will help you prepare for court.

Our Mission . . .

I want to share our Mission Statement with you:

Our standard of operation and service is excellence. We believe in substantial ongoing professional education. We believe that proactive law can protect the majority of Clients, and that education of Clients by presenting and explaining options are part of well representing Clients. We believe that no Client should ever have a question or a concern as to how his or her matter is being handled. We believe that Clients should remain in control of the solution to their matter. We treat and care for a Client's problems as if they were our own and will loyally, honestly, and confidentially carry out our professional services.

Because the principle of excellence has endured at our firm, we hope you will be well served by our relationship.

Our Professional Relationship. Our professional relationship is based upon trust.

When you retain me as a neutral arbitrator or mediator, you will receive:

- [1] care and concern about your matter;
- [2] ethical standards affecting our relationship;
- [3] professional competence;
- [4] fair professional legal fees;
- [5] an efficient staff; and
- [6] ADR skills.

How I can help you. I have practiced law since 1973 and represent many individuals and organizations. The organizations I represent range from for-profit and not-for-profit corporations and limited liability companies, to EMS and fire departments, both volunteer and paid, and include churches. ADR has application to all of these individuals and organizations.

My Experience. I have served as arbitrator for the American Arbitration Association, the Milwaukee Bar Association, and Better Business Bureau, and in many private arbitrations and mediations. If I can be of service to you, please call for further information.

Affiliated with Schober Schober & Mitchell, S.C. I serve as an Of Counsel Attorney to Schober Schober & Mitchell, SC. The Business Journal has ranked Schober Schober & Mitchell, S.C. in the top 30 Milwaukee-area law firms.

Call with any questions you may have,

Sincerely,

Barry W. Szymanski

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This booklet has been prepared to give a general overview of the legal issues in this area and is not intended to provide the type of legal advice that is given when an Attorney confers with a Client and is able to discover exactly the needs and requirements of the Client's matter and thereafter provide specific professional advice for the Client's benefit.

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