

## Getting the opposing party to the negotiating table (and keeping them there).

Getting the other party to the mediation table can be a challenge. Sometimes, the opposing party may have been ordered to ADR and, therefore, may merely intend to 'go through the motions of ADR.' In such case, the opposing party may "attend" but not be a real and authentic participant in the ADR process. How can you increase the other party's motivation for ADR?

Below are some ideas for increasing motivation of the other party.

**"Why are you suggesting mediation?"** The wide spread use of ADR has also brought with it suspicion: "Why do you want to mediate and why with this mediator?" One defense oriented suspicion has been referred to as "Litamediation" (see Lande, *Alternatives*, April, 98). "Litamediation" refers to the practice of bringing a lawsuit with no intent of going to trial but rather to extract money from a defendant(s) in the eventual court-ordered mediation. From the plaintiff perspective, there is a parallel suspicion that the mediation is suggested by the defense as an easier way to offer get a defense-friendly neutral to propose "nuisance" costs as a settlement amount.

Suspicion about ADR and mediation is rampant. Can your opposing party accept that you are really proposing mediation so that all parties have a better understanding of the conflict and settlement options, and make better decisions?

**Don't assume similarity.** Do not assume that the other party thinks like you, or makes decisions like you. In order to negotiate an agreement for ADR, you will need to understand their needs and expectations (both client and lawyer). You then can determine whether you can find an ADR process that meets all participants' needs.

**"People want buy, not be sold."** If this maxim is true, you should not design an ADR process and then sell it to opposing counsel. Rather, co-design the ADR process with the opposing party. As a co-designer, the opposing party is more likely to be committed to the process. In such a co-design meeting, parties can conduct a conflict assessment, assess informational needs, identify party negotiators, set a preliminary schedule for actions, discuss confidentiality and the use of neutrals.

**Use conflict assessment as an introduction.** One way to start the process of negotiating ADR is to undertake a conflict assessment with your client, and to share the conclusions with your opposing counsel. Under Rule 408 or an agreement for settlement discussions, this information should be protected. Moreover, the conclusions of a conflict assessment are not likely to be the type of material that is relevant to later use at trial.

**Use a neutral, possibly in a neutral convening format.** You may consider using a neutral to assist in the conflict assessment and to make an ADR process recommendation to both parties. Ideas from the neutral on ADR may be more likely accepted by the opposing party, and a neutral convening is a simple way to accomplish this! It is a direct, and relatively inexpensive, way to assess ADR options.

**Informal and voluntary discovery builds trust.** Often if your client holds information deemed important to the opposing party, the voluntary and early disclosure of that information (beyond the disclosure required as "initial disclosures" under Rule 26) can (1) build trust and (2) remove uncertainty and mystique from the

lawsuit. Where you suspect (a) that your opponent believes that certain relevant information will be useful and (b) that its eventual disclosure is likely, consider offering prompt and early disclosure of it to incent the opposing party to come to the negotiating/ADR table. Informal discovery agreements can provide for faster disclosure, and limit use of such information while ensuring ultimate availability of information that would otherwise be available in civil discovery.

**Offer an ADR agreement.** In some circumstances, you can propose initial ADR agreements that, although limited in scope, will build trust and demonstrate a commitment to explore settlement. Such early agreements can provide for:

- Staying litigation,
- Suspending formal discovery and implementing informal discovery,
- Exchanging technical information, and,
- Providing for enhanced confidentiality of settlement discussions and planning.

**Incentives.** Where a party is reluctant to participate in ADR, it may be appropriate, in some cases, to offer incentives to participation in the process. Examples:

- *Mediation or advisory opinion.* If approved by the neutral, your party may offer to cover the majority or all of the neutral's fees.
- *Mediation, advisory opinion or neutral fact-finding.* If the other party feels strongly about their likelihood of prevailing, you may also agree to some form of "semi-binding" ADR (such as an agreement that the costs/fees of the ADR process can be awarded as "costs" by the court or arbitrator).
- *Advisory Opinion.* You can agree that an "advisory opinion" may be admissible in evidence in any later hearing.

**Technical teams.** For complicated cases, more than a simple data exchange may be necessary. You may need to set up a process whereby experts can confer to reduce unnecessary conflict and focus settlement discussions. Agreements covering technical and informational exchanges can address each party's information needs, protection, methods of exchange, meetings (confidential and protected) among experts/consultants, timing for exchanges and meetings, and later requests/use for the information if settlement fails. Agreements can be tailored to permit consultations among testimonial experts during the ADR process without losing/compromising their ability to later testify at trial if necessary.

**Keeping the other party at the table.** Using phased process (breaking the process in to phases that can be accomplished in reasonable time intervals with established goals) can let each Party get accustomed to the process, and become more likely stay involved. Additionally, counsel can try to find times to meet one-on-one with opposing counsel to work to anticipate upcoming challenges and resolve/mitigate them early.