



## ADR: How you and your employees can win a dispute without ever going to court

By Liz Tascio  
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The economy's tight, and your employees are stressed. Because you had to make cuts, they have more work to do, and they're also worried about their own job security. A workplace that's more tense than usual gives rise to more complaints and conflicts than usual, and that can mean rising costs for you – especially when those conflicts end up in court as harassment or discrimination suits.

“What is conflict? Conflict is a growth industry,” said Michael Bertty, getting a laugh out of his audience at the November Human Resources Roundtable. Bertty is vice president of dispute resolution at B3, a firm and consultancy that specializes in Alternative Dispute Resolution.

To control the costs of conflict and de-stress your workforce at the same time, give employees a way to deal with conflict in-house – or at least *outside* a courthouse, Bertty said. He and two other B3 executives presented a few strategies to the Roundtable audience.

### **What is ADR, and how can it help?**

Alternative Dispute Resolution, or ADR, includes three processes under its umbrella:

- Negotiation, which can be as simple as calling the employee on the phone
- Mediation, in which both sides sit down with a neutral third party and discuss what possible solutions will satisfy them both
- Arbitration, in which both sides agree to be bound the decision of a neutral third party

“In my world, the best ways to go are first, a telephone call,” said Richard Block, a principal with B3. “If that breaks down, let's mediate this claim. Then, the next best way for a defense lawyer or a defense manager is arbitration, because it's going to be a lot less costly than a full court proceeding and a lot less risky. You're not going to have the emotions that a jury may have.”

All three processes can be voluntary, confidential, and more satisfying for both sides than going to court. The benefits for both the employer and the employee include:

- Keeping the issue out of court, saving both parties time and money
- Creating a forum in which employees can state their complaint, improving morale
- Each party has control over the terms of the outcome
- Improving communication between the employer and employees, allowing issues to come to light before they become more serious

If negotiation isn't an option – and it sometimes isn't, especially if your employee is too angry to negotiate – mediation has some big advantages over arbitration, Block said. It can take the emotional heat out of the conflict because it's voluntary and because both parties have substantial control over the outcome. It can be a win-win. Even an issue that does go to court sometimes gets kicked back to mediation, Bertty said.

“If you're in court,” Bertty said, “the judge may say, ‘Mediate before you come see me. If you come see me, you're both going to lose.’”

The success rate of voluntary mediation is far higher than that of court-mandated mediation, Block noted, so it's best to suggest it in advance.

### **Preparing for a win-win mediation**

The right mediator can be crucial. There's no rule that says you have to use an attorney; in fact, B3 helps companies learn to mediate in-house. Sometimes the best choice of mediator is someone the employee can see connects with them.

“I'll be a little bit politically incorrect: Typically, the mediators look like me,” said Block – a white man in a suit. “Typically, the employees ... come from all different racial and ethnic backgrounds. Seems to me you'd want to have a resource of diverse mediators so there's buy-in from the employees.”

The point is that the employee feels heard. Employees who believe they have no influence or fair recourse inside the company will go outside the company, which at the very least will drive up your legal costs, said Philip Berry, principal of B3.

When deciding who will attend the mediation, consider the message you want to send to the other side. The employee will probably arrive alone, or with a spouse or friend for moral support.

“If you come in with your cadre of executives and legal reps and that sort, at the onset, you've intimidated them, and instead of having a conversation, you're going to be digging your heels in, and they think they have to prove their case instead of discuss their case,” Bertty said. “Should you have an attorney in there? That's your choice. It's not needed, and you'll probably do better without.”

Other things to be aware of when preparing for a mediation:

- Make sure you're entering with the authority to make a decision. The other side will.
- Keep an open mind. It's possible that you haven't heard all sides of the story and that the employee's complaint is valid.
- Be prepared for venting. The charging party might even want to shout a little; the mediator will keep things under control.
- Be creative. “All settlements do not require money. Sometimes it's an apology, sometimes it's changing working conditions,” Bertty said.

Bertty shared the story of a sporting goods company B3 worked with recently used ADR to settle a dispute with a worker. “The company said, ‘We have toys, we can give your family a one-week canoe trip, and if you like that, we can make that happen.’ She was just ecstatic. She and her husband and kids went off for the weekend. What did it cost the company? Nothing. Creative thinking.”

## **The bottom line: Why you both want ADR**

The goal of alternative dispute resolution is the same from the employee's perspective – they want a complaint resolved – but it's better for both sides than spending time and money in court, where someone always has to lose, Block said. And if the issue ends up in front of a jury, as the employer you're automatically at a disadvantage. "A jury is going to identify with an individual as opposed to this big monolithic company," Block pointed out.

Even if it's obvious that a straightforward negotiation won't work because the employee is too angry, the offer of mediation or arbitration with a neutral third party may be appeal to them because it brings a neutral third party into the discussion.

The employee might be open to that even if they're thinking, "I'm really pissed off because you fired me," Block said. "I don't want to talk to you, I don't want to listen to what you want to say.' Mediation takes the heat out of it."

Above all, offering ADR can help an employer maintain a diverse, talented, and productive workforce, even during the most difficult times.

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