



# ADR in the Business World: Mediation the Preferred Method

By Amy Lieberman

Amy Lieberman is the executive director of Insight Employment Mediation LLC and Insight Mediation Group LLC. She has been listed in "Best Lawyers in America" for alternative dispute resolution since 2004. She can also be reached at (480) 246-3366, or by email at amy@insightemployment.com

**A**lternative dispute resolution (ADR) is alive and well in the business world. Time and time again, when companies have brought lawsuits to enforce arbitration agreements, the U.S. Supreme Court has repeatedly confirmed that public policy favors ADR.

Corporate counsel from Fortune 1000 companies indicated, in a recent study,<sup>1</sup> their increasing preference to resolve disputes through ADR, most notably through mediation, and with less emphasis on arbitration.

Litigation is costly, distracts from the company's focus on business, is emotionally draining, and is typically resented by clients. Hence, companies search for ways to resolve disputes sooner with less expense and public exposure. In a recent meeting of manufacturing executives, one CEO said, "My competitors are all litigating this one issue, spending hundreds of thousands of dollars. I'm just happy the competition is so distracted....my dollars are being used far more productively."

### Trends in ADR for Business

According to the research, 98.8% of all federal civil cases settle before trial. Civil trial lawyers will confirm it is the rare case that makes it to and through trial, so perhaps, oddly enough, trial has become an alternative form of dispute resolution.

Though the likelihood of actually trying a case is small, the litigation process is still enormously costly. The companies surveyed in 2011 reported that litigation represents more than half of their legal budgets, with discovery comprising the largest share of those costs.

The 2011 survey identified trends in the use of ADR, by comparing the results to a similar survey done in 1997. The recent survey showed:

Action:	1997:	2011:
Always Litigate	5-6%	1%
Start with ADR (unless litigation is better choice)	25-27%	38%
Start with Litigation, Move to ADR	21-25%	19%
Always use ADR	11-12%	11-12%

So what does that show? ADR is on the rise. Mediated resolution allows disputes to be resolved more informally, more efficiently and for less expense. The business world is recognizing that litigation is the least preferable choice.

What begins the ADR process? The study showed that the use of ADR is increasing in part due to the presence of contractual provisions mandating the use of those procedures:

Type of Case:	Contract Requirement	Company Policy	Court Mandate	Voluntary Use
Commercial:	54%	4%	14%	27%
Employment:	19%	13%	20%	43%
Consumer:	41%	2%	21%	36%

### Why ADR?

The principal reasons for ADR use are given below. (Multiple choices were permitted)

Reason:	% Cited Favorable:
Saves Time	71%
Saves Money	69%
Confidentiality	57%
Limited Discovery	52%
More Satisfactory	52%
Preserves Relationships	44%
Neutral Expertise	43%

*Living with ADR: Perceptions and Use of Mediation, Arbitration and Conflict Management in Fortune 1000 Corporations*, Thomas J. Stipanowich and Ryan J. Lamare, <http://ssrn.com/abstract=2221471>.

Additional reasons included avoiding legal precedents, more satisfactory settlements and more durable resolution.

### Mediation vs. Arbitration: Mediation is "Ubiquitous"

When asked about the company's use of mediation in the past three years, the reported use was 97%, as compared to 87% in 1997. This is an increase of 10%.

In virtually every category, the use of mediation increased from 1997 to 2011:

Type of Case:	1997:	2011:
Commercial:	78%	84%
Employment:	79%	86%
Consumer:	24%	44%

Similar increases were seen in corporate finance, environmental, intellectual property, personal injury, product liability, real estate and construction.

When asked about the likelihood of future use of mediation, in both commercial and employment cases, over 40% of the respondents said "very likely" and almost 50% said they are "likely" to mediate.

According to Mr. Stipanowich, one of the survey architects, "the use of mediation today is virtually ubiquitous, and it continues in a growth mode."

Compare this to the use of arbitration, which has seen a decrease overall from 83% to 80% since 1997. In employment cases, the use has decreased from 62% to 38%, and in commercial, from 85% to 62%.

A few of the reasons given for this decline include difficulty of appeal, less strict application of legal rules, and the perception of a compromised outcome. According to Stipanowich, "cost concerns are increasing, and counsel are evenly split on its benefits and the likelihood of future use" of arbitration.

### Conclusion

Given the widespread use of ADR, companies and their counsel are wise to pay attention to dispute resolution when drafting and negotiating business agreements. Choice of process and provider can be critical to a successful outcome at the end of the day. Arbitration is no longer the only option, and swift resolution through mediation can be a preferable choice.