

# 10 Good Reasons Not to Litigate

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Most litigators think of Alternative Dispute Resolution (ADR) as a softer and less lucrative approach to litigation that puts a crimp in billable hours by limiting discovery and inviting early settlements.

Litigators believe their clients want a take-no-prisoners, no-holds-barred, mad-dog zealot of an attorney who will carry their flag and die for their cause.

Think again. There are 10 good reasons to simmer down and consider ADR.

Commonly recognized virtues of ADR include lower costs, greater expedition, increased privacy, and control over timing, hearing location, and decision-making. Yet these are only some of the benefits. Litigators should take another look at ADR's considerable advantages for both the client and attorney.

ADR generally includes *arbitration*: a process under which a neutral arbitrator, chosen by the parties, renders a final and binding decision after a hearing on the record; and *mediation*: a process of informal, off-the record facilitation by a third party, assisting the parties to reach a voluntary agreement.

Here then are 10 good reasons not to litigate.

## 1. You Cannot Choose The Judge

With mediation or arbitration, you can choose the fact finder. This key determination is not left to chance. There are major differences between how fact finders treat litigation-related issues (e.g., the law, discovery, evidence, trial procedure, and remedy).

With arbitration, the parties can choose the approach they want to follow and a neutral with expertise and knowledge in the subject matter. The parties can provide guidance to the arbitrator through the submission agreement, which the arbitrator is bound to follow.

Even with court-ordered mediation, the parties lack control over the process, timing, location, and choice of mediator. When Judges or their magistrates act as mediators, the parties focus on what the Judge wants, not what meets their own interests. Discerning and meeting each party's essential interests is the central goal of the independent mediator. Only when parties can independently designate a mediator do they retain control of the process.

## **2. You Can Avoid A Jury**

Juries are totally unpredictable. Virtually every study of juries finds them an odds maker's nightmare. Twelve individuals chosen from the community at large to decide complex legal disputes preclude any foreseeable notion about outcomes.

## **3. You Can Avoid Litigating A Losing Case**

Attorneys can use a mediator to deflate clients' misguided optimism and high expectations. Clients who bring litigation are often emotional and married to their arguments. A good mediator can bring a realistic perspective to the parties and resolve a weak case before it takes on a momentum of its own.

Attorneys and their clients are often afraid to make the first settlement move, because they fear they will appear to have the weaker case. In mediation, however, the parties can subtly get a mediator involved. For instance, before or during discovery, a party can suggest that a mediator work with the parties to establish ground rules and a time frame for discovery. The mediator can then move from discovery to mediating the underlying case on the merits

*Process: The mediation session usually requires each side to articulate its basic facts and positions through oral argument and a summary of its case. Each side also may ask questions of the other side. The mediator then usually holds separate sessions with each side, searching for their real interests as distinguished from their surface demands. The focus is on the central elements of each side's case. Once movement begins on sometimes small points of common agreement, it builds in to a mutual problem solving mode or at least a mutually beneficial exchange. A term sheet is drafted incorporating the salient points of the settlement.*

Because the client plays a key participative role, he or she sees and hears firsthand the weaknesses of his/her own case. The client observes what he or she is up against, as does the attorney. Until then, the client may not believe or really understand his or her attorney's evaluation of the case.

Attorneys are often reluctant to emphasize weaknesses in their client's case or the strengths of the other side's case because they think their clients will think less of them. Attorneys fear that their clients may think they cannot overcome obstacles in the case or that their focus on the weaknesses of a client's case reflects trepidation, not the bravado clients look for in their litigator.

## **4. You Can Avoid Losing a Winning Case**

The passage of time in the litigation process can turn a winning case—one with persuasive facts and legal arguments—into a losing one. The high cost of litigation can wear down one side, even though it has the winning case. Witnesses forget or disappear, and evidence is degraded over time. Statutory and decisional case law may also change adversely.

The side with the weaker case on the merits may have deeper pockets than its opponent. The weaker side may make more of an investment in a case. It may be less willing to settle on terms that are favorable to the side with the meritorious argument and facts. Getting down to the essential contentions of a case early can resolve it and avoid losing a winning case.

## **5. You Can Stop Discovery Runarounds**

The long and torturous discovery process can be condensed and speeded up through mediation or arbitration. The cat-and-mouse motion and discovery process can be short-circuited; instead of a piecemeal approach, the parties can focus on the central facts and issues.

The litigation alternative, despite its plethora of discovery, means the parties must wait for the trial to experience the same clear exposition of the opposing side's case that it could have seen much earlier in the process.

## **6. You Can Control the Discovery Process**

In both mediation and arbitration the parties can set a discovery schedule according to their own needs, not the court's. They have the decision-maker available at all times for discovery decisions. Informal decision-making, rather than an extensive motion practice, expedites the process.

*Discovery can turn a six (6) month case into a five (5) year odyssey through the legal system that would make Kafka blanche. A central concept in dispute resolution is convergence. It means that the parties' positions and relative strength can be crystallized early in the litigation process and their underlying interests can be clarified and effectively remedied. This happens before the litigation process takes on a life of its own and before fog and self-delusion set in as a result of the passage of time, an escalation of frustration, and the absence of resolution.*

## **7. You Can Avoid a Weak "Courthouse Steps" Settlement**

Settlements "on the courthouse steps" tend to reflect a simple division of money after a quick auction process of offer and counter-offer. Most of the time, the parties posture and prepare for trial. The pressure of a looming trial date leads to almost impulsive settlements, with little reflection or attention to detail. Preparing for trial consumes nearly all time and effort; settlement is usually given cursory attention with a rudimentary result.

Parties do not spend enough time settling. Little time is spent on a remedy, even though it is the only part of the litigation that will last into the future.

In mediation the parties jointly look honestly at the case and its merits as well as identify their real interests and remedial options.

*Most settlements leave value on the table. This is because the parties do not explore all possibilities. A third party can explore options with the parties; parties alone tend to just look at a simple division of the original remedy sought. One side may be willing to give something the other side wants and visa versa. A good settlement process explores each side's underlying interests, rather than their surface demands, and looks for the best fit.*

Once the best settlement arrangement is on the table, the parties can always reject it. The parties are not locked into a settlement until they agree upon all terms of a deal. However, it is important for the parties to look for the best possible settlement options before proceeding to trial.

Similarly, in arbitration, the parties can agree to give the arbitrator remedial authority ranging way beyond the narrow limits of traditional legal remedies.

## **8. You Can Help Maintain Relationships**

In family, employment, and commercial disputes, where the parties must continue to live, work and do business together, maintaining relationships is extremely important. It is hard to “live and let live” after a bruising, extensive, and costly litigation.

In family-related litigation, if there are children, the parties must likely deal with each other for years to come. In the employment setting, the individuals involved may also have to live and work with each other in the future. Similarly, in the commercial arena, the bad taste that litigation often cuts off valuable future relationships.

An ADR process and resolution is most likely to leave the parties talking and able to do business in the future. It focuses on the issues, not personalities or motivations. It gets the emotional hostility out of the process. It actually encourages a collaborative problem-solving approach that, if successful, encourages joint projects for the future.

## **9. You Can Avoid The Endless Appeals Process**

Appeals can last for years. Litigation has almost no certain endpoint. The losing side, even if the loss is partial, can appeal and delay a final resolution.

Appeals escalate time and expense to litigants. Moreover, the risks are compounded when unknown future fora and decision-makers are involved. Mediation ends the process through a binding enforceable settlement agreement. Arbitration ends the process with a final and binding decision and award.

## 10. You Can Make More Money

If a client trusts the attorney's judgment and feels the attorney recognizes the client's economic concerns about litigation, it is more likely that the attorney will be able to retain the client for future matters. Total billable hours therefore increase.

Today, clients can be expected to have heard about arbitration and mediation options. ADR is relatively well known, especially in corporate legal departments. Clients will expect their attorney to at least raise alternatives to litigation. Moreover, they will appreciate the attorney's candor in explaining the various options available.

In addition, because the client chooses the option, less after the fact attorney-client conflict can be expected, even if the client chooses the litigation option. Providing options shows that the attorney cares about the client's potential expenditures and time commitment.

*Arbitration lets the parties pick a definite date and location for a hearing. That date may be sooner than a court date and involve lower costs. An arbitration hearing is actually more likely to occur than a trial because of the chronic delays in the litigation process. With a trial delay, there is less time to consider other options e.g., withdrawal or settlement. With a timely arbitration, there is more likely to be a hearing on the merits.*

In mediation, the parties can get together early in the process or at the end of discovery. If the parties attempt to mediate at the end of discovery, the billables are already pocketed and there is a focus on resolution for a concentrated period. This results in even more billable hours. Looking ahead, the pleased client sticks with the attorney for the long term, and refers him/her to others, which can lead to more cases and more billable hours.

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