

# Introduction to How to Use ADR

Everything You Want to Know and  
Don't Get The Chance to Ask

March 20, 2015 Program  
presented by

Virginia State Bar – Virginia Bar  
Association

Joint ADR Committee

# Materials and Presentation

Sarah P. “Sally” Campbell, Esq. Supreme Court of Virginia,  
Dispute Resolution Services Manager

[spcampell@courts.state.va.us](mailto:spcampell@courts.state.va.us)

Jeanne F. Franklin, Esq. Mediator  
Franklin Solutions

[jfranklin@franklinsolutions.net](mailto:jfranklin@franklinsolutions.net)

James Q. Pope, Esq. Mediator  
Law offices of Pope & Pope

[jpope555@msn.com](mailto:jpope555@msn.com)

# Introduction

- Our goal is to converse with practicing lawyers about how they use ADR, particularly mediation, to serve clients effectively. We'll talk about what works, what doesn't work, and how to handle various concerns lawyers have with ADR processes. Ethical considerations about advising clients and choosing ADR will be included in the discussion.

# American College of Trial Lawyers' Code of Pretrial and Trial Conduct (2009)

“A lawyer must never be reluctant to take a meritorious case to trial if the dispute cannot otherwise be satisfactorily resolved. However, a lawyer must provide the client with alternatives to trial when to do so would be consistent with the client’s best interests. A lawyer should educate clients early in the legal process about various methods of resolving disputes without trial, including mediation, arbitration, and neutral case evaluation” (p. 5).

# Beginning Questions

- What is your experience?
- What questions or concerns have you had about the effectiveness of the process used?
- Do you have questions about advocacy skills and how to improve satisfactory outcomes?

# *WHAT IS ALTERNATIVE DISPUTE RESOLUTION?*

- ADR provides *alternatives* to traditional processes – does not take *the place of* traditional processes
- Generally, ADR is *voluntary*
- ADR *empowers and enables the disputants* to seek solutions which *they* decide meet their needs
- Generally, ADR uses a *neutral third party* to help the parties communicate and resolve their dispute

# MANY FORMS OF ADR

- Negotiation
- Conciliation
- Facilitation
- Mediation
- Settlement Conferences
- Neutral Evaluation
- Neutral Fact-Finding
- Mini-Trial
- Peer Review Panels
- Non-Binding Arbitration
- Binding Arbitration
- Ombuds
- Negotiated Rulemaking
- Partnering

# Interest-Based Conflict Resolution Principles

- Focus on the issues
  - *Separate the people from the problem*
- Explore the interests underlying the issues
  - *Look at needs (interests), not just wants (positions)*
- Be alert for new possibilities
  - *Be open, creative*
- Seek ways to meet both parties' needs
  - *Look for “win-win” solutions*

# Reasons Lawyers Use ADR- It Can Be Good for Clients

- Faster
- Less costly
- Easier, less formality
- Less confrontational, adversarial
- Creative, practical solutions
- Avoiding unpredictability
- Avoiding precedent
- Better for on-going relationships
- Participant satisfaction
- Solutions with “buy-in” likely to last
- Avoiding publicity
- Ability to choose neutral
- Little to lose by attempting ADR
- *Parties retain control of outcome*

# Reasons Lawyers Might *NOT* Use ADR

- Need for precedent or certainty
- Anticipation of bad faith
- When one party mainly seeks delay
- Clients don't want to
- Public policy development – openness/record needed
- Options are dictated or limited by law
- Serious power imbalances exist
- Linkage to other litigation
- Outcome will have significant affect on other people
- ADR as improper substitute for other required action

# Other Reasons

- Are there other reasons why lawyers might hesitate to use the process?
- Are there ways lawyers can address some of the reasons and still use ADR process?
- A few “take away” tips are attached to assist with lawyer-lawyer and lawyer-client communication issues and other potential barriers

# Mediation and Dispute Resolution in the VA Code\*

- [State Employee Dispute Resolution \(EDR\)](#)
- [Any public body may use ADR](#)
- [ADR in state contracting](#)
- Court-referred dispute resolution (§§ [8.01-576.4](#) – [8.01-576.12](#))
- Mediation (§§ [8.01-581.21](#) – [8.01-581.26](#))
- [Mediation use in custody and visitation](#)
- [Custody, visitation, and child support referral to mediation](#)
- ADR in condemnation proceedings §§ [25.1-205.1](#) (dispute resolution orientation) and [25.1-219](#) (settlement conference)

*\*List not exhaustive; click on underlined text for statute*

# FOCUS ON MEDIATION

- One of the most common ADR methods
- Voluntary
- Confidentiality guaranteed
  
- Future oriented
- Mediator is a trained neutral with process expertise
- Mediator does not “decide” anything
  
- Mediation is oriented to *self-determination* by the parties
- Involves a structured process
- Is codified in Virginia law – citations are included herein

# GOALS OF MEDIATION

- Allow parties to express their feelings and views of the dispute and its impact
- Help parties see each other's perspectives
- Help clear up misunderstandings
- Help determine underlying interests
- Help parties recognize their overlapping interests and areas of agreement
- Help parties devise their own solutions, building on the interests they've identified

# Role of Mediator

***The mediator is a non-directive facilitator of the parties' own journey to their own resolution***

The mediator:

- Helps parties talk about their concerns
- Assists parties with their looking for and thinking about options for resolving things
- May provide analytical assistance in certain circumstances
- Welcomes conflict
- Follows the participants
- Asks questions, suggests process steps
- Respects the parties' needs and interests
- Leaves responsibility for resolution to the participants
- Stays optimistic

# Attorney/Party Preparation for Mediation

- Clarify party goals and objectives
- Prepare to be open-minded; consider alternative goals
- Identify interests and needs
- Consider goals, objectives, interests of *other* parties
- Select mediator
- Prepare to *listen* – a *critical skill*
- Determine who will make opening statement
- Be aware of differences between mediation and litigation  
– *future*, not past oriented
- What documents, visual aids will be useful during opening statement

# Attorney/Party Preparation for Mediation

Quality preparation has been identified as one of four elements facilitating the likelihood of a successful mediation

- American Bar Association Section of Dispute Resolution, Task Force on Improving Mediation Quality 2008

# Mediation Process

- Preliminaries: Agreement to Mediate
- Mediator's Introduction/Orientation
- Narrative Stage/Opening Statement by Parties
- Issue Identification/Agenda Setting
- Problem Solving Stage
- Agreement

# CAUCUSES

- Used by mediator to:
  - Gain control of the process
  - Allow party to vent or share information
  - Ensure party heard/understood what was said
  - Move beyond impasse
  - Find out more about a party's interests
  - Provide opportunity for party to explore strengths and weaknesses of their case and of the other party's case

# Using Caucus Effectively

- Provide opportunity for party to consider their BATNA (Best Alternative to a Negotiated Agreement) and WATNA (Worst Alternative to a Negotiated Agreement)
- Encourage creativity in identifying solutions
- Set agenda, and prepare party for the next joint session
- Encourage information sharing by party
- Reinforce confidentiality, and identify information that mediator can share with the other party

# Rules of Professional Conduct & ADR

## Rules for Lawyer-Client Relationship

- [Rule 1-1](#)
- [Rule 1-2](#)
- [Rule 1-3](#)
- [Rule 1-4](#)
- [Rule 1-5](#)
- [Rule 2-1](#)
- [Rule 2-3](#)

# Rules of Professional Conduct & ADR

## Rules for Lawyer as Neutral

- [Rule 2-10](#)
- [Rule 2-11](#)
- [Rule 8-3](#)

(Click link to Rule)

# NON-BINDING ARBITRATION

- Useful when parties seek quick decision, some control
- Can be a recommended decision, or...
- ...decision will become binding if not challenged
- “Med-Arb” variation

# ARBITRATION (BINDING)

- An *adjudicatory* process – arbitrator is a “private judge”
- Often contract-based
- Arbitrator identity sometimes specified by contract (VA Code §8.01-581.03 allows courts to appoint an arbitrator when named one is unavailable –see [Schuiling v Harris, 286 VA 187, 747 SE2nd 833 \(2013\)](#))
- Arbitrator often has *subject-matter* expertise
- Final decision has few appeal possibilities
- Decisions usually not precedential
- Decisions usually short and to the point
- Special rules for federal agencies
- Arbitration is controversial in employment context

(Click link to case)

# ADR and Access to Justice

ADR is a valuable tool for expanding access to justice for self-represented litigants by fostering a more educated, empowered and meaningful interaction with the judicial system, and promoting feelings of fairness and procedural justice.

# Concluding Points

- Please complete the brief survey provided on site
- ADR is a significant field with a lot we can still learn and experiences to share.  
Lawyers can hone specific ADR skills.
- What would you want covered in future programs?

# Concluding Points

- Join the VSB-VBA Joint ADR Committee
- Strong programs
- Regular electronic publications
- A new and growing online Archive
- Opportunity for pro bono and networking
- Only \$25 annual dues – join through VSB or VBA
- Go to [www.vba.org/adr](http://www.vba.org/adr), Joint ADR Committee

Introduction to How To Use ADR

March 20, 2015

Joint ADR Committee

## ATTACHMENT A

Virginia Judicial System Website Resource

[www.courts.state.va.us](http://www.courts.state.va.us)

The screenshot shows the homepage of the Virginia's Judicial System website. At the top, the URL [www.courts.state.va.us](http://www.courts.state.va.us) is displayed in the browser's address bar. The page features a header with the text "VIRGINIA'S JUDICIAL SYSTEM" and a logo. Below the header, there are three navigation tabs: "For Citizens", "For Legal Community", and "For Students/Teachers". The "For Citizens" tab is circled in red, and a red arrow points to it from the URL above. A vertical sidebar on the left contains a list of menu items: Home, Virginia's Court System, Online Services, Case Status and Information, Court Administration, Directories, Forms, Judicial Branch Agencies, Programs, and Judicial Branch Expenditures. The main content area is divided into several sections, each with a heading and a list of links or descriptions. These sections include: "Americans with Disabilities Act (ADA)", "Court Contact and Operational Information", "Court Informational Pamphlets", "Commissioners of Accounts", "Employment with the Judicial Branch", "Frequently Asked Questions", "Glossary of Terms Commonly Used in Court", "Jury Service", and "Mediation Informational Videos". The "Mediation Informational Videos" section is enclosed in a red rounded rectangle, and a red arrow points to it from the right side of the page. On the right side of the page, there is a "Search this Site" box with a "Go" button, and a "Quick Links" section containing various links such as "RSS", "What's New", "Pay Traffic Tickets and Other Offenses", "Employment Opportunities", "Find a Local Court", "Opinions", "Rules of the Supreme Court of Virginia", "Frequently Asked Questions", "Legal Links", and "Maps of Virginia". The "Maps of Virginia" section includes a map of the state and two options: "By Judicial Circuit/District" and "By Magisterial Region".

www.courts.state.va.us/citizens.html

Most Visited Getting Started Latest Headlines Next » Subscribe...

# VIRGINIA'S JUDICIAL SYSTEM

For Citizens For Legal Community For Students/Teachers

Search this Site Go

### Quick Links

- RSS
- What's New
- Pay Traffic Tickets and Other Offenses
- Employment Opportunities
- Find a Local Court
- Opinions
- Rules of the Supreme Court of Virginia
- Frequently Asked Questions
- Legal Links
- Maps of Virginia

- By Judicial Circuit/District
- By Magisterial Region

## Home

## Virginia's Court System

## Online Services

## Case Status and Information

## Court Administration

## Directories

## Forms

## Judicial Branch Agencies

## Programs

## Judicial Branch Expenditures

### Americans with Disabilities Act (ADA)

Provides basic information about the requirements of the ADA as they pertain to Virginia's Judicial System, including how to request an accommodation.

### Court Contact and Operational Information

- General Contact Information for All Courts
- Individual Court Homepages

Please select from list below

- Map of Virginia's Judicial Circuits and Districts
- Map showing Magisterial Regions

### Court Informational Pamphlets

Please select from list below

### Commissioners of Accounts

### Employment with the Judicial Branch

- Benefits of Working for the Virginia Judicial System
- Employment Opportunities

### Frequently Asked Questions

### Glossary of Terms Commonly Used in Court

### Jury Service

Please select from list below

### Mediation Informational Videos

- Mediation: The Alternative**  
Produced by the Virginia Mediation Network in 2002, this video describes the facilitative model of mediation most often used by Virginia certified mediators.
- The Three Little Pigs Go to Mediation**  
Produced by the United States Department of Veterans Affairs, this video demonstrates mediation using familiar story characters.

Introduction to How to use ADR

March 20, 2015

Joint ADR Committee

## Attachment B

### TIPS from the Trenches

The first set of tips was used originally in a 2010 program Jeanne Franklin and Larry Hoover, Jr created for lawyers of the Alexandria Bar Association about need and ways to arrange for use of ADR on behalf of clients. The second set includes communications ideas originally developed for mediation training by Jeanne Franklin, customized for health lawyers trying to bring clients into early dispute resolution. They can be useful for lawyers when working with clients generally to strategize about goals and objectives and when working in a negotiation or mediation process.

## First Set: Practice Pointers in view of the VRPC concerning ADR

1. Evaluate dispute resolution options (pros/cons/characteristics) in light of client needs and interests
2. No question is a dumb one! If not comfortably familiar with particular dispute resolution processes and their attributes, make a plan to find out more about them, e.g., speak with colleagues, study CLE materials, consult with neutrals for their advice
3. Beware: what if your advice as to preferred process is actually because it is the one you happen to know well and you don't know much about the others?
4. Bear in mind that processes can be shaped to fit needs. Mediation is NOT one-size-fits-all. Its practice varies depending upon the neutral, and expressed needs of the situation.
5. As part of evaluation of ADR, consider optimal timing for its use. Early intervention is gaining recognition as preferable for mediation or facilitation in many instances. Why?
6. Be prepared to discuss with the client any reasons for client resistance. "Enlightened leadership."
7. Be prepared to speak persuasively and collaboratively with opposing counsel to create access to a dispute resolution process and to shape it. Consider sources of attorney resistance and work with other side to avail clients of the best forum for your client's situation. Remember the ACTL Pretrial and Trial Code of Conduct (2009).

8. Running into trouble with opposing counsel about details of the process to be used (e.g. timing, location, selection of neutral, limits on discovery)? This *might* occur when you are not operating under a contract ADR provision that has set forth such details or that calls for application of particular rules of procedure of an administering service. If getting stuck at such point, what does that tell you? Consider facilitation for establishing the process? Does your firm have a “settlement counsel” or “coach”?
  
9. Pick your neutral carefully – tips for selecting a mediator may be republished by the Joint ADR Committee. (A handout of tips was included in the Well Tailored ADR 2009 and 2010 programs).
  
10. Consider how much discovery/information you need to settle (as opposed to in order to try the case). This is a timing issue as well as a process issue.

Second Set:

## **Some Thoughts and Considerations for Lawyers and Clients**

**Jeanne F. Franklin, Esq.**

### In General:

- Less is More - we don't have to say it all or at least all at once
- Think before you burn your bridges
- Put that letter in the drawer before sending
- Things said or done in anger often feel good but rarely work out well in the long run ("I really told him!" Un huh...and then what...?)
- Flip the ABCs (i.e. beware your assumptions) See below

### Regarding the problem before us:

- [Remember the joy of deflecting – breathe - step back – bring it back down]
- How do we think the other person will perceive what we say and how we say it?
- What's the *desired* effect?
- What might it cause them to do? Turn away?
- Can you think of one good thing you respect or appreciate about the other? Is that worth something to you? Are you willing to say it out loud?
- What might the other person really like to hear?
- What would you (I) like the other person to be able to say about you (me)?
- What would you like someone else to do for you? (i.e., how would you like to be treated?)

- Testing questions: How does it benefit you to .....(do or say or insist upon)?
- What is to be lost by.....?
- What would you like your life to look like in one year? Two years? What effect does this conflict and how we handle it have on that coming about?
- Are we part of something else (a specific community)? How is this matter and how we handle it affecting the larger community?
- Can we agree to minimize losses – real and potential – as we work through this?

### We're Stuck

- Let's remember and return to our initial idea – we'll work together to work something out
- [That] is talking about the past and about how we got here. Let's focus for now on the future – avoid getting stuck in the “retread” (Assuming there has been sufficient review of the past) (from John Settle)
- If we can't seem to get out of hashing over the past what does that tell us? Is there something else we need to do? Can we address it differently - constructively?

### Hope

- Solutions *do* tend to build on themselves; one or two smaller breakthroughs can open the way to other understanding or agreement in the future
- People often act differently, even if subtly, once they've worked hard and reached some agreement – Honest! Be open to it.
- What's your wisdom?

## Don't Forget to Flip the ABCs – Dealing with Assumptions and Other Unhelpful Thinking

We all sometimes get stuck and play the same message in our heads over and over, reinforcing our opinions and inhibiting open minded inquiry and learning. Sometimes we don't even know that is what we are doing, and perhaps it is especially true when we are upset about the matter in which we are involved.

These are often the **ABCs** of fatigued, rigid, or unproductive thinking:

**A** ssumptions

**B** lame

**C** riticism

**To break this unhelpful thought pattern, try “flipping the ABCs:”**

**C** huck the assumptions, at least momentarily, and check out facts and perceptions

**B** egin to reframe, redefine the situation

**A** cknowledge other facts, perspectives or possibilities

**See what “flipping the ABCs” allows you to achieve in terms of fresh thinking.**

