



# Using ADR to Streamline the Complex Case

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Handling complex or “bet the company” litigation in a cost effective and timely manner is often a significant challenge for litigation counsel.

These cases frequently have secondary and collateral issues that take on a life of their own, resulting in the projected timelines and/or costs promised to the client that quickly exceed expectations.

Savvy litigators are increasingly turning to “targeted” ADR to resolve these “sub-issues” while continuing to prepare for trial. As these issues are eliminated, the possibility of an ultimate resolution of the whole matter is enhanced.

The most common techniques considered are issue-based (as opposed to case-based) evaluative mediation, special masters and non-binding arbitration.

Some of the more promising applications are discussed below.

## **Discovery Disputes:**

In large cases, discovery can be overwhelming, expensive and time-consuming. The most common approach is to appoint a special master, who assumes all control from counsel once the dispute is submitted and may need multiple hearings. Another approach is to bring in a discovery “mediator” (preferably one knowledgeable in ESI if applicable), who allows the parties to keep negotiating as often as necessary as the case unfolds. This also has the benefit of leaving decision-making control with the parties and their counsel.

## **Procedural Matters and Disputes:**

Procedural disputes, such as venue, personal or subject matter jurisdiction, sufficiency of process, conflicts of interest or scheduling, are prevalent in complex, multi-party dis-

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putes and can unnecessarily prolong and increase the cost of litigation. Many of these are well-suited to **mediation** or even non-binding arbitration. Where the issue must be preserved for appeal, the agreement may be as simple as preserving it for later in the case when the substantive issues are more fully developed.

### **Experts:**

The nature of expert testimony needed and how it will be presented is frequently a significant cost in litigation. ADR can help reduce that cost. As an example, in antitrust cases, market definition is often expert-driven. The decision-maker frequently has little expertise in the area, and the result is left to the testimony of “dueling experts.” Counsel may be well-served by utilizing an industry expert as an evaluative mediator to assist the parties in agreeing to a stipulated market definition.

### **Class Actions:**

Class definition is akin to the “procedural disputes” discussed above. Counsel should consider using an evaluative mediator to assist in arriving at an agreed upon class definition.

### **Settlement of Defendants’ Allocation:**

In multi-defendant cases, how expenses and judgements should be allocated among de-

fendants is often a key issue. A “defendants only” mediation can help.

### **Attorneys’ Fees and Costs:**

At the conclusion of a matter, the parties may need to engage in further litigation to resolve disputes over fees and costs, resulting in further costs. Non-binding arbitration or mediation can resolve these disputes at a greatly reduced cost.

ADR need not be seen only as a vehicle for resolving an entire case. The use of targeted and limited ADR for specific issues can greatly reduce time and costs.

It is no longer settle or litigate – but settle and litigate. ●

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