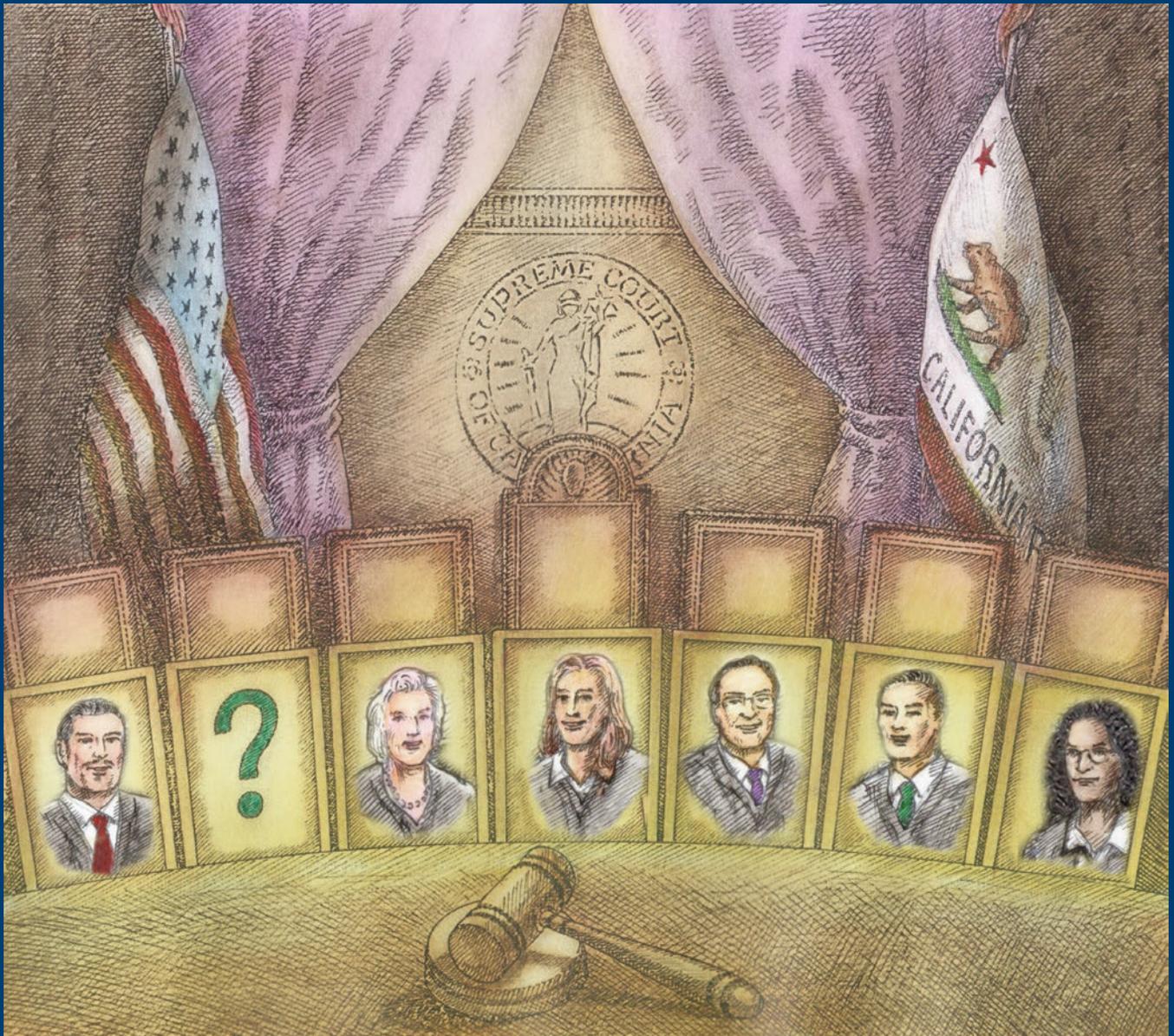


Volume 31 • Number 3 • 2018

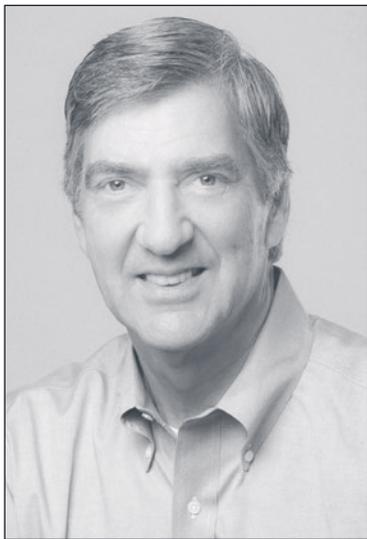
California Litigation

THE JOURNAL OF THE LITIGATION SECTION OF THE CLA



What Is Neutral-Driven Dispute Resolution (NDR) And When Do I Need It?

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The face of Alternative Dispute Resolution (ADR) has been changing in recent years with the addition of online dispute resolution and other innovations for use by litigators. One innovation is

Neutral-Driven Dispute Resolution (NDR), a potential solution for limited stakes disputes which, if not settled quickly, will cost more

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California Litigation Vol. 31 • No. 3 • 2018

to litigate, arbitrate or mediate than they are worth to the parties. This article explores what NDR is and isn't, where it makes sense and doesn't, and what it can mean to you.

What is NDR? Where does it come from?

NDR is exactly what its name implies, an alternative dispute resolution process driven by the neutral decision-maker(s) instead of opposing lawyers. NDR empowers a *mutually selected, independent* neutral judge, expert or panel to (a) personally conduct a robust, yet stakes-sensitive investigation into what happened and what law controls a dispute and, (b) if necessary, ultimately decide the dispute. In NDR, neutral(s), and not the parties' dueling attorneys, drive and control the investigation of facts and law to simplify, consolidate and expedite a practical and cooperative search for truth, taking into account the limited stakes. For example, neutral-conducted witness interviews replace depositions, mandatory disclosures replace records discovery wars, and conversations replace briefs. The roles of parties' attorneys consequently are limited to what the neutral(s) request and to what clients want by way of advice, counsel and/or liaison to the neutral(s). This "neutral-driven" nature of NDR makes it very different procedurally from the courts and other popular ADR methods like mediation and arbitration, and enables savings and rationality in time and money costs where stakes are limited. In these ways, NDR is more akin to Continental Europe's judge-as-investigator justice model, with the primary differences being that NDR is private and neutrals are chosen by the parties rather than the state.

NDR was born from the need for a principled, cost-effective dispute resolution method when the limited stakes of a case do not justify the actual and hidden costs associated with

litigation and its traditional alternatives. Many cost-conscious individuals and businesses in common commercial contract disputes, for example, have decried the absence of a fast, principled process and outcome that is cost-effective yet allows them to seek vindication and avoid what may be viewed as extorted compromise. These people value truth, relationships, and reputation over "winning at all costs." The same can be true in other kinds of disputes as well, as suggested below. NDR can be used for many such disputes among people who believe they are right, want a timely and cost-effective solution to their dispute, and realize real justice is impossible when costs consume the stakes.

What are the benefits of NDR?

Though the specific rules and steps can vary, when done right, NDR can deliver on critical criteria when selecting an ADR method:

1. NDR limits time and costs to rational levels by focusing all investigation and analysis on non-adversarial truth-seeking instead of enabling maneuver for advantage. Where gamesmanship and opportunity for ego and emotional triggering are reined in, savings in both legal and hidden costs multiply, real justice proportional to financial stakes is enabled, and the interests of attorneys and clients enjoy far greater alignment.

2. NDR makes the *workload predictable and controllable*, enabling candidate neutrals (and potentially even legal advisors) to competitively quote *fixed or capped fees and costs in advance at stakes-sensitive levels*—something virtually impossible in an adversarial process.

3. NDR *investigation and analysis are robust* because the neutral(s) are empowered to obtain whatever information they want in the manner they want it from parties

who have agreed to cooperate fully and promptly. To that end, the neutral(s) must have traditional judicial discretion to deter any failure to cooperate with potential adverse inferences or findings.

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4. NDR is *fair* because (a) process rules and neutral(s) are independent and mutually

selected, (b) neutral(s) can be fully vetted for conflicts of interest, integrity and experience/expertise, and (c) the risks of disadvantage for being less powerful or out-lawyered are essentially eliminated.

5. NDR is *private* and can be kept as *confidential* as the parties may agree.

6. The NDR process has great *flexibility*, including options for the number and expertise of neutrals, facilitated negotiation (mediation) before decision, the choice between a binding and court-enforceable decision or advisory neutral evaluation, and expedited (preferably appellant-paid) review by additional neutrals to assure against plainly wrong or biased outcomes.

7. NDR satisfies parties’ critical psychological needs to *be heard*, to feel enfranchised in the process, to have legal counsel advising them, to feel fairly treated, and to preserve dignity regardless of outcome.

8. NDR controls opportunities for and the negative consequences of ego baiting, emotional triggering, and frivolous claims and defenses by all participants. Moreover, in a business contract, NDR provisions protect parties and lawyers from themselves by disincentivizing all these forms of waste and their ability to fuel negative perceptions of our profession and justice system.

What does NDR mean for litigators?

NDR is an additional problem-solving path for litigators, offering an option that makes more sense for clients in otherwise lose-lose situations while aligning lawyer and client financial interests in uneconomic cases. NDR is also a complementary tool for litigators’ current practices because they can responsibly manage or refer out cases that otherwise make no economic sense (to them or their clients), concentrate on cases

that do make economic sense, and earn greater client trust and loyalty for high stakes situations that truly warrant zealous adversarial representation.

Where does NDR make sense?

NDR can be ideal for limited stakes disputes arising out of commercial contracts. It is easy to implement at the outset of a relationship by specification in written contracts for whatever range of disputes the parties agree would make sense. It can also be chosen by the parties and counsel after a dispute has arisen, although mutual distrust, suspicion and advantage-seeking make it a harder mutual choice at that point. Following is a no-frills sample NDR contract clause:

“DISPUTE RESOLUTION. The parties agree to submit any dispute arising out of or relating to this Agreement to _____ [NDR service provider] for binding neutral-driven, non-adversarial resolution according to its then-current rules.”

NDR may be especially appropriate in limited stakes disputes involving the following kinds of parties and situations: Construction companies (where time is dear, margins are already thin, and time is of the essence due to risks of domino delays), realtors (where claimed failures to disclose material facts vex brokers, sellers and buyers alike), start-up companies and their investors (where legal fees spent on disputes can waste precious capital), commercial buyers and sellers (where valuable relationships can be saved), independent service contractors (where small disputes kill profits and ruin reputations), family partnerships and small estates (where feuding families spend the corpus on legal expense and holiday dinners change forever), cross-border transactions (where foreign business partners loathe the hostility

and costly gamesmanship of American justice), and insurers and insureds (where faster, cheaper claims resolutions should improve customer satisfaction and ultimately save billions nationally in lower premiums).

Where doesn't NDR make sense?

- ✓ As with Arbitration and Mediation, NDR is not right for some situations:
- ✓ When the parties can voluntarily share enough information and settle, with or without the help of lawyers, before initiating legal action.
- ✓ When stakes are so high that the adversarial process is worth its many actual and hidden costs.
- ✓ When an indispensable third party or a nonparty witness will not cooperate.
- ✓ When immediate equitable relief—like a temporary restraining order or preliminary injunction—is needed.
- ✓ When one side simply won't agree to NDR for whatever reason(s)—especially likely in tort and other claims between or among strangers and any relationship-based claims where one side is inherently suspicious (or counseled to be suspicious) of anything the other side might suggest.
- ✓ When considerations of public policy prevent otherwise willing parties from effectively agreeing to it.

What are the obstacles to using/adopting NDR?

NDR isn't used in a widespread fashion for limited stakes cases even though variations have been around for many years under the rubrics of “Ombudsmen” and “Neutral-Fact-Finding.” The reasons are several and interactive. First, creative, outside-the-box innovations like NDR, and the large gap in civil

justice they can help fill, are not taught in law school. Second, the psychology of dispute resolution inhibits adoption of NDR in many situations because people think they are right and want to prove it through litigation, until legal bills start adding up and they begin to realize what it is ultimately going to cost them. These types of cases often end up settling for the wrong reason—the absurd cost of seeking justice—when they could be resolved inexpensively and on the merits using NDR by having an agreed decision maker hear and assess their stories. Third, most parties to a dispute end up in litigation so infrequently that it is seen as a “one-off” event. Fourth, there frankly will always be some litigators who see no incentive to deploy alternative dispute resolution methods that may reduce their incomes or their client’s dependency on their role as gatekeepers and problem solvers of all things legal. Fifth, we have a law-suit happy culture where we romanticize adversarial process and are inherently myopic about knowing or finding alternate ways of solving a dispute. Lastly, there is an inertia and attention deficit disorder aspect to lawyers learning about new methods: They are busy and it can be overwhelming to invest in learning about and “risking” new methods to resolve disputes. Lawyers just don’t know about NDR yet; it is mostly an unknown choice—like arbitration and mediation were 40 years ago.

Where can I get NDR?

Current providers and models for NDR include the following: (1) Dispute Resolution Boards (DRBs) used in large construction industry projects for mostly nonbinding recommendations. E.g., www.drb.org. (2) That form of collaborative lawyering common to domestic relations in

which both husband and wife retain the same attorney-mediator and other neutral experts to investigate and recommend fair terms for their dissolution and division of assets. See, e.g. www.family-law.lawyers.com, www.collaborativepractice.com. (3) Membership-, industry- and statutory-based processes designed to expedite the resolution of smaller disputes without need of adversarial process. E.g. www.bbb.org, www.dca.ca.gov, www.finra.org/smallclaimsmediation. (4) Independent service providers who specialize in offering binding or advisory NDR by one name or another. (5) Independent mediators, arbitrators, ombudsmen, and retired judges who have (or *could*) put together a basic set of rules and conduct a neutral-driven resolution between or among amenable parties.

Neutral-driven dispute resolution is not a panacea, but it is a real cure for the injustice and profit-consuming waste, costs and distractions of many common, limited stakes lawsuits. Changing the business world for the better (and improving profitability and outcomes for all concerned) begins with a single step in the right direction, and NDR can be that step.

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