

### ADVISORY OPINIONS

Why get an advisory opinion? In some commercial, personal or environmental disputes, there are legal or factual conflicts that the parties cannot resolve without some guidance -- yet they do not necessarily want to arbitrate or litigate to a final resolution. A "non-binding" assessment of a legal matter may help one or more of the disputants to reconsider their positions and options. Thoughtful consideration of using an advisory opinion involves a number of considerations. Two key factors are: (1) how to set up the process and (2) considerations as to whether an advisory opinion is appropriate.

The following is a list of **factors to consider** in using the Advisory Opinion Process

1. Intended value of an Advisory Opinion
  - 1.1. Provides an objective risk assessment
  - 1.2. Intended to reduce some of the settlement decision making errors (so called "reality check")
    - 1.2.1. Case evaluation errors by one or more parties
    - 1.2.2. Anchoring
    - 1.2.3. May highlight information/data errors
  - 1.3. Can assist in each party's definition or redefinition of its reservation value
  - 1.4. Can provide a "golden bridge" for a party or counsel
  - 1.5. However, may not affect psychological or perceptual errors
2. Can an advisory opinion accurately predict the adjudicated outcome?
  - 2.1. Predictability of the case
    - 2.1.1. Known decision structure
    - 2.1.2. Outcome turns more on data/law
    - 2.1.3. Outcome not too sensitive on presentation and the actual testimony of the trial day
    - 2.1.4. Prior history of similar matters
    - 2.1.5. Facts not in great dispute or at least clarified
  - 2.2. Predictability of the adjudicator
  - 2.3. Adequacy of available data at the time of the advisory opinion
3. Does the selected neutral have the ability to predict the adjudicated outcome?
  - 3.1. Training or experience in the subject matter
  - 3.2. Adequate legal skills
  - 3.3. Analytical skills
4. Can an advisory opinion persuasively predict the adjudicated outcome?
  - 4.1. Willingness of parties to accept the opinion?
  - 4.2. Are settlement decisions of one party driven by external factors?
5. Is the Opinion neutral and unbiased?
  - 5.1. Able to be objective
  - 5.2. Uses data known to all participants
6. Setting up the process
  - 6.1. Scope of submittal
    - 6.1.1. Fact
    - 6.1.2. Law
  - 6.2. Use of an agreement

- 6.3. Semi-binding options
  - 6.3.1. Cost shifting (loser at trial bears the cost?)
  - 6.3.2. Admissible advisory opinion in later proceedings

**Using a submission agreement.** It is often advisable to set up a process to describe the process that the parties will use to obtain the advisory opinion. The value of the opinion can be greatly enhanced if all parties have an agreement about how the process will proceed. The basic format of the submission agreement should be tailored to meet the parties' needs.

**How to get an advisory opinion.** I can help the parties by setting up a process and rendering a non-binding assessment of the dispute, by doing some or all of the following:

- Assist counsel in determining whether an Advisory Opinion is appropriate in the circumstances.
- Assist counsel in negotiating an Advisory Opinion Agreement.
- Assist counsel in scheduling the steps in the process.
- Look for ways to simplify the presentation of material.
- Ensure that the advisory opinion is based on information and potential evidence known to all participants so the opinion has predictive value.
- As appropriate, produce a short written advisory opinion on the disputed issues.
- Confer with counsel and parties to explain the opinion.
- After the opinion, discuss other ADR processes that may focus the subsequent trial or arbitration.

## Predictability of trial outcome - types of cases

### Low predictability

**Decision structure unclear**

**Adjudicator unknown**

**Limited legal/social guidance**

**Facts - complex and messy**

**Lack of case law**

### Mid-zone

**Decision structure - complex**

**Adjudicator unknown**

**Legal/social guidance moderate**

**Facts - usual array**

**Case law mixed**

### Reasonably Predictable

**Decision structure - clear**

**Adjudicator - known**

**Legal/social guidance - solid**

**Facts - straightforward**

**Case law - known**