

**Alternative Dispute Resolution: The Collaboration Between
Profit and Principle In Resolving Business Conflicts**

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Introduction—The Big Picture Of Conflict Resolution

Conflict is inevitable in virtually every aspect of business. This is true whether the endeavor be strategy development, operations, finance, production, marketing, sales, mergers, contracts, shareholder relationships, human resources, or personal injury or property damage from international terrorism. In today's business environment, every manager must be equipped with the theoretical knowledge, ethical foundation, analytical competency and practical skills to correctly diagnose conflict and fashion optimal solutions. The cost of failing to properly diagnose and manage conflict ranges from direct added expense and reduced profit, to wasted human and organizational resources, reduced competitiveness, costly litigation, governmental intervention, elimination from the domestic marketplace, and even or nationalization by a foreign host nation. The question, therefore, is whether there exists a profitable and ethically principled methodology for successfully resolving business conflicts?

This paper presents the argument that "ADR" (Alternative Dispute Resolution) offers just such a methodology. It is further argued that ADR offers not only a meaningful choice for addressing business conflicts in whatever form they take, but a toolkit for achieving a much improved collaboration between profitability and ethical, principle-based decision-making in the ever-changing global economy.

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Lastly, it is argued that ADR is the further evolutionary step in a society's social development as it moves from the ultimate technique in competitive decision-making--annihilation by the lance and sword--to the recognition that we are socially interdependent. ADR employs a collaborative dispute resolution model with the concepts of the individual, internally developed responsibility for decision-making and the guidance of external company ethical standards. The end result is a new philosophical business standard for resolving the conflict profitably and ethically.

Underpinnings of the Traditional Adversarial Conflict Resolution Framework

Historically, the American civilization was carved out of a wilderness by individuals who created something out of basically nothing using only raw materials and personal energy. These early entrepreneurs were motivated by a desire to build lives free of Old World despotic power; religious intolerance; limited property rights; restrictive cultural castes; and a powerful desire for personal security, fulfillment and self-determination.

The business of nation-building also required physical stamina and a constant competition with the natural elements in order to tame them into service of civilization. Personal and collective survival depended upon the ability of the fittest to survive—a biologically wired instinct and characteristic. Out of this challenge, the necessary survival skills were developed that what would eventually form a national character, and an economic and political system that reveres individual rights, personal industriousness and competition.

Contributing, as well, to the creation of our unique national character, was and continues to be, the tremendous influence of diversity. In the early years, the country was populated mostly by Western European Christian immigrants. Today, our society is a population consisting

of the descendents of slaves, immigrants from wars and natural disasters, and individuals from all corners of the global compass seeking fulfillment of the promise of freedom and opportunity. We speak languages of every kind; practice every conceivable religion; and have personal appearances with a multitude of physical features and have skin colors from the whitest white to tan, red, yellow, brown and the deepest shade of black. This nation has never been a thoroughly homogeneous nation.

Not surprisingly for a nation created from the full spectrum of human diversity, our ethical system is a combination of deontology and teleology—we affirm absolute morality while at the same time we concern ourselves with the consequences of our actions apart from the morality of the actions themselves. The melding of these “formalist” and “consequentialist” approaches results in a thinking that can lead to the same decision.¹ This combination of viewpoints also contributes to a more expansive view of mankind—one that fosters a kind of enlightened self-interest. This idea can be found in Adam Smith’s *The Wealth of Nations*² where he suggests that such a characteristic is in the nature of man:

“However selfish man believes himself to be, there is no doubt that there are some elements, in his nature which lead him to concern himself about the fortune of others, in such a way that their happiness is necessary for him, although he obtains nothing from it except the pleasure of seeing it.”

Whether present because of nature or nurture, and more likely as a collaboration of both, this enlightened self-interest has influenced the development of our particular political formulation of individual rights as embodied in the Declaration of Independence, the U.S. Constitution and Bill of Rights. The founders of the Republic conceived that certain “truths were self-evident” because, as human beings, we are endowed with the “inalienable Rights, among these are Life, Liberty and the pursuit of happiness.”³ They sought to transform these rights from philosophical precepts to legal codifications by establishing them in the foundational legal

documents of the land. They determined to employ the mechanism of “the rule of law” to preserve and enforce these “inalienable rights” when involved in conflict. From the very beginning of our nation, therefore, we have enshrined individual rights as sacrosanct and organized our culture, political and social institutions to maximize these values.

Not surprising, as well, is that our chosen economic system is capitalism which extols individual effort, hard work, material acquisition, protection of private property, profit, free enterprise and competition. We hold these characteristics to be fundamental to the exercise of our “inalienable rights,” if not, in fact, inherent in our human nature itself. So important are these rights, that we extend them beyond ourselves and endow our business organizations with the rights and legal status of persons. Thus, have we meshed our competitive economic system with our concept of an individualistic, rights-based human nature to create what we conceive as the ideal society. Finding the appropriate balance has been the challenge. On the one hand, we insist upon the primacy of an unfettered free-market economy, free enterprise and individual entrepreneurship. As a practical matter, however, we find ourselves frequently unable to self-regulate either our personal or business conduct to assure the fulfillment of individual rights in the context of a civilized society. Indeed, our direct-day-to-day personal lives and business endeavors are subject to legislation, judicial decisions, and administrative regulation by boards, bureaus, commissions, agencies and organizations all for the purpose of maintaining the integrity of individual rights and a balance among the competing interests and needs of a diverse culture. The question inherent in our economic system, therefore, becomes, “How we define the ‘win’ for the individual and the society in which the economic competition is played out?”

In a sense, our national pastimes—baseball, football and sports in general—also reflect the interplay of these same values of individualism, competition and collaboration. While we

cheer the individual athlete on to “win,” we remind both competitors and fans alike that, “There is no ‘I’ in team!” Even in the world of sport, the on-going and inherent conflict in this meshed system of values is how we define “the win.”

The Adversarial Conflict Resolution Framework

Thus, it comes as no shock that our preferred method of conflict resolution is an adversarial one conducted in an institutionalized framework of laws, lawyers and courts, carried on as controlled combat in a highly competitive environment in which a win-loose, individual rights, and position-based philosophy prevails. Indeed, given the historical antecedents described previously, such a system would seem all but inevitable.

Our present day conflict resolution philosophy is founded upon the premise that the adversary system is the best guarantee that truth will prevail in an interpersonal or business-to-business dispute. This idea derives its origins from actual battle where the emergence of truth was believed to come from the confrontation of opposing views. In such a contest, the underlying belief was that “heaven would give the victory to him who was in the right.”⁴ Over time, the belief that “might makes right” has evolved to the less physically violent, but still spirited, verbal clash of legal adversaries in zealous advocacy. As we have perfected and gentrified the adversarial contest with laws and courts, constitutions and legislation, we have retained the belief that an adversarial system remains the best way to produce the truth.⁵ Indeed, the adversarial method for resolving civil conflict is enshrined in the holiest sanctuary of our legal system--the United States Supreme Court’s reported decisions: It is “the best means of ascertaining truth and minimizing the risk of error.” Mackey v. Montrym⁶; and “adversarial testing will ultimately advance the public interest in truth and fairness.” Polk County v. Dodson⁷

Although oratorical warfare has replaced war by physical combat in the process of resolving everyday personal and business disputes, this method of conflict resolution retains the characteristics of a battle to the finish: The rules of engagement are declared (Court Rules of procedure); each side marshals its resources for the best offense and defense (pretrial discovery and the gathering of evidence); strategic positions are developed for a winning battle plan (the legal research is conducted to develop the best positions and arguments to maximize the potential for victory and minimize the risk of defeat); ground, air and sea forces are organized to carry out the battle plan (the assemblage of lawyers, support staff and experts are placed on retainer to conduct the fight); the field of battle is set for the encounter (the courtroom is made available to service the trial); and the divine hand of the truth is summoned to impose its judgment (the judge or jury is made ready to hear the evidence and adjudicate the decision). Until relatively recently, we have continued to operate under the assumption that this model of conflict resolution is the only effective method for resolving the dispute.⁸

The Ultimate System Paradox--Preparing for the Battle, Knowing That It Never Comes

The utility of any system whether living or manmade is that its design actually accomplishes its purpose. The best system does this with maximum efficiency in application of resources and processes, and with the least destruction to the system and participants. So, it should be that the adversarial system of lawsuits, courts and trials, as the principal system for resolving business disputes, is how most all decisions are made about who is right and who is wrong. In actuality, however, the overwhelming majority of lawsuits are never tried to a judgment in a courtroom. In fact, all but a tiny fraction of lawsuits—as low as 5%—ever depend upon this system to actually produce a decision.⁹ Rather, most lawsuits are resolved by an entirely different mechanism designed to reach an entirely different kind of result—this

mechanism utilizes ADR techniques. This other mechanism is negotiation (not adjudication) and the result is settlement (not decision).

Parties choose to use this other system because they conclude that a decision about who is right and who is wrong is unnecessary or even undesirable. They choose this approach because, as a practical matter, a negotiated settlement based upon satisfying their respective needs and interests is more important than demonstrating the “truth” of one’s own legal position by annihilation of the other’s through adjudication. In a sense, the parties are employing a new “strategy” to achieve desired business ends—one that is being recognized as better constructed to accomplish ultimate business ends. This strategic form focuses upon the interdependence of the adversaries’ decisions and on their expectations of each other’s behavior.¹⁰ It is an approach, as explained in economic “game theory,” grounded in the understanding that disputing parties have a “common interest in pursuing outcomes that are mutually advantageous.”¹¹

In those rare cases where lawsuits are tried to decision, very specific reasons exist to explain why. In such limited situations, the adversarial system becomes the last alternative to resolving a conflict after all other means of negotiation and settlement have proven futile. In everyday application, therefore, while we enter the conflict resolution process both philosophically and systemically using the adversarial design, we almost never depend upon it to actually reconcile our differences. This paradoxical circumstance creates a whole host of ethical dilemmas and waste of material and human resources. It is a circumstance that we are coming to recognize calls for a new and innovative methodology for resolving conflict—one that is based upon on the reality of what parties actually want to achieve and what they actually do to resolve their conflict—one in which the disputing parties employ collaboration rather than

adversarialism and interest-based rather than positional bargaining to achieve a “mutually advantageous,” ethical, principle-based and profitable outcome.

Discontent with the Traditional Adversarial Model of Conflict Resolution

Over approximately the last decade, the stakeholders in the conflict resolution system have increasingly expressed discontent with the adversarial conflict resolution process: Lawyer job dissatisfaction has increased; judges complain that they are servicing a bureaucratic apparatus rather than dispensing justice; clients denounce the system for its cost, delays, loss of control and uncertainty; and the public finds fault in a system that permits “frivolous” lawsuits and outrageous verdicts.

To business people, the adversarial model of conflict resolution has never made much sense. The very nature of the adversarial process as played out in the judicial system is anathema to basic business needs and interests. Businesses seek to develop, manage and protect their internal and external environments. Businesses need to arrange the multitude of constituent elements that make up any endeavor in a way that preserves relationships, maximizes efficiency and minimizes the risk of disruption along the chain from product/service conception to delivery. Conflicts and disputes among the players in any business activity threaten the short and long-term success of such an endeavor.

Whether the conflicts involve hiring, product R & D, raw materials, construction of facilities, strategic planning, licensing, financial projections and budgeting, supplier relations, customer satisfaction or any of the other myriad aspects of business activity, the concern is always that conflict will impair the success of the activity. The methodology for the resolving the conflict, therefore, becomes very important. The ideal approach being one that is speedy; cost effective; enables the participants to retain decision-making control of the outcome;

minimizes uncertainty of the results; maintains business relationships; and is flexible and adaptable to changing business needs and environments. None of these metrics are served by the adversarial litigation model of conflict resolution. To the contrary, litigation is generally slow; costly; removes control of the decision-making from the stakeholder and places it in the hands of third parties unfamiliar with the business; is uncertain as to outcome; destructive of relationships; and is rigid in its design and application. Moreover, litigation is a game of “hide the ball” that discourages candid discussion among the disputants about their real business needs and interests. Rather, it encourages the expending of tremendous effort to build impenetrably constructed legal positions to use as both assault tactics as well as to defend the righteousness of their causes. A “win” in the litigation game becomes more important than “winning in the marketplace.” However, even the “win” can be a hollow experience because after the smoke of battle has cleared it is often difficult to distinguish the victor from the vanquished.

The Reticence to Change

Yet, there is reticence to change even in the face of this apparent disconnect between what business needs by way of a meaningful conflict resolution process and the traditional, prevailing adversarial methodology. A major reason for this problem is that we have grown up according to a standard conflict resolution map or “blueprint.” We have so perfected this design for addressing conflict, that its deployment is almost automatic as breathing. Not only have we created this highly specialized schematic for diagnosing conflict, we have developed a whole “tool kit”¹² of techniques and procedures for reading it; and we have become extremely proficient in employing the tools to implement it. The whole process, from education to implementation, is so embedded in our thinking that it has become a virtually invisible part of our philosophical and social makeup.

The great irony, even contradiction, is that while we employ the adversarial model as the “standard philosophical map”¹³ and mechanism for conflict resolution, the overwhelming majority of disputes do not use it to actually resolve disputes. Indeed, the vast majority of all lawsuits are not adjudicated by a judge’s or jury’s decision at trial.¹⁴ Rather, parties and lawyers sit down to negotiate settlement using an entirely different set of rules, procedures and criteria. In fact, perhaps of even greater irony, is that the courts—the very halls of justice where the adversarial system is practiced—have adopted these techniques as a formal part of the court process. Parties and lawyers are routinely encouraged, if not ordered, to employ ADR techniques rather than trial to resolve their disputes in Federal, state and international courts.¹⁵ Thus, while the adversarial system remains in place and pervades our approach to resolving conflict, it is a paradigm whose power is all out of proportion to its utility except in a tiny minority of situations where it truly serves a need.

The Changing Face of Conflict Resolution

After years of active resistance, recognition judicial system has come to understand and accept ADR. Where in the ADR’s early years, to even whisper the word “ADR” in a courtroom, was to risk drawing sneers and unpleasant comments and even ostracism. Today, however, the courts themselves have moved to the forefront in promoting the use of ADR as a part of the conflict resolution establishment. In the vast majority of studies done to date on the effectiveness of “court-annexed” ADR, the conclusions are that these collaboration-based techniques save the parties money, time, produce more satisfying experiences with resolving conflicts, and more durable and acceptable settlements.¹⁶

In the legislative area, too, ADR use is widespread. Congress has enacted a number of statutes promoting ADR under the Federal law. In 1996, The Administrative Dispute Resolution

Act (ADRA) was passed giving federal agencies additional authority to use ADR in most administrative disputes.¹⁷ Also in 1996, Congress enacted the Negotiated Rulemaking Act (NRA) which directs regulatory agencies to use negotiation as well as facilitated consensus building to develop administrative rules.¹⁸ In 1998, Congress enacted the Alternative Dispute Resolution Act (ADRA) empowering the Federal District Courts to employ ADR in all civil actions.¹⁹ In the state legislative area, some 35 states have passed ADR statutes ranging from the use of ADR in specific statutory subject matters, to directing state agencies to incorporate ADR in regulatory proceedings, to mandatory ADR in court cases.²⁰ In the field of international enactments, there now exist some 200 laws pertaining to ADR in over 70 countries.²¹ Additionally, innumerable international treaties and conventions now exist incorporating ADR as the principal dispute resolution mechanism. Among them, are the Convention On The Settlement Of Investment Disputes Between States and Nationals Of Other States;²² The North American Free Trade Agreement;²³ and The European Free Trade Association Agreement.²⁴

In the business world, progress is strong towards creating more interest-based, ethically principled conflict resolution techniques. For example, the movement to create workplace dispute resolution programs within a business enterprise has grown substantially.²⁵ Numerous companies have incorporated such programs from the specific board of director level to company-wide programs such as Detroit Edison, Ford Motor Company, General Motors, Daimler-Chrysler, General Dynamics, IBM, Home Depot, Ernest & Young, Shell Oil Company and General Electric. In addition, over 4000 companies have subscribed to the Center For Public Resources “ADR Pledge” which obligates signatory companies to explore the use of ADR in disputes prior to resorting to litigation.²⁶

Whole industries, formerly employing litigation as the main tool for dealing with disputes, have turned to ADR as the process of choice. The securities industry now employs both mediation and arbitration as the sole means for conflict resolution in investor/broker-dealer cases as well as for all internal investment house disputes.²⁷ In the construction field, the American Institute of Architects includes mediation and arbitration clauses as standard in its industry contracts.²⁸ Collective bargaining contracts have long used ADR processes to resolve grievances and labor disputes.²⁹ Residential and commercial real estate transactions routinely include ADR as the method for addressing disputes.³⁰

In the healthcare field, among the major industry ADR collaborations having taken place is the Commission On Healthcare Dispute Resolution. The Commission was the joint effort of the American Medical Association, the American Bar Association and the American Arbitration Association. The Commission issued its Final Report in 1998 recommending that Alternative dispute resolution can and should be used to resolve disputes over health care coverage and access arising out of the relationship between patients, providers, private health plans and managed care organizations.³¹

These are but a few examples of the widespread use of the new non-adversarial approach to resolving conflicts throughout the business related world.

ADR—A Means for Achieving Business Health, Profitability and Ethical Performance

Today's business environment is in a state of turbulence. Business managers are striving to find flexible and imaginative solutions to the challenges of globalization; the movement to knowledge-based enterprises; the need for innovative products/services; avoiding ethical dilemmas; new regulations for financial reporting; and managing success across a range of time frames from short-term to long-term. For the business world in general, the threat of extinction

means more than an occasional example of a company going out of business due to inept business management or lack of market receptivity. Indeed, that survival cannot be guaranteed by simple mechanistic application of the standard business philosophical map for success is evident from the fact that 10 of the largest 15 bankruptcies in history have occurred since 2001.

From the ethical practices viewpoint, the last decade has revealed the unpleasant underbelly of unethical practices in the form of numerous scandals involving Enron, Arthur Anderson, WorldCom and Martha Stewart to name only a few. To address this very real challenge to business, a number of approaches have been taken. Among them, are the developments of organizational codes of ethics. Nearly all large corporations have their own codes of business ethics.³² The Business Roundtable has identified a general list of topics that should be included in such codes.³³ This list includes matters that are not only the subject of ethical concerns—but are the areas in which conflicts routinely arise in the business setting. These include financial reporting, pricing/billing/contracting, product safety and quality, supplier relationships, and intellectual property—all subjects that impact upon business health and profitability. Clearly, then, a close relationship exists between business ethics, profitability and employing an effective methodology for resolving conflicts that arise in the business setting.

ADR is coming to be recognized as the most effective conflict methodology for maintaining a healthy business and performance profitability. In fact, “performance and health,” as the prerequisite to survive the physical rigors of a long and active life, has become a metaphor in the 21st-century business lexicon for the ability of a business to remain profitable in the short term and to perform well year after year.³⁴ This emerging appreciation of health consciousness was demonstrated in a recent survey of 1,000 corporate board directors. The key factors identified included devoting more time to setting strategy; developing new leaders; acquiring

more information about markets, organizational issues such as skills and capabilities, and monitoring other issues that underpin a company's long-term health such as assessing risks and *constructively addressing internal and external conflicts* that arise among these factors.³⁵

When interest-based, collaborative approaches to conflict resolution are adopted, an environment prevails in which business interests and needs are the focus—not position building to win an adversarial contest. Consequently, the innovative approach to conflict resolution that ADR brings to the table supports all of the fundamental considerations necessary to corporate health, profitability and ethical performance. In the most comprehensive study to date, Cornell University in cooperation with PricewaterhouseCoopers LLP surveyed the use of ADR among 1,000 of the largest U.S. corporations. The findings included the conclusion that ADR techniques are widespread and likely to grow significantly in the foreseeable future. The survey showed the vast majority of American corporations have used one or more ADR procedures during the last 3 years prior to the survey.³⁶

Individual examples abound to support the Cornell study. A prime example is Georgia-Pacific Corporation which recently marked 2005 as the 10th anniversary of its ADR program. Georgia-Pacific was one of the first Fortune 500 companies to establish a formal ADR program. The Company replaced its traditional adversarial approach to disputes with an ADR strategy that incorporated less adversarialism, and more problem-solving techniques. The findings in terms of simple cost savings are impressive: During the 10 years since implementation of the new program, the Company was involved in 595 lawsuits. By employing ADR, it saved nearly \$33,000,000.00 in expense. Moreover, the concerns initially expressed by management about how a “problem-solving settlement mentality” would be perceived in the marketplace were found to be without substance—lawsuits did not come out of the woodwork and the Company's

competitive business position did not suffer. As a result of this success, the Company now considers virtually all disputes, not just commercial disputes with other large companies, as appropriate for ADR.³⁷

ADR—The Collaboration Between Profit and Ethical, Principle-Based Conflict Resolution

Buckminster Fuller, the prolific inventor and philosopher, wrote in his book *Operating Manual For Spaceship Earth* that we have propensity to retain yesterday' contrivances for resolving today's problems even though their utility may no longer remain:

If you are in a shipwreck and all the boats are gone, a piano top buoyant enough to keep you afloat that comes along makes a fortuitous life preserver. But this is not to say that the best way to design a life preserver is in the form of a piano top. I think that we are clinging to a great many piano tops in accepting yesterday's fortuitous contrivings as constituting the only means for solving a given problem.³⁸

The tried and trusty adversarial system has been instrumental in achieving a more civilized philosophy and reality of conflict resolution. ADR is the next step in the evolution of conflict resolution models. It employs interest-based collaborative strategies that act in concert with modern business management metrics basic to healthy business performance: Among them being the metrics of efficiency, speed, cost-effectiveness, control, certainty, relationships, leadership and operational outcomes. ADR does this by focusing on the true needs and interests of disputing parties rather than on contrived legal arguments that often obfuscate these needs and interests and confound rather than facilitate settlement. In the ADR framework, what is important and what is not important to a company's profitability can remain center stage.

ADR also focuses on making decisions to resolve conflict that are ethical and principle-based. Guided by company codes of ethics, decision making in conflict situations becomes focused on employing processes, conducting analyses and weighing alternatives and conducting business consistent with the company's stated ethical principles. This combined focus on

business needs and interests and ethical conduct acts as a mirror reflecting back to both the company and individual decision-maker the consequences of acting consistently or inconsistently with these values.

The utility of ADR seems to be clear: It creates a new standard philosophical map or “toolkit” that can be designed, taught and utilized to achieve a successful collaboration among profit, ethics and conflict resolution.

Appendix A THE PRELIMINARY ADR ANALYSIS

A decision process to assess whether to use ADR in a given case should start with the key question: Should *any* form of ADR be utilized for this case? Some preliminary questions to help answer that question follow:

1. What interests dominate the dispute (legal, psychological, procedural, and substantive)?
2. What does the client want to achieve?
3. Are the parties' interests consistent with settlement?
 - a. Does this type of case usually settle?
 - b. Is litigation necessary?
 - c. Is a speedy, inexpensive resolution important?
 - d. Is there a need for privacy?
4. Are the parties' interests consistent with settlement?
 - a. Will a summary judgment motion be successful?
 - b. Is a court-decision (i.e. precedent) needed?
 - c. Does one side want vindication?
 - d. Does one side want delay?
5. Can the barriers to negotiation be overcome by a neutral?
 - a. Why is the dispute still here?
 - b. Is there deep-seated hostility/contempt/or distrust between the parties or counsel?
 - c. What is the BATNA (Best Alternative to a Negotiated Agreement)?
 - d. Does one side need some heavy "reality-testing"?
6. What are the possibilities for ongoing relationships between the parties?
7. Could a multi-step ADR option be helpful to attempt settlement, but assure closure?

ADR processes fall on a continuum: Facilitative processes (mediation, mini-trial, case evaluation); evaluative processes (summary jury trial, neutral fact-finding, early neutral evaluation); and adjudicative processes (med-arb, arbitration, consensual special magistrate). Therefore, once it is decided to use ADR, further analysis of ADR suitability must address whether the business objectives are better achieved through having the dispute decided by a third person or by a negotiated agreement.

Appendix B THE CURRENT FORMS OF ADR

MEDIATION: A third-party neutral facilitates in negotiating a resolution

Of all ADR processes, **mediation** allows businesspeople to exercise the most control over both procedure and outcome. In mediation, a third-party, neutral individual assists the parties in reaching a mutually acceptable agreement by aiding them in discussing the relevant facts, exploring their interests, examining the strengths and weaknesses of their positions and generating possible solutions. Mediation allows flexibility in determining the procedures to be used in resolving the dispute, and focuses more on finding solutions than on determining fault. Most significantly, the mediator does not impose a decision upon the parties. A dispute will be resolved through mediation only on terms and conditions acceptable to the parties themselves.

MINI-TRIAL: Panel decision-making by the parties assisted by third-party neutral

A **mini-trial** is a more formal process than mediation, but also permits the parties to determine the outcome. In a mini-trial, the parties make an abbreviated "best case" presentation before a panel that usually consists of a high level decision-maker with full settlement authority for each side and a neutral third-party advisor. At the conclusion of this presentation, the decision-makers meet to attempt to settle the dispute. If they are unable to do so, the advisor may serve as a mediator or render a non-binding opinion as to the probable litigated outcome regarding specific legal, factual and evidentiary issues as well as the likely overall litigation result. Armed with the advisory opinion, the disputants enter into further confidential settlement negotiations in an attempt to reach a mutually acceptable agreement. A mini-trial is particularly useful when the parties wish to control the possible settlement outcome of a dispute but (1) prefer a more formal, legalistic procedure for reaching that outcome, (2) wish to more formally educate the decision-makers regarding the strengths and weaknesses of their cases and (3) may need a third-party opinion regarding the merits of a case.

Appendix B continued

CASE EVALUATION: An evaluation by experienced third parties

In the **case evaluation** conference, the parties and their respective counsel present their position before a panel of neutral third parties, usually attorneys. Limited witness testimony and exhibits may be introduced. The panel then issues a non-binding advisory opinion. This opinion may deal with liability, damages, or both. The parties can use the panel's opinion to help them as they discuss settlement. In some cases, sanctions can be imposed upon the non-accepting party.

SUMMARY JURY TRIAL: Viewing the case through the eyes of a mock jury

The **summary jury trial** is like a mini-trial but involves a mock jury. The process occurs in a courtroom with a presiding judge and a mock jury (usually consisting of six members) empanelled by the court from the list of "real jurors." Counsel for each party presents an expedited best case of the evidence and legal arguments that would be admissible at trial. The jury gives an advisory verdict to the parties, which can be used as a basis upon which to build a settlement. After the summary jury trial, the judge meets with the parties and counsel to encourage settlement.

NEUTRAL FACT FINDING: A third-party neutral determines key facts

Neutral fact-finding represents an alternative process for resolving complex matters such as those involving scientific, technical, sociological, business, or economic issues. In this process, either the parties or the court selects a neutral expert who investigates the question(s) at issue and submits a non-binding report or testifies in court. This process may be either voluntary or involuntary. If the process is voluntary, the parties can decide whether or not they will accept the expert's recommendation as binding.

Appendix B continued

An important advantage of neutral fact-finding is the ability to select a neutral decision-maker with expertise in the technical areas involved in the dispute. Using a neutral expert as fact-finder in these types of cases, may promote a fast and fair settlement without the obfuscation of issues or litigation posturing that can otherwise result.

EARLY NEUTRAL EVALUATION: A third-party neutral focuses and manages case

In this format, the attorneys present the core of the dispute to a third-party neutral or panel in the presence of the parties. This occurs after the case is filed but before discovery is conducted. The neutral then gives a candid assessment of the strengths and weaknesses of the case. Settlement may result at this point. If settlement does not result, the neutral helps narrow the issues and suggests guidelines for managing discovery.

MED-ARB: Mediation followed, if necessary, by binding arbitration

Med-arb is a hybrid of mediation and arbitration in which the parties initially mediate their dispute. If the parties reach impasse in the mediation phase, they arbitrate the deadlocked issues. Among other issues, the parties must decide whether they wish to use the same individual as mediator and arbitrator or use two individuals and whether they wish to conduct both processes on the same day or different days

ARBITRATION: Formal decision by a third-party neutral (usually binding/no appeal)

Arbitration, once, the most commonly known and used alternative to civil trials, it has been supplanted by mediation. Arbitration may be voluntary or mandatory, binding or non-binding. If it is binding, this process affords the parties the least control over either the decision-making process or the outcome. In an arbitration, each party has an opportunity to present evidence and argue the case at a hearing which is structured but is less formal than court adjudication. The process is designed to

Appendix B continued

be less expensive and more expeditious than litigation, with decision-making provided by an arbitrator or panel of arbitrators with expertise in the substantive area of the dispute.

Variations of traditional arbitration include "baseball arbitration" and "high-low arbitration." In baseball arbitration, each side proposes an award and the arbitrator must choose one of those proposed. In high-low arbitration, the parties agree to restrict the range of an arbitrator's award so that the high and low boundaries of an award are fixed. The award will never exceed the highest amount in the range nor drop below the lowest amount. This affords the parties some opportunity to "hedge their bets" and exercise some control over the final outcome.

CONSENSUAL MAGISTRATE: Formal decision by former judge

Consensual special magistrate (also known as private judging) involves the parties retaining a retired judge to conduct a trial of their claims and render a binding decision. It is similar to arbitration in concept and purpose. One important difference is that if the private judging is court-annexed and the presiding judge adopts the private judge's decision, the parties preserve their right to appeal. This process is limited by the number and availability of qualified retired judges.

OTHER ADR PROCESSES: Hybrid and flexible tools for dispute resolution

One of the most exciting aspects of ADR is the flexibility provided clients and their attorneys in fashioning the most appropriate process to solve a particular problem and resolve the dispute. Although the best-known ADR processes are described above, there is no rule that limits them to these definitions. The parties are free to mix and match key elements of various ADR processes to create the best opportunity and process for resolving a particular dispute.

Appendix C ADR PROCESSES AT A GLANCE

The following chart provides a quick summary of the nine most common ADR processes.

	PROCESS	THIRD PARTY NEUTRAL	PRIMARY GOALS
F A C I L I T A T E	Mediation	Mediator	Facilitated negotiation. Facilitation of settlement negotiations; discussion of issues and interests, focus on clarifying and analyzing communication.
	Mini-Trial	Neutral member of three-person panel	Education of decision-makers. Education of decision-makers regarding positions to facilitate later settlement negotiations; possible advisory opinion from ADR neutral.
	Case Evaluation	Three-member panel of neutrals, usually attorneys	Evaluation by legal experts. Non-binding advisory opinion regarding liability, damages, or both.
E V A L U A T E	Summary Trial Jury	Six-member advisory jury and judge	Evaluation by laypersons. Non-binding advisory verdict regarding liability, damages or both.
	Neutral Fact Finding	Neutral expert investigator	Evaluation by technical expert. Non-binding advisory report after informal investigation.
	Early Neutral Evaluation	Neutral evaluator	Evaluation and aggressive case management. Assessment of strengths and weaknesses of positions; discovery management to refine issues; if not settled case proceeds.
D I C T A T E	Med-Arb	Mediator; arbitrator (may be same or different persons)	Facilitated negotiation and assurance of final resolution. Facilitation of settlement negotiations; if not fully successful, binding award.
	Arbitration	Arbitrator	Final resolution. Binding if all parties agree.
	Consensual Special Magistrate	Private Judge	Final resolution with right to appeal. Binding decision; may be appealed.

Appendix D ANATOMY OF THE MOST COMMON ADR PROCESSES

The following describes the various ADR processes, their intended results, the roles and powers of the neutral, when the ADR process is most and least useful.

1. MEDIATION

Facilitation of settlement between parties and attorneys. Of all ADR processes, mediation allows parties and their attorneys to exercise the most control over both procedure and outcome. In mediation, a third-party neutral assists the parties in reaching a mutually acceptable agreement. Mediation allows flexibility in determining the procedures to be used in resolving the dispute, and focuses more on finding solutions than on determining fault. Most significantly, the mediator does not impose a decision upon the parties. A dispute will be resolved through mediation only on terms and conditions acceptable to the parties themselves.

Facilitator manages communication process, asks questions regarding important facts and underlying interests, conducts reality testing regarding strengths and weaknesses of positions, helps parties generate solutions, acts as a "shuttle diplomat". Mediation most effective when:

- Confidentiality important
- Ongoing relationship between the parties worth preserving
- Parties want minimized costs
- Parties need to express emotions
- Communication difficulties impede settlement
- Out-of-control clients need reality testing from outside
- Desire for creative solutions (not obtainable in court)
- Risk-free forum for risk -adverse parties
- Uncertain outcome in court

2. MINI- TRIAL

Presentations made before parties' decision-makers and neutral. A mini-trial is a more formal process than mediation, but also permits the parties to determine the outcome. In a mini-trial, counsel for the parties make an abbreviated "best case" presentation before a panel that usually consists of a high-Level decision maker with full settlement authority for each side and a neutral third-party advisor. At the conclusion of this presentation (often limited to a day or two) the decision-makers meet to attempt to settle the disputes. If they are unable to do so, the advisor may serve as a mediator or render a non-binding opinion as to the probable litigated outcome regarding specific legal, factual and evidentiary issues as well as the likely overall litigation result. Armed with the advisory opinion, the disputants enter into further confidential settlement negotiations in an attempt to reach a mutually acceptable agreement. Most effective for:

- Make evidentiary decisions
- Render opinion (optional)
- Facilitate settlement (optional)
- One or both parties need a realistic and graphic picture of strength of opposition's case and weaknesses of own case
- Ongoing business relationship important to decision makers
- Educated, key decision-makers can break the log-jam in settlement

Appendix D continued

3. CASE EVALUATION

Third party panel of neutrals. Dispute not worth the expense or effort of a mini-trial. Parties do not have a realistic picture of each other's case. One side is not motivated to present its "best case". Most effective where

- Need for neutral opinion of "experts" due to different views of facts and law
- Need for neutral opinion of "experts" due to different views of strengths and weaknesses of cases
- Disposition of critical issue might encourage settlement
- Some sense of vindication

4. SUMMARY JURY

The trial judge makes evidentiary rulings and may facilitate subsequent settlement negotiations Summary jury gives opinion with reasoning. Takes place in a courtroom with a presiding judge and a mock jury. Usually consisting of six members impaneled by the court from the list of "real jurors." Counsel for each party makes his or her best expedited presentation of evidence that would be admissible at trial. The jury gives an advisory verdict to the parties which the parties can use as a basis upon which to build a settlement. The attorneys often have an opportunity to poll jurors regarding the reasons for their verdict. The judge meets with the parties and counsel to encourage settlement. Most effective where:

- Need for neutral opinion of "typical jurors" due to different variations of case
- Need for ice-breaker --Settlement more likely if summary jury gives likely verdict
- Opportunity for day in court" very quickly and less costly

5. NEUTRAL FACT FINDING

Evaluation by technical expert. Investigation by mutually-selected expert, followed by advisory opinion. Neutral fact-finding represents an alternative process for resolving complex matters such as those involving scientific, technical, sociological, business, or economic issues. In this process, either the parties or the court selects a neutral expert who investigates the question(s) at issue and submits a non-binding report or testifies in court. This process may be either voluntary or involuntary. If the process is voluntary, the parties can decide whether or not they will accept the expert's recommendation as binding. An important advantage of neutral fact finding is the ability to mutually select the expert involved in the dispute. Using a neutral expert as fact-finder in these types of cases may promote a fast and fair settlement without the obfuscation of issues or litigation posturing that can result when opposing advocate experts are engaged. Most effective where:

- Need for neutral opinion of "typical jurors" due to different variations of case
- Need for ice-breaker --Settlement more likely if summary jury gives likely verdict
- Opportunity for day in court" very quickly and less costly

Appendix D continued

6. EARLY NEUTRAL EVALUATION

Mini-presentation to neutral early in life of case. In this forum, the attorneys present the core of the dispute to a third-party neutral or panel in the presence of the parties. This occurs after the case is filed but before significant discovery is conducted. The neutral then gives a candid assessment of the strengths and weaknesses of the case. Settlement may result at this point. If settlement does not result, the neutral helps narrow the dispute and suggests settlement by discovery management to refine issues. Most effective when:

- Attorneys agree that one neutral expert makes more sense than two advocate experts
- A neutral decision-maker with expertise in the technical areas
- One or both attorneys have not focused on the key issues in the case
- One or both attorneys are having difficulty with their clients
- One or both parties do not have a realistic picture of strength of opposition's case or weaknesses of own case Parties want to minimize costs
- Parties desire a speedy result
- Technical and complex issues require untangling

7. MED-ARB

Med-arb is a hybrid of mediation and arbitration. The parties attempt to mediate some or all of the issues in the dispute. If the parties reach impasse in the mediation phase, they arbitrate the deadlocked issues. Among other procedural decisions to be made, the parties must decide whether they wish to use the same individual as mediator and arbitrator or use two individuals and whether they wish to conduct both processes on the same day or different days. Of concern is that either process will be "contaminated" by role switch of the single neutral (solution: Use different person for each process.) Most effective when:

- Need for closure
- Preference for creative, non-rule-bound process
- Creativity and realism can be encouraged when arbitration is "around the corner"
- Important legal principles at stake

Appendix D continued

8. ARBITRATION

A trial-like process with a privately selected neutral (or neutral panel) acting as judges. It involves the calling of witnesses, introduction of evidence, opening and closing arguments. While discovery is also permitted, it is typically less than that in civil litigation. Arbitration can be voluntary or mandatory, non-binding or binding. The process is designed to be less expensive, faster and less formal than court adjudication. The adversarial and trial-like nature of the process often results in a proceeding as lengthy and complex as a trial. Most effective when:

- Opportunity for "day in court"
- Parties desire for speedier result than court trial
- Parties desire for less expensive procedure
- Parties desire for confidentiality

9. CONSENSUAL SPECIAL MAGISTRATE

Private judging by a retired judge. Where part of court-annexed process and the presiding judge adopts the private judge's opinion, the right to appeal exists.

- Decides the case as a judge would
- When final decision desired but faster than court
- Need for vindication
- Parties want minimal costs
- Limited liability of retired judges

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