

# **ALTERNATIVE DISPUTE RESOLUTION: A STRATEGY FOR COMBINING PROFIT AND PRINCIPLE IN RESOLVING BUSINESS CONFLICTS**

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## **INTRODUCTION**

Conflict is inevitable in virtually every aspect of business. Conflicts may arise out of product development, operations, finance, production, marketing, sales, mergers, contracts, shareholder relationships, loans, client relations, employment, accidents on the premises and other foreseen and unforeseen events. Accordingly, every manager must be able to develop effective conflict avoidance strategies and techniques for efficient conflict resolution. The result of failure is a direct adverse impact upon profitability through costly litigation, wasted human and organizational resources, reduced competitiveness, possible governmental regulation, and in extreme cases, bankruptcy, or in the case of foreign enterprises, even nationalization by the host nation.

In this article, I argue that alternative dispute resolution (ADR) offers the best methodology for addressing business conflicts in the modern global economy, avoiding at all costs the adversarial litigation model. This article begins by examining the adversarial system from its inception as battlefield physical combat where victory was conferred as if a blessing from heaven to its evolutionary culmination as a quest for truth through a verbal clash of zealous advocates in the courtroom. Next, it considers how the business world has become increasingly discontent with preparing for the courtroom contest when the controversy almost always concludes in a settlement without the necessity of trial. Then it examines how this discontent has served as an impetus for change: The emergence of ADR as both a business strategy and the preferred methodology for avoiding and resolving business conflicts. ADR can be taught to business managers to help companies satisfy their business needs, resolve conflicts and support their profitability goals in the global economy.

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## I. THE ADVERSARIAL LITIGATION FRAMEWORK

Our preferred method of conflict resolution is adversarial litigation, conducted in an institutionalized framework of laws, lawyers and courts. It is founded on the premise that an adversarial system is most likely to ensure that truth will prevail.<sup>1</sup> The apex of the American adversarial system for resolving civil conflict takes place in the United States Supreme Court, which has written that adversarial testing is “the best means of ascertaining truth and minimizing the risk of error”<sup>2</sup> and “will ultimately advance the public interest in truth and fairness.”<sup>3</sup> This idea has its origins in the belief that truth would emerge from an actual physical battle between adversaries.<sup>4</sup> The belief was that “heaven would give the victory to him who was in the right.”<sup>5</sup> Over time, the belief that “might makes right” evolved to the less physically violent, but still spirited, verbal clash of legal adversaries in zealous advocacy. Until relatively recently, we have continued to operate under the assumption that this model of conflict resolution is the only effective method of resolving disputes.<sup>6</sup>

In many respects, litigation still retains the characteristics of war on a battlefield with mutually accepted rules of engagement. In federal court these are the Federal Rules of Civil Procedure<sup>7</sup> and the Federal Rules of Evidence.<sup>8</sup> All state courts have their similar rules of engagement. Each side engages counsel, marshals its resources, and develops litigation strategies for a winning battle plan.<sup>9</sup> The battlefield location for the ultimate encounter is the courtroom where judgment (i.e., truth) will be determined by a judge or a jury of the defendant’s peers.

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<sup>1</sup> Andrew E. Taslitz, *An African-American Sense of Fact: The O.J. Trial and Black Judges on Justice*, 7 B.U. PUB. INT. L.J. 219, 237 (1998).

<sup>2</sup> Mackey v. Montrym, 443 U.S. 1, 13 (1979).

<sup>3</sup> Polk County v. Dodson, 454 U.S. 312, 318 (1981).

<sup>4</sup> Roberta K. Flowers, *A Code of Their Own: Updating the Ethics Codes to Include the Non-adversarial Roles Federal Prosecutors*, 37 B.C. L. REV. 923, 923 (1996).

<sup>5</sup> Id.

<sup>6</sup> See, e.g., Kwok Leung & E. Allan Lind, *Procedural Justice and Culture: Effects of Culture, Gender, and Investigator Status on Procedural Preferences*, 50 J. PERSONALITY & SOC. PSYCHOL. 1134 (1986); Neil Vidmar & Nancy MacDonald Laird, *Adversary Social Roles: Their Effects on Witnesses’ Communication of Evidence and the Assessments of Adjudicators*, 44 J. PERSONALITY & SOC. PSYCHOL. 888 (1983).

<sup>7</sup> 28 U.S. Code-Appendix.

<sup>8</sup> 28 U.S. Code-Appendix.

## II. PREPARING FOR A BATTLE THAT NEVER COMES

The utility of any system, whether living or man-made, is that its design accomplishes its purpose. The best system does this with maximum efficiency. That cannot be said of the American judicial system. The adversarial system is actually quite inefficient. The process is very lengthy<sup>10</sup> and the overwhelming majority of lawsuits never go to trial.<sup>11</sup> In fact, all but a tiny fraction of lawsuits—as low as 5%—ever see trial in an actual courtroom.<sup>12</sup> Most lawsuits are settled before trial.<sup>13</sup> In other words, they are resolved by negotiation (not adjudication) and the result is an agreed settlement, not a decision imposed by a third party.

Parties choose to settle for various reasons. Often, they want to cut their losses, eliminate the liability on the balance sheet, or cannot afford to continue the lawsuit because of mounting legal fees.<sup>14</sup> In the rare cases where lawsuits are tried to decision, there is usually a reason to explain why. It may be that one party wanted to set a legal precedent. Or it may be because attempts to negotiate a settle failed. Thus, parties in reality do not depend on the litigation model to reconcile their differences.

The fact is that society is coming to recognize that conflict resolution takes place through negotiated settlement and not trial. Furthermore, there is a growing understanding that an effective settlement methodology is needed that must have a sound basis in ethics. This methodology usually first involves collaboration and interest-based (not positional) bargaining to achieve the desired ends, and it takes place in an environment where the disputants seek elements satisfactory to both parties.<sup>15</sup> Then, in that tiny fraction of cases where settlement is not achieved, the true “*alternative dispute resolution*” is resort to trial in the litigation process.

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<sup>10</sup> Patrick Higginbotham, *So Why Do We Call Them Trial Courts*, 55 SMU L. Rev. 1405 (2002).

<sup>11</sup> U.S. CONG. BUDGET OFFICE, *THE ECONOMICS OF U.S. TORT LIABILITY: A PRIMER* 5-6 (2003), available at [http://www.policymanac.org/economic/archive/tort\\_liability.shtml](http://www.policymanac.org/economic/archive/tort_liability.shtml).

<sup>12</sup> *Id.*

<sup>13</sup> ABA LITIGATION SECTION ALTERNATIVE DISPUTE RESOLUTION: THE LITIGATOR'S HANDBOOK 1 (2000).

<sup>14</sup> See ROBERT M. SMITH, *ALTERNATIVE DISPUTE RESOLUTION FOR FINANCIAL INSTITUTIONS* 1.02 (West Group 1998).

<sup>15</sup> For a discussion of interest based and integrative negotiation, see ROBERT MNOOKIN ET AL., *BEYOND WINNING: NEGOTIATING TO CREATE VALUE IN DEALS AND DISPUTES* (2000).

### III. DISCONTENT WITH THE ADVERSARIAL MODEL OF CONFLICT RESOLUTION

Over the last decade or so, participants in the legal system have increasingly expressed discontent with the adversarial conflict resolution model: Lawyer job dissatisfaction has increased;<sup>16</sup> judges complain that they are servicing a bureaucratic apparatus rather than dispensing justice; parties denounce the system for its cost and delays;<sup>17</sup> and the public finds fault with a system that permits “frivolous” lawsuits and outrageous verdicts.<sup>18</sup> Moreover, with decreasing public expenditures for courts, combined with increased filings, efficient court management has meant employing ADR.<sup>19</sup> These factors have lead to increased attention on ADR.

The public nature of litigating in court is often anathema to basic business needs and interests. Businesses want to protect sensitive information from disclosure, but litigation makes many documents and the trial itself public. Businesses also need to preserve relationships with customers, lenders, venders and others; they need to maximize efficiency and competitiveness and minimize disruption along the chain from production to delivery. Litigation does not serve those interests. To the contrary, litigation is highly public, and it is generally slow and costly compared to ADR.<sup>20</sup> Furthermore, the outcome of litigation is always uncertain (juries are very unpredictable.<sup>21</sup> and invariably destructive of relationships.<sup>22</sup> It also disrupts the work environment and diverts attention away from productive work.<sup>23</sup> It also places the decision in the hands of juries or judges who are unfamiliar with the business.<sup>24</sup> ADR by contrast allows the parties to negotiate themselves, or to select a private mediator of

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<sup>16</sup> See RISKIN & WESTBROOK, DISPUTE RESOLUTION FOR LAWYERS (West 1987).

<sup>17</sup> JUDGE RICHARD ENSLEN ET AL., ALTERNATIVE DISPUTE RESOLUTION 1:5-1:10 (Thomson West 2003).

<sup>18</sup> PETER LOVENHEIM, MEDIATE DON'T LITIGATE 4 (McGraw Hill 1989).

<sup>19</sup> WOLF HEYDERBRAND, & CARROLL SERON, RATIONALIZING JUSTICE: THE POLITICAL ECONOMY OF FEDERAL DISTRICT COURTS (1990).

<sup>20</sup> CORNELL/PERC INSTITUTE ON CONFLICT RESOLUTION, THE USE OF ADR IN US CORPORATIONS 3 (1997).

<sup>21</sup> Alternative Dispute Resolution: Corporate Counsel's Guide, 1-29 to 1-32, Thomson West (2006)

<sup>22</sup> *Id.* at 1-30.

<sup>23</sup> *Id.* at 1-32.

<sup>24</sup> *Id.* at 2-6, 3-7.

their choosing, or an experienced arbitrator with knowledge of the subject matter in dispute to resolve the conflict.

Another downside of litigation is that it encourages hardening of positions, thereby reducing the possibility that the parties will be able to discuss the possibility of a settlement that would satisfy both side's business needs and interests. In litigation, "winning the case" can take priority over "winning in the marketplace." However, winning at litigation can be a hollow experience because after the smoke of battle clears, it can be difficult to distinguish the victor from the vanquished.<sup>25</sup>

Therefore, the methodology for resolving conflict is very important. The ideal approach is interest-based, private, speedy, and cost effective. This describes ADR. ADR includes a number of conflict resolution processes that are alternatives to the court system. Among them are unassisted negotiation, facilitated negotiation (known as mediation), fact-finding, early neutral evaluation, dispute review boards, standing neutrals, summary jury trial, mini-trial and arbitration. All of these processes have the potential to minimize cost, the time involved, the uncertainty of a decision by a judge or jury, and maintain privacy and business relationships. Privately negotiated dispute resolution mechanisms are more flexible than litigation and can be adapted to changing business needs and environments.

## V. THE CHANGING FACE OF CONFLICT RESOLUTION

Litigators have become so proficient in employing the tools of litigation that some find it hard to depart from them. In law school, lawyers are imprinted with litigation processes and procedures; these become embedded in their thinking and are an invisible part of American legal philosophy, what has been called the standard philosophical map.<sup>26</sup> (Only relatively recently have ADR courses been added to the curriculum.)

Because legal matters are often reported in the newspapers and courtroom dramas have long been typical television fare (the show *Perry*

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<sup>25</sup> David M Trubek *et al.*, *The Costs of Ordinary Litigation*, 31 UCLA L Rev 121 (1983); *see also Abraham Lincoln, Notes for Law Lecture* (July 1, 1850) in NICOLAY & HARP, 2 COMPLETE WORKS OF ABRAHAM LINCOLN 140, 142 (1894).

<sup>26</sup> *See generally* Leonard L. Riskin, *Mediation and Lawyers*, 43 OHIO ST. L.J. 29, 43-44 (1982) (stating that most lawyers have a "standard philosophical map" that causes them to make two assumptions regarding the practice of law: 1) that disputants are adversaries and that there must be a winner and a loser; and 2) that disputes may be resolved by a third party who applies some general rule of law).

*Mason* may have started this trend), this system has been broadcast widely to the public at large, which accepts it as the traditional route for resolving disputes. Most people on the street have never heard of ADR and can't tell mediation from arbitration.

In spite of this, ADR now has the recognition of the judicial system. Most litigants in federal and state courts are routinely encouraged, if not ordered, to court-assisted ADR to resolve their disputes before going to trial.<sup>27</sup> Ironically, the very halls of justice where the adversarial system is practiced, is required to adopt ADR techniques as a formal part of court processes.<sup>28</sup>

This is a dramatic change from the early years of ADR. In those years, ADR had no credibility. Arbitration was reviled by courts, which refused to enforce agreements to arbitrate future disputes.<sup>29</sup> Agreements to mediate were of questionable enforceability, often considered unenforceable agreements to agree.

In the vast majority of studies done to date on the effectiveness of "court-annexed" ADR, researchers have concluded that these collaborative save the parties money and time, produce more satisfying experiences with resolving conflicts, and provide more durable and acceptable settlements.<sup>30</sup>

This would not have happened without legislative activity. The federal government has been a leader in this regard. The 1996 Administrative Dispute Resolution Act (ADRA) gave federal agencies authority to use ADR in most administrative disputes.<sup>31</sup> The 1996 Negotiated Rulemaking Act (NRA), directed regulatory agencies to use negotiation to facilitate consensus building and develop administrative rules.<sup>32</sup> The 1998 Alternative Dispute Resolution Act (ADRA) empowered the federal district courts to employ ADR in all civil actions.<sup>33</sup> In 2003, Congress enacted the Alternative

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<sup>27</sup> See U.S. DEP'T OF JUSTICE, FEDERAL COURT-ANNEXED ADR PROGRAMS AT A GLANCE, <http://www.usdoj.gov/adr/annexedkant.htm> (last visited Jan. 26, 2006); CORNELL UNIV., ALLIANCE FOR EDUCATION IN DISPUTE RESOLUTION, [http://www.ilr.cornell.edu/alliance/resources/Legal/state\\_court\\_rules\\_adr.html](http://www.ilr.cornell.edu/alliance/resources/Legal/state_court_rules_adr.html) (last visited Jan. 26, 2006).

<sup>28</sup> See 28 U.S.C. §§ 651-658 (1998).

<sup>29</sup> SMITH, *supra* note 14.

<sup>30</sup> JENNIFER E. SHACK, BIBLIOGRAPHIC SUMMARY OF COST, PACE, AND SATISFACTION STUDIES OF COURT-RELATED MEDIATION PROGRAMS, CENTER FOR ANALYSIS OF ALTERNATIVE DISPUTE RESOLUTION SYSTEMS (2003), <http://www.caadr.org/downloads/MedStudyBibliography.pdf> (last visited Jan. 26, 2006) (citing various studies done).

<sup>31</sup> 5 U.S.C. §§ 571-583 (1996).

<sup>32</sup> 5 U.S.C. §§ 561-570 (1996).

<sup>33</sup> 28 U.S.C. §§ 651-658 (1998).

Dispute Resolution Act requiring Federal Courts to establish ADR programs.<sup>34</sup> Some 35 states have also passed ADR statutes of various kinds, some allowing the use of ADR,<sup>35</sup> others directing state agencies to incorporate ADR in regulatory proceedings, and others requiring litigants in court cases to participate in mandatory ADR.<sup>36</sup> For example, in Michigan the State Supreme Court has mandated the use of ADR throughout the entire court system, and by court rule subjects all civil cases to ADR processes.<sup>37</sup> In other jurisdictions, litigants are required to mediate their cases before the case will be assigned a trial date. These and other ADR developments in state courts are tracked by the National Center for State Courts.<sup>38</sup>

In the international arena where international commercial arbitration is considered the most effective way to resolve commercial disputes because it avoids the uncertainty of litigating in national courts under unfamiliar laws,<sup>39</sup> there are some 200 laws pertaining to ADR in over 70 countries.<sup>40</sup> International treaties and conventions incorporating ADR as the principal dispute resolution mechanism have allowed this process to develop. Some of the most important the treaties and conventions are the Inter-American Convention on International Commercial Arbitration (Panama Convention),<sup>41</sup> United Nations Convention on the Recognition and

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<sup>34</sup> 28 USC 651-658 (2003).

<sup>35</sup> New York was the first state to enact a modern arbitration act. See “Federal Arbitration Act at 80; A Tribute,” Lecture by Judge Judith Kaye, Oct. 25, 2004, Association of the Bar of the City of New York, available at [www.adr.org/si.asp?id=1730](http://www.adr.org/si.asp?id=1730) (last visited Sept. 28, 2006). The U.S. Government followed suit in 1925 with U.S. Arbitration Act, 10 U.S.C. §§ 1 *et al.*

<sup>36</sup> See American Arbitration Association, *www.adr.org* (last visited Jan. 26, 2006) (providing citations for state ADR statutes, with links to statute texts at legislative web sites); see also Cornell University Legal Information Institute, [http://www.law.cornell.edu/topics/state\\_statutes.html#alternative\\_dispute\\_resolution](http://www.law.cornell.edu/topics/state_statutes.html#alternative_dispute_resolution) (last visited Jan. 26, 2006) (providing similar citations for state statutes).

<sup>37</sup> Mich. Ct. Rule 2.410 *et seq.*

<sup>38</sup> See National Center for State Courts, Court Links to the 50 States, at [www.ncsc.dni.us/KMO/Topics/ADR/States/ADRusmap.htm](http://www.ncsc.dni.us/KMO/Topics/ADR/States/ADRusmap.htm). A description of ADR programs in federal district and appellate courts can be found in FEDERAL COURTS OF APPEALS: A SOURCEBOOK FOR JUDGES AND LAWYERS (1997).

<sup>39</sup> See, e.g., Claude R. Thomson & Annie M.K. Finn, *Managing an International Arbitration: A Practical Perspective*, 60 DISP. RESOL. J. 74-76 (May-July 2005) (stating that there are legitimate concerns about the integrity of some foreign judicial systems, and the legal principles that apply in a foreign jurisdiction could be unclear).

<sup>40</sup> See ADR World Observer, ADR Legislation, [www.aryme.com/aryme/eng/adr\\_world\\_observer/legislacion.asp](http://www.aryme.com/aryme/eng/adr_world_observer/legislacion.asp) (last visited Jan. 26, 2006) (providing links to ADR legislation in various countries).

<sup>41</sup> B-35: Inter-American Convention on International on Comercial Arbitration, adopted

Enforcement of Foreign Arbitral Awards,<sup>42</sup> the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States;<sup>43</sup> the North American Free Trade Agreement,<sup>44</sup> and the European Free Trade Association Agreement.<sup>45</sup>

Businesses are in the forefront of promoting ADR techniques for a variety of disputes.<sup>46</sup> For example, many large companies now have workplace dispute resolution programs. Examples are Brown & Root,<sup>47</sup> Eaton Corporation,<sup>48</sup> Hughes Electronics, Polaroid, TRW, Detroit Edison, Ford Motor Company, General Motors, Daimler-Chrysler, General Dynamics, IBM, Home Depot, Ernest & Young, Shell Oil Company and General Electric. Over 4,000 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.<sup>49</sup>

Whole industries that formerly employed litigation as the main tool for dealing with disputes have turned to ADR as the process of choice. The best example is the securities industry.<sup>50</sup> It employs arbitration (and now

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at Panama, Panama, January 30, 1975, entry into force June 16, 1976, in accordance with Article 10 of the Convention, available at [www.sice.oas.org/dispute/comarb/iacac/iacac2e.asp](http://www.sice.oas.org/dispute/comarb/iacac/iacac2e.asp) (last visited Sept. 28, 2006).

<sup>42</sup> Available at [www.jus.uio.no/lm/un.arbitration.recognition.and.enforcement.convention.new.york.1958/doc.html](http://www.jus.uio.no/lm/un.arbitration.recognition.and.enforcement.convention.new.york.1958/doc.html)

<sup>43</sup> Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, Oct. 14, 1966, [www.worldbank.org/icsid/basicdoc/partA.htm](http://www.worldbank.org/icsid/basicdoc/partA.htm) (last visited Jan. 26, 2006).

<sup>44</sup> North American Free Trade Agreement, Can.-Mex.-U.S., Dec. 17, 1992, 32 I.L.M. 289(1993); *see* International Trade Canada, Dispute Settlement Under NAFTA, [www.dfait-macci.gc.ca/nafta-alena/settle-en.asp](http://www.dfait-macci.gc.ca/nafta-alena/settle-en.asp) (last visited Jan. 26, 2006) (describing the sections of NAFTA that deal with dispute settlement).

<sup>45</sup> European Free Trade Association Secretariat, Consolidated Version of Convention Establishing the European Free Trade Association, <http://secretariat.efta.int/Web/EFTAConvention/EFTAConventionTexts/EFTAConvention2001.pdf> (last visited Jan. 26, 2006).

<sup>46</sup> BUREAU OF NATIONAL AFFAIRS, POLICIES FOR UNORGANIZED EMPLOYEES (PPF Survey No. 125, 1979). *See also* U.S. GENERAL ACCOUNTING OFFICE, ADR: GAO/GGD-97-157, EMPLOYER'S EXPERIENCES WITH ADR IN THE WORKPLACE 2, (1997).

<sup>47</sup> *See* ALTERNATIVE DISPUTE RESOLUTION IN THE EMPLOYMENT CONTEXT 12.003-.019 (2<sup>nd</sup> ed. Business Laws, Inc. (2005).

<sup>48</sup> *Id.* at 11.001-.028.

<sup>49</sup> *See* Center For Public Resources, ADR Pledges, <http://cpradr.wld.com/pledges.htm> (last visited Jan. 26, 2006) (provides roster of corporate signers).

<sup>50</sup> According to the NASD website, National Association of Securities Dealers, at [www.nasac.com/introduction-arbitration.html](http://www.nasac.com/introduction-arbitration.html), in 1817 the New York Stock Exchange Constitution first provided for the internal resolution of disputes among members. In 1872,

mediation<sup>51</sup>) to resolve all conflicts between investors and broker-dealers, as well as for all employment disputes.

The construction industry has always been in the forefront of the ADR movement. First, construction industry organizations, such as the American Institute of Architects, included arbitration clauses in their standard form agreements. Today, many of those agreements call for mediation first.<sup>52</sup>

Collective bargaining contracts have long called for arbitration as part of the process of resolving employee grievances.<sup>53</sup> Residential and commercial real estate contracts also include an ADR clause to address disputes when they arise.<sup>54</sup>

Businesses are now driving the movement toward the use of ADR.<sup>55</sup> They are motivated to save money and increase efficiency and they are skilled in making business, rather than legal, decisions. 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.<sup>56</sup> The survey demonstrated that use of ADR techniques is widespread and is likely to grow significantly in the foreseeable future.<sup>57</sup> The survey showed that the vast majority of American corporations have used one or more ADR procedures during the three years prior to the survey.<sup>58</sup> The Cornell study is abundantly supported by

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the Constitution was broadened to provide for the arbitration of claims by customers against members. The NASD adopted arbitration rules in 1968. In 1979, the Self Regulatory Organizations ("SRO's") developed a uniform set of arbitration rules. In 1987, in *Shearson/American Express, v. McMahon*, the Supreme Court determined that pre-dispute arbitration agreements would not deprive investors of the protections of the Securities Exchange Act. The 1989, in *Rodriguez de Quijas v. Shearson/American Express, Inc.*, the Court explicitly overturned the earlier *Wilco* decision, making virtually all claims under the federal securities laws arbitrable..

<sup>51</sup> [www.nasd.com/ArbitrationMediation/index.htm](http://www.nasd.com/ArbitrationMediation/index.htm) (last visited Feb. 11, 2006).

<sup>52</sup> See The American Institute of Architects, AIA Document B141-1997, Standard Form Agreement, 1.3.4-1.3.5, [www.aia.org/SiteObjects/files/b141comparison\\_art67.pdf](http://www.aia.org/SiteObjects/files/b141comparison_art67.pdf) (last visited Feb. 11, 2006).

<sup>53</sup> See The National Mediation Board's Alternative Dispute Resolution Program: Overview, <http://www.nmb.gov/adrservices/adr.html> (last visited Feb. 11, 2006).

<sup>54</sup> See National Arbitration Forum: Real Estate, [http://www.arb-forum.com/focus/real\\_estate](http://www.arb-forum.com/focus/real_estate) (last visited Feb. 11, 2006.)

<sup>55</sup> John Lande, *Getting The Faith: Why Business Lawyers and Executives Believe in Mediation*, 5 HARV. L. REV. 137 (2000).

<sup>56</sup> David B. Lipsky & Ronald L. Seeber, *The Appropriate Resolution of Corporate Disputes: A Report on the Growing Use of ADR by U.S. Corporations* (1998).

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

individual examples, such as Georgia-Pacific, which recently marked 2005 as the 10<sup>th</sup> anniversary of its ADR program. The cost savings of the Georgia Pacific program are impressive. Over the 10-year period, 595 cases went through the program. As a result, Georgia Pacific saved nearly \$33 million in expenses. Moreover, the concerns initially expressed by management that an ADR program would give rise to a “problem-solving settlement mentality” leading to more disputes 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, Georgia-Pacific now considers using ADR for virtually all disputes, not just commercial disputes with other large companies.<sup>59</sup>

## VII. ETHICALLY ACHIEVING BUSINESS HEALTH AND PROFITABILITY

From the ethical practices viewpoint, the last decade has revealed the unpleasant underbelly of some business practices. Newspapers have reported on scandals involving Enron, Tyco, Arthur Anderson and WorldCom, to name just a few. The response to egregious corporate conduct was the Sarbanes-Oxley Act of 2002. This act requires corporations to develop codes of ethics for senior financial officers. It defines a "code of ethics" to mean “such standards as are reasonably necessary to promote (1) honest and ethical conduct, including the ethical handling of actual or apparent conflicts of interest between personal and professional relationships; (2) full, fair, accurate, timely, and understandable disclosure in the periodic reports required to be filed by the issuer; and (3) compliance with applicable governmental rules and regulations.

Nearly all large corporations have a code of ethics.<sup>60</sup> The Business Roundtable Institute for Corporate Ethics has identified a list of general

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<sup>59</sup> Philip M. Armstrong, *Georgia-Pacific's ADR Program: A Critical Review After 10 Years*, 60 J. DISP. RESOL. 19, 22, (2005). Georgia Pacific Corporation is also a signatory to the CPR pledge and has its own business ethics code. See KARL A. SLAIKU & RALPH H. HASSON, CONTROLLING THE COSTS OF CONFLICT: HOW TO DESIGN A SYSTEM FOR YOUR ORGANIZATION 14 (1998) (reporting that Brown & Root reported 80% savings, Motorola reported 75% savings, and NCR reported 50% savings); International Institute for Conflict Prevention and Resolution, *at* [www.cpradr.org/cpr2.asp](http://www.cpradr.org/cpr2.asp) (reporting that a 5-year study of 652 companies that implemented CPR-sponsored ADR processes and programs showed a savings of over \$200 million, with the average company savings being \$300,000) for other examples of company reported litigation expense savings.

<sup>60</sup> REED, ET AL., *supra* note 1, at 126.

topics that should be included in such codes.<sup>61</sup> The topics include ethics in financial reporting, pricing/billing/contracting, product safety and quality, supplier relationships, and intellectual property.<sup>62</sup>

Instead of dubious business practices, “performance” and “health” have become 21<sup>st</sup>-century metaphors for short- and long-term business goals.<sup>63</sup> A recent survey of 1,000 corporate board directors demonstrates this emerging appreciation of health consciousness.<sup>64</sup> Significantly, among the key factors identified in the survey as underpinning a company's long-term health included constructively addressing internal and external conflicts that arise.<sup>65</sup>

Employing a fair, reliable ADR methodology for resolving conflicts that arise in the business setting is an ethical business practice that can support the business health and performance goals. Interest-based, collaborative approaches to conflict resolution are more constructive than adversarial ones.<sup>66</sup>

The prolific inventor and philosopher R. Buckminster Fuller wrote that we have propensity to retain yesterday's 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 contrivances as constituting the only means for solving a given problem.<sup>67</sup>

His observations describe the use of the judicial system to resolve conflicts that would be better handled by other means. The judicial

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<sup>61</sup> Business Roundtable Institute for Corporate Ethics, <http://www.corporate-ethics.org>

<sup>62</sup> *Id.*

<sup>63</sup> Richard Dobbs *et al.*, *Building the Healthy Corporation*, MCKINSEY Q. 63 (October 20, 2005).

<sup>64</sup> Robert F. Felton *et al.*, *The View From The Boardroom*, MCKINSEY Q. 48, 48-61 (October 20, 2005).

<sup>65</sup> *Id.* *The key business factors identified included setting strategy, developing new leaders, acquiring more information about markets, organizational issues such as skills and capabilities, and assessing risks.* *Id.*

<sup>66</sup> American Bar Association, *Ethics 2000: The Final Report—Significant Aspects for Business Lawyer.*

<sup>67</sup> R. BUCKMINSTER FULLER, *OPERATING MANUAL FOR SPACESHIP EARTH* (Simon and Schuster, 1969).

litigation system has long been the centerpiece of the American conflict resolution philosophy. However, it is time to move to the next step in the evolution of conflict resolution models. The next model must allow the parties to employ interest-based, collaborative strategies that are consistent with modern business management and the goals of achieving a healthy business performance.

I contend that that this model should involve a variety of choices, a menu of ADR methods to choose from. These processes will allow the parties to decide whether they want to focus on their true needs and interests in negotiation or mediation (rather than on contrived legal arguments that often obfuscate these needs and interests) or whether they want a prompt decision by an expert arbitrator so that they can put this dispute behind them and get back to business and business goals. By taking this approach we allow what is important to a company's performance to be the paramount consideration.

To meet the standards of ethical practices, ADR processes must be fair. Guided by company codes of ethics, managers can make better decisions in conflict situations.

## 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, 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 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.

### **CASE EVALUATION: An evaluation by experienced third parties**

In the case evaluation conference, each party and his or her counsel presents 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.

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, now 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 their evidence and argue their case at a hearing which is structured but is less formal than court adjudication. The process is designed to 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**

Private judging (also known as using a consensual special magistrate) 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 parties or attorneys 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  | PROCESS GOALS   |
|--------------|--|---|
| FACILITATIVE | Mediation<br>Mediator  | Facilitated negotiation. Facilitation of settlement negotiations; discussion of issues and interests, focus on clarifying and analyzing communication.                  |
| EDUCATIONAL  | Mini-Trial<br>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. |
| EVALUATIVE   | Case Evaluation<br>Three-member panel of neutrals, usually attorneys | Evaluation by legal experts. Non-binding advisory opinion regarding liability, damages, or both.  |
| ADVISORY     | Summary Trial Jury<br>Six-member advisory jury and judge             | Evaluation by laypersons. Non-binding advisory verdict regarding liability, damages or both.  |
| TECHNICAL    | Neutral Fact Finding<br>Neutral expert investigator                  | Evaluation by technical expert. Non-binding advisory report after informal investigation.   |
| MANAGEMENT   | Early Neutral Evaluation<br>Neutral evaluator                        | Evaluation and aggressive case management. Assessment of strengths and weaknesses of positions; discovery management to refine issues; if not settled case proceeds.    |
| RESOLUTION   | Med-Arb<br>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.                             |
| FINAL        | Arbitration<br>Arbitrator  | Final resolution. Binding if all parties agree.   |
| APPEALABLE   | Consensual Special Magistrate<br>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

### 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:

- Complex factual or technical matters requiring decision-maker expertise
- Factual issues narrowed
- Focus on legal issues once complex factual matters concluded
- Neutral supervision of fact gathering and resolution

## 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

#### 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