

THE ADR REVOLUTION

Richard M. Calkins

I. Introduction

No one disagrees that the American judicial system is the finest yet devised by mankind. It was created with the highest ideals in mind; to seek the truth in all instances, and to do justice for all who enter its hallowed halls. Yet there has been a literal revolution in the way we resolve differences. It is called Alternative Dispute Resolution (ADR). Rather than submit a matter to the courtroom, parties are now turning to other means to find resolution. Winning does not require defeating another, but making that other person a winner. The reality is, that if all else fails, the “alternative” today is the courtroom.

The question is, why has there been such a dramatic switch to ADR, from the courtroom to the conference table?¹ There are probably two reasons: one, necessity, and the other, compassion.

¹ When mediation first became more generally used in this country, the plaintiffs’ bar questioned its objectivity. The common complaint was that defendants, and in particular insurance carriers, were promoting mediation as a means to push plaintiffs to accept settlements counsel felt were unfair or less than what could be achieved in court. This resistance was slowly overcome as counsel tried the process and realized that the feared consequences were not as great as anticipated. Thereafter, resistance came from the defense bar. Its concern was basic – the economics of mediation. If a case can be settled before it is even filed and discovery taken, fees generated will be considerably less. For many large defense firms, mediation is viewed as a threat to their very survival. As mediation has grown, these firms have had to readjust their modus operandi and priorities. Those that have continue to thrive. RICHARD M. CALKINS & FRED LANE, *LANE & CALKINS MEDIATION PRACTICE GUIDE* 2-5 (Aspen Publishers 2006).

There are, of course, non-economic reasons advanced for resisting mediation. It has been described as an effort to bypass the courts and undermine our jury system. *See, e.g.,* Owen M. Fiss, *Against Settlement*, 93

1. Necessity

The modern day awakening to the use of ADR started in the 1980s. Critics of the American judicial system noted the soaring costs, long delays and inefficiencies as reasons for change.² Just the increase each year in the number of cases being filed (today over 18 million), causing judicial gridlock in many jurisdictions, was reason enough. Former Chief Justice Warren E. Burger of the United States Supreme Court blamed this phenomenon, in part, on the introduction of new and novel causes of action.³ He stated:

One reason our courts have become overburdened is that Americans are increasingly turning to the courts for relief from a range of personal distresses and anxieties. Remedies for personal wrongs that once were considered the responsibility of institutions other than the courts are now boldly asserted as legal “entitlements.” The courts have been expected to fill the void created by the decline of church, family, and neighborhood unity.⁴

YALE L.J. 1073 (1984); Eric K. Yamamoto, *ADR: Where Have the Critics Gone*, 36 SANTA CLARA L. REV. 1055 (1996). More than one judge has expressed concern that with less jury trials, fewer legal issues will reach the appellate courts, which, in turn, slows down the development of the law.

There have even been expressions of concern that mediation undermines the rights of women in family law dispute. See Trina Grillo, *The Mediation Alternative Process Dangers for Women*, 100 YALE L.J. 1545 (1991). Others have expressed fear that the informality of ADR fosters racial and ethnic prejudices. See Richard Delgado, *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WIS. L. REV. 1359 (1985).

² There can be no question that the American judicial system is too costly. Every experienced trial lawyer will agree. Hourly rates today for top litigators are as high as \$1500 per hour. In one case in which a manufacturer sued another for tortious interference with contractual rights, it sought damages of \$8 million. The defendant manufacturer counterclaimed under §§ 1 and 2 of the Sherman Act, seeking \$150 million in damages (when trebled and attorneys fees and costs added amounted to \$500 million). In two and one-half years of discovery, the parties spent in excess of \$40 million. Ultimately, the case was mediated just before trial and settled in three weeks with no money exchanging hands.

The long delays, riddled with appeals and pretrial forays, make litigation unacceptable to many who wish to find closure and go on with their lives. Cases lasting ten and even twenty years are not uncommon. One lawsuit, *In re Midwest Milk Monopolization Litig.*, 510 F. Supp. 381 (W.D. Mo. 1981), *aff'd in part, revs'd in part*, 687 F.2d 1173 (8th Cir. 1982), *on remand, Alexander v. Nat'l Farmers' Org., Inc.*, 614 F. Supp. 745 (W.D. Mo. 1985), *aff'd in part, revs'd in part sub nom. Nat'l Farmers' Org., Inc. v. Assoc.'d Milk Producers, Inc.*, 850 F.2d 1286 (8th Cir. 1988), *as modified*, 878 F.2d 1118 (8th Cir. 1989), involved numerous related court rulings and two appeals to the eighth Circuit Court of Appeals. It was in its twenty-first year with an anticipated three more years to conclusion, when it was successfully concluded through mediation in two months.

³ Warren E. Burger, *Isn't There A Better Way?*, 68 A.B.A. J. 274, 275 (1982).

⁴ *Id.*

Added to the mix was the increase in claims created by new statutory and regulatory promulgations at both the state and federal levels, as well as the explosion of criminal cases, particularly drug-related, which brought some civil trial calendars to a virtual halt.⁵ Finally, delays and inefficiencies in the courts were augmented by the extensive pretrial forays courts permitted into the irrelevant as well as relevant. The change to ADR, therefore, was driven by necessity.

2. Compassion

There is, however, perhaps a more compelling reason for the introduction of ADR. It might be described as “compassion.” A number of jurists have expressed their concern as to how aggressive and unkind the legal system has become, and the damage it is often doing to those who invoke it as a means to resolve differences. Former Chief Justice Burger observed in 1984, that “Our [legal] system is too costly, too painful, too destructive, and too inefficient for a truly civilized people.”⁶ Judge Learned Hand formerly of the federal Second Circuit of Appeals noted that, “I must say that, as a litigant, I should dread a lawsuit beyond almost anything else short of sickness and of death.”⁷ Associate Justice Antonin Scalia of the United States Supreme Court said this about the system:

I think we are too ready today to seek vindication or vengeance through adversary proceedings rather than peace through mediation. . . . Good Christians, just as they are slow to anger, should be slow to sue.⁸

Chief Justice Burger summarized the problem, as he saw it, this way:

⁵ See generally CALKINS & LANE, *supra* note 1.

⁶ Warren E. Burger, *The State of Justice*, 70 A.B.A. J. 62, 66 (1984).

⁷ L. Hand, *The Deficiencies of Trials to Reach the Heart of the Matter*, 3 Association of the Bar of the City of New York, *Lectures on Legal Topics* 89, 105 (1926).

⁸ Antonin Scalia, *Teaching About the Law*, QUARTERLY, Fall 1987, at 6, 8.

The entire legal profession - lawyers, judges, and law teachers - has become so mesmerized with the stimulation of the courtroom contest that we tend to forget that we ought to be healers – healers of conflict.⁹

Chief Justice Burger is undoubtedly one of the forefathers of modern ADR, and in particular mediation. He spoke of ADR when few lawyers understood the difference between arbitration and mediation. And he was criticized for his apparent disparagement of the American trial system. He admonished that lawyers:

must be legal architects, engineers, builders, and from time to time, inventors as well. We have served, and must continue to see our role as problem-solvers, harmonizers, and peacemakers, the healers – not the promoters – of conflict.¹⁰

Chief Justice Burger went so far as to redefine “justice,” and the lawyer’s obligation to his or her client. He observed:

To fulfill our traditional obligation means that we should provide mechanisms [ADR] that can produce an acceptable result in the shortest possible time, with the least possible expense and with a minimum stress on the participants. That is what justice is all about.¹¹

It is the thesis of this article that ADR, and in particular mediation, is fulfilling Chief Justice Burger’s new definition of “justice.” It meets each criteria. It provides an acceptable result because the parties voluntarily agree to it; it is expeditious because it eliminates much of the formality, minutiae, and abuse of pretrial discovery and trial; it is considerably cheaper for the most part because it is streamlined and more efficient; it is kinder and gentler on those who participate – party and attorney alike – because it seeks

⁹ Warren E. Burger, *The State of Justice*, A.B.A. J. 62, 69 (1984).

¹⁰ Warren E. Burger, *The Decline of Professionalism*, 61 TENN. L. REV. 1, 5 (1993).

¹¹ Warren E. Burger, *supra* note 3. Chief Justice Burger’s words mirror those of another great lawyer and president. Abraham Lincoln said:

Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a real loser – in fees, expenses, and waste of time. As a peacemaker the lawyer has a superior opportunity of being a good man. There will be business enough. Abraham Lincoln, Notes for a Law Lecture (July 1, 1850), 2 Collected Works of Abraham Lincoln, (Roy B. Basler ed. (1953)).

not only resolution but conciliation, peace, and even healing; and it is successful beyond what the bar ever envisioned.¹²

The change to ADR and mediation is so pervasive that many states now require parties to mediate before they can obtain a trial date.¹³ Some states have gone so far as to require lawyers to discuss with their clients all possible alternatives to reach resolution short of trial.¹⁴

II. The Practical Implications of ADR

ADR is an amorphous term which describes the various mechanisms to resolve disputes short of the courtroom. There are many differences between ADR and a courtroom trial. The latter is quite structured and tightly controlled by complex rules of procedure, rules of evidence, and precedent developed through the appellate courts.

¹² For example, some mediators are reporting a success rate exceeding ninety-five percent with the average across the country at eighty to eighty-five percent, which is excellent in itself. See CALKINS & LANE, *supra* note 1, at 2-13.

¹³ Hundreds of state statutes establish mediation programs in a wide variety of contexts. See SARAH R. COLE, CRAIG A. MCEWEN, & NANCY H. ROGERS, *MEDIATION: LAW, POLICY, PRACTICE* APP. B (2001 2d ed. and 2001 Supp.). Many states have created state offices to encourage greater use of mediation. See, e.g., ARK. CODE ANN. §§ 16-7-101 to -207 (1999 & Supp. 2005); HAW. REV. STAT. §§ 613-1 to -3 (1993 & Supp. 2004); KAN. STAT. ANN. § 5-501 to -504 (2001); MASS. GEN. LAWS ANN. ch. 7, § 51 (West 2002); NEB. REV. STAT. ANN. §§ 25-2901 to -2942 (LexisNexis 2004); N.J. STAT. ANN. § 52:27E-73 (West 2001); OHIO REV. CODE ANN. §§ 179.01-.04 (LexisNexis 2001 & Supp. 2005); OKLA. STAT. ANN. tit. 12, §§ 1801-1813 (West 1993 & Supp. 2006); OR. REV. STAT. ANN. §§ 36.100-.270 (West 2003 & Supp. 2005); W. VA. CODE ANN. §§ 55-15-1 to -6 (LexisNexis 2000). See generally Suzanne J. Schmitz, *A Critique of the Illinois Circuit Rules Concerning Court-Ordered Mediation*, 36 LOY. U. CHI. L.J. 783 (2005) (discussing the function of court-ordered mediation in Illinois circuit courts).

¹⁴ Some states, through their supreme courts, strongly recommend, as a matter of professionalism, that attorneys inform clients of alternative procedures for dispute resolution. These currently include Hawaii, Texas and Colorado. See, e.g., Hawaii Rules of Professional Conduct 2.4 (1997), which provides: "In a matter involving or expected to involve litigation, a lawyer should advise the client of alternative forms of dispute resolution which might reasonably be pursued to attempt to resolve the legal dispute or to reach the legal objective sought." The State of Georgia now requires all members of the State Bar be educated in dispute resolution. See Geor. R. ADR Rule 8 (1999). Some scholars now suggest that failure to discuss ADR possibilities with a client constitutes legal malpractice. See Robert E. Cochran, *Legal Representation and the Next Step Toward Client Control: Attorney Malpractice for the Failure to Allow the Client to Control Negotiation and Pursue Alternatives to Litigation*, 44 WASH. LEE L. REV. 819 (1990); Monica L. Warmbrod, *Comment, Could an Attorney Face Disciplinary Action or Even Legal Malpractice Liability for Failure to Inform Clients of Alternative Dispute Resolution*, 27 CUMB. L. REV. 791 (1996-97).

Failure to abide by established protocol can result in sanctions or dismissal of an action. The relief available is limited by the court's jurisdiction and case law.

ADR, on the other hand, is quite the opposite. The genius of ADR is that it is by contract. The parties have total flexibility. They can agree to resolve their differences any way they wish. They can contract to use a binding or nonbinding mechanism, an adversarial or nonadversarial process, a formal or informal method, whatever the exigencies of the dispute require. And the remedies can include so much more than the exchange of money. The only limitation is that whatever is done cannot violate public policy.

A case demonstrating creativity involved Southwest Airlines. When it first came on line, it found itself in a trademark dispute with a regional airline in the southeast. Facing potential litigation costs in the millions of dollars, the two CEO's of the companies agreed to resolve their differences by arm wrestling, two out of three. The CEOs trained, a party was held and the matter resolved – for the cost of the party.¹⁵

How creative and flexible ADR can be is illustrated by the evolution of “mediation/arbitration” (med/arb), now a recognized ADR mechanism. An insurance company in Chicago, Illinois, stopped mediating because few cases were being resolved and the company faced the added costs of pretrial discovery and trial. It therefore insisted that lawsuits be arbitrated. However, plaintiffs' attorneys resisted, preferring to try their cases before a jury. A compromise was then worked out whereby the case was

¹⁵ Richard Calkins, *Role of ADR in the Judicial Process*, PEACEMAKER QUARTERLY, September 2006, <http://www.adrpeacemaking.org/newsletter.htm>.

first mediated, and then, if no resolution resulted, the mediator became an arbitrator and entered a binding award.¹⁶

The next step in this evolution was to eliminate the risk that a plaintiff might receive nothing in the arbitration when the defendant had offered an amount to settle in the mediation phase.¹⁷ Therefore, as part of the process the parties set high-low parameters: if the award in the arbitration phase of the case was less than a certain figure, say \$20,000, the award would still be \$20,000, or if the high was \$100,000 and the award was \$150,000, it would be reduced to \$100,000.

Another problem arose in the mediation phase. Counsel, concerned that a case might not be settled and would have to be arbitrated, was not as candid in the mediation as normally expected. Rather than fully disclose their weakness, when asked, they often held back concerned that full disclosure might adversely affect their position in the arbitration. Or, they might not give a candid appraisal of their best case/worst case before a fact-finder (if the case were tried). To correct this, the process was modified again: at the end of the mediation, if the case did not settle, the plaintiff was required to give its final (best) demand, and the defendant its final (best) offer. The mediator, now arbitrator, was then required to choose one figure or the other as his award – he could not make an independent determination. Understanding this limitation, the parties were far more realistic in their final demands and offers for fear the arbitrator would select their opponent's figure.

¹⁶ In some instances, the parties reserve the right to use a different person for the arbitration phase of the case if the case does not settle through mediation. This, of course, adds costs.

¹⁷ In one case, the defendant offered \$35,000 and the plaintiff demanded \$40,000. Neither would compromise and the matter was arbitrated. The mediator now arbitrator was an ex judge and found that there was no liability and found for the defendant. Plaintiff and counsel were justifiably upset at the result and stated they would never participate in such a process again.

One arbitrator, desirous of facilitating voluntary settlement between the parties, initiated a process whereby, after the evidentiary hearing was held, reviewed the evidence with the parties, indicating how he was reacting to it – what impressed or concerned him and what he felt was not persuasive. (He did not disclose what his final ruling would be.) He then gave the case back to the parties to give them a last chance to reach a voluntary settlement. If the case did not settle, the arbitrator entered his independent award.¹⁸

New mechanisms are continually being created in many areas of the law depending upon the exigencies of the parties. In the business arena, where business entities are being dissolved, for example, parties are using a process called European arbitration.¹⁹

In the automotive industry, where a dispute has arisen between a car dealership and the manufacturer, a mediation process has evolved whereby a panel of three mediators – one representing the dealer, one the manufacturer, and a neutral – mediate the case.²⁰ Even in the telecommunications industry, when telephone companies seek to enter a local market, a very unique form of arbitration has evolved.²¹

III. Selecting the Best ADR Mechanism

A. Recognized ADR Mechanisms

Although the parties by contract can initiate any form of ADR they wish, there are certain mechanisms that are well established and used regularly. These break down into two categories: binding and nonbinding. Binding ADR, such as arbitration, is used when

¹⁸ This process is called Rapid City arbitration. An interesting phenomenon of this process is that if the parties can agree on a settlement figure, both will be relatively satisfied. However, if the same figure is imposed upon them by the arbitrator as his award, one or both will be quite dissatisfied and feel they had lost. See CALKINS & LANE *supra* note 1, at 1-27.

¹⁹ See *id.* at 1-40.

²⁰ *Id.* at note 10, at 1-9

²¹ *Id.* at 1-37

the parties seek finality and certainty, for the award entered is binding on the parties and enforceable in court. Nonbinding, such as mediation, is more flexible and reserves to the parties the right to go to trial if agreement cannot be reached.

B. Binding ADR

There are four categories of binding ADR – arbitration, rent-a-judge, mini-trial, and binding mediation. Under the general category of “arbitration,” there are a plethora of mechanisms that are being utilized today, including (a) formal arbitration, (b) Rapid City arbitration, (c) European arbitration, (d) summary arbitration, (e) high-low arbitration, (f) fixed high-low arbitration, (g) baseball arbitration, (h) arbitration/mediation (arb/med), and (i) mediation/arbitration (med/arb).

1. Arbitration

There are many advantages to arbitration over the courtroom jury trial or bench trial. It is generally less expensive because discovery forays can be limited. It can be more expeditiously initiated and completed because more summary procedures can be utilized. It is easier to accommodate the parties and counsel in scheduling the discovery and hearings. It is usually less stressful on the parties because it is less formal, and strict protocol does not have to be adhered to as in the courtroom. Unlike a courtroom trial, which is open to the public, an arbitration can be conducted in a confidential setting benefiting both parties. Generally, the rules of evidence and procedures are more lax. And the decision-maker must be approved by both parties thereby assuring greater neutrality and sometimes competency.

a. Formal arbitration

Formal arbitration, which is conducted like a bench trial, is the most common format utilized. It is particularly important in the commercial arena between businesses. On the international business level, it is almost always used, because no party wishes to litigate in another's home court.

In smaller cases, the parties generally utilize a single arbitrator. In substantial commercial cases, it is more common to utilize a panel of three arbitrators – one chosen by each party, and a third appointed by the two.

b. Rapid City arbitration

This form of arbitration follows the same format as formal arbitration with one decided difference. An effort is made to get the parties more involved in the process and reach a settlement before an award is made.

The process begins with the parties putting in their cases before the arbitrator. At the conclusion of the hearing, the arbitrator then reviews the evidence with all participants present and indicates how he is reacting to it. The purpose of this review is to signal to the parties those matters he is concerned about and those he feels are not probative. Thus, he might suggest that a defense being asserted is not as compelling as defendant hoped, or a claim might not be provable. The arbitrator, of course, will not suggest how he is going to rule ultimately or what the award will be. Through this exchange, the parties get a better sense as to what the merits of the case are and be able to enter more meaningful settlement discussions.

At the conclusion of the hearing and review of the evidence, the arbitrator gives the case back to the parties to make one more effort to settle. He does not participate in

this discussion. If the case settles, which happens fifty percent of the time, the settlement is entered as the arbitrator's award. If the case does not settle, then the arbitrator enters the award he has independently reached.²²

c. European arbitration

In this format, the arbitrator does his own pre-arbitration discovery. He meets with the parties personally, interviews witnesses, examines documents and physical evidence, and visits premises if relevant. When interviewing the parties and witnesses, all parties may be present or be represented by counsel.

Upon completion of the investigation, the arbitrator makes preliminary findings which are then submitted to all parties for corrections, additions, deletions and comments. The parties are then requested to agree to as many findings as they can. Those, concerning which there is no agreement, become the ultimate facts of the case decided by the arbitrator. The parties are then given an opportunity to make closing arguments and the arbitrator enters his award.

²² *Case Study*: Rapid City arbitration was used in a case in which a twenty-two year old cowboy in western South Dakota was injured in a pickup truck rollover. Plaintiff and a farmer friend (the latter driving) went to a town seventy-five miles away to hit the bars. Driving back, the farmer fell asleep at the wheel and the truck ran off the road. Plaintiff suffered soft-tissue injuries to his back and demanded \$30,000. The insurance carrier defended on the grounds that plaintiff was contributorily negligent in that he had paid for some of the drinks consumed by the farmer. It also argued that there was an assumption of risk, in that plaintiff knew that the defendant had been drinking and might be tired before driving back.

The hearing was held, and at the close, the arbitrator reviewed the facts with the parties. He noted that there might be no contributory negligence on the plaintiff's part because the drinks bought by plaintiff did not contribute to the accident. Defendant only had a sip or two of each and when tested for intoxication was well below the legal limit. The arbitrator also noted there was no assumption of risk because plaintiff had inquired if the defendant was too tired to drive back that night and was assured by the latter that he was fine.

On the issue of injuries, the arbitrator noted that although plaintiff could no longer compete in bronco-riding, he was riding his horse again, and had, in fact broken in a mustang horse. He further noted that a demand of \$30,000 for a soft-tissue injury in the rural county in question was high.

With the air cleared, the arbitrator asked the parties to continue their negotiations. In thirty minutes, the case settled for \$9,000 (the defendant previously offered only \$6,000).

One of the advantages of this form of arbitration is that it is less intrusive on the parties and counsel. In other words, the arbitrator can accommodate the parties and counsel and give consideration to their schedules and availability. The process is particularly successful in splitting up a business partnership or medical group, for example, where there are many details to consider.

Using European arbitration has a number of advantages: first, it cuts down dramatically on costs because the arbitrator does his own investigation for the most part, and the parties do not engage in pre-arbitration discovery; second, there are no depositions, interrogatories, document requests or motions to compel – the arbitrator has complete access to witnesses and documents; third, the parties have considerably more input into the process, and, therefore, the final result should be easier to accept; fourth, the arbitrator is more sensitive to compromise and the possibility of reaching a result both can accept; and, fifth, the arbitrator will encourage the parties to keep lines of communications open with the possibility they may reach their own settlement.²³

²³ *Case Study:* A law partner left his partnership taking a number of his good cases with him, leaving those that were questionable. Because they were contingency fee cases, the law firm had advanced costs and expenses on each. The day he left, he received a check on one case that had settled, which he put into his own account to operate his new office. The law firm became quite upset at this and reported him to the state ethics committee, claiming that he had embezzled funds belonging to the firm. It then prepared to sue the partner for funds owing.

Rather than litigate, the parties agreed to arbitrate and European arbitration was commenced. The arbitrator informed the parties that he would do his own investigation, interview witnesses, examine documents, etc. He even suggested that they did not have to retain counsel but could handle all matters themselves. He also worked around each side's schedule so that they were not unduly drawn away from their practices.

Upon completing his investigation, he made preliminary findings of facts and asked each side to make whatever changes they wished. The final draft was then submitted to both and they were asked to agree upon as many facts as they could. There remained only a few concerning which agreement was not reached, which became the ultimate facts. Thereafter, a hearing was held and an award was made, which was ultimately acceptable to both sides. The primary consideration was the amount owed by the terminating partner and the terms of payment. The parties agreed on a schedule of payments.

d. Summary arbitration

Generally, arbitrations are conducted like any bench trial and follow the same format. The parties, however, can contract to shorten the trial and make it more summary in form to save time and costs. Instead of examining live witnesses, counsel may offer highlighted deposition testimony or written summaries of the testimony. Experts' reports can be used rather than expert testimony, and documents are generally received in evidence without objection, permitting the arbitrator to give them the weight they merit. Most of the hearing is limited to arguments of counsel. In this way a two-month trial might be reduced to one week, for example, and at a fraction of the cost.²⁴

e. High-low arbitration

A popular form of arbitration is high-low arbitration. Rather than give an arbitrator unbridled authority to enter a binding award, the parties can protect themselves by privately negotiating high-low limitations on any award. For example, in a personal

The separation was completed in a shorter time frame and at a considerably lower cost than if each side hired counsel and engaged in pre-arbitration discovery and a trial. Also, because of the nature of the law firm, the publicity would have been distracting. Further, such information as salaries would have become public.

²⁴ *Case Study:* Summary arbitration was used in an antitrust case when mediation failed to resolve the matter. A two-month trial had been scheduled, which would have resulted in an appeal to the federal court of appeals. Both sides anticipated spending \$500,000 more in discovery and trial of the case with the appeal, which would have taken three to four years to complete. The facts were not in serious dispute, but the law was. Defendant contended there was no viable cause of action under §§ 1 and 2 of the Sherman Act, 15 U.S.C. § 1, 2.

The parties agreed to summary arbitration utilizing a panel of three antitrust experts both sides had to approve. One week was set aside for the hearing. The first day all motions were resolved. The second and third days, plaintiff's counsel presented his case in summary form. The fourth and fifth days, defense counsel presented his case. On the sixth day, the arbitrators deliberated and announced their decision. There was no written opinion. There was no appeal.

The matter was resolved expeditiously and at only a fraction of the cost of a trial by jury and an appeal. Although the plaintiff lost, counsel explained that he had had a fair hearing in front of antitrust experts. He added, that if this was the way the matter would ultimately be resolved in the courts, it was better to reach that result at a fraction of the cost to the client and himself, and to avoid spending an inordinate amount of time pretrying and trying the case. He was on a contingent fee.

injury case the parties might agree to place a \$100,000 cap on any award and a floor of \$20,000. If the arbitrator awards \$120,000, the final award will be reduced to \$100,000, and if he finds no liability, an award of \$20,000 will still be entered. If the award falls somewhere between the high and low, that is the award. Normally, the arbitrator is not informed of the high-low.²⁵

f. Fixed high-low arbitration

Fixed high-low arbitration is an effective vehicle when the only real issue is liability. In many cases, there is no question that a plaintiff was injured; however, whether the defendant was at fault or whether plaintiff was more at fault than the defendant is in issue. Rather than take discovery and hire experts on the issue of injury and damages, the parties instead negotiate the damages and set a high figure if liability is established and a low figure if it is not established. The arbitration then goes forward only on the issue of liability. If liability is found, then the fixed high figure is awarded, and if liability is not established, then the low figure. For example, in an automobile accident case, plaintiff may have been seriously injured; however, there is a question as to whether she is more than fifty percent at fault, which would foreclose recovery. Rather than go to the expense of calling experts on the issue of damages, the parties might negotiate high and low figures. If liability is established, the fixed high is awarded

²⁵ Placing limits on the award can make the arbitrator's work more difficult. For example, if he enters an award which exceeds the high or is less than the low, it might appear that he lacked the judgment or experience to arrive at a reasonable figure. Such a discrepancy may even be perceived as evidence of bias one way or the other.

An award that exceeds the high might cause a problem for plaintiff's attorney, for he might have difficulty explaining to his client why he recommended the high limitation in the first place. Likewise, if the award is less than the low, counsel for the defense may have the same difficulty. An award falling within the high-low parameters eliminates any such difficulties.

– say \$500,000. If liability is not established or plaintiff is more than fifty percent at fault, the low is awarded - \$50,000.²⁶

In fixed high-low arbitration, the parties may wish to use the judge assigned to the case rather than an arbitrator. In this instance, the court would be informed that only the issue of liability is being litigated, damages having already been resolved, depending upon the ruling of the court. Of course, the court would have to agree to the process.

The incentive for a plaintiff to enter such arrangement is savings of costs. If the costs of proving injuries and damages are high and liability is in question, there is an incentive to fix the damages by agreement and litigate only liability. If the arbitrator finds no liability, plaintiff will still receive something and avoid the added costs of proving damages.

Defendants likewise agree to the process to save costs. This is particularly true if liability is seriously in question. Because the costs of proving damages have been eliminated, defense costs have been correspondingly reduced. On the other hand, if liability is established, defendant's exposure on damages is fixed and there is no possibility for a jury to give an excessive verdict. The process acts like an insurance policy for defendants, particularly insurance carriers.²⁷

²⁶ If comparative fault is an issue, the parties can agree to a formula where a percentage is deducted from the fixed high. Of course, if plaintiff is more than fifty percent at fault, she will recover only the fixed low.

²⁷ *Case Study:* Fixed high-low arbitration is illustrated by a case in which the plaintiff was involved in a head-on collision. She had entered an island which separated the northbound traffic from the southbound traffic. Stopping at a fast-food restaurant, she had an ice tea and then got back into her car. However, forgetting which direction the one-way traffic was going, she entered the one-way northbound traffic heading south and ran into a car going north. That accident was resolved, and plaintiff sued the fast-food restaurant for not properly marking the direction of the one-way traffic when she exited its parking lot. There had been seven similar accidents of cars exiting the island and going in the wrong direction, although none as serious. Plaintiff had a serious closed-head injury and her damages were substantial.

The insurance carrier felt that liability was lacking and agreed to fixed high-low arbitration. It negotiated a high of \$450,000 if liability was established and a low of \$37,500 (costs of litigation) if there was no liability. The arbitration hearing was held and the arbitrator found for the defendant, so the carrier paid

g. Baseball arbitration

There are two forms of baseball arbitration.²⁸ In the first, the plaintiff selects any high it wishes, and the defendant any low. After the arbitration hearing, the arbitrator, who is not informed of the high-low, makes a tentative award. If the tentative award is more than the midpoint, then the award is increased to the high; if less than the midpoint, it is reduced to the low. If it is exactly the midpoint, that becomes the award.²⁹

In the second form of baseball arbitration, each party again sets the figure it wishes for the high and low. Upon completion of the arbitration hearing, each party discloses its figure to the arbitrator. The arbitrator then must choose the high or the low and cannot select a compromise figure. By waiting for completion of the hearing, the parties can adjust their figures based on how they feel their cases are being received by

\$37,500. Plaintiff agreed to the process because counsel was concerned about liability and wanted to be certain that at least costs were recovered.

If the parties do not wish to use an arbitrator, the same fixed high-low agreement can be used with the assigned judge or even a jury, so that only the issue of liability will be tried. The judge would have to consent to this.

²⁸ In the major leagues, where this form of arbitration gets its name, each party – the owner and the player – set any figure they wish, which is submitted to the arbitrator. After the hearing, the arbitrator must select one figure or the other. He cannot select a compromise figure. This tends to make the parties more realistic in their submissions. This format is also known as “last best offer” or “final offer.” See, A. Strickland, “Baseball” Mediation/Arbitration. Baseball, available at <http://www.webcount.com/baseballhtn>. (Website is no longer available)

²⁹ For example, if plaintiff selects a high of \$100,000 and the defendant a low of \$20,000, and the tentative award \$62,000, the final award would be raised to \$100,000. If the tentative award was \$58,000, then the final award would be \$20,000. The parties can change the high-low up until the tentative award is made. In this way, the parties can evaluate how they believe their cases are being received by the arbitrator. If the plaintiff becomes concerned that the midpoint of \$60,000 is too high, he can lower it by reducing his demand, and the defendant can raise it by increasing its offer. Thus, in the above example, if plaintiff believes \$60,000 is too high, he might lower his demand from \$100,000 to \$75,000, thereby lowering the midpoint to \$47,500. On the other hand, the defendant might wish to counteract this move by raising its offer to \$35,000 and thereby increasing the midpoint to \$55,000. The consequence of this bidding process is to force the parties to assume more realistic positions thereby encouraging the possibility of a voluntary settlement.

the arbitrator.³⁰ The purpose of allowing the parties to change their last demand or offer is to bring them closer together and even settle the matter before an award is made.³¹

h. Arbitration/mediation (“Arb/med”)

There are many situations where the parties seek resolution of a matter and are willing to arbitrate. However, it is always better if the parties can agree to a settlement rather than have it imposed upon them. To accomplish both aims, the parties might agree to arbitrate the matter initially and to announce the award only if the parties fail to reach agreement following mediation. After the arbitration hearing is concluded, the arbitrator will write out his award, seal it, and put it away for safekeeping. He will then change hats and commence a full-scale mediation, acting as the mediator. Standard mediation procedures are followed and techniques utilized. If settlement is reached, the sealed

³⁰ At the beginning of the arbitration hearing, a plaintiff might be at \$400,000, and the defendant at \$100,000. As the evidence goes in, plaintiff might reduce his demand to \$300,000 feeling that the original demand is too high. Defendant might react by increasing the offer to \$200,000. By this process, the gap is narrowed and might even be closed before the arbitrator must make his selection.

³¹ Case Study: On February 8, 1996, President Clinton signed into law the Federal Telecommunications Act of 1996, which, for the first time, opened local telephone services to competition. (47 U.S.C. §153) The local carrier was required to make its switching facilities available to a new competing system until it could get its own system up and running.

In a Midwestern city, a competing telephone system sought to establish a local phone system. Pursuant to the new law, the local monopoly was required to enter an interconnection agreement. Ultimately, the two parties failed to agree on some fifty-two issues and arbitration was commenced, as required by law. The arbitrator, in hearing the matter, was required to select one party’s position on each issue – he or she could not make an independent decision.

By the time the actual hearing was held, only fifteen issues remained unresolved. During the hearing, the parties were constantly making cell phone calls to their superiors and all but six issues were resolved. Briefs were submitted, and the arbitrator selected one party’s position on each issue. Within a month the state utility commission reviewed the matter and the interconnection agreement was completed.

Had the arbitrator been required to make an independent decision on the matter, as is usually the case in utility matters, the hearing would have gone on for months and even years with both sides offering evidence and providing expert testimony. Both sides would have demanded far more than they expected to get hoping the arbitrator would compromise. More important, the onus would have been on the arbitrator rather than the parties.

award is destroyed and not disclosed to the parties. If settlement is not reached, it becomes binding on the parties.³²

One of the significant advantages to arb/med is that when the arbitrator commences the mediation phase of the process he knows what the outcome will be if he is required to disclose his sealed award. Therefore, he can subtly suggest that a party be

³² Case Study: The arb/med mechanism was used in a complex copyright infringement case filed in federal court. A large international manufacturer of pumps retained a programmer to help develop software for a new valve in its pumps. He created new modules for the software as well as utilize modules developed by the company's employees.

When the project was about completed, a dispute arose over two invoices he had submitted, which the company did not wish to pay because the work was allegedly outside the contract. To gain leverage, he placed a copyright notice on the program declaring that he was the sole owner of the copyright. He threatened suit; however, the company filed a declaratory judgment action first, and the programmer counterclaimed for copyright infringement, seeking an injunction against the company's use of the software. At this time, the company was using it extensively on its pump products.

To save time and costs both sides agreed to arbitrate and the arbitrator suggested arb/med. They agreed that after the arbitration phase was completed, the arbitrator would make a tentative award, seal it, and then conduct a full-scale mediation.

At the conclusion of the one-day arbitration hearing, the arbitrator announced the following tentative findings. He found that the programmer was the sole author of the copyright in question; that because the company had paid for the program, it had a non-exclusive implied license to use it as contemplated; that the programmer, being the owner, was entitled to sell or license it to other manufacturers; and that the programmer was entitled to \$18,500 plus interest on the two invoices he submitted. The only issue that the arbitrator left open was whether a confidentiality agreement, which the programmer signed, foreclosed him from licensing or selling his copyright for five years – the agreement provided that for five years he could not disclose certain trade secrets contained in the software program.

In the mediation phase, the arbitrator/mediator pointed out to the company that as long as the programmer controlled the copyright, he might be in a position to sell it or give it to others, depending on how he ruled on the trade secret clause. If he ruled against the company, its competitors would have access to advanced technology.

To the programmer he pointed out that if he ruled against him on the trade secret issue, his copyright would be worthless in five years (the industry was already working on the next generation of software). Both parties had risks and agreed to a settlement of \$75,000. The sealed award was destroyed and never disclosed.

The key to arb/med was to leave several issues unanswered so that both sides were at risk. Compromise and resolution was in both side's best interest.

more open to compromise or face the uncertainty of his sealed award. This subtle element gives considerably more meaning to the mediation phase of the case.³³

i. Mediation/arbitration

Mediation/arbitration (“med/arb”), also known as “binding mediation” allows the parties to mediate initially, and, if unsuccessful, convert the process into binding arbitration. This form of ADR is particularly popular in smaller cases where the parties do not wish to incur the additional costs of further pretrial discovery and trial, if the mediation phase fails. In other words, they want closure at the end of the day.

The mediation phase is conducted like any other mediation. The only difference is the parties sometimes are not as candid in disclosing their weaknesses or what they feel their worst case before a jury might be (issues raised in caucus mediation). This is because they do not wish to prejudice themselves in case the mediator becomes the arbitrator and makes a binding award.

A modification of med/arb, which has proven quite successful, is if the matter goes into the arbitration phase of the process, the mediator/arbitrator’s award is limited to

³³ Case Study: Plaintiff was a partner in the defendant law firm. In settling with the firm, when she terminated her partnership interest, it was agreed she would receive up to \$42,000 in accounts receivables as they were paid in. At the time of her departure, she received \$9,000 and \$16,000 was being held in a trust account plaintiff set up.

Plaintiff pleaded a breach of the settlement agreement in that the remaining partners failed to use their good offices to collect the accounts receivables, of which they were to receive fifty percent of anything collected.

Defendants counterclaimed asserting that plaintiff was illegally holding \$16,000 in paid accounts receivables. To force plaintiff to give them one-half, they filed an attorney’s lien against her as trustee in bankruptcy in a matter she was working on. The bankruptcy judge dismissed the lien as being inappropriately filed. Plaintiff then amended her complaint and added a tort claim for malicious prosecution seeking punitive damages.

The arbitrator conducted a hearing, at the conclusion of which he asked the parties if he could mediate their claims. In the mediation he suggested to the plaintiff that her malicious prosecution claim was a separate matter and not part of the arbitration. To the defendant he suggested that it was not certain how he would rule on the tort claim and that they might be at risk for punitive damages. After realizing that they both had something at risk the parties compromised and settled their claims amicably.

the last demand or offer made by the parties. In other words, after hearing, the mediator/arbitrator must select either the plaintiff's last demand or defendant's last offer and cannot reach an independent or compromised figure. This has the effect of pushing the parties closer together and reaching the real value of the case.

Med/arb has also proven an effective mechanism in complicated business disputes where there are multiple issues to be decided. Initially, the parties agree to arbitrate and select an arbitrator. Generally, at the suggestion of the arbitrator, the parties might agree to mediate the matter first before the parties commence formal arbitration. As issues are mediated, the mediator/arbitrator has one decided advantage. If the parties cannot agree on a particular issue, the mediator/arbitrator can rule on the spot as the arbitrator to resolve the issue. They can then go on to the next issue. In other words, the mediator/arbitrator has a sword hanging over their heads as they mediate. This can be a powerful weapon in encouraging the parties to compromise.³⁴

³⁴ *Case Study*: Two brothers built a successful real estate and construction business. Wishing to pass on the enterprise to their sons, many problems arose; not the list of which the sons could not work together. It was therefore decided to divide the business between construction (Brother A) and real estate (Brother B) and seek IRS approval for a divisive reorganization.

After months of haggling, the sons could agree on very little. Rather than commence litigation, which could undermine the divisive reorganization plan, the parties decided to arbitrate the entire matter. The following issues had to be resolved:

1. valuation of the construction business and the real estate business as separate entities;
2. valuation and division of real estate holdings: industrial, commercial and residential;
3. the new name each business would use;
4. valuation of personal property and division thereof;
5. equalization of key-man insurance carried for the benefit of each brother;
6. rate of commission each would receive in selling real estate owned by the other.

An arbitrator was appointed and the first thing he suggested was that they use med/arb. He gave several reasons. First, items that the parties could likely agree on should be resolved. As mediator/arbitrator he would informally help in the process. Second, it would be extremely expensive and time consuming to formally arbitrate each issue in dispute. This working together in mediation creates a better atmosphere to maintain peace within the family. The parties agreed. The issues in dispute were resolved as follows:

1. Valuation of construction and real estate businesses: An outside CPA was retained to set the value of the construction business, belonging to Brother A's family and the real estate business belonging to Brother B's family. The value placed on the construction business was accepted; however the value of the real estate business became a serious obstacle to resolution.

Family A valued the real estate business at \$1 million and Family B valued it at \$350,000. To the surprise of everyone, the CPA valued it at \$180,000. This created a major barrier to resolution. The mediator/arbitrator decided to leave this item last and resolve the others. His thinking was that if all other matters were resolved, there would be sufficient momentum to gain compromise on the last major item rather than lose the entire settlement.

2. Division of real property (industrial and commercial): The real property was divided by A and B indicating what property they wanted outright. When the two lists were compared, there was bartering to balance the accounts. This took approximately six hours with the mediator/arbitrator hardly participating. His only function was to value one building that A valued higher than B, which was going to B. Wearing his arbitrator hat he made a decision which both sides accepted. He also participated as mediator concerning where a second building was going, to A or B. Neither wanted the building. It was finally decided that B would take the building with an easement and an exchange of some land to create a parking lot. He did not have to rule on the matter as arbitrator.

Division of real estate (residential): There were a substantial number of lots which were both improved and unimproved. The parties flipped a coin and the winner chose first. Thereafter, they alternated until most of the property was taken. The value used on the property was assessed valuation. Three pieces of property remained and it was agreed to put them on the market and sell them, with the proceeds being split. The mediator/arbitrator did not have to intercede in any way.

3. New names to be used by A and B: The parties were able to work this out amicably

4. Key-man insurance: There was a disparity in the insurance coverage on the brothers because Brother A was nine years older than B. For this reason, the same premium purchased considerably more coverage for B than A. The mediator/arbitrator actively participated in resolving the difference.

5. Commissions: Pursuant to an earlier agreement, the commissions that each was to receive for sale of property belonging to the other were set. A dispute arose as to one piece of property that was being developed. An agreement had been entered giving B a higher commission than that previously agreed to. On this issue, briefs were submitted and the mediator/arbitrator made his decision. However, this matter in no way delayed the overall resolution of the division.

6. Revisiting the valuation of the real estate business: Acting as mediator, the mediator/arbitrator pointed out to B, who benefited immensely from the low valuation placed on the real estate business by the CPA, that A was most unhappy and was contemplating filing legal action in court reviewing the valuation. Although not likely to succeed, A could hold up the divisive reorganization for over a year or more. B was quite anxious to complete the division immediately so that he could commence work on a number of projects. This would be indefinitely delayed. The mediator/arbitrator therefore pointed out that there was additional value in resolving this issue. In confidence, he explained to A that he did not feel he had the authority as arbitrator to set aside the CPA's valuation even though it was low for two reasons; First, he was not qualified to review the work of the CPA; and second, the parties agreed to be bound by the valuation set by the CPA. After hours of mediation, the parties agreed on a compromise figure and the division was completed.

2. “Rent-A-Judge”

This binding form of ADR originated in California, and to a great extent resembles a bench trial. However, it has decided advantages over a bench trial. An ex-judge can be selected with expertise in the area in dispute. The parties can schedule the trial to meet their needs rather than the court’s. A decision can be reached more rapidly and there is greater flexibility in the rules and procedures.³⁵

The procedure requires the formal presentation of witnesses and documents and generally follows normal court rules of procedure and evidence.³⁶ In several states, courts can refer a case in civil or family court to a private judge. In such cases, a record of proceedings is kept, and judgment entered by the rent-a-judge becomes a judgment of the court. Thus, the right of appeal is preserved.³⁷

3. Mini-trial

The mini-trial is used primarily in corporate disputes, where the parties seek to avoid substantial protracted litigation and maintain an ongoing relationship. It requires a high corporate executive from each corporate entity with authority to bind the corporation

What made the med/arb so successful was that it forced the parties to negotiate with each other rather than spending time trying to convince the arbitrator to rule in their favor. This required significant give and take which cannot occur in an arbitration or courtroom trial for that matter.

Finally, the parties negotiated and mediated in good faith to avoid having the mediator/arbitrator enter a ruling that might not be in their best interest. It was this possibility that pushed the parties hard to a successful division. And peace was maintained, to a degree, between the two families.

³⁵ See, JOHN S. MURRAY, ALAN SCOTT RAU AND EDWARD F. SHERMAN, PROCESSES OF DISPUTE RESOLUTION, (2d Ed., Foundation Press (1996); and KIMBERLEE K. KOVACH, MEDIATION, PRINCIPLES AND PRACTICE (2d Ed., West Group 2000).

³⁶ See, Amy L. Litkowitz, *The Advantages of Using Rent-a-Judge System*, 10 OHIO ST. J. ON DISP. RESOL. 491, 494 (1998).

³⁷ For example, see TEXAS CIV. PRAC. & REM. CODE ANN. § 151.011 (West 1997).

to sit on the panel conducting the mini-trial. These two executives select a third neutral to make up a panel of three persons.

Counsel for both corporate entities present their cases in summary form. At the conclusion of the hearing, which can last several days, the panel encourages the parties to settle. If they cannot, the panel renders a non-binding decision as to the probable outcome of the case. Armed with this additional data, the panel once again seeks to settle the case. If this fails, a majority of panel members decide the case.

4. Binding mediation

The term “binding mediation” is a contradictory term, for mediation, by definition is nonbinding. However, this is another ADR mechanism created by contract between the parties to meet the special needs of the parties.

This hybrid ADR mechanism is unique and needs to be distinguished from both binding arbitration and nonbinding mediation inasmuch as it utilizes features of both. The process utilizes the mediation format in that there is an opening session followed by private caucuses, at which the parties are encouraged to discuss their strengths and weaknesses, etc. After the case has been fully developed through this process, the mediator makes a binding award. However, there is a significant difference between this award and one that would be made in an arbitration although both are binding.

In arbitration, the arbitrator, in making his or her award, must base it on the facts in evidence and the controlling law of the case. This could result in a finding of no liability. In binding mediation, the mediator considers many other factors and is not limited to the facts or law of the case, although they weigh heavily in the decision. The mediator will consider such additional factors as (1) the relative risks of litigation as it

relates to liability and damages if the case were to be tried in court or before an arbitrator; (2) the time it will take to complete discovery and take the case to trial; (3) the possibility of an appeal and the additional costs and risks involved; (4) the value of an immediate decision as opposed to long, drawn out proceedings in court; (5) because of the passage of time, the collectibility of any judgment entered by a court of law; (6) the costs of fully litigating the matter and what the parties are saving by utilizing the process; (7) the time value of money; (8) the stress factor and the price the parties will pay emotionally going through a trial and appeal; and (9) the compromise the parties have already made in the mediation phase of the case. In other words, the final figure in binding mediation could be quite different from the award entered by an arbitrator or court of law.

In binding mediation, the mediator will constantly be encouraging the parties to settle before any award is entered. In this regard, he can be considerably more active in settlement discussions than an arbitrator or judge in a court of law.

C. Nonbinding ADR

Nonbinding ADR is also quite varied and flexible. The common denominator is that if the parties cannot reach agreement, they can always resort to a binding format or trial. For this reason, it is easier to encourage parties to use it because they really are not at risk. The more common formats of nonbinding ADR are (1) negotiation, (2) mediation, (3) summary jury trial, (4) focus study, (5) mock trial, (6) nonbinding arbitration, (7) moderated settlement conference, (8) early neutral evaluation, (9) ADR case controller, and (10) ombudsman.

1. Negotiation.

Negotiation is a primary ADR tool and is utilized, in one form or another, in all cases. When a dispute arises, the parties generally talk to each other hoping they can resolve differences without litigation. If they are unsuccessful, then lawyers are brought into the process.³⁸

Negotiation is a very successful ADR mechanism in that seventy to seventy-five percent of cases filed are settled before trial. It is, however, the remaining twenty-five percent or so that clog our courts today. The disadvantages of negotiation are that in many cases settlement is not reached until the eve of trial. Therefore, the huge costs of pretrial and trial preparation have been incurred. Also, the stress and the interruptions in the parties' lives have been incurred, which often leave scars that never heal. Finally, many lawyers are simply not properly trained to negotiate effectively and do a disservice to their clients.³⁹

2. Mediation.

a. background

Mediation long predates Western civil law with its origin in ancient China.⁴⁰

Used in colonial times in America, it fell into disuse, except in labor disputes, during the

³⁸ In full-blown litigation, how many times a plaintiff will state that if only the adjuster had talked with me and made a meaningful offer, I would have settled the case for only a fraction of what is now being demanded. The participation of lawyers dramatically increases the demand and defense costs for the obvious reason that attorney's fees must now be included.

³⁹ See, Robert H. Mnookin, *Why Negotiators Fail: An Exploration of Barriers to Resolution of Conflict*, 8 OHIO ST. DISP. RESOL. 235 (1993) (where the author examines four barriers to successful negotiation: strategic barrier, principal/agent barrier, cognitive barrier, reactive devaluation barrier.)

⁴⁰ Mediation has been documented in China over two thousand years ago. See, JEROME ALAN COHEN, *Chinese Mediation on the Eve of Modernization*, 54 CAL. L.REV. 1201, 1205 (1966). Professor Northrop noted that Confucius Chinese considered "litigation" as "second best" in resolving disputes:

The "first best" and socially proper way to settle disputes, used by the "superior man," was by the method of mediation, following the ethics of the "middle way." This consisted in bringing the disputants to something they both approved as the settlement of

industrialization of this country.⁴¹ In the last two decades, there has been a dramatic revival of ADR and in particular mediation.⁴² A number of states now require parties to mediate before they can receive a trial date.⁴³

b. mediation formats

the dispute, by means of an intermediary. The middle man served largely as a messenger. Proper behaviors prescribed that he refuse even to arbitrate the differences at the request of the disputants. “Good” dispute settling consisted in conveying the respective claims of the disputants back and forth between them until the disputants themselves arrived at a solution which was approved by both.

F.S.C. Northrop, *The Mediatonal Approval Theory of Law in American Legal Realism*, 44 Va.L.Rev. 347, 349 (1958).

⁴¹ In the American colonies, emphasis was placed on communal peace and harmony between parties. The growth of commerce and industry, however, resulted in more complex dealings and “the formation of complex trade and commercial laws which required legal interpretation.” Susan L. Donegan, *ADR in Colonial America: A Covenant for Survival*, 48 ARB J. June 1993, at 14-16. See also JEROLD S. AUERBACH, *Justice Without Law?* 8 (Oxford University Press 1983). Thus, the impetus to mediate was lost.

The implementation of mediation in labor disputes was the one exception to the trend towards litigation. In 1913, Congress created the Department of Labor and provided that the Secretary of Labor has the power to act as mediator. WILLIAM E. SIMKIN & NICHOLAS A. FIDANDIS, *Mediation and the Dynamics of Collective Bargaining* 25 (2d ed. 1986). Mediation was used to end expeditiously labor disputes, which impacted seriously on economic growth. *See* CHRISTOPHER W. MOORE, *THE MEDIATION PROCESS: PRACTICAL STRATEGIES FOR RESOLVING CONFLICT* 23 (3d ed. 2003). (noting that federal mediation procedures were initiated to “prevent costly strikes and lockouts”). In 1947, Congress created “[t]he Federal Mediation and Conciliation Service (FMCS), an independent federal agency, [which] has jurisdiction over disputes in industries engaged in interstate commerce, private nonprofit health facilities, and agencies of the federal government.” DEBORAH M. KOLB, *THE MEDIATORS* 7-8 (1983).

⁴² Few foresaw the major impact mediation would have on our court system. Literally, every conceivable case has been mediated successfully, from personal injury to major antitrust class action lawsuits. Large volume court venues are drafting top litigators as mediators and arbitrators to reduce their case backlogs. *See generally* JOHN S. MURRAY ET. AL., *PROCESSES OF DISPUTE RESOLUTION: THE ROLE OF LAWYERS* 329-37 (3d ed. 2002) (describing the development of contemporary mediation through the nineteenth century to present); John Lande, *How Will Lawyering and Mediation Practices Transform Each Other?*, 24 FLA. ST. U. L. REV. 839, 839-841 (1997) (noting the increasingly widespread use of mediation in litigation).

⁴³ Hundreds of state statutes establish mediation programs in a wide variety of contexts. *See* SARAH R. COLE, CRAIG A. MCEWEN & NANCY H. ROGERS, *MEDIATION: LAW, POLICY & PRACTICE* Adpp. B (2d ed. 2005). Many states have created state offices to encourage greater use of mediation. *See, e.g.,* . §§ 16-7-101 to -207 (1999 & Supp. 2005); HAW. REV. STAT. §§ 613-1 TO -3 (1993 & Supp. 2004); KAN. STAT. ANN. § 5-501 TO -504 (2001); MASS. GEN. LAWS ANN. CH. 7, § 51 (West 2002); NEB. REV. STAT. ANN. §§ 25-2901 TO -2942 (LexisNexis 2004); N.J. STAT. ANN. § 52:27E-73 (West 2001); OHIO REV. CODE ANN. §§ 179.01-.04 (LexisNexis 2001 & Supp. 2005); OKLA. STAT. ANN. tit. 12, §§ 1801-1813 (West 1993 & Supp. 2006); OR. REV. STAT. ANN. §§ 36.100-.270 (West 2003 & Supp. 2005); W. VA. CODE ANN. §§ 55-15-1 to -6 (LexisNexis 2000). *See generally* Suzanne J. Schmitz, *A Critique of the Illinois Circuit Rules concerning Court-Ordered Mediation*, 36 LOY. U. CHI. L.J. 783 (2005) (discussing the function of court-ordered mediation in Illinois circuit courts).

Today, there are three mediation formats that are primarily used: trial, conference, and caucus. Trial format, also known as nonbinding arbitration, is conducted by a single mediator, or, as in the state of Michigan, a panel of three.⁴⁴ Counsel for the parties argue their cases and a nonbinding award is made. If either or both of the parties are dissatisfied, they can go to trial; however, a penalty is usually imposed if they do not improve their position before the jury such as the payment of attorneys' fees and costs.

Conference mediation, which is preferred in family and employment disputes, keeps the parties together with the mediator acting as a "referee."⁴⁵ It is similar to negotiation except a third-person facilitator is present to help the parties in their negotiations. A form of conference mediation is transformative mediation.⁴⁶

⁴⁴ See, 5 DISP. RESOL. MAG 2 (Winter 1998). A panel of three lawyers listen to lawyers present their cases and then make a nonbinding award. The neutral panel is balanced so that in a personal injury case, it would consist of a plaintiff's lawyer, a defense lawyer, and a neutral, such as a lawyer practicing in commercial law. If either party or both wish to reject the panel's recommendation for settlement, they are entitled to proceed to trial. If they do so, they must improve their position by at least ten percent, or a penalty is assessed. See, Kathy L. Stuart, *Settling Cases in Detroit: An Examination of Wayne County's Mediation Program*, 8 JUST. SYS. J. 307 (1983). See, Kovach *supra* note 35, at 10; R. Hansen Lawton, *The Dynamics and Mechanics of ADR*, ST. MARY'S ALTERNATIVE DISPUTE RESOLUTION INSTITUTE at C-13 (1988).

⁴⁵ Conference mediation is regularly used in divorce cases. Leonard L. Riskin, *Teaching and Learning from the Mediations in Barry Werth's Damages*, 2004 J. DISP. RESOL. 119, 134. This is because many times attorneys are not present in order to save costs. Even though conference mediation is used, the mediator may wish to meet with each party alone to clarify a point or two.

Where domestic violence has occurred and a spouse is intimidated by the mere presence of the other spouse, caucus mediation may be the only viable format. See Gay g. Cox & Robert J. Matlock, *The Case for Collaborative Law*, 11 TEX. WESLEYAN L. REV. 45, 57 (2004); René L. Rimelspach, *Mediating Family Disputes in a World with Domestic Violence: How to Devise a Safe and Effective Court-Connected Mediation Program*, 17 OHIO ST. J. ON DISP. RESOL. 95, 107 (2001); Kerry Loomis, Comment, *Domestic Violence and Mediation: A Tragic Combination for Victims in California Family Court*, 35 CAL. W. L. REV. 355, 364-65 (1999).

In employment discrimination, mediators also tend to use the conference method. For a general discussion on employment discrimination and the current legal discourse, see Tristin K. Green, *Work Culture and Discrimination*, 93 CAL. L. REV. 623 (2005).

⁴⁶ For a more detailed discussion of transformative mediation, see Joseph P. Folger & Robert A. Baruch Bush, *Transformative Mediation and Third-Party Intervention: Ten Hallmarks of a Transformative Approach to Practice*, 13 MEDIATION Q. 263 (1996).

Conference mediation is used in divorce and employment disputes for several reasons: First, in divorce actions attorneys are many times not present because of cost considerations. It is therefore awkward for the mediator to confer alone with one of the parties, leaving the other to wonder what they are discussing.

Second, a primary goal is to help the parties reconcile their differences so that they can have a meaningful ongoing relationship, particularly when children are involved. By hearing each side, and working through the communication problems, the mediator can help them find a way to exchange ideas and express concerns and emotions without offending each other.

Third, in divorce the caucus methodology is simply of no advantage unlike other areas of litigation. To ask a party what her strengths and weaknesses are or what she believes the judge will do, best case/worst case scenario, is meaningless in this context. Only lawyers can respond to such inquiries.⁴⁷

Caucus mediation, which is used in most areas of the law, begins with the mediator and all parties and counsel conferring in a joint session. The participants first have an opportunity to introduce themselves, and then the mediator makes opening remarks, explaining the process and his function in it – he pledges absolute neutrality and explains the confidential nature of the proceeding. The mediator then invites the attorneys to make opening statements. Once this joint session is completed, the mediator separates the parties into separate caucus rooms where he meets with them in a confidential setting. In caucus, the mediator inquires of counsel what the strengths and weaknesses of the cases are and what they believe a jury will do in the best case/worst

⁴⁷ The mediator may meet separately with each side during the course of conference mediation; however, this is not to be compared with caucus mediation which is a different format.

case scenario. He also discusses the risks both sides face and assists the parties to reach a meaningful settlement. In shuttling back and forth, the mediator will take new demands and offers until the case is settled.⁴⁸

The factor which sets caucus mediation apart from all other ADR mechanisms and courtroom proceedings is that the mediator can meet alone with each side in a confidential setting. He therefore can ask questions which a judge, jury, arbitrator, or even mediator utilizing the trial or conference formats could never raise. He can ask each side not only what their strengths are, but also what their weaknesses are in their respective cases. He can also ask all counsel what they believe are their best case/worse

⁴⁸ Scholars have debated whether conference mediation is preferable over caucus mediation. Those advocating the former are primarily involved in divorce and employment law, and perhaps have not had exposure to the great expanse of law where caucus mediation is favored. See Riskin, *supra* note 30, at 133-34; Nancy A. Welsh, *Stepping Back Through the Looking Glass: Real Conversations with Real Disputants About Institutionalized Mediation and Its Value*, 19 OHIO ST. J. ON DISP. RESOL. 573, 647 (2004). Most authorities agree that caucus mediation plays an important role in the mediation process. See, e.g., Jennifer Gerarda Brown & Ian Ayres, *Economic Rationales for Mediation*, 80 VA. L. REV. 323, 325-29 (1994) (“Sequential caucusing is particularly adept at responding to informational problems because it is a uniquely meditative way to elicit and channel private information.”); Emily M. Calhoun, *Workplace Mediation: The First-Phase, Private Caucus in Individual Discrimination Disputes*, 9 HARV. NEGOT. L. REV. 187, 189 (2004) (recommending a private caucus between the mediator and the complainant in a discrimination case); Christopher W. Moore, *The Caucus: Private Meetings That Promote Settlement*, 16 MEDIATION Q. 87, 88-90 (1987); Jeffrey S. Rosen & F. Alec Orudjev, “Come Now, Let Us Reason Together”: *Mediating Investment-Related Disputes*, in SECURITIES ARBITRATION 2003: SIMPLIFYING COMPLEXITY 444 (Practicing Law Institute 2003) (indicating that National Association of Securities Dealers Mediation Rule 10406(e) allows the mediator the discretion to meet and communicate separately with each party); Michael S. Wilk & Rik H. Zafar, *Mediation of a Bankruptcy Case*, Am. Bankr. Inst. J., May 2003, 12 at 60 (addressing several benefits of caucus mediation, including the opportunity afforded to the parties by letting them meet informally and discuss options to resolve the disagreement); Nancy A. Welsh, *Making Deals in Court-Connected Mediation: What’s Justice Got to Do With It?*, 79 WASH. U. L.Q. 787, 809-13 (2001) (discussing a number of benefits of caucus mediation, including enhanced communication between the parties and preventing the disputants from worsening their relationship).

Both forms of mediation are extremely important and the mediator needs to be well acquainted with both. Conference mediation should be used in divorce and employment law disputes where an ongoing relationship is important. Caucus mediation is important in other areas of the law where confidentiality is required between the parties in order to fully develop the case.

case scenarios before a jury. With this knowledge, the mediator has an excellent insight into the case which positions him to assist the parties to reach a meaningful resolution.⁴⁹

c. role of the mediator

Mediators play different roles, depending on what they are asked to do, and the format of mediation utilized. They can act as messengers, be evaluative, or be facilitative.

(i) messenger

If the mediator acts only as a messenger, which is quite common in the Orient, he will simply take demands and offers back and forth between the parties. He will not inject himself into the process.

(ii) evaluator

If the mediator is retained to be evaluative, he will, after hearing the evidence, tell the parties what he believes a case is worth and its settlement value. This is the role played by the mediator utilizing the trial format of mediation. Not infrequently, such a person has expertise in the subject matter of the mediation. The evaluator can also be used in caucus mediation. After meeting several times in caucus with both sides, he is expected to tell the parties the value of the case. Such a person is specifically retained to make such a valuation. Attorneys are most likely to request a mediator to be evaluative when they are having difficulties with their clients and need to provide a reality check.⁵⁰

(iii) facilitator

⁴⁹ See CALKINS & LANE, *supra* note 1, Chaps. 3 and 4. See also, Richard M. Calkins, *Caucus Mediation – Putting Conciliation Back Into the Process: The Peacemaking Approach to Resolution, Peace, and Healing*, 54 DRAKE L. REV. 259 (Winter 2006).

⁵⁰ See Maureen E. Laflin, *Can Informed Consent Preserve the Integrity of Mediation?*, ADVOCATE (Idaho), Nov. 2000, at 12 (noting that “[i]n many situations, a third party neutral with an evaluative orientation will be more effective and more to the parties’ liking than a strictly facilitative neutral”).

Generally, mediators utilizing the conference and caucus formats will not be asked to be evaluative, but rather facilitative. Their function is to assist the parties and counsel to evaluate their own cases by identifying their strengths and weaknesses. He also looks at the process holistically, identifying hidden agendas and creative solutions.

If not specifically assigned the responsibility of being evaluative, the mediator should remain nonjudgmental, that is, he should not state what he believes is the value of the case.⁵¹ In this role, he will assist the parties to evaluate the case by careful questioning and raising determinative issues. The primary focus is critical questioning rather than giving an evaluative opinion.⁵²

3. Summary Jury Trial.

⁵¹ Some mediators may play an intermediary role; that is, they will remain facilitative throughout the mediation until the very end. If the process bogs down, they will then give their evaluation in order to restart the process.

⁵² Many times the parties will ask a mediator, who has not been specifically retained to be evaluative, to give his opinion as to the value of the case, especially early in the mediation. There are several reasons why he should not switch roles and be evaluative: First, whatever value he places on the case, he will be favoring one side over the other, or it will be so perceived. If plaintiff asks, and the figure given is favorable, there is little incentive for plaintiff to go below the figure, for, after all, this is what the mediator said the case was worth. And if the defendant asks, and the figure is acceptable, there is no real incentive to the defendant to go above it. Yet, if a case is to settle, generally both parties must compromise beyond what they would like to settle for.

Second, a request that the mediator place a value on the case could actually be a way to test the mediator's bias. For example, if, at plaintiff's request, the mediator gives a value which counsel feels is too low, plaintiff will conclude the mediator has poor judgment, is inexperienced, or is defense oriented. Likewise, the defendant and counsel may feel the mediator is plaintiff oriented if the figure is too high. It becomes a no-win situation for the mediator, whatever way he goes. More important, by giving his evaluation, he will, at a minimum, lose rapport with one side or the other, and perhaps both.

Third, the experienced mediator recognizes that no one knows what a jury will do. In giving an evaluation, the mediator might just be proven wrong if the case later goes to trial. The bottom line is that the mediator does not have to make such a judgment call and risk antagonizing one party or the other and undermining the rapport and trust he is trying to build.

Fourth, many times a settlement figure reflects considerations other than money. A plaintiff may wish to end the case because of the stress it is causing or because bill collectors are constantly hounding her and she wishes to pay them off. She might therefore go beyond the value the mediator puts on the case. Likewise, a defendant may pay more than the mediator's valuation because it wishes to avoid the possibility of a run-away jury verdict.

Another effective ADR mechanism is the summary jury trial developed by federal Judge Thomas D. Zambros.⁵³ It is used when the parties are quite far apart and unwilling to move further, and one or both is clearly misreading the case. It acts as a reality check. The process is nonbinding.⁵⁴

A jury is impaneled by a judge from the regular jury pool, or, if not available, from the community. The jurors are voir dired as in a regular jury trial to assure that the panel is credible. The jurors may or may not be informed that their verdict is nonbinding. Experience suggests that it is better not to inform them because they will take their role more seriously.

Once the jury is impaneled, the lawyers present their cases in summary form, usually taking one or two hours each. A party, if agreed, might be examined for twenty or thirty minutes, but not cross-examined. Once the lawyers have completed their arguments, the jury is instructed on the law and retires for its deliberations. The jury is given a set period of time to reach a verdict, which is then announced to the parties.

After the jury has completed its work, each side is permitted to meet alone with the jury to ask questions concerning the verdict and how it was reached. The jury deliberations might even be videotaped for later review. Two or more separate juries might be used to get a better cross-section of potential jurors in the venue. Mediation

⁵³ See, Thomas Zambros, *The Summary Jury Trial – An Alternate Method of Resolving Disputes*, 69 JUDICATURE 286 (1986) Judge Zambros found that a trial normally taking six to eight weeks could be condensed to one or two days and reach the same conclusion. See also, Richard A. Enslen, *ADR: Another Acronym, or a Viable Alternative to the High Cost of Litigation and Crowded Court Dockets? The Debate Commences*, 18 N.M.L. REV. 13 (1988).

⁵⁴ In addition to jury evaluation, the parties might consider a judicial evaluation or expert evaluation. In the former, a retired judge might be asked to point out to the lawyers and parties the strengths and weaknesses of their cases. This feedback can be quite helpful in evaluating the merits of a cause of action or a defense. Likewise, having an expert examine technical issues, which may be beyond the understanding of the lawyers, and provide his analysis in a neutral manner, can assist the parties in reaching a meaningful settlement.

then begins again and continues until the case settles.⁵⁵ Federal magistrates have been particularly successful using this process. One reports a ninety-eight percent settlement rate after the hearing.

⁵⁵ The summary jury trial format can also be used as a mechanism to obtain a binding result. The same procedure is followed except the jury's verdict is binding rather than advisory. The procedure would more likely be used in smaller cases where less is at stake and the parties seek immediate resolution. To protect the parties, they might set high-low parameters, that is, the verdict cannot go above a certain number or below a certain number as agreed to by the parties. See, Neil Vidmor and Jeffrey Rice, *Jury Determined Settlements and Summary Jury Trials: Observations About Alternative Dispute Resolution in an Adversary Culture*, 19 FLA. ST. U. L. REV. 89, 98 (1991).

Case Study: Plaintiff hit her head on the side window of her car when she ran into the rear of a bus crossing into her lane to make a right-hand turn. Plaintiff did not lose consciousness but did complain of migraine-like headaches that incapacitated her thereafter.

The case was mediated and plaintiff ultimately demanded \$150,000 and would move no further. The insurance carrier for the bus company offered \$65,000 and stopped. Plaintiff's attorney recommended she accept the bus company's offer but she refused. It was then proposed that they initiate a summary jury trial.

The judge scheduled to try the case was contacted and he offered to use the summary jury format. A jury was selected from the regular jury pool and a one-day hearing was scheduled. The jurors were voir dired and the trial commenced. Plaintiff's counsel first had plaintiff testify for thirty minutes concerning her injuries – there was no cross. Each attorney then made a one and one-half hour summary argument concerning the merits of their respective positions. At the close, the jury was instructed and given three hours to reach a verdict.

The jury returned a verdict of \$35,000. Upon inquiry, it was determined that the jurors did not feel plaintiff was as injured as she contended. As part of the arrangement, plaintiff had forty-eight hours after the hearing to accept or reject the bus company's last offer. She accepted, expressing disbelief that the jury was not more sympathetic. The hearing acted as a reality check.

Had the verdict been in excess of \$65,000, presumably the insurance carrier would have, but was not required, to offer more.

4. Focus Study

The focus study is also used as a reality check. An outside consultant, generally a psychologist, conducts the study. He is provided with the pleadings, a statement of each party's case, relevant depositions and documents, interrogatory answers and other information that could influence the outcome of the case. Jurors are professionally selected from the venue where the case is filed to provide a cross section of jurors likely to sit at trial. Their selection is based on age, sex, economic status, race, etc. The entire process is videotaped.

The consultant conducts the process. The jurors introduce themselves giving their backgrounds, educational and work experiences, hobbies, likes and dislikes, and any other relevant background information. The consultant then gives a summary of the case in as much detail as he thinks necessary. The jurors are invited to ask any questions they wish as the presentation is made. The consultant then discusses the issue of damages including punitive damages, if relevant. Each juror is asked what he or she thinks jurors in the venue would do, the highest and lowest verdicts expected. He then is asked for his or her verdict with an explanation as to why he reached it. Generally, the parties and counsel do not participate in the process to give it more credibility.

If requested, the consultant can reduce the video to thirty or forty minutes for use in negotiation or mediation. Such a tape can be used effectively to convince an insurance carrier, for example, that jurors in a particularly conservative rural venue are capable of reaching a verdict in excess of \$1 million. The only limitation to the process is that it is

expensive and therefore cost-justified only in significant cases.⁵⁶ A focus study is generally done separately, but it can also be done jointly with both sides participating.

5. Mock Trial

Trial attorneys for some time have used mock trials to prepare for trial. In more recent years, it has also been used as an ADR vehicle to help one side or the other, or both, evaluate their cases. Mock trials are not done jointly.

The attorney's office for the party participating in the mock trial will provide the attorney and party for the other side, usually someone from the same office. A jury is hired to hear the case and witnesses are examined and cross-examined as in a regular trial. Closing arguments are then made and the jurors are instructed. After the verdict is reached, the jurors are questioned concerning the verdict and other aspects of the case. Lawyers gain information as to whether the jurors understood their cases.

The problems with mock trials are that only one side conducts it; the other side does not participate and therefore the outcome can be skewed. Unsophisticated parties may be misled by the verdict and later be reluctant to settle for a more realistic figure. This can make later settlement efforts more difficult. A plaintiff, for example, hearing a

⁵⁶*Case Study:* In one case, the defendant, who was intoxicated, drove his car in excess of 100 mph, and ran head-on into a car driven by the decedent traveling in the opposite direction. Decedent's husband was driving a car directly behind her and witnessed the death of his wife. Asserting a wrongful death action and bystander claim, the husband sought in excess of \$1 million, an amount never before awarded in the rural county where the case was filed.

In anticipation of mediation, plaintiff's counsel had a focus study conducted, which demonstrated that jurors in the venue could award from \$500,000 to \$10 million – only one juror was below \$1 million. The attorney then reduced the session to a thirty-minute video covering mostly the verdicts each juror would award. This was used as the lawyer's opening statement at the mediation. The insurance carrier asked for the full eight hours of video and interviewed the consultant. It then paid \$1.5 million and the case settled.

mock trial verdict of \$13 million, is not likely to settle her case for \$1 million or \$2 million, although such a range may be far more realistic.⁵⁷

6. Non-Binding Arbitration

If both parties are willing to participate in a mock trial, they can do so before a single hearing officer or a panel of three rather than a jury. Witnesses are examined and cross-examined and the attorneys make closing arguments. As agreed between the parties, the attorneys present their cases in summary form. The hearing officer or panel then renders a non-binding award – the parties can reject it and still go to trial.⁵⁸

7. Moderated Settlement Conference

The Moderated Settlement Conference was developed in Texas, and utilizes three neutrals, generally experienced, trial attorneys.⁵⁹ They listen to presentations by the attorneys for both sides, consisting of factual and legal arguments. The panel then questions the attorneys as well as the parties, who are present throughout the one or two-

⁵⁷ A mock trial was successfully used to help the plaintiff better evaluate his case. Plaintiff, a farmer, visited another farm to examine cows he wanted to purchase. The defendant farmer provided him with an All Terrain Vehicle (ATV) to ride out to the pasture. On returning to plaintiff's car, the defendant, in the lead ATV, traversed a steep hill, which plaintiff on his ATV was unable to negotiate. The ATV flipped over backward and plaintiff severely injured his back. He sued his host and the manufacturer of the ATV for failure to have proper warnings.

Plaintiff settled with the defendant farmer, and the case against the ATV manufacturer went to mediation but the case was not settled. Plaintiff's final demand was \$650,000 and the final offer \$300,000. The mediator suggested plaintiff's counsel mock trial the case to get a better valuation on the case. This was done and the mock jury returned a compromised verdict of \$150,000. Plaintiff was shocked but quickly realized that farmer jurors were not going to be sympathetic towards him. He quickly settled his case for \$325,000.

⁵⁸ In the State of Michigan, parties must submit a matter to non-binding arbitration before they can get a trial date. *See*, 5 DISP. RESOL. MAG 2 (Winter 1998). A panel of three lawyers listen to lawyers present their cases and then make a non-binding award. The neutral panel is balanced so that in a personal injury case, it would consist of a plaintiff's lawyer, a defense lawyer, and a neutral, such as a lawyer practicing commercial law. If either party or both wish to reject the panel's recommendation for settlement, they are entitled to proceed to trial. If they do so, they must improve their position by at least ten percent what does this mean? should explain better, or a penalty is assessed. *See*, Kathy L. Stuart, *Settling Cases in Detroit: An Examination of Wayne County's Mediation Program*, 8 JUST. SYS. J. 307 (1983).

⁵⁹ *See Kovach, supra* note 35, at 10; *Lawton, supra* note 35, at C-13.

day hearing. After deliberation, the panel points out the strengths and weaknesses of each side's case and provides a range of possible settlement. This non-binding procedure is intended to help the parties in their settlement negotiations.

8. Early Neutral Evaluation (ENE)

A third-party neutral can be utilized as an evaluator to assist in the actual pre-trial discovery as an adjunct of the ADR process.⁶⁰ Claims which have not been filed, or which are at the initial stages of discovery are perfect candidates for the ENE evaluator. As part of the process, the ENE evaluator can conduct private sessions with the parties for the purpose of determining the issues in the case and the evidence the parties expect to present. In identifying the issues, the evaluator can question witnesses, examine documents, and search for needed evidence. During discovery or at its conclusion, the evaluator can communicate with each side privately and give his evaluation of the respective cases.⁶¹

9. The ADR "Case Controller" in protracted or complex litigation

One of the truly challenging problems facing the American economy is the skyrocketing costs of litigation, which has resulted in insurance carriers increasing their premiums and corporations diverting more and more of their gross income to litigation.

⁶⁰ Although the process can be informal as hereinafter described, it can also be more structured when adopted by a court. The first court to institute the process was the Northern District of California. See, David I. Levine, *Northern District of California – Adopts Early Neutral Evaluation to Expedite Dispute Resolution*, 72 JUDICATURE 235 (1989). Here, the ENE attorney may be selected by the court, rather than the parties. He or she helps the parties identify the issues and helps develop an official discovery process. It almost takes on the nature of a settlement conference. For a thorough discussion of the California ENE program, see Joshua D. Rosenberg and H. Jay Folberg, *Alternative Dispute Resolution: An Empirical Analysis*, 46 STAN L. REV. 1487 (1994).

⁶¹ Use of the ENE evaluator has several advantages: (1) the evaluator can question witnesses and examine documents privately without the other side present to determine the facts of the case; (2) he functions without subpoenas or formal notices and depositions; (3) the evaluator can work expeditiously at minimal cost; and (4) he can report privately to each side the strengths and weaknesses of their respective cases.

To help correct the problem, ADR experts are now being retained as “case controllers” at the commencement of litigation. Their role is to monitor discovery and streamline the process. They first evaluate the case, identify the legal and factual issues, and then design a strategy and course of discovery that is cost effective and minimizes waste. The “case controller” can also advise the parties on the appropriate ADR mechanism they might use.⁶²

Ombudsman

Since the 1960’s, corporate entities⁶³, universities⁶⁴, hospitals, nursing homes, etc. have employed ombudsmen to act as a neutral party to resolve disputes. Authorized

⁶² *Case Study:* A “case controller” was used in a case involving a waste disposal company which entered a contract with a municipal corporation. To finance the project, non-registered municipal bonds were sold, which were not guaranteed by the municipality. Ultimately, the project failed and the bondholders sued the disposal company, the city, the original underwriter, the law firm that prepared the prospectus for the bonds, officers and directors of the disposal company, and the trustee bank handling the payoff of the bonds. One of the primary allegations of fraud was that a representation was made by a city employee that the city would supervise and manage the project, which was not true.

The “case controller,” retained by the parties, determined that legal questions had to be resolved before the parties began taking depositions of the defendants and the seventy-five plaintiffs. The legal issues were (1) whether under state securities laws, plaintiffs had to show that the misrepresentation was intentionally made or whether the securities law in question provided for strict liability; (2) whether each plaintiff had individually to establish that he or she relied on the misrepresentation; and (3) whether the city, as a municipal corporation, could be held responsible for a statement made by an employee without approval of the city counsel.

As a result of the rulings of law, the city was dismissed as well as the defendant law firm, the only two deep pockets. The remaining defendants had insufficient resources to satisfy any substantial judgment. The case thereafter settled with minimal pretrial discovery being taken.

⁶³ In the corporate structure, the ombudsman is outside the normal managerial chain of command and reports directly to the president or CEO. *See* STEPHEN B. GOLDBERG, *NEGOTIATION, MEDIATION, AND OTHER PROCESSES*, Note 2, at 236-27 (2d ed. 1992).

⁶⁴ An ombudsman, serving a college or university, could handle a full spectrum of problems arising on campus, from fraternity and sorority difficulties, to student conflicts with authorities, to employment problems. The following are examples of university ombudsmen: Michigan State University, Office of the Ombudsman, Stanford University Ombudsman, available at <http://www.stanford.edu/dept/ombuds/index.html>; University of Texas at Austin, Office of the Ombudsman, available at <http://www.utexas.edu/student/registry/catalogs/geninfo/students2html>; Washington State University Office of the Ombudsman, available at <http://www.wsu.edu/~ombuds>; University of Michigan, University Ombudsman, available at <http://www.umich.edu/~ombuds/standards.html>.

Some graduate schools likewise have their own ombudsman. *See e.g.* University of Maryland, Ombud’s Office for Graduate Studies, available at <http://www.gradschool.umd.edu/ombuds/index.htm>.

to investigate, this person is selected to resolve differences arising within the corporation, university or hospital before they blossom into disputes headed for the courts. They might include employee grievances, professor tenure disputes, or student concerns. An important element of the process is that it be conducted in a confidential setting.

D. Selecting the Best ADR Mechanism

1. General considerations

In considering the various ADR mechanisms, several factors need to be considered: First, if one ADR mechanism fails, counsel must be flexible enough to consider another before giving up and going to trial. Second, more than one mechanism can be used at a time in resolving a dispute.

Because so many cases today are mediated (a primary nonbinding mechanism), the mediator should always encourage the parties to consider other ADR mechanisms if the mediation fails. For example, if a dispute is mediated between a doctor and his hospital for breach of contract and it fails, the mediator might encourage the parties to consider arbitration (a binding mechanism), rather than spend large amounts of money in pretrial discovery and trial.⁶⁵ Or, if the parties are quite far apart in their expectations

⁶⁵ *Case Study:* Plaintiff, a psychiatrist, entered an employment agreement with a medical center. He contracted to receive \$100,000 for one year, plus be paid a productivity bonus of ninety-five percent of his net profits for business he generated, plus ninety dollars per hour for treating indigent patients. He was paid a \$16,000 signing bonus allocated over the year. After nine months, the doctor terminated the contract because the hospital refused to pay him his productivity bonus (\$195,000) as well as pay for handling indigent patients (\$65,000).

The hospital defended, contending that paying plaintiff his productivity bonus would forfeit its tax-exempt status, and the only indigents it would pay for were those it assigned to him, which were none at that time.

At the mediation, the hospital said it would only pay \$30,000, for it considered the lawsuit of nuisance value. In caucus with the plaintiff, the mediator determined that the \$65,000 claim for treating indigents was fatuous because it would have required more hours than he could have provided. Plaintiff was working under a twenty-five hour per week work restriction set by the medical board because of alcohol

and neither is willing to compromise at the mediation, the mediator might encourage them to use a summary jury trial or a focus study to give them a reality check. In other words, the mediator should take the lead in encouraging parties to consider other ADR mechanisms.

Second, several mechanisms might be used in a single case. For example, the parties in a case being mediated might request that the mediator or some other person also render a nonbinding verdict to give them some guidance in the settlement process.⁶⁶

abuse. Billing \$65,000 means plaintiff violated his restrictions, and if disclosed in a trial would cost him his license.

The big dispute concerning the productivity bonus was the accounting methods used by the respective parties. An impasse occurred and the mediator suggested a hybrid form of arbitration. He suggested that the arbitrator be a certified public accountant, and rather than hold a formal hearing, he would examine the books and determine the proper accounting procedures and the amount owing.

Plaintiff agreed to this approach because litigating his fee for indigent cases would jeopardize his license. The hospital agreed because plaintiff waived his claim for indigent fees and there would be no further discovery. The attorneys agreed because they avoided a trial during the Christmas holidays when it was scheduled to begin.

⁶⁶ *Case Study:* A mother, as next of friend, sought to sue a hospital and doctor for alleged medical malpractice, which left her child retarded and unable to lead a normal life. Several plaintiff lawyers turned down the case. One lawyer did take the case on the condition his cousin, a trial lawyer, would handle the trial. The case was later settled for \$1,200,000. After fees, \$400,000 was put in a structured annuity for the child, and \$400,000 was deposited in a trust account. The mother was appointed conservator and the first lawyer was made counsel to the conservator. To use any of the trust money she had to have court approval. A court order providing this was not filed by counsel with the bank as required by law.

After a month, the mother removed the \$400,000 from the bank without court approval. She then moved to Hawaii, bought a house and several cars, and took her boyfriend to Paris. In six months the money was spent. When she failed to file an annual report with the court, she was removed and a new conservator appointed.

The new conservator then sued the two lawyers in question for malpractice in not filing the court's order with the bank. The first lawyer was judgment proof and had no insurance. The cousin, who negotiated the settlement, was solvent and insured. The conservator sought return of the \$400,000 fee as well as the loss of the \$400,000 wasted by the mother and interest. An insurance carrier defended and considered the case frivolous; however, it offered to settle for \$100,000 – defendant demanded \$800,000.

The case was mediated; however, the defendant would not offer more than \$100,000. An impasse was reached. The mediator suggested that an ex-state supreme court justice be retained to give guidance on certain key issues. His decision would be advisory only. The issues were: (1) did a partnership or joint venture exist between the two lawyers so that the failure of the one to file the court order with the bank, was attributable to the other; (2) did the trial lawyer's participation in the case end when he turned the settlement funds over to the conservator (mother); (3) were the acts of the mother in "embezzling" her daughter's funds an independent intervening cause releasing the negligence of the attorneys?

Thus, both mediation and non-binding arbitration are employed to reach resolution. Or, a mediation might be interrupted with the parties using a summary jury trial, and then using mediation again to reach a settlement.

Third, in any dispute in which ADR is contemplated, the attorneys must determine the mechanism or mechanisms that will best meet the needs of the parties collectively. This requires them to address four issues: whether it is in the best interest of the parties to (1) utilize binding or nonbinding ADR; (2) use an adversarial or nonadversarial mechanism; (3) use a formal or informal format; and (4) seek only a dollar award or also include nonmonetary considerations. The following discusses each of the above four considerations:

2. Binding or nonbinding ADR

In contemplating using some form of ADR, the parties and counsel must first determine if they should use a binding or nonbinding format. If a binding format is considered, arbitration is the mechanism of choice. If nonbinding is contemplated, mediation is the primary mechanism.

a. binding arbitration

If arbitration is being considered, the following factors should be weighed. First, whether it has great acceptance in the commercial arena, both nationally and internationally. International disputes are generally arbitrated because it provides a neutral forum which favors neither party's country of origin. In the United States, more

The ex-justice found that a joint venture did exist, that the trial attorney would most likely be released of any responsibility once the funds were turned over to the conservator, and the embezzlement was not an intervening cause releasing the defendant of responsibility. With this ruling, the parties settled the case for \$400,000. Here, a second ADR mechanism was utilized.

and more commercial contracts provide for arbitration. In fact, commercial arbitration has a long history in this country, dating back to colonial times.⁶⁷

Second, in most instances, it is far less expensive and time-consuming to arbitrate a case than to try it in a courtroom before a jury. The only exception to this is when the parties elect to use formal arbitration with a panel of three arbitrators.

Third, in most instances, the arbitrator's award is final and no appeals, by agreement, are permitted.⁶⁸ This gives finality to a matter and permits the parties to plan for the future without the shadow of appeals hanging over them. In the courts, with its appellate process, a matter can continue for years before it is resolved. The protracted nature of the trial process alone causes injury to the parties.

Fourth, in arbitration, the parties can better protect themselves from arbitrary or unconscionable results. By setting high-low limitations, the defendant can foreclose the

⁶⁷ Consider the following provision in an insurance policy:

Loss on this Policy: it shall be referred to two different Persons; one to be chosen by the Assured, the other by the Assurer or Assurers, who shall have full power to adjust the same; but in case they cannot agree, then such two Persons shall choose a third; and any two of them agreeing, shall be obligating to both parties.

This clause was found in an Insurance Company of North America policy written in 1792. Even earlier, in 1768, the New York Chamber of Commerce had initiated active arbitration, as had financial and trade centers throughout the Colonies.

⁶⁸ It is the agreement of the parties to eliminate appeals. Should they wish to permit an appeal they can do so. In *LaPine Technology Corp. v. Kyocera Corp.*, 130 F.3d 884, 887 (9th Cir. 1997) the parties contracted as follows:

The United States District Court for the Northern District of California may enter judgment upon any award, either by confirming the award or by vacating, modifying, or correcting the award. The Court shall vacate, modify, or correct any award (i) based upon any of the grounds referred to in the Federal Arbitration Act; (ii) where the arbitrators' findings of fact are not supported by substantial evidence, or (iii) when the arbitrators' conclusion of law are erroneous.

A Seventh Circuit Court of Appeals decision allowed for review but not judicial review. In *Chicago Typographical Union v. Chicago Sun Times*, 935 F.2d 1501 (7th Cir. 1991), the court ruled that the parties could contract for a private appellate arbitration panel to review the arbitrator's award, but they could not contract for judicial review by the courts. Federal jurisdiction cannot be created by contract.

arbitrator from going above a certain figure, and the plaintiff from going below a certain figure. These high-low parameters are negotiated between the parties.

Fifth, in arbitration, the parties and counsel can better control procedural matters. They can set the time for the hearing, which is more convenient for all concerned, and they can select a site which will accommodate them comfortably.

Sixth, the parties can limit and streamline discovery, which can dramatically reduce the costs of litigation. They can even agree to bifurcate the case and try only the issue of liability, leaving discovery and trial of damages until liability has been resolved – this also reduces costs.⁶⁹

⁶⁹ *Case Study*: Plaintiff was a franchised dealer who sued its manufacturer for violating the exclusive territorial provisions in its franchise agreement. It sued for breach of contract and for violation of § 1 of the Sherman Act, 15 U.S.C. § 1. The antitrust issue was tried and the jury awarded plaintiff \$600,000 in damages, which when trebled, as required under the Sherman Act, amounted to \$1,800,000 plus costs and attorneys fees. This was reversed on appeal and the case remanded for trial of the breach of contract claims.

On remand, the case was in its tenth year with the parties conducting pretrial discovery on the damages issue, which was to take one more year and some \$150,000 in fees and expenses. Mentally and financially exhausted, the distributor's owners, a father and son, requested mediation. The manufacturer agreed if the dealer paid the costs. The mediation failed; however, the mediator proposed that the parties use arbitration. He gave a number of reasons why each should consider it. To the defendant he pointed out:

- (1) arbitration would get the case out of the courtroom of a very unfavorable judge, who consistently ruled against the manufacturer;
- (2) the manufacturer would have a say as to who the arbitrator would be;
- (3) not having a jury was more favorable to the defendant because it was a large corporation;
- (4) the case would be bifurcated and initially only liability tried; this would stop discovery on damages. If liability was found, then the issue of damages would be addressed; and
- (5) the arbitrator's ruling would be final with no appeal, thus ending the matter once and for all.

To the plaintiff, the mediator pointed out:

- (1) the case had been extremely costly using up all the distributor's profits and the owner's savings with no end in sight. Discovery on damages would cost another \$150,000 which they could not afford without going heavily in debt;
- (2) the lawsuit had disrupted the owners lives both emotionally and time-wise. They simply could not afford to spend more time on the case away from their business;

Seventh, the parties can reduce the number of witnesses who will testify live, and rely more on deposition testimony. They can also submit much of their cases in summary form, which also shortens trial time and save costs.

Eighth, one reason given for utilizing the courtroom is to resolve matters in front of a jury. Plaintiffs, particularly, feel they have an advantage. However, in many cases a jury is of little advantage to either party. In commercial, construction, contract and business related matters, for example, it is difficult to keep the attention of jurors. In some instances, a party is actually disadvantaged appearing before a jury. For example, large corporations, corporate officers, lawyers, doctors (as plaintiffs), insurance companies, insurance adjusters and agents, banks, bank officers, police officers (as plaintiffs), farmers, bill collectors, Internal Revenue agents, to name a few, have no advantage before a jury.⁷⁰

Ninth, in selecting an arbitrator, both parties must approve; therefore, they have an opportunity to select somebody both parties have confidence in who is truly neutral.

(3) the case could be bifurcated and only the issue of liability tried – if liability was established, the likelihood of settlement was vastly increased without completing discovery on damages; and

(4) an arbitrator's award would end the matter because there would be no appeal – the owners could go on with their lives. Ten years was long enough.

Both parties agreed to arbitration. However, the week before it was to convene, the mediator was able to settle the case for \$150,000, half the out-of-pocket expenses incurred by the dealer and its owners. However, they reluctantly agreed to the settlement to conclude the matter.

⁷⁰ Large corporations when suing or being sued by an average citizen or small company fair poorly because of their size and perceived financial advantage. Corporate officers, because of the large income they enjoy, fair poorly, especially when seeking damages. Lawyers, whether suing or being sued, are not favored because most everyone has had an unfortunate experience with a lawyer or knows someone who has. Doctors fair very well when they are sued for medical malpractice; however, when they sue for money, they are disadvantaged as soon as they jury learns what their incomes are. Insurance companies and adjusters and agents have difficulty because most people or family members have had a bad experience with an insurance carrier. Banks and bank officers are target defendants especially in rural areas where farmers have had to do battle with their bankers, or faced foreclosure. Jurors will protect a police officer when he is sued, but if he sues he does not fair that well – everyone has received a speeding ticket and it is not forgotten. Farmers are conservative and will not help a fellow farmer suing another. Bill collectors and Internal Revenue agents are not favored for obvious reasons.

Also, they can select a person with expertise in the area being litigated. This can be important especially if the matter involved is technical, such as a patent or copyright.

Tenth, arbitration permits the parties to resolve a matter without the publicity of a courtroom trial. Confidentiality can be important for several reasons. The subject matter may be such that disclosure would only invite more litigation from bystanders interested in the proceedings. Also, the subject matter might involve classified or confidential information that should not be made public. Finally, the subject matter might be sensitive or embarrassing to the participants and would hold them up to ridicule or censor.

Eleventh, generally an arbitrator selected by the parties will try to reach a result which offends neither, if at all possible. He or she tries to avoid being labeled a plaintiff's or defendant's arbitrator, well-knowing that such labels will be picked up by the bar and the arbitrator boycotted by one side or the other in the future. Also, a good arbitrator will be sensitive to settlement possibilities and will encourage ongoing negotiations.

b. nonbinding mediation

There are many decided advantages to using mediation to resolve disputes. Whatever format is used – trial, conference, caucus – the introduction of a neutral third-person into the process to guide and persuade the parties to accept resolution, is a decided improvement over the adversarial process whether in the courtroom or in arbitration. Mediation literally is the opposite of the courtroom trial. In the latter, the goal is to defeat the opponent – it is a battle that can leave the parties and counsel mentally bruised and even scarred. In mediation the parties are encouraged to work together to a resolution both can accept – a win/win situation. The goal is not just a conclusion to the

matter in dispute, but conciliation between the parties, and a finding of peace and even healing.

The form of mediation which best meets the needs of the parties and counsel is, in the opinion of the authors, caucus mediation.⁷¹ There are many reasons why caucus mediation, using peacemaker techniques, is so successful.

First, a primary goal of the mediator/peacemaker is to calm the storm that exists between the parties and many time their attorneys.⁷² Much of what he or she says and does is designed to soften the intransigence of the parties, encouraging them to think in

⁷¹ CALKINS & LANE, *supra* note 1, at 4-3 to 4-58.

⁷² *Case Study*: Plaintiff sued the defendant for alienation of affection for taking his wife away. His wife divorced him and had an affair with the defendant. Plaintiff was devastated and brought suit for the sole purpose of punishing his rival. He didn't care how the case came out or how it affected him.

Mediation was scheduled, but the plaintiff refused to participate. It was rescheduled and he appeared and demanded \$300,000, knowing that this would end the mediation before it began.

The mediator recognized immediately that plaintiff's action would fail for several reasons: first, his ex-wife would testify for the defendant and state that she initiated the affair and not the defendant because she wanted to get away from the plaintiff, who physically abused her. Second, plaintiff admitted in his deposition that his wife was as much at fault as the defendant. The law required that the defendant be more at fault than the spouse; this requirement was fatal to plaintiff's claim. Third, there would be little sympathy towards the plaintiff because he had been quite aggressive with his wife, even insisting she have an abortion when she got pregnant before they married (she was Catholic and this constantly weighed on her conscience during their married life).

The mediator did not even discuss these matters with the plaintiff, but compassionately tried to work with him to mollify his desperation. They talked about his family and what the lawsuit, if tried, would do to his sixteen-year old daughter because of the publicity. They talked about other matters, including the fact that a trial would bring great embarrassment to some of their friends because he intended to disclose that his wife and some of her friends went to Phoenix, Arizona for a weekend and had affairs with men they met there.

Once the mediator calmed plaintiff down, they talked about what they could do to end the tragedy. Plaintiff insisted that defendant pay a token amount (\$10,000 was paid) to acknowledge the wrong, and he wanted to talk to the defendant without the lawyers present. This also was arranged. The two men met and in tears, plaintiff explained how the matter had impacted on his family, including his three daughters. He knew, however, that he had to go forward. He requested one thing of the defendant and this is if he was not going to marry his ex-wife, to please tell her now because any delay could have serious consequences on her personal well-being. The defendant agreed. And then a very strange thing happened. The two men, past enemies, gave each other bear hugs – a sign that peace was found between them.

terms of “our” resolution and not “my” resolution – working together. From the opening session and the first few caucuses, the mediator will be addressing these basic goals.

Second, the mediator/peacemaker, in order to calm the emotions of the parties and counsel, must be able to control his own inner feelings. He is trained to be patient and not show frustration or anger.⁷³ He understands the importance of being positive and

⁷³ One of the most important qualities of the successful peacemaker is to control frustration and not allow the parties or attorneys to intimidate him. Some lawyers use intimidation as a negotiation tool, feeling that if they can intimidate the mediator he will work harder for them than the opposing side. They will use such tactics as threatening termination of the mediation, or accusing the mediator of favoring the other side, or pushing them harder than the other side. They will even go so far as to suggest the mediator is incompetent.

If the mediator loses his poise and reacts or defends his actions, the settlement is probably forfeited. The best technique for the mediator is not to defend but agree with the party’s or attorney’s concern. If they can see that they are not getting a reaction, they will most often cease that tact.

Case Study: A mediator was flown in to an eastern city to handle a mediation. He was retained because of his expertise in pedophile cases. The case involved three elementary school boys who were sexually abused by their basketball coach. Being a private school, the parents of the boys sued the coach and the school.

The mediator quickly learned that plaintiffs’ counsel was one of the top plaintiff lawyers in the east and he demanded \$3.5 million to settle the case. The sexual abuse involved rubbing the boys’ groin areas with their clothes on. This occurred several times. Significantly, the boys, now in high school, were doing quite well and were embarrassed about the matter and did not want their friends to find out what happened. Based on standards in other areas, the cases were not worth more than \$75,000 per boy. The insurance carrier defending the case offered \$250,000.

After an hour of mediation, plaintiffs came down one million dollars to \$2.5 million and defendant went up \$100,000 to \$350,000. Plaintiffs’ counsel asked to speak to the mediator outside the presence of his clients. Although he had previously been quite friendly and charming, he suddenly turned on the mediator and accused him of incompetence and favoring the defense. He remarked that the mediator in one hour had only gotten the defense to move up \$100,000 and the plaintiffs had gone down \$1 million. He ended the conversation stating, “If you don’t get a major move from the defense in one-half hour, you are history – you can take your plane back to wherever you came from.”

The mediator felt quite intimidated but kept his composure. He did not defend himself but said he understood how counsel felt and if he had been in his shoes would have felt and probably said the same.

The mediator left the room to be alone and try to work out a different strategy. He finally went back to counsel and said that if he could get the defense to \$750,000, would the plaintiffs consider such a figure. Counsel hesitated before answering, and in that hesitation the mediator knew it was a viable figure. Counsel said they would consider it.

On the defense side, the mediator proposed the same number and the adjuster rejected it saying that the defense could not go much above \$500,000. After going back and forth several times, the case settled at \$625,000. Had the mediator reacted to the intimidation, he would have given up and the case would not have been settled.

persistent as well as being professional.⁷⁴ For many lawyers who put on the mantle of peacemaker, it takes a very different mindset as compared to when they litigate. Often mediators describe themselves as recovering litigators.⁷⁵

Third, the peacemaker has tools with which to work that are designed to heal the wounds and bring resolution. Unlike the trial lawyer, each tool the mediator uses is designed to build rapport and trust with the parties and counsel. Where the litigator relies on highly confrontational tools designed to impeach, discredit, and undermine a party opponent, the peacemaker's tools are designed to be supportive, calm the storm, and bring the parties together as winners. The common denominator of the peacemaker's tools is that they are nonconfrontational and avoid putting a party on the defensive.⁷⁶ The peacemaker does not play devil's advocate.⁷⁷

⁷⁴ In being professional, the mediator gives a pledge of absolute neutrality, what he does for one side he will do for the other. In being neutral, the mediator is even concerned about the appearance of neutrality. Thus, he will travel alone when it would be more convenient to travel with one of the attorneys or parties. He will always insist on paying for his own meals or he will eat alone unless he is using a lunch or dinner as a caucus with the consent of the other party. He will even wait until all parties are present before walking into the conference room where the opening session is to take place.

Being professional also requires the mediator to be nonjudgmental. He does not judge the case and then try to push the parties to a settlement he considers appropriate. He will let the parties decide the range of settlement – his function is to close the gap. Likewise, he does not judge the parties, who is worthy and who is unworthy. In his eyes all are worthy and he is concerned and compassionate with all.

See CALKINS & LANE, *supra* note 1, Chapter 2.

⁷⁵ Abraham Lincoln said, "It is as peacemakers that the lawyer has his greatest opportunity." Indeed, peacemaking is the highest calling in the legal profession because the peacemaker is the only person not in an adversarial position with his colleagues. By the nature of the system, advocates, even if friends, must oppose each other and do battle. And judges constantly confront the attorneys and make decisions which disappoint at least one of the parties. Everyone seeks to win because that is the name of the game. The peacemaker, on the other hand, is trained to avoid confrontation and be supportive of all concerned. His goal is to make all winners and establish peace, conciliation and healing.

⁷⁶ There are a number of reasons why the mediator avoids confrontation with a party or counsel. First, the mediator who utilizes confrontational techniques, albeit well intentioned, merely polarizes the positions of the parties. Being confronted, the party or counsel will defend and often harden their position. Second, the longer a party defends her position, the greater becomes her vested interest in it. Compromise would appear to be a surrender or backing down. Third, the more the mediator challenges or confronts, the more it will appear he favors the other side.

⁷⁷ For an in depth discussion of the peacemaker's tools, *see* CALKINS &, *supra* note 1, Chapter 4.

Fourth, the successful mediator must almost be a psychologist. He has to be able to read body language and identify whether a verbal “no,” for example, is really a silent “maybe,” or a disguised “yes.” Mediation is an intensive insight-oriented process, which can only be developed through training and experience.

Fifth, through the private caucuses with each side, the mediator can gain an insight into the case never before realized in the American judicial system. In other words, the mediator can ask in strict confidence questions which a judge, jury, or arbitrator could never ask. The mediator can ask each side what their weaknesses or concerns are in litigating the case.⁷⁸ He can also ask what counsel believes a jury would do, best case/worst case scenario. With this information from each side, the mediator has an insight into the real merits of the case shorn of advocacy and rhetoric. He is thereby positioned to give real guidance to a resolution of the matter.

Sixth, parties come into a mediation with the hope and expectation that the matter will be resolved. As the mediation progresses, the parties have a greater and greater investment in the process both in terms of time and money. So many mediations take on a life of their own and create a momentum that the parties get caught up in. Because of this momentum, parties often compromise more than they ever intended. Mediators often sense this momentum long before the parties and recognize a case will ultimately settle.

Seventh, because mediation requires all parties to a lawsuit, or potential lawsuit, be present, resolution can often be reached in a day rather than weeks or months as in

⁷⁸ Parties and counsel are relatively forthright in answering this delicate question because the mediator has pledged absolute confidentiality. They recognize that he will not disclose this information to the other side. If there is hesitation in disclosing such information because the attorney has not worked with the mediator before, the information will be developed, in any event, as the mediation progresses and rapport and trust is established.

negotiations. Also, by having all participants present, the mediator is able to work with them directly and establish the rapport and trust required for compromise. Additionally, with the parties in separate rooms, the mediator can convey messages directly and take new demands and offers back and forth. If a question is raised or a point made, the mediator can immediately go to the other side and get a response. There are no delays.⁷⁹

Eighth, confidentiality is another important benefit of caucus mediation.⁸⁰ By law and contract, mediation is a settlement conference, which forecloses later disclosure.⁸¹

⁷⁹ With multiple parties, there can be no other way to negotiate other than having everyone present and participating. Any other arrangement is clumsy and difficult to control.

Case Study: Ten defendants were named in a propane gas explosion in which the plaintiff, a plumber, suffered third degree burns over fifty percent of his body. Plaintiff had been called to the house of a ninety-five year old woman to fix a defective faucet. She also asked him to light a pilot light in the basement, but neglected to inform him that her propane gas tank had just been filled. Suit was brought against the propane gas supplier, the supplier of the ethyl mercaptan (the odorizer added to the gas), wholesalers and retailers. Each defendant blamed the other.

As a group, the defendants offered a global settlement of \$500,000, which was rejected outright. The problem was the defendant offering the least amount set the norm for the others.

With everyone present, the mediator was able to confer with each separately in private caucus. He asked each defendant to allocate percentage of fault among the defendants. He took the totals, dropped the percentage allocated by a defendant for itself, and reported to all defendants what percentage the group allocated. He then conferred with the plaintiff to establish a settlement figure it would accept. Applying the pre-established percentages, he set a dollar amount each defendant was requested to pay. The case then settled. Without everyone being present, this matter could not have been resolved in the efficient way it was.

⁸⁰ See Ellen E. Deason, *Enforcing Mediated Settlement Agreements: Contract Law Collides With Confidentiality*, 35 U.C. DAVIS L. REV. 33, 35 (2001) (stating that “[o]ne of the fundamental axioms of mediation is the importance of confidentiality”).

⁸¹ In *Schumacker v. Zoll*, the Court of Appeals of Ohio enforced a confidentiality provision and ordered all references to a mediation communication to be struck from the record after the defendant breached the provision by disclosing to the trial judge certain matters discussed in the mediation *Schumacker v. Zoll* No. L-00-1199, 2001 WL 1198641, at *2-3 (Ohio Ct. App. Oct. 5, 2001). There are, however, a number of cases wherein confidentiality has been eroded. For example, in *Olam v. Congress Mortgage Co.*, the court compelled a mediator to testify when a party challenged a mediated agreement claiming duress. *Olam v. Congress Mortgage Co.*, 68 F. Supp. 2d 1110, 1129-39 (N.D. Cal. 1999). The testimony of the mediator was taken in camera and only after the parties (but not the mediator) waived the protection of confidentiality. *Id.* The court ultimately found no duress. *Id.* at 1151. *Olam* suggests that the mediator does not enjoy an absolute privilege of confidentiality, but the privilege is subject to an independent determination by the court regarding whether the “testimony of the mediator should be accepted.” *Id.* Such an interpretation could seriously undermine the very foundation of mediation and hopefully will be revisited. In another case, the mediator found that the defendant acted in bad faith in attending a mediation hearing and recommended sanctions against it. See *Foxgate Homeowners’ Ass’n v. Bramalea, Cal., Inc.*, 25 P.3d 1117, 1121 (Cal. 2001). In his report to the judge, the mediator detailed what occurred at the

Also, by terms of the mediation agreement, the mediator, his notes, records and work product cannot be subpoenaed for later trial or hearing. Also, mediation sessions are closed to all outsiders so that confidentiality is maintained at all times.

There is, however, a more important aspect of confidentiality that caucus mediation provides. In private caucus, the mediator can discuss all aspects of a party's case – strengths, weaknesses, best case/worst case, etc. Just as important, the parties and counsel can use the mediator as a sounding board to work out a strategy to resolve the dispute. Through the mediator they can also float figures or propose creative ways to resolve the matter.

Ninth, because mediation is flexible, the parties have great latitude as to how it is conducted.⁸² Witnesses can give live testimony or be put on a speaker phone, or the mediation can be continued to allow the mediator to interview witnesses. There are no rules of evidence, established protocol, or precedent to follow.

mediation, thereby breaching the confidentiality provision. *Id.* The trial court entered sanctions against the party, but they were later set aside. *Id.* at 1119. For further discussion of mediation confidentiality, see Anne M. Burr, *Confidentiality in Mediation Communications: A Privilege Worth Protecting*, 57-APR DISP. RESOL. J. 66 (2002); Ellen E. Deason, *The Quest for Uniformity in Mediation Confidentiality: Foolish Consistency or Crucial Predictability?*, 85 MARQ. L. REV. 79, 80-84 (2001); Ann C. Hodges, *Mediation and the Transformation of American Labor Unions*, 69 MO. L. REV. 365, 436-37 (2004); James K. L. Lawrence, *Mediation Advocacy: Partnering With the Mediator*, 15 OHIO ST. J. ON DISP. RESOL. 425, 440 (2000); Klaus Reichert, *Confidentiality in International Mediation*, 59-JAN DISP. RESOL. J., at 60; Dennis Sharp, *The Many Faces of Mediation Confidentiality*, 53-NOV DISP. RESOL. J., at 56; Diane K. Vescovo, Allen S. Blair & Hayden D. Lait, *Essay—Ethical Dilemmas in Mediation*, 31 U. MEM. L. REV. 59, 80-97 (2000); Wilk & Zafar, *supra* note 13, at 12.

⁸² *Case Study*: Flexibility was demonstrated in a medical malpractice case where the plaintiff was operated on by a doctor who punctured his colon. This left him incontinent and unable to control his gas, which proved to be quite embarrassing.

At the mediation, plaintiff demanded \$300,000 and eventually went to \$250,000. The insurance carrier raised its offer to \$200,000. Plaintiff's lawyer recommended plaintiff accept the offer, but he would not. About to terminate the mediation, the mediator asked him why he was not following his attorney's advice. He stated, because his doctor had said the case was worth \$250,000 to \$300,000. The mediator recommended they call the doctor, who was contacted. The mediator explained the reason for the call and the doctor asked to speak alone with the plaintiff. Five minutes later, the plaintiff accepted the \$200,000. Plaintiff would not listen to his lawyer, but he did listen to this doctor.

If the mediator feels an insurance supervisor, who did not attend the mediation and who is making the decisions, is not properly evaluating the case, then the mediator can ask for a recess and meet with that person. The mediator could then make a presentation, perhaps, showing a thirty-minute video of certain critical depositions.⁸³

Tenth, caucus mediation provides an excellent forum for a party to vent and express their anger and frustration. The mediator will listen with compassion and understanding and, in essence, give the party her day in court. This can be quite therapeutic. Once the parties have released their emotions, there can be a decided change in their demeanor and their willingness to move forward to settlement.⁸⁴

⁸³ *Case Study:* Plaintiff sued two trucking companies on behalf of her two children killed in a highway accident, and herself as a bystander to the accident. Plaintiff, driving a van in a blizzard, slid on ice on an interstate striking a semi truck which had jackknifed on the interstate. Only a fender-bender, she removed one of the three children from the van to the truck and was returning to get the other two, when a second semi truck, going 40 mph in the blizzard slammed into the rear of her vehicle and instantly killed the two children.

Suit was brought and mediation ensued. The first trucker, which had jackknifed on the highway, settled for \$450,000. The second trucker that killed the children offered \$300,000, and the adjuster attending had no more authority. The mediator continued the mediation, and with permission arranged to visit the home office of the insurance carrier to make a personal presentation to a vice president.

He had a thirty minute video of two depositions. The first was that of a third trucker who learned of the accident and tried to slow traffic down by flashing his amber lights and straddling the middle of the interstate. He testified that the trucker who killed the children passed him on the shoulder going 45 mph, and as he did gave the witness the “finger.” The target trucker’s deposition was also included. In it he was asked what the “finger” meant and he answered. He was then asked if he ever used it, and he answered he had. He was not asked the next logical question because that was presumed. Seeing the videos, and recognizing the impact these witnesses would have, the vice president raised its offer to \$3,000,000 and the case resolved.

⁸⁴ *Case Study:* In many of the sexual abuse cases throughout the country, involving pastors who abuse children, the victims, often in their 40s and 50s at the time of mediation, are given an opportunity to speak to church officials without interruption or questioning. They are permitted to say whatever they wish, the way they want to say it, and as long as they want to speak. The only response from the church officials are expressions of concern and compassion. All legal inquiries are put over to a later caucus outside the presence of the victims.

Some victims cry, some swear, all become angry and describe the difficult lives they have lived because of the abuse. One victim, dressed in a coat and tie, who was a high executive of a major corporation, asked if the church officials wanted to know how angry he was. He then took out a plastic tube eighteen inches long and attached a shorter tube at one end. He then took tape off the other end and it was a dagger. He pointed it at the bishop, not as a threat, but to make a point. He was convinced not to fly back home with this in his baggage because carrying such a weapon was a felony.

Eleventh, mediators play an important role in helping the parties evaluate their cases and encourage compromise when required. Generally, the mediator will not be evaluative, but he can help develop the strengths and weaknesses on both sides so that the parties can be more realistic in their expectations. This can be a very important function, for if liability is lacking, the mediator can help the parties recognize this possibility. Likewise, on the defense side, the mediator can help a defendant better evaluate a case, and when more should be offered, can support the request for additional authority.⁸⁵

Twelfth, one of the true benefits of mediation is its ability to craft creative settlements. As noted previously, because any resolution is contractual, the parties can agree to any terms they wish, which a judge, jury, or arbitrator could not consider. Thus, the parties can contract to have the defendant provide a written apology or letter of commendation, or a structured annuity, or spread payments out over several months or years. The parties might even agree to be bound by a polygraph test.⁸⁶ The possibilities are limited only by the creativity of the parties.

Almost to a person, when the process is completed, the victims feel better. One stated he slept the night through for the first time in years. All feel the session is therapeutic.

⁸⁵ One mechanism a mediator can use to support a party or counsel is the mediator's findings and conclusions. For example, if the adjuster and counsel feel that more money should be paid, and the adjuster has no more authority, the mediator might prepare findings and conclusions to support the request. Likewise, if a subrogated lien holder is making a request for reimbursement which exceeds that which is recoverable in an action, the mediator can prepare findings and conclusions which establish no causal relationship between certain of the claims and the accident.

⁸⁶ *Case Study:* Nine teenagers were held in a halfway house for difficult children. Their counselor was a pedophile. He tried to approach each of the boys; however, eight rejected him. One claimed that he entered a sexual relationship with him and was sodomized on repeated occasions.

The matter was mediated. The insurance carrier offered each boy \$25,000. It did not believe the story of the ninth. The eight accepted and the ninth demanded \$750,000. An impasse was reached and it was finally decided to resolve the matter by giving the boy a lie detector test. The parties set up four categories. If plaintiff established he was sodomized, he was to receive \$550,000; if there was masturbation only, \$300,000; if there was a rubbing with clothes on, \$100,000; and if he was not molested except for inappropriate touching, \$50,000. On the day before the polygraph test was to be taken, the plaintiff stated he did not want to take it and accepted a settlement of \$75,000. Because of his refusal to take the test, the

Thirteenth, many times mediators are asked to come into a case because the lawyers are having difficulties with their clients. Clients get exaggerated expectations of what they should recover, and the attorneys hope the mediator can give them a reality check. In private caucus, the mediator can ask what the weaknesses in the case are or what the client's worst case is before a jury. Up to this time the client may have refused to listen to the negative aspects of the case, but because the mediator is now asking the questions, he or she is forced to listen and reevaluate the case.

The mediator can also help the attorney in another way. By noting the fine work the attorney is doing, if this is the case, the mediator can reinforce the attorney's position with the client. Many times clients do not appreciate how skilled and creative their attorneys are, and when this is pointed out, they may have a new appreciation for the way they are being represented. Realizing this, clients are more willing to listen to their attorneys when asked to make that final compromise to settlement.

3. Adversarial or Nonadversarial ADR

The next decision to be made is whether the process should be adversarial or nonadversarial. Of course, if the parties elect binding ADR, i.e. arbitration, they have already made that decision; it will be adversarial. In making that election, the parties must recognize that the adversarial process will be more stressful and difficult to endure and they will have little control over the process.

attorneys, including his own counsel, concluded that he had exaggerated the abuse incurred to enhance his recovery.

When using the polygraph test, it is rare that it is ever given. If a party is fabricating, they will not take the test. They will use excuses such as lie detector tests are inadmissible or unreliable, or they get nervous or are sick. Of course, the test is not used as evidence and is suggested only for purposes of the mediation.

Nonbinding mechanisms can be either adversarial or nonadversarial. For example, a nonbinding summary jury trial is adversarial in that the parties present their cases to a jury by arguing the merits. Likewise, a mock trial or focus study utilizes an adversarial format – a mock jury must choose one side over the other.

The two most prevalent forms of nonbinding ADR are negotiation and mediation. Both have elements that are adversarial and nonadversarial. These must be identified in selecting the format best suited to the parties and situation.

a. Negotiation

There are two basic categories of negotiation, adversarial and nonadversarial. Lawyers who are untrained in the process generally resort to adversarial or positional negotiation. Their goal is to win by overwhelming their opponent. Their tactics are to make a high opening demand, offer few concessions and convince the opponent that if he does not capitulate, they are ready to go to court where the outcome could have serious consequences for the opponent. They take a gamesmanship attitude, which creates high levels of tension and pressure on opponents.⁸⁷ Lawyers using these adversarial tactics often use threats, are willing to stretch the facts, sometimes create false issues for the purpose of misleading and make the other side believe its weaknesses are greater than they are. Their style is to make themselves appear inflexible and intransigent and create enough pressure and tension to defeat emotionally the opponent.⁸⁸

⁸⁷ See LARRY L. TEPLY, *LEGAL NEGOTIATION: IN A NUTSHELL* 62 (West Publishing 1992). See also DONALD G. GIFFORD, *LEGAL NEGOTIATION: THEORY AND APPLICATION* 84-85 (West Publishing 1989).

⁸⁸ ROGER FISHER, WILLIAM URY & BRUCE PATTON *GETTING TO YES: NEGOTIATING WITHOUT GIVING IN* 4-7 (2d ed. Penguin Books 1991) (1981). The authors state:

In positional [adversarial] bargaining you try to improve the chance that any settlement reached is favorable to you by starting with an extreme position, by stubbornly holding to it, by deceiving the other party as to your views, and making small concessions only as necessary to keep the negotiations going.

A major difficulty with this approach is that if their bluff is called they either must back down and lose credibility, or go to court in a trial they may or may not win. Of serious concern is that their tactics so antagonize their opponent that any civility is lost and the worst of litigation faces all concerned. Another major difficulty is that non-economic settlement opportunities are often lost because of the animosity generated. Additionally, opportunities of conciliation are lost because the parties feel they have been abused and treated unfairly.

Nonadversarial negotiation is quite another matter. Rather than fight to win, the goal is to consider each side's needs, desires, concerns and fears. To uncover these, the parties must work together; they must be on the same side. If both sides can meet these requirements, resolution follows. For example, the Egyptian-Israeli peace treaty of 1978 was reached at Camp David because the countries looked beyond the positions each had taken, which appeared to be incompatible. After the Six-Day War, Israel insisted on keeping some of the Sinai for security purposes. Egypt demanded that the Sinai be returned to Egyptian sovereignty and nothing less was acceptable. These were the positions each took.

Going beyond the positions each had taken and looking at their interests, needs, concerns and fears, a very different picture emerged. Israel wanted security; it did not want Egyptian tanks at its borders. Egypt's interests lay in sovereignty; the Sinai had been Egyptian since the days of the Pharaohs. Through the good offices of President Jimmy Carter, President Sadat of Egypt and Prime Minister Begin of Israel reached a resolution which satisfied both countries' needs: Israel returned Sinai to Egypt, and a

Id. at 6.

large area around Israel was demilitarized so that Egyptian tanks were no longer on the border. This is the essence of nonadversarial negotiation.⁸⁹

b. Mediation

Like negotiation, the parties in mediation can select either an adversarial or nonadversarial format. If, for example, the trial format is utilized, it is adversarial, for each side will be presenting their cases to a neutral, which will make a decision, albeit, nonbinding. The goal is to win out over the opponent and then convince him or her to accept the decision of the mediator.

In conference and transformative mediation the process is clearly nonadversarial. The mediator tries to bring the parties together thereby establishing peace and conciliation, as well as resolution. This is an important part of the process, for generally, as in divorce, the parties will have an ongoing relationship – when their children get married or there are family gatherings. Likewise, in employment matters the complaining employee may not be terminated and will have ongoing employment with the company against which the changes were brought. Establishing lines of satisfactory communications is extremely important. Only a nonadversarial approach can accomplish this.

Caucus mediation, on the other hand, can be adversarial or nonadversarial depending on what is required. If the parties are not listening to counsel, it might be desirable to use an ex-judge, who will tell them for what they should settle and the consequences if they don't. In this instance the mediator is retained to be evaluative and

⁸⁹ See FISHER ET AL., *supra* note 87 for an excellent discussion of nonadversarial negotiation as the term is used in this article. See also Robert H. Mnookin, *Why Negotiators Fail: An Exploration of Barriers to Resolution of Conflict*, 8 OHIO ST. J. ON DISP. RESOL. 235 (1993).

plays devil's advocate. In this adversarial setting mediators have been known to mislead the parties or make false statements; anything is fair so long as settlement is reached. As one scholar noted, it is perfectly proper for him to use "deception and illusion" to reach settlement. He suggests that consensual deception is the essence of caucus mediation.⁹⁰ This approach is highly confrontational. The disadvantages of adversarial mediation are several. First, although settlement may be reached, albeit at a lower success rate, it leaves the parties unrequited with a feeling they were abused rather than fulfilled. Indeed, this approach simply mirrors what a party must face in the courtroom. A comment often made is that the party will never mediate again because of the abuse he or she received from the mediator.

Second, in adversarial mediation there is no chance to bring the parties together and establish a basis for conciliation, peace and healing. They only remain adversaries fighting the battle of adversaries.

And, third, rarely can the mediator achieve anything but a settlement figure. There is little opportunity to consider nonmonetary possibilities or creative settlements. To reach such requires the parties to work together and consider possibilities that make

⁹⁰ See John W. Cooley, *Mediation Magic: Its Use and Abuse*, 29 LOY. U. CHI. L.J. 5 (1997). The author suggests that consensual deception is the essence of mediation. See also ALESTER CROWLEY, *MAGIC IN THEORY AND PRACTICE* (Dover Publications 1976):

Mediators, like trickster figures, are in some measure illusionists... Their use of deception and strategic intervention is calculated not for self-gain at the expense of conflicting parties but rather for the parties' benefit. As a result, ideally, the parties learn, but at the very least they survive the conflict. All human beings and especially mediators, deceive, manipulate, and even sometimes lie. That is a given.

See also Steven Hartnell, *Understanding and Dealing With Deception in Legal Negotiation*, 6 OHIO ST. J. ON DIS. RESOL. 171, 185, 194 (1991); Gerald B. Westlaufer, *The Ethics of Lying In Negotiation*, 75 IOWA L.REV. 1219, 1272 (1990) (lying is prevalent and pervasive in advocacy); James J. White, *Macheavelli and the Bar: Ethical Limitations on Lying in Negotiation*, 1980 AM. B. FOUND. RES. J. 926, 926-27 (1980); Robert D. Benjamin, *The Constructive Uses of Deception, Skill, Strategies, and Techniques of the Folkloric Figure and Their Applications By Mediators*, 13 MEDIATION Q. 3, 17 (1955).

both winners. Together they must think outside the box. This cannot be done in the adversarial setting.

Nonadversarial mediation or peacemaking, on the other hand, utilizing the caucus format, is a decidedly different process. It is based on the principle that if the mediator is supportive of both parties and confronts neither, he is positioned to still the storm of anger and frustration. Through compassion and understanding, the mediator can guide the parties to a meaningful settlement, which establishes a foundation for peace and even healing. It creates the very best atmosphere for creative thinking and resolution. It reincorporates the lost element of conciliation back into the process.

c. Formal or Informal ADR

Regardless of whether the ADR selected is binding or nonbinding, a decision must be made whether the process should be formal or informal. For example, if arbitration is selected, there are many forms that can be utilized depending on the needs of the parties. If a complex matter needs to be resolved, then formal arbitration should be considered with a three-person arbitration panel.⁹¹ On the other hand, if funds are short

⁹¹ *Case Study*: Plaintiff was a management company that helped an Indian tribe set up a gambling casino on its reservation. A five-year contract was entered into; however, after three years, the tribe determined that it could run the casino itself and terminated the contract without cause. The contract provided for arbitration.

Plaintiff invoked the arbitration clause and a panel of three arbitrators was selected – each party appointing one arbitrator, and a presiding neutral. This was done pursuant to the rules of the American Arbitration Association. Because considerable discovery had yet to be taken, the presiding arbitrator resolved all disputes.

At the first hearing, the tribe moved to dismiss the arbitration on the ground that the panel lacked subject matter jurisdiction to hear the matter. This was based on the defense of sovereign immunity – that the tribe had not waived its immunity. It also argued that the panel did not have jurisdiction to determine its own subject matter jurisdiction. The panel agreed and the matter was submitted to a state court. It ruled there was jurisdiction. This was appealed and affirmed.

At the second hearing, the matter was tried formally with each side offering witnesses and evidence. The majority of the panel found there had been a breach, and the presiding arbitrator wrote an extensive forty-

or the parties wish an early resolution of the matter, informal summary arbitration might better serve their needs. Through this vehicle, a two-month trial and a two and one-half year appeal could be resolved in one week. And there are any number of formats in between these two extremes, such as European arbitration, Rapid City arbitration, and baseball arbitration.

Similarly, in the nonbinding category, the same decision must be made. If the primary interest of the parties is to have a neutral party evaluate the case, then a more formal trial format might be utilized, with a single mediator or panel of three hearing the evidence and rendering a nonbinding award. On the other hand, if the needs of the parties are to establish conciliation and peace in addition to resolution, then an informal mediation process might be utilized as used in conference and caucus mediation.

d. Award or Creative Resolution

Finally, the parties need to decide if they seek only a monetary solution or wish to include the resolution of nonmonetary matters. Generally, if arbitration is used only a monetary award can be given. However, even in arbitration, the arbitrator can be asked to address nonmonetary issues. For example, a doctor might be appointed arbitrator and asked to determine whether an accident caused a subsequent medical problem.⁹² Or a

five page opinion. One panel member dissented. The tribe then filed motions in both state and federal court again contesting jurisdiction. Ultimately, the matter was resolved.

Because the matter was complex, it was essential that formal arbitration be employed and a formal award entered supported by a written opinion. Only in this mode could the state and federal action be perfected and the courts rule on the various issues raised.

⁹² *Case Study:* Plaintiff was injured when she was rear-ended by the defendant. She claimed that the accident caused her to have sudden pain in her back, which caused her right leg to jerk uncontrollably. Six months after the accident she was going down some steps when she felt sudden pain in her back and her leg jerked. She fell down the steps and broke her ankle.

Plaintiff claimed both soft tissue injuries and recovery for her broken ankle. The insurance company argued there was no causal connection and offered only \$8,000. Plaintiff sought \$45,000. Rather than try the matter, the parties agreed to retain a medical doctor to determine if there was causal connection

psychologist might be asked to determine the extent to which visitation rights should be extended to a father, who is alleged to have anger problems. (Any modification of visitation rights must be submitted to the psychologist/arbitrator and his or her decision is binding without recourse to the courts).

Typically, if the parties wish to resolve nonmonetary issues as well as monetary, they will negotiate and/or mediate. Through these vehicles they can include, in any agreement, such nonmonetary items as an apology, a letter of recommendation or commendation, naming a conference room after an employee who is suing for age discrimination, setting up a structured annuity to provide income to the plaintiff over a period of years, having a church entity initiate rules and regulations to protect children from pedophiles or ephebophiles. In this regard, the attorneys and parties must decide the role non-economic matters will play in resolving their differences and then select the best ADR vehicle to achieve their ends.⁹³

IV. Common Questions Asked About Mediation and Arbitration

1. What is the difference between mediation and arbitration? Both are initiated pursuant to agreement of the parties. In arbitration, the parties agree to a binding

between the accident and her leg jerking. If he found a causal connection, the insurance carrier agreed to pay \$45,000, and if there was not, the plaintiff agreed to accept \$8,000. The doctor, who was approved by both parties determined there was causal connection and plaintiff was awarded \$45,000.

⁹³ In the church-related sexual abuse cases, mediated settlements include many non economic conditions, such as (1) defrock the clerics involved so they could no longer have access to housing or other facilities; (2) have a sexual misconduct policy instituted which would permit representatives of the victims to meet periodically with church officials to discuss current concerns; (3) have the bishop write a letter of apology to each victim and his family if requested; (4) when there is an allegation of sexual abuse, suspend the pastor while an investigation is conducted; (5) have investigation of all sexual abuse incidents conducted by an independent investigative agency; (6) establish a state hot line with the telephone number posted around the church and schools, which victims can use to report, in confidence, any perceived abuses; (7) publish a public apology in the newspapers by the bishop addressed to victims and their families; (8) establish Safe Touch education for children to help them identify sexual abuse; (9) establish training for employees, volunteers, independent contractors, and clerics of the church to identify signs of abuse; (10) provide counseling for the victims and their families; (11) criminally prosecute those offenders who can still be indicted; (12) allow no cleric to travel alone with children under the age of 18 years, or stay overnight with a child without a proper chaperone, etc.

award entered by the arbitrator, which is intended to end the matter. In mediation, no award is entered. The parties must mutually agree to a resolution, and if they do not they can still proceed in court or seek arbitration. Both the award of the arbitrator and the mediated agreement of the parties are enforceable in courts of law.

If the parties arbitrate, some discovery must be taken; this is not true of mediation, which is often conducted before a case is even filed. Because an award is entered in arbitration, the process is more structured and requires the parties to offer evidence upon which that award can be based. In mediation no evidence is tendered at the hearing and the settlement can be based on many factors unrelated to the facts and law of the case.

Finally, in arbitration the arbitrator is limited to entering a monetary award or deciding an issue submitted by the parties for decision. In mediation there is considerably more flexibility – the parties may include as many non-monetary considerations as they wish. Because it is not winner-loser based, as in arbitration, it has the decided advantage of establishing a basis for conciliation, peace, and healing in addition to resolution.

2. Which is utilized more, arbitration or mediation? Until two decades ago, arbitration was far more prevalent than mediation. However, in the past few years, mediation has become quite popular and in some states where it is mandatory it now surpasses the use of arbitration except in certain areas of litigation. In commercial dealings, particularly international transactions, arbitration is clearly the ADR mechanism of choice. Today many commercial contracts provide for arbitration.

There really is no conflict between mediation and arbitration. In other words, parties do not have to choose one over the other. More and more parties will agree in

their contracts to first mediate if a dispute should arise, and if this fails they arbitrate the matter.

3. Of the three recognized mediation formats, which is preferred? The answer to this question depends upon what the parties seek to accomplish. If they are using mediation to help them better evaluate their respective cases, they will probably utilize some form of trial format. They will ask the mediator to weigh the facts of the case and then make a nonbinding award. The goal of the parties is to obtain an opinion, which will act as a reality check for both. The trial format could include a single mediator, a panel of three, or even a jury (summary jury trial).

If a primary purpose of the mediation is to improve communications between the parties as well as seek resolution, they most likely will utilize conference mediation. Here, the mediation is more than a problem solver, it also seeks to help the parties better communicate after the divorce, for example, because of continuing family commitments (marriage of the children, family gatherings, etc.).

In more recent years, caucus mediation has grown in popularity because it better facilitates the activities of the mediator. Through the caucuses, the mediator is better able to learn the real merits of the case, the strengths and weaknesses of each side. He or she is then positioned to guide the parties to a meaningful settlement. Caucus mediation is oriented to problem solving, while conference mediation focuses on communication solving.

4. What can be mediated and arbitrated? Twenty years ago mediation was limited to labor, neighborhood and small claims disputes. Today, it is used in all areas of

the law, from personal injury to large antitrust class actions. Whatever is in dispute, whether filed in court or not, can be successfully mediated.⁹⁴

Arbitration has had a different evolution. In the commercial arena, it has been used successfully going back to colonial times. It also has been used in organized labor along with mediation. Today, it also is used in all areas of the law – the deciding question is not what the subject matter in dispute is, but do the parties want a binding process (arbitration) or a nonbinding process (mediation). Both lead to final resolution.

5. When should a mediation or arbitration be held? There is no set time when mediation should be conducted. Some are held before a case is filed, some after there has been a jury verdict, and some even when the case is on appeal.⁹⁵ However, because a primary consideration is to reduce costs, the earlier the mediation is successfully held, the better it is for all concerned. Of course, to conduct it too early, before the facts are developed, can be a waste of resources. As a rule, mediation can be held when the critical facts are reasonably established. If a case is more complex, the case might have to be filed and some formal discovery taken.

⁹⁴ Literally, any matter can be mediated. It is used quite extensively in divorce and family matters where it is serving a function the courts cannot facilitate – allowing the parties to communicate and establish a relationship for future years with children. See DAVID GOLANN, *MEDIATING LEGAL DISPUTES: EFFECTIVE STRATEGIES FOR LAWYERS AND MEDIATORS* para. 3.2 at 68 (Aspen Publishers 1996). It is used extensively in employment matters. See Emily M. Calhoun, *Workplace Mediation: The First-Phase, Private Caucus in Industrial Discrimination Disputes*, 9 HARV. NEGOT. L. REV. 187 (2004). It is used even in bankruptcy matters. See Michael S. Wilk & Rik H. Zafar, *Mediation of a Bankruptcy Case*, 22-4 ABIJ 12. May 2003.

⁹⁵ Case Study: Plaintiff, a thirty-five year old woman, was sexually abused as a child of ten years by her pastor. The case was filed twenty-five years after the abuse, and the church contended that the action was barred by the applicable statute of limitations. The trial court dismissed the action, and the plaintiff appealed.

The case was on appeal before the state supreme court when the parties agreed to mediate the matter and worked out the following: if the case was reversed by the court, plaintiff would be paid \$100,000; if the court affirmed, she would be paid \$60,000. The church's interest was not only to have an important legal question decided, which would govern many other pending cases filed against it, but also help the plaintiff receive counseling and financial assistance to overcome the personal difficulties she was suffering because of the abuse. This case illustrates how mediation can be successfully conducted and still have an appeal go forward.

Arbitration is a different matter. Rarely can it be held before discovery is taken and the facts more formally developed. This is because a trial of the matter will be conducted and testimony and documents offered into evidence.

6. Who should attend the mediation and arbitration? For a mediation to be successful, the decision-makers must be present. It is most difficult to conduct a mediation by telephone and develop the rapport and trust required to reach resolution. If an insurance carrier is defending, it is sufficient that only the adjuster be present.⁹⁶

In caucus mediation, counsel for the parties should also attend. Only an attorney can answer many of the inquiries made by the mediator – the strengths and weaknesses in the case, what a jury will do, best case/worst case scenario. A problem arises if only one side is represented by counsel. This can create a dilemma for the mediator. He will be concerned about the attorney present overreaching and having to protect the unrepresented party. This could cause him to breach his pledge of neutrality. The mediator must also be concerned that the unrepresented party does not later allege that both opposing counsel and the mediator forced her into a settlement she opposed. The better course is to have no attorney participate if one side is unrepresented.

Arbitration is somewhat different. Counsel are generally present to litigate the case if the matter has any substance. If one or both of the parties wish to represent

⁹⁶ There are situations where a defendant, even if insured, should also attend the mediation: (1) If plaintiff seeks damages in excess of policy limits, the defendant should be present with counsel to defend against the excess amount; (2) if the plaintiff makes a demand of policy limits, and there is the potential for a verdict in excess of that amount, the defendant should be present to put the carrier on notice (in writing) to pay. Then if the verdict exceeds policy limits, defendant can sue the carrier for bad faith; (3) if the policy provides that the insured can veto a settlement (this is true of doctors) then the defendant should participate because he is in essence a decision-maker; (4) at times the presence of the defendant is required for emotional reasons. The parties may be suing for the death of a loved one and the presence of the defendant is needed for emotional support.

themselves pro se this is their decision. The arbitrator has no obligation to protect against the overreaching of counsel. He is simply required to make a decision.

7. How long does a mediation or arbitration take? Most mediations take a few hours to one day. Of course, large complex matters will take several days and even longer. Many times if a matter is not resolved the first day, the mediation will be continued by the mediator, caucusing with the parties at their offices or counsel's office, or by telephone. It is generally unnecessary to have further joint sessions with everyone present.⁹⁷

The length of an arbitration is totally dependent upon the complexity of the issues to be decided. A small arbitration will generally take less time than the same case if mediated. This is because in mediation, once the facts are developed, the mediator will caucus with the parties as many times as required to reach resolution, whereas in arbitration, once the facts are developed, the arbitrator will take the matter under advisement and make a decision.

Formal arbitration, on the other hand, can take longer than a bench trial before a judge. This is because the parties often want recesses to obtain more discovery or to set

⁹⁷ Case Study: Plaintiff, a female and recent graduate from law school, was hired by a very prestigious 400-person law firm. She was assigned to a satellite office in a major city. The managing partner of the law office took a liking to the plaintiff and began to harass her sexually. She complained to the home office, but it did nothing. She finally quit her job and was immediately hired by another law firm at the same salary but with a better chance for promotion.

Plaintiff retained an attorney specializing in sexual harassment cases to protect other women being abused by the same managing partner. She demanded \$850,000 even though she had very minimal provable damages. The law firm offered \$300,000 to avoid the very bad publicity that would result when the case was filed. The parties could not agree on a settlement figure.

For one year, the mediator kept in contact with the parties and counsel to determine if any progress was being made. The day before the case had to be filed, the parties and mediator reconvened the mediation. By the end of the day, the case settled for \$320,000. If the case had been filed, the case had little or no value because the damage of the bad publicity would have been done. Plaintiff recognized this and therefore settled.

the matter over for another hearing convenient to all concerned. A judge, on the other hand, will hold everyone until the trial is completed.

8. Are ex parte communications in mediation and arbitration permissible?

The very essence of caucus mediation (meeting separately with each side) involves ex parte communications between the mediator and parties. Therefore there is nothing improper with ex parte communications. However, it is suggested that the mediator not communicate ex parte with either side before the mediation commences, because this might give the appearance of partiality. If contacted by one side, the mediator should contact the other and inquire whether they have similar questions. Even if the mediator and party do not discuss the case, it is preferable that they not travel or eat together. This is to avoid the appearance that ex parte communications are taking place to the disadvantage of the other side.⁹⁸

In arbitration, ex parte communications are never permissible. Such communications would not only be a breach of ethical standards, but grounds to set aside an award.

CONCLUSION

Alternative Dispute Resolution mechanisms, and in particular mediation, are having a profound impact on how we resolve our differences. With heavy emphasis on the nonadversarial, matters are being resolved amicably which just two decades ago would have had to go to trial. However, the true miracle of what has occurred is that

⁹⁸ *Case Study:* One mediator, flying to the mediation site, met the adjuster in the case as he was deplaning. They took the same taxi to the office building and rode up in the same elevator. As they exited the elevator, plaintiff saw them smiling and talking and assumed too much. (They had not once talked about the case.) The plaintiff became quite upset feeling that the adjuster had an advantage and almost would not go forward with the mediation. This appearance of partiality could have been avoided by the mediator taking a different elevator to the office.

parties are not only finding resolution, but they are being reconciled; peace and healing are the aftermath. To continue this process and encourage more growth, the mindset of the parties and counsel must continue to adjust so that disputes are seen not as adversarial encounters but as nonadversarial opportunities.