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# Representing Clients Effectively in an ADR Environment

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# PRACTITIONER'S GUIDE

## REPRESENTING CLIENTS EFFECTIVELY IN AN ADR ENVIRONMENT

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The practice of law has changed dramatically during the past two decades. Practitioners today face an environment that did not exist fifteen or twenty years ago. Clients have become more involved in the management of their legal affairs with an eye toward cutting costs.[1] The arrival of paraprofessionals[2] and new technology[3] has forced lawyers to restructure the work flow within their law offices.

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1. *See generally* Avery S. Cohen, *Retooling Your Firm*, 77 A.B.A. J. 71 (Dec. 1991); Don J. DeBenedictis, *Growing Pains*, 79 A.B.A. J. 52 (Mar. 1993); Sherri Kimmel, *Fee Not So Simple Whether Your Fees Are Fixed, Flat, Discount, Percentage or Hourly, Figuring Out What and How to Charge Is More of a Challenge Then Ever*, 19 PA. LAW. 12 (May/June 1997); Darlene Ricker, *The Vanishing Hourly Fee*, 80 A.B.A. J. 66 (Mar. 1994); Robert L. Haig & Steven P. Caley, *More Bang for Your Litigation Buck: Cost Effective Litigation Strategies, in* Fifth Annual Litigation Management Supercourse 1994 (PLI Litig. & Admin. Practice Course Handbook Series No. H4-5185, 1994).

2. *See generally* William R. Fry, *Practicing Law without a License — Is It Time for the Bar to Drop Its Opposition to Independent Paralegals?*, 81 A.B.A. J. 36 (Jan. 1995); Hope Viner Samborn, *Legal Assistants — Has the Time Arrived for State-by-State Licensing?*, 78 A.B.A. J. 42 (Dec. 1992); Hope Viner Samborn, *Conflicts & Confidences — Code Addresses Ethics for Paralegals, and Impact on Lawyers*, 82 A.B.A. J. 24 (June 1996); Carl M. Selinger, *The Retention of Limitations on the Out-of-Court Practice of Law by Independent Paralegals*, 9 GEO. J. LEGAL ETHICS 879 (1996).

3. *See generally* William T. Braithwaite, *How Is Technology Affecting the Practice and Profession of Law?*, 22 TEX. TECH L. REV. 1113 (1991); Jim Meyer, *The New Lawyering — Microsoft's Bill Gates Looks at Computers' Impact*, 79 A.B.A. J. 56 (Aug. 1993); Jon Newberry, *Status Checks*, 82 A.B.A. J. 68 (Feb. 1996); M. Steven Potash, *Should Your Law Office Automate?*, 71 A.B.A. J. 44 (Aug. 1985); David A. Saraceno, *Simple Steps to Automate Your Law Firm*, 40 ADVOCATE (IDAHO) 20 (Jan. 1997); Thomas C. Scawell, *Introduction to Automated Legal Support*, 26 COLO. LAW. 71 (Jan. 1997); *Twenty-Seventh Selected Bibliography on Computers, Technology and the Law*, 21 RUTGERS COMPUTER & TECH. L.J. 551 (1995).

The late 1970s and early 1980s also marked the beginning of the alternative dispute resolution movement ("ADR").[4] The movement emphasized a broad array of methods for dispute resolution.[5] By emphasizing choice rather than merely offering litigation, options were created for clients that have had a significant economic impact on the practice of law.[6]

Attorneys must now demonstrate to clients their ability to operate effectively in specific ADR proceedings. If clients believe their attorneys are ineffective in an ADR proceeding, they may select an attorney who operates as well in ADR as in the courts. This lack of understanding of ADR may, therefore, erode an attorney's client base which will have a significant economic impact on the bottom line.[7]

This article will generally explore what attorneys must know to effectively represent their clients in the ADR environment.

## I. UNDERSTANDING THE ATTORNEY'S OBJECTIVES RELATIVE TO THE CLIENT'S CASE

Before attorneys can begin to understand their clients' cases, they must understand their own objectives, which are not always congruent with the client's objectives.

### *A. Understanding One's Own Objectives*

Attorneys must clearly understand their own objectives. First, to remain involved in the process, attorneys must control their clients, their cases, and the process itself. Second, to maintain a continuing relationship with their clients, attorneys must keep their clients satisfied. Clients must be both satisfied with their own role in the decision making process and comfortable with the attorney's role in selecting and managing the dispute resolution process. They must also be satisfied with the costs of the process and with the ultimate resolution of their dispute.[8] Third, to protect the clients' interest, the attorney should

4. This is not to say that negotiation, mediation, arbitration, and ombusdmanship have not been previously employed to resolve disputes. What is relatively new is the concerted effort to organize and implement the various dispute resolution methods. *See* Valerie A. Sanchez, *Towards a History of ADR: The Dispute Processing Continuum in Anglo-Saxon England and Today*, 11 OHIO ST. J. ON DISP. RESOL. 1 (1996) (discussing in detail the history of ADR). *See also* Rhonda McMillion, *Growing Acceptance for ADR*, 82 A.B.A. J. 106 (May 1996); Larry Ray, *Emerging Options in Dispute Resolution*, 75 A.B.A. J. 66 (June 1989).

5. *See* Judith Resnick, *Many Doors? Closing Doors and Alternative Dispute Resolution and Adjudication*, 10 OHIO ST. J. ON DISP. RESOL. 211 (1995); Frank E.A. Sander & Stephen B. Goldberg, *Making the Right Choice*, 79 A.B.A. J. 66 (Nov. 1993); Jeffrey W. Stempel, *Reflections on Judicial ADR and the Multi-Door Courthouse at Twenty: Fait Accompli, Failed Overture, or Fledgling Adulthood?*, 11 OHIO ST. J. ON DISP. RESOL. 297 (1996).

*See also* Henry J. Reske, *DOJ Adopts ADR Program*, 81 A.B.A. J. 38 (July 1995); Henry J. Reske, *Victim-Offender Mediation Catching On*, 81 A.B.A. J. 14 (Feb. 1995); Dan Trigoboff, *More States Adopting Divorce Mediation*, 81 A.B.A. J. 32 (Mar. 1995).

6. *See* Edward F. Sherman, *The Impact on Litigation Strategy of Integrating Alternative Dispute Resolution into the Pretrial Process*, 168 F.R.D. 75 (1996).

7. *See* Eric K. Yamamoto, *ADR: Where Have All the Critics Gone?*, 36 SANTA CLARA L. REV. 1055 (1996).

8. *See* Barbara L. Morgenstern, *Avoid the Wake-up Call — Level of Service Must Meet or Exceed Ex-*

not let personal economic gain or loss affect the advice given to a client about settling or litigating a case.[9] Resolving cases through negotiation, mediation, and arbitration, for example, will generally involve fewer hours, producing saved time, which may produce higher hourly yields.[10] This higher hourly yield, however, must be achieved while protecting the clients' interests. Fourth, to profitably use the time saved when dispute resolution processes other than litigation have been used, attorneys must attract additional clients. By developing a reputation for considering ADR as an alternative to litigation and for knowing how to select and operate within a broad array of ADR processes, additional clients will be attracted.

### *B. Understanding the Client's Case*

Regardless of which dispute resolution mechanism is ultimately selected for a particular dispute, the attorney must understand the client's case. The attorney's goal in the initial interview with the client is to gather as much factual information as possible. If additional documents exist, the client is assigned the responsibility of providing these documents to the attorney by a specific date. Once additional facts have been gathered and any necessary legal research done, the attorney can make an intelligent analysis of the client's dispute.

It is crucial that the attorney understand the broad range of processes or strategies that may be available to resolve this particular dispute. This includes the ADR processes as well as litigation. Additionally, the attorney must be familiar with specific ADR processes available in each possible forum where the dispute may be resolved. For example, a particular forum might be a preferable site to litigate a dispute, based on its settlement conference procedures.

Understanding the risks of litigation is also important when analyzing a dispute. The risks involved in a future trial must be balanced against the certainty of a present settlement. The client's attitudes toward these risks play a critical role in the selection of a particular dispute resolution process. For example, a risk averse client may prefer to settle rather than litigate. A risk taker, on the other hand, may prefer to "roll the dice" in front of a jury. Be sure to ex-

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*pectations, or Clients May Defect*, 81 A.B.A. J. 91 (Sept. 1995).

9. *See* Model Rules of Professional Conduct Preamble (A Lawyer's Responsibilities), Rule 1.3 (Diligence) (1983).

10. For plaintiffs' attorneys on contingency fee arrangements, the economic impact of settling cases versus litigating them can be significant. For example, consider a contingent fee arrangement where the attorney receives 30% if the case settles and 40% if litigated to a judgment for the plaintiff. Assuming the case requires 200 hours to prepare and try, resulting in the plaintiff recovering a $100,000 judgment, the attorney would receive $40,000, which is equivalent to $200 per hour. If the same case requires only 50 hours to prepare and settle, and the plaintiff recovers $50,000, the attorney would receive $15,000, which is equivalent to $300 per hour, or a $300 to $200 per hour differential.

The hourly yield differential increases when the risk of loss at trial is considered. For example, using the same illustration, assume the attorney has two cases, each requiring 200 hours to prepare and try. In one the plaintiff recovers a $100,000 judgment. In the other, the plaintiff recovers nothing. The attorney would receive $40,000, which is equivalent to $100 per hour. If the same two cases require only 50 hours each to prepare and settle, and the plaintiffs recover $50,000 each, the attorney would receive $30,000, which is equivalent to $300 per hour, or a $300 to $100 per hour differential.

plore and determine where your client fits in the risk spectrum.

## II. THE DISPUTE RESOLUTION CHOICES

Knowing which dispute resolution choices are available is a key to being effective in an ADR environment. The focus here is on who resolves the dispute. Disputes may be resolved: (1) by a single party; (2) by the parties with or without the assistance of a third party neutral; and (3) by a third party neutral who resolves the dispute for the parties.

### A. *One Party Resolves the Dispute*

The one party method for dispute resolution is the most widely used method of dispute resolution. The one party method is a self-help method involving disengagement.[11]

Since the continuation of a dispute requires at least two participants, the dispute is resolved if one participant withdraws and walks away. The party who disengages not only controls the method by which the dispute is resolved, but also the terms of the resolution.

The one party method may be used even after another method of dispute resolution has been initiated. For example, a party may enter into a negotiation or mediation but reject all proposed solutions. Or a party may, after filing a legal action, move to dismiss the complaint with or without prejudice. In these instances, one party has exercised control over whether the other party or a third party decision-maker, will continue the process of dispute resolution. That party has, therefore, imposed the solution on the dispute.[12]

### B. *The Parties Resolve Their Own Dispute*

The two party method requires the parties to resolve their own dispute. This method includes negotiation, ombudsmanship, mediation, mini-trial, and summary jury trial.

#### 1. Negotiation

Negotiation is a voluntary, consensual process within the private arena. In a negotiation, the parties attempt to resolve the dispute themselves. Traditionally, negotiations have been adversarial, with each party staking out a solution or position and then, by sheer will, attempting to force the other to abandon its position and move toward the other's position. The fundamental assumption in an adversarial negotiation is that each party to the dispute desires to maximize

11. *See* Gerald R. Williams, *Negotiation as a Healing Process*, 1996 J. DISP. RESOL. 1.

12. During a careful analysis of the options, the party may discover that a better solution exists than one that could be achieved through negotiation or another method of dispute resolution. For the process of discovering the *best alternative to a negotiated agreement* ("BATNA"), see ROGER FISHER & WILLIAM URY, GETTING TO YES 101-11 (1981).

its gain.[13]

For example, in an adversarial negotiation that involves buying and selling of a item for a price, each party knows three numbers. The seller will know her opening price, her target price (what she would like to receive), and the lowest price she would accept. The buyer will know his opening price, his target price (what he would like to pay), and the highest price he is willing to pay. The parties perform the following dance. The seller begins by stating her opening price. Upon learning the seller's opening price, the buyer now knows four figures. The buyer responds with his opening price (his lowest price). The seller now knows four figures and the negotiation is now bracketed—the seller's highest number and the buyer's lowest number are known to both parties. The process continues until the settlement range (a number that is within both the buyer's and seller's ranges) is reached and the parties agree upon a price. Since each party lacks information about the other's range of numbers, neither knows when, or even whether, a settlement range exists. Through the various counteroffers (including the relative degree of change), each party develops a sense as to the other's range of numbers. Also as the process continues, each party presents reasons why the other party should consider extending his or her range. The seller will argue that the buyer's numbers are too low while the buyer will argue that the seller's numbers are too high. The process continues until the settlement range is discovered or until one party discontinues the process.[14]

Another style of negotiation, popularized by the book *Getting to Yes*,[15] is the problem-solving method. Using this approach, the parties work from their interests rather than from inflexible positions. The philosophy underpinning this process is that the parties focus on expanding the pie rather than on distributing a fixed pie. In effect, the parties have no preconceived settlement range. This approach moves the parties from a "win/lose" mode to a "win/win" philosophy.[16]

In a problem-solving approach, as described in *Getting to Yes*, the parties first carefully identify each party's perception of the problem, the parties' feelings, and attendant communication problems. Next, they identify and discuss the interests of each party, with the goal of ultimately developing a list of

13. *See* ROBERT M. BASTRESS & JOSEPH D. HARBAUGH, INTERVIEWING, COUNSELING, AND NEGOTIATING: SKILLS FOR EFFECTIVE REPRESENTATION 377 (1990). Adversarial negotiation includes a variety of bargaining theories and models including game theory, economic bargaining model, social-psychological theory, and bargaining theory. *See id.* at 349-87. *See also* Donald G. Gifford, *A Context-Based Theory of Strategy Selection in Legal Negotiation*, 46 OHIO ST. L.J. 41 (1985); Jonathan M. Hyman, *Trial Advocacy and Methods of Negotiation: Can Good Trial Advocates Be Wise Negotiators?*, 34 U.C.L.A. L. REV. 863 (1987); Carrie Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem Solving*, 31 U.C.L.A. L. REV. 754 (1984).

14. *See* ROBERT M. BASTRESS & JOSEPH D. HARBAUGH, INTERVIEWING, COUNSELING, AND NEGOTIATING: SKILLS FOR EFFECTIVE REPRESENTATION 367-70 (1990) (describing the bargaining theory).

15. *See* ROGER FISHER & WILLIAM URY, GETTING TO YES (1981). *See also* WILLIAM URY, GETTING PAST NO (rev. ed. 1993); ROGER FISHER & SCOTT BROWN, GETTING TOGETHER (1988).

16. *See* LUCY BEALE & RICK FIELDS, THE WIN WIN WAY (1987); Carie Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem Solving*, U.C.L.A. L. REV. 754 (1984).

shared and non-shared interests. Finally, the parties develop a matrix of solutions (without evaluating their acceptability) and then evaluate each listed solution against the shared and non-shared interests. After all listed solutions have been evaluated, the solution or combination of solutions that best meets the parties' interests is selected.[17]

2. Ombudsmanship

Unlike negotiation where the parties meet and attempt to resolve their dispute, ombudsmanship is a fact-gathering process that utilizes the services of a third party.[18] The ombudsman is a neutral fact-finder who investigates the complaint and produces a report for both the complainant and the party against whom the complaint has been lodged, that is, the respondent. In the process, the respondent may gain insight into ways to resolve the dispute and take corrective action to prevent similar disputes from arising.

The ombudsman is often appointed by a company or industry. A large corporation could have an ombudsman to investigate employee complaints.[19] A hospital or a nursing home may have an ombudsman to investigate patient or resident complaints.[20] Ombudsman may also be found in some academic institutions.[21]

The ombudsman, however, is not always associated with a company or industry. For example, they have been used to protect children's rights[22] and migrant workers.[23] Ombudsmanship is even moving onto the internet.[24]

3. Mediation

Mediation (facilitative mediation and facilitative mediation plus early neutral evaluation) traditionally has been consensual. In mediation, disputants relate the nature of their dispute to each other and to a neutral third party who helps the parties resolve their dispute. In a facilitative mediation, the mediator assists the parties by working through a process that focuses them on the nature of their problem, their interests, and an array of resolutions for their dispute. The mediator neither evaluates the problem nor suggests solutions. The parties them-

17. *See* ROGER FISHER & WILLIAM URY, GETTING TO YES 15-98 (1981).

18. *See* Shirley A. Wiegand, *A Just and Lasting Peace: Supplanting Mediation with the Ombuds Model*, 12 OHIO ST. J. ON DISP. RESOL. 95 (1996).

19. *See* Mary P. Rowe, *The Corporate Ombudsman: An Overview and Analysis*, NEGOTIATION J. 127 (Apr. 1987); Brenda Thompson, *Corporate Ombudsmen and Privileged Communications: Should Employee Communications to Corporate Ombudsmen Be Entitled to Privilege?*, 61 U. CIN. L. REV. 653 (1992).

20. *See* Jeffrey S. Kuhana, *Reevaluating the Nursing Home Ombudsman's Role with a View Toward Expanding the Concept of Dispute Resolution*, 1994 J. DISP. RESOL. 217.

21. *See* Lawrence D. Mankin, *The Role of the Ombudsman in Higher Education*, 51 DISP. RESOL. J. 46 (Oct. 1996).

22. *See* Malfrid Grude Flekkuy, *The Children's Ombudsman as an Implementor of Children's Rights*, 6 TRANSNAT'L L. & CONTEMP. PROBS. 353 (Fall 1996).

23. *See* Beverly A. Clark, *The Iowa Migrant Ombudsman Project: An Innovative Response to Farm Worker Claims*, 68 N.D. L. REV. 509 (1992).

24. *See* M. Ethan Katsh, *Dispute Resolution in Cyberspace*, 28 CONN. L. REV. 953 (1996).

selves, not the third party, must resolve the dispute. The process is private and controlled by the third party mediator.[25]

A number of courts have added mediation to the public arena labeling it a settlement conference.[26] In a court annexed or court sponsored settlement conference, the litigants participate in the process before they are allowed an opportunity to litigate. The procedural and evidentiary rules of this mediation process are the courts, and not the parties or the individual settlement judge.

A settlement conference is conducted by an officer of the court and may include an early neutral evaluation of the case ("ENE"). The court officer may be a judge or an adjunct settlement judge ("ASJ"). An ASJ is an attorney who has been specially selected and trained by the court to conduct settlement conferences.[27] In an early neutral evaluation, the settlement judge may help the parties evaluate the strengths and weaknesses of the case, the costs to achieve a judicially rendered decision, the likelihood of success, and the difficulties in collecting a favorable judgment. Through the early neutral evaluation process, the parties have an opportunity to preview the outcome of litigation, and thus are in a better position to evaluate their mediation options.[28]

The settlement conference need not be limited to a court sponsored or court annexed conference. Settlement conferences can be privatized by the parties simply by deciding to have a private settlement conference. The disputants first agree on a private person who will act as the settlement judge, and then decide on the place, the time, and, of course, the fee. The private settlement conference will not be a matter of court record. Parties can participate in a non-court sponsored settlement conference at any time in the dispute resolution process: before filing a complaint, after filing but before discovery, during discovery, after discovery, on the eve of trial, during trial, after trial, or after appeal.

4. Mini-Trial

The mini-trial, also a non-binding process, is often useful in resolving disputes between corporate parties. In a mini-trial, representatives with settle-

25. *See* Peter S. Chantilis, *Mediation U.S.A.*, 26 U. MEM. L. REV. 1031 (1996).

26. *See* FED. R. CIV. P. 16; *see, e.g.*, U.S.D.C. N.D. Okla. R. 16.3 (Alternative Dispute Resolution).

27. In 1986, Magistrate Judges of the United States District Court for the Northern District of Oklahoma began holding settlement conferences. Two years later, the Court added an Adjunct Settlement Judge Program. The ASJ program began with six ASJs and expanded to 42. From 1986 through 1996, the Magistrate Judges held 1415 settlement conferences, settling 833 cases (58.9%). From 1988 through 1996, the Adjunct Settlement Judges held 834 settlement conferences, settling 394 cases (47.2%). In total, 2249 settlement conferences were held and 1227 cases settled (54.6%). Statistics supplied by The Honorable John Leo Wagner, Magistrate Judge for the United States District Court for the Northern District of Oklahoma.

Less than five percent of all civil cases filed reach trial. Thus, over 95% of all civil cases end by the conclusion of the pretrial stage. William L. Adams, *Let's Make a Deal: Effective Utilization of Judicial Settlements in State and Federal Courts*, 72 OR. L. REV. 427, 429 (1993). *See also* Stephen McG. Bundy, *The Policy in Favor of Settlement in an Adversary System*, 44 HASTINGS L.J. 1 (1992).

28. Whether mediation should include early neutral evaluation is a debated topic. *See* Lela P. Love, *The Top Ten Reasons Why Mediators Should Not Evaluate*, 24 FLA. ST. U. L. REV. 937 (1997); Richard C. Reuben, *Model Ethics Rules Limit Mediator Role*, 82 A.B.A. J. 25 (Jan. 1996).

ment authority (usually senior executives) join a neutral party and form a three-person panel. The panel hears a summary presentation of the case by the attorneys. After the presentation, the corporate members of the panel discuss settlement, often with the neutral party's assistance.[29]

5. Summary Jury Trial

The summary jury trial is a sophisticated settlement mechanism involving a summary presentation by attorneys to a judge and a jury. Unlike the normal trial, a summary jury trial is non-binding. The procedure is flexible and tailored to the particular requirements of each case. Although the summary jury trial may be structured so that no witnesses are used, a limited number of witnesses may testify if witness credibility becomes an issue.

A jury is selected to hear the case. At the conclusion of the evidentiary presentation, the jury is given a limited amount of time to deliberate. The litigants and their lawyers are permitted to talk at length with the jurors after their nonbinding verdict is returned. The non-binding verdict and comments of the jurors are then considered as the settlement negotiations proceed.[30]

### C. *A Neutral Third Party Resolves the Dispute*

The third party method defers the resolution of the dispute to a third party neutral who then resolves the dispute for the parties. The third party method is an adjudication. In an adjudication, the disputants come before a third party, relate the nature of their dispute to the third party, and the third party resolves the dispute for the parties. Adjudication may take the form of litigation or arbitration.

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29. *See* Robert W. Bradford, Jr., *The Mini-Trial and Summary Jury Trial*, 52 ALA. LAW. 150 (1991); Mark D. Calvert, *Out with the Old, In with the New: The Mini-Trial Is the New Waive in Resolving International Disputes*, 1991 J. DISP. RESOL. 111; Kester Edelman & Frank Carr, *The Mini-Trial: An Alternative Dispute Resolution Procedure*, 42 ARB. J. 7 (March 1987); Lawrence J. Fox, *Mini-Trials*, 19 LITIGATION 36 (Summer 1993); Eric D. Greene, *Growth of the Mini-Trial*, 9 LITIGATION 12 (Fall 1982); Reba Page & Frederick J. Lees, *Roles of Participants in the Mini-Trial*, 18 PUB. CONT. L.J. 54 (1988).

30. *See* Robert W. Bradford, Jr., *The Mini-Trial and Summary Jury Trial*, 52 ALA. LAW. 150 (1991); T. Robert Cook, *The Summary Jury Trial: A Summary of Issues in Dispute Resolution*, 1993 J. DISP. RESOL. 359; Thomas D. Lambros, *The Summary Jury Trial: an Effective Aid to Settlement*, 77 JUDICATURE 6 (July-Aug. 1993); Thomas Mulroy & Andrea Friedlander, *Trial Techniques: A Discussion of Summary Jury Trials and the Use of Mock Juries*, 24 TORT & INS. L.J. 563 (1989); Glen Newman, *The Summary Jury Trial as a Method of Dispute Resolution in the Federal Courts*, 1990 U. ILL. L. REV. 177.

Summary jury trials have not been routinely used for several reasons. The preparation and presentation of a summary jury trial requires substantial effort and therefore may not reduce discovery and preparation costs. In fact, the duplication of effort caused by adding a summary jury trial to a full trial may add costs. Also, the parties may not present their full case at the summary jury trial. They may not want the other side to use the summary jury trial as a discovery tool (evidence as well as strategy). Without full disclosure, the jury will be making their non-binding verdict on incomplete information and therefore the jury's non-binding verdict may not be an accurate indicator of the results from a full trial.

1. Litigation

Litigation is instituted by one of the parties before a public forum, usually a court. Once the complaint has been filed, the other party has no choice but to participate. The process is public, and the procedural and evidentiary rules of the forum apply to both the dispute and to the parties.

Litigation, traditionally a public process, has also been expanded into the private sector. The parties consent to bring their dispute before a private judge, sometimes referred to as a "rent-a-judge."[31] Since this process is consensual, the parties can select the judge as well as the procedural and evidentiary rules that will apply to their dispute. The parties may also decide to have the judge determine the rules.

2. Arbitration

Arbitration, on the other hand, is traditionally consensual (voluntary). At the time of contracting (prior to the dispute), or at the time of the dispute, the parties consent to arbitration rather than litigation. Arbitration is private and the procedural and evidentiary rules of the process are those agreed to by the disputants. Rather than fashion their own rules, the disputants may agree to have the arbitrator determine the rules.[32]

Just as litigation has been privatized, arbitration, traditionally a private process, has been annexed by some courts in the public sector. In 1978, ten federal district courts were established as pilot districts to experiment with court annexed arbitration.[33] In certain cases which involve amounts in controversy below a certain dollar amount, and where the dispute may be classified as a certain type, the court will order the parties to participate in a court-sponsored arbitration before they are allowed to litigate their dispute.[34]

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31. *See* Alan Scott Rau, *Integrity in Private Judging*, 38 S. TEX. L. REV. 485 (1997).

32. *See* Richard Chernick, *Choosing the Neutral: Opportunity and Risk*, ABA-ALI 201, SB41 (Dec. 12, 1996) (Alternative Dispute Resolution: How to Use It to Your Advantage!).

33. The ten judicial districts that were authorized to use arbitration were: Northern District of California; Middle District of Florida; Western District of Michigan; Western District of Missouri; District of New Jersey; Eastern District of New York; Middle District of North Carolina; Western District of Oklahoma; Eastern District of Pennsylvania; and Western District of Texas. Ten additional judicial districts were permitted to apply to the Judicial Conference of the United States for approval to use arbitration. *See* U.S.C. tit. 28, § 658 (1997).

William Kinsland Edwards, *"No Frills" Justice: North Carolina Experiments with Court-Ordered Arbitration*, N.C. L. REV. 395 (1988).

34. See, e.g., USDC MDFL L.R. 8.01-8.06; USDC WDMI L.R. 43. Since each district had latitude to create its own rules, differences between districts existed. Consider two areas: the claim limit and the length of the arbitration hearing. The claim limit is $100,000 in the Western District of Michigan but $150,000 in the Middle District of Florida. *Compare* USDC WDMI L.R. 43(b) *with* USDC MDFL L.R. 8.02. Each party has a 2½ hour limit on the presentation of its case at the arbitration hearing in the Western District of Michigan and no limit except that "the presentation of testimony shall be kept to a minimum, and that cases shall be presented to the arbitrators primarily through the statements and arguments of counsel" in the Middle District of Florida. *Compare* USDC WDMI L.R. 43(h)(5) *with* USDC MDFL L.R. 8.04(d).

### D. *Combining Two Methods of Dispute Resolution*

The fundamental problem with parties attempting to resolve their own disputes is that they must eventually agree, otherwise the dispute is not resolved. Sequencing mediation and arbitration capitalizes on the benefits of both processes which can lead to eventual dispute resolution. In mediation/arbitration ("med/arb") the parties agree to begin their dispute resolution process with mediation. This gives them an initial opportunity to resolve their own dispute. If they are unable to reach a mediated agreement, the process converts into arbitration.[35] Once into arbitration, the parties know that the dispute will be resolved.[36]

## III. MATCHING THE DISPUTE RESOLUTION PROCESS TO THE CLIENT AND THE DISPUTE

The array of available dispute resolution processes offers clients many choices and presents many questions. The selection depends on what is important to that client. Does the client need the dispute resolved? Is no resolution better than an adverse resolution? How long is the client willing to wait for the dispute to be resolved? Is finality in the resolution important? How much is the client willing to commit to the resolution of the dispute? Is the client interested in having control over the process? How interested is the client in having control over the outcome of the dispute? Is the client interested in the opportunity to fashion solutions that would not have been available had the dispute been resolved by litigation? Is the client interested in building bridges between the parties so they may repair disruptions in their relationship and enhance the opportunity for long term cooperation? Is the implementation of the resolution important to the client?

### A. *What Does a One Party Resolution Offer a Client?*

Disengagement offers the client a speedy solution which the client controls. For disengagement, the initial costs are minimal, the resolution is immediate, and the outcome is predictable. With some effort, the client may even create alternatives that are better than any solution that a joint resolution or an adjudication could produce.[37]

Not all disputes, however, can be resolved by disengagement. Merely

35. Depending on the prior agreement of the parties, the arbitrator may be the same person as the mediator. The advantage of having the same person serve as both mediator and arbitrator is that the arbitration process will proceed rapidly and can quickly follow mediation. The arbitrator will already know the background of the dispute. The disadvantage of having the same person serve in both neutral capacities is that the parties may be reluctant to share information with the neutral party during mediation because this information may prejudice their case in the arbitration phase of the process.

36. *See* Barry C. Bartel, *Med-Arb as a Distinct Method of Dispute Resolution: History, Analysis, and Potential*, 27 WILLAMETTE L. REV. 661 (1991).

37. *See* ROGER FISHER & WILLIAM URY, GETTING TO YES 101-11 (1981).

walking away may lead to action by the other party. For example, if a party does not pursue litigation, the other party may file a lawsuit and thus acquire the advantages that go with being the plaintiff.[38]

### *B. What Does a Joint Resolution Offer a Client?*

Negotiation and mediation, two forms of joint resolution, provide significant advantages over disengagement and adjudication. Both negotiation and mediation have the potential to lead to the resolution of the dispute by the parties, rather than accepting the status quo (walking away) or a resolution imposed by a third party. Both involve a negotiated agreement, by the parties themselves or through the assistance of a third party neutral.

The following factors should be considered when considering a joint resolution process.

- The process is inexpensive and non-binding and often results in the immediate resolution of the dispute.
- The parties control scheduling (the parties have greater control in a negotiation and less in a mediation).
- The process can be scheduled before a case is filed (with the exception of the court-sponsored mediation) or at any time after filing.
- The process is private, takes place in a private setting, and the records and documents can remain private.
- The process is informal, with the disputants having an opportunity to discuss their perception of the dispute and their interests.
- The process encourages creative resolutions.
- The control of the outcome remains with the parties.
- The process can be more cooperative and less confrontational than adjudication.
- The agreement eliminates the uncertainties inherent in an adjudication.
- Discovery costs can be reduced by an early agreement.
- Litigation and appeal costs are saved when an agreement is reached.
- Even if an agreement is not reached, the issues may be simplified.
- The parties feel better about the process because they had control of the process and of the outcome.

Omitted from this discussion are the "costs" for each process. Certainly after the characteristics of each process are evaluated, the client's costs for the process must be considered in great detail. Costs to be weighed include the normal "billable" costs for the process, such as filing fees, discovery, transportation, witness fees, and attorneys fees, and, if applicable, fees for the third party neutral. They also include the "unbillable" costs to the client such as time

38. For example, the plaintiff initially frames the law suit and controls the selection of forum. The plaintiff has the power through deposition and interrogatories to discover the defendant's secrets. The plaintiff has the power to dismiss the action with prejudice. By continuing the litigation, the plaintiff subjects the defendant to costs and inconveniences. The plaintiff may, by continuing the law suit, force the defendant to settle what the defendant considers a meritless claim for nuisance value or more.

for the process to be completed, time lost from an occupation due to personal participation in a process, damage to a relationship, risk of an adverse decision if the decision making is placed with a third party, and risks involved in the process (for example, loss of self-esteem, loss of control, and trauma). Since each client is different, the client's feelings concerning these costs must be evaluated.

### *C. What Does a Third Party Neutral Resolution Offer a Client?*

The extent to which arbitration offers advantages over litigation depends in part on the timing of the arbitration process and the rules and procedures selected to govern the arbitration.[39] Parties electing arbitration should give considerable advance thought to these issues.

- The parties control the scheduling of the arbitration which can be scheduled before a case is filed.
- The disputants have an opportunity to control discovery and thus reduce discovery costs.
- If the dispute is resolved through arbitration, the parties will preserve the privacy of their records and documents.
- Arbitration may be less expensive than litigation.
- Arbitration takes place in a private setting.
- Arbitration can be less formal than a trial.
- Arbitration allows the disputants to have some control over the process, although they lose the opportunity for creative resolutions.
- Arbitration will result in a resolution of the dispute.

## IV. CONVINCING THE OTHER PARTY TO USE THE PROCESS

The attorney must understand how to persuade the other party to use ADR. To convince another party to use ADR, it becomes essential to consider what that party would gain or lose by going through the ADR process. A judge who believes in ADR can be a powerful ally when dealing with a reluctant party.

Some important issues to consider include:

- What will the other party gain by using an ADR process?
- Is the other party eager to relinquish control over the process by which the dispute is resolved or over the outcome of the dispute?
- Is the other party interested in a legal or a "needs-based" solution?
- Does the other party need "his or her day in court" or at least an opportunity to tell his or her story to a judge figure?
- Is the other party interested in curtailing costs?
- Will the other party gain by having a speedy resolution of the dispute?

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39. Arbitrations range from very informal to formal. *See* James R. Deye & Lesly L. Britton, *Arbitration by the American Arbitration Association*, 70 N.D. L. REV. 281 (1994); Steven A. Meyerowitz, *The Arbitration Alternative*, 71 A.B.A. J. 78 (Feb. 1985).

- Is the other party interested in a private resolution?
- Will the court encourage ADR if the issue is raised in conference before the judge?[40]

## V. SELECTING THE RULES FOR THE PROCESS

In some ADR processes the parties may fashion their own rules, although the rules are preordained in other ADR processes. If the parties may fashion their own rules and a third party neutral is involved in the process, the parties may defer the development of the rules to the third party. The attorney must understand whether the process includes mandatory rules or whether the parties can create their own rules. If the parties can fashion their own rules, the attorney must evaluate whether there is something to be gained by doing so rather than by deferring to the third party. In either case, the attorney must know the rules governing the process before the dispute resolution process begins. Without knowledge of these rules, an attorney is not prepared to take full advantage of the process on behalf of a client.

Negotiation is a process, and effective negotiations do not just happen. Negotiations generally do not operate under pre-agreed upon formal rules because the rules evolve as the process unfolds. An attorney, however, should have a game plan for the negotiation. By having a game plan, the attorney controls the process and in turn controls the rules of the process. Substantial pre-negotiation planning is required.

If an attorney is following an adversarial negotiation format, the process should be fully understood before negotiations begin. The attorney should know the client's opening, target, and maximum or minimum positions. The attorney should anticipate the arguments that will be made by each side attempting to persuade the other party to change their position.

If an attorney is following a problem-solving negotiation format rather than an adversarial negotiation format, the problem and interests should be analyzed from the client's perspective as well as from the other party's perspective. In addition, a matrix of solutions should be created.[41]

Mediation and arbitration operate under rules selected by the parties. Many times, the rules are selected by the parties at the time of contracting, which could be years before the mediation or arbitration occur.[42] If, however, the parties do not select the rules, the mediation or arbitration operates under rules selected by the mediator or arbitrator.

Court-sponsored settlement conferences operate under the court's rules.[43]

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40. *See* Arthur Garwin, *Show Me the Offer*, 83 A.B.A. J. 84 (June 1997) (an attorney's obligation to inform the client as to a proposal to use mediation); Monica L. Warmbrod, Note, *Could an Attorney Face Disciplinary Actions or Even Legal Malpractice Liability for Failure to Inform Clients of Alternative Dispute Resolution?*, 27 CUMB. L. REV. 791 (1996-97).

41. *See* ROGER FISHER & WILLIAM URY, GETTING TO YES 58-83 (1981).

42. In some areas, mandatory ADR clauses have come under criticism. *See* Richard C. Reuben, *Mandatory Arbitration Clauses Under Fire*, 82 A.B.A. J. 58 (Aug. 1996).

43. *See* John Maull, *ADR in the Federal Courts: Would Uniformity Be Better?*, 34 DUQ. L. REV. 245

A settlement conference order issued by the court will set forth additional rules governing the conference. Settlement judges may also impose their own rules on the process. At times, these rules may be negotiable between the judge and the parties.

## VI. SELECTING THE BEST TIMING FOR THE PROCESS

To maximize the effectiveness of an ADR process for a client, the attorney must determine the proper timing for that process. Because some private ADR processes can take place before a complaint is ever filed, the attorney must decide whether the filing of a complaint will add leverage to resolving the dispute by ADR. Issues that need to be addressed include the following.

- What needs to be done in a case before the ADR procedure will be meaningful?
- What facts must the attorney know, how long will it take to gather these facts, and how (or by whom) will these facts be gathered?
- How much law must the attorney know and how long will this take to find and analyze? Does the ADR process focus on the law or will it be driven by the interests of the parties?
- Is this dispute better settled before initiating litigation, or, is the litigation forum critical to the process?
- When and how does an attorney tell a judge that the case is not ready for the ADR process that the judge has scheduled or would like to schedule? Are the parties scheduled for a case management conference and would this be an appropriate topic for discussion?

The timing of a mediation depends on the attorneys and the nature of the dispute. Some attorneys believe it is necessary to have the case fully prepared before entering mediation. Others like to participate in mediation before depositions are conducted and before much has been spent on the case. Some use mediation as a discovery tool. In some cases, attorneys find it helpful to have completed a deposition or two or to interview several witnesses before they can effectively participate in mediation. At a minimum, attorneys should review all relevant documents before beginning negotiation or mediation. If a dispositive motion has been filed with the court, some attorneys want the motion to be ruled upon before settlement offers are tendered. Others prefer the uncertainty created by a pending dispositive motion.

Because arbitration is an adjudication process, the arbitrator will decide the dispute based on the law and the facts as they apply to the law. Therefore, a thorough understanding of both the facts and the law will be necessary to prepare for arbitration.

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(1996).

## VII. PREPARING FOR THE ADR PROCESS

Preparation for ADR will be determined by the particular process to be utilized. Preparing the facts and the law will vary from process to process. When the parties have control over the outcome, the process can be recessed if more facts are needed. That luxury will not exist when the outcome is within the control of a neutral third party.

Preparing the client for the process will hinge upon the nature of the dispute and the chosen dispute resolution process. The roles of the client and the attorney will vary considerably in negotiation or mediation. Attorneys must also prepare their clients for their role in the chosen process. A client's role can range from not being present to representing himself or herself. For example, clients in arbitration must be prepared to testify as if they were in litigation.[44]

### *A. Preparing the Facts, the Law, and the Parties' Interests for the Process*

Some processes are driven by the law and the facts. Still others are driven by the interests of the parties. The process chosen naturally determines to what extent the facts, the law, and the parties' interests must be prepared.

#### 1. When the Parties Resolve the Dispute

Documents and other evidence have limited importance in negotiation and mediation since the parties are attempting to resolve their own dispute by making a good business decision based on their interests rather than one based on legal issues. Parties who attempt to convince the other party of the merits of their respective positions have little success because neither is an objective decision-maker. Parties who attempt to convince the mediator of the merits of their respective positions also have little success because the mediator is not the decision-maker. Some documentation and other evidence, however, may be helpful when exploring various perceptions of the problem and may lead to a discussion of the interests of the parties.

In anticipation of mediation, attorneys must consider and be prepared to give (if asked by the mediator) an opening statement that will present the salient facts and issues. The opening statement in mediation is different from an opening statement in litigation. It should be neither legalistic nor inflammatory.

Attorneys should be prepared to discuss with the mediator both the strong and weak points of their case, their client's needs and interests, and previous settlement efforts, including offers and counteroffers. The attorneys must be prepared to answer questions posed by the mediator, to be candid with the mediator, and to work toward fashioning a settlement that achieve their clients' interests or needs.

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44. The rules of evidence and civil procedure are relaxed in an arbitration, thereby affording the witness more latitude when testifying.

The attorneys and their clients should speak directly to the other side in the presence of the mediator and not just to the mediator.[45] They should be civil to the other side and show respect for the other attorneys and their clients. They should not belittle the other side during the mediation. Furthermore, attorneys should avoid grandstanding. Attorneys should emphasize their client's needs or interests without being positional. They should listen carefully and avoid interrupting the other attorneys and their clients.

Attorneys should analyze the costs of going forward, the costs of losing, and the costs of winning. The insurance aspects of the case as well as wanted and unwanted publicity should also be considered. Any necessary exhibits and computations of costs should be completed beforehand.

Attorneys should be prepared and willing to spend the time in the settlement conference that is necessary to exhaust all avenues of settlement.

The mediation should also be a learning experience for all parties. It provides an opportunity to focus on the problem from various perceptions, to articulate and understand the relevant interests, and to fashion a workable outcome that addresses those interests. All of this can be accomplished in a brief period of time because the decision-makers, along with their legal advisors, are meeting under the auspices of a neutral third party.[46]

2. When a Third Party Resolves the Dispute

In arbitration, attorneys must be prepared to present a complete statement of the case as if it were a trial. Preparation will includes an opening statement, the evidence, and a closing statement. Various visual aids such as graphs, blown-up pictures, slides, and videos should also be prepared. This will help the arbitrator understand the case. Attorneys should keep in mind that they are not dealing with a jury and the arbitrator will decide both the factual and legal issues of the case. Therefore, the passionate pleas normally given to the jury will not be effective. Also, the rules of evidence and civil procedure will not apply in the same manner as if this were a trial. Therefore, technical objections to the presentation of evidence may not be effective.

### *B. Deciding Who Should Attend the Process*

Deciding who should attend the process is critical when the dispute is being resolved by the parties. The absence of clients requires attorneys to communicate with their clients and report back to the other attorneys. This not only

45. Treating the opposing party as someone who has feelings and interests is an important step in the road to a settlement. *See* ROGER FISHER & WILLIAM URY, GETTING TO YES 19-21 (1981). Since a settlement requires the agreement between the disputants, the opposing party cannot be ignored.

46. *See* Tom Arnold, *Mediation Outline: A Practice How-To Guide for Mediators and Attorneys*, ABA-ALI Course Study, vol. CA13, at 425 (Jan. 25, 1996); Shelby R. Grubbs, *Preparing for Mediation: An Advocate's Checklist*, 30 TENN. B.J. 14 (Mar./Apr. 1996); David Plimpton, *Mediation of Disputes: The Role of the Lawyer and How Best To Serve the Client's Interest*, 8 ME. B.J. 38 (1993); Leonard L. Riskin, *A Quick Course in Mediation Advocacy*, 82 A.B.A. J. 56 (Aug. 1996); Richard C. Reuben, *The Lawyer Turns Peacemaker*, 82 A.B.A. J. 54 (Aug. 1996).

takes time, but detracts from the spontaneity of the process.

In a court-sponsored settlement conference, the court may require the presence and participation of client as well as counsel. The advantages of client participation in the settlement conference include first hand information gained by the client (the client may speak with and listen directly to the settlement judge and the other side), as well as the instantaneous exchange of information and offers. By being present, the client (after being advised by counsel) can determine whether to accept an offer or propose a counteroffer.

If a client or a client's representative attends the settlement conference, that person must have full settlement authority. Without full settlement authority, the representative acts only as a messenger and therefore cannot fully participate in the process. In a corporate dispute, the person with the greatest understanding of the corporation's interests relative to the dispute and its resolution should be selected as the corporate representative.

At times it is necessary to bring others to the process because they provide either psychological support to a client[47] or expertise regarding the facts. Having too many people attend a process may also present problems. Clients with settlement authority may feel constrained to exercise that power if accepting an offer would make then look weak in the eyes of others attending the process. Therefore, if others are to attend the process, their continuing presence should be subject to ongoing evaluation and they should be excused when their presence is no longer needed.

### *C. Preparing the Client for the Process*

Clients have different roles depending on the nature of the dispute and the dispute resolution process selected. Clients are prepared differently depending on whether they are in attendance to give evidence, or to resolve the dispute.

#### 1. When the Parties Resolve the Dispute

The role of the parties in negotiation and mediation vary depending on the design of the process. In some negotiations and mediations, the clients represent themselves and their attorneys are excluded. When the attorneys are excluded, the clients must be prepared to articulate their facts, feelings, and interests. They must be able to evaluate offers and act upon them.

In other negotiations and mediations, the clients represent themselves but their attorneys are present as advisors. The attorneys do not actively participate in the process. Although the clients must be prepared to articulate their facts, feelings, and interests, they need not be solely evaluate offers since counsel is

47. In a sexual discrimination or harassment case, the plaintiff, often female, usually will be confronted by an all-male cast. Present will be one or more male attorneys, several male officials of the company, and the male who discriminated against or harassed the plaintiff. The plaintiff may be left by herself while her attorney confers with the mediator. Having a supportive person present for the plaintiff could help level the playing field.

present for assistance.

In still other negotiations and mediations, the attorneys represent their clients and actively participate in the process. The clients must be able to articulate facts, feelings, and interests when called upon, although the attorneys are usually the more active of the participants.

In some negotiations and mediations, the attorneys represent their clients without their clients being present. In these instances, the attorneys must be prepared to articulate the clients' facts, feelings, and interests. When the clients are not present, the attorneys must know whether they have the authority to evaluate offers and act upon them, or whether they have only limited authority requiring communication with their clients so that their clients may evaluate the offers and advise appropriately.

Regardless of the format, the clients must be informed about the process and their role during the process. The clients must understand that they are required to arrive at their own agreement as opposed to an agreement that is imposed by a third party. If the process does involve a mediator (a third party neutral), clients must understand that the mediator has no interest in the case and does not care if the case settles. The attorneys should explain to their clients that the mediator is experienced and knowledgeable in the mediation process and is able to provide understanding and assistance *vis a vis* the process.

Attorneys should discuss the cathartic aspect of the mediation (that is, an opportunity to vent feelings by telling their story to the judge uninterrupted and hear the other side do the same). Attorneys should also explain the consequences if the dispute does settle (that is, written agreement and dismissal of the law suit, if one has been filed) and what will follow if the case does not settle (that is, additional discovery, trial, and possibly an appeal, assuming a suit will be or has been filed).

Since the third party neutral will not resolve the dispute for the parties, the attorneys for both sides must help their clients develop a game plan for the process. The clients must understand that they can expect the negotiation or mediation to be a give and take process in which they should be prepared to make concessions. They should be prepared to take significantly less or give significantly more than their opening position, and they should be prepared to discuss and evaluate creative ways to resolve the dispute. Attorneys should counsel their clients not to compromise their needs or interests but to be flexible and creative on how their needs or interests can be met.

Attorneys should explain the sequencing of events at a mediation. Clients should be prepared, if asked by the mediator, to give an opening statement presenting the salient facts. They should be able to discuss their needs or interests without focusing on an outcome. They must listen to the other side without interrupting, and ask questions when they do not understand something. The attorneys should explain to their clients that they may have an opportunity to speak privately with the mediator with or without their attorneys being present. Clients should be made aware of the fact that all statements made in a media-

tion will be confidential and cannot be used for any other purpose.[48]

The attorneys should explain that the parties may be in the same or different rooms, that a courtroom will not be used, that there will be no refreshment breaks, and that the conference may span a number of hours and extend into the night. In mediation, attorneys may want to advise their clients that they may be left alone in a room for an extended period when the mediator meets with the attorneys privately and, therefore, the clients should be prepared to entertain themselves. The clients may be advised to bring someone to act as their support team. This may be especially helpful where the client already feels that the playing field is not level.

Clients must advised about what to wear and how to behave. They should be advised that they must attend and participate in the mediation in good faith.[49]

If the mediation goes beyond facilitation and includes an early neutral evaluation, the attorneys should explain to their clients that the mediator will provide an objective review of the merits of the case. Advise the clients that the mediator's review is not the rendering of a decision. The attorneys should explain to their clients that as the mediator is not the trial judge, and that the mediator will neither communicate with the trial judge about this case nor be involved in this case at a later stage.[50]

2. When a Third Party Resolves the Dispute

Clients must be informed about the arbitration process and about their role during arbitration. In an arbitration, as in litigation, clients may be witnesses and testify. Attorneys should prepare their clients to testify as if this were a trial, although the testimony will be less formal than at a trial. If clients testify, they should be prepared to respond to cross-examination. Neither clients nor their attorneys have a role in the ultimate resolution of the dispute. Since the number of witnesses will be limited in arbitration, they should be selected very carefully.

Clients should be informed that the arbitrator will decide the case. Depending on the process, this decision may be rendered immediately or at a later time, and may or may not be accompanied by a written, reasoned opinion. Also depending on the process, the decision may be binding or non-binding. A bind-

48. If the settlement judge is also the trial judge, then counsel must approach the confidentiality question with some caution. Only the evidence admitted during the trial should be used to render a judgment. Therefore, knowing the applicable rules is imperative. *See* Wayne D. Brazil, *Protecting the Confidentiality of Settlement Negotiations*, 39 HASTINGS L.J. 955 (1988); Eric D. Green, *A Heretical View of the Mediation Privilege*, 2 OHIO ST. J. ON DISP. RESOL. 1 (1986); Michael A. Perino, *Drafting Mediation Privileges: Lessons from the Civil Justice Reform Act*, 26 SETON HALL L. REV. 1 (1995).

49. Participation in good faith does not mean that disputants must accept a proposed settlement offer. Disputants, however, must at least consider a proposed settlement offer and have the authority to accept it if they believe it is in their best interest.

50. In some jurisdictions, the settlement judge is the trial judge and therefore the dynamics of the settlement conference dramatically change because the judge will have *ex parte* information about the case. Therefore, counsel must familiarize himself or herself with the applicable rules in this regard. *See supra* note 48.

ing arbitration decision may be appealed only on very limited grounds.[51]

## VIII. CONCLUSION

The practice of law has changed dramatically during the past fifteen to twenty years. These changes may be attributed to many factors, including: a more competitive and less cooperative legal community; the client's involvement in case management; the arrival of paraprofessionals and new technology; and the ADR movement.

To practice law in an ADR environment, today's attorneys must thoroughly understand the various dispute resolution processes. It is imperative that they know which processes are available in order to effectively help their clients select the appropriate ADR process. Those attorneys who counsel clients only on litigation may find their clients becoming disenchanted, thus leading to an erosion of the client base. Attorneys must understand not only how to be effective in the ADR process, but they must also know how to prepare their clients to be effective. Attorneys and clients play vastly different roles in each ADR process. Therefore, attorneys must learn to work with clients who may, due to the nature of ADR, have more active roles in the dispute resolution process. Attorneys must remain involved in their clients' disputes and play an active role in all ADR processes selected.

Effective representation in the ADR environment will promote client satisfaction. This satisfaction will come about because the clients' expenditures of time and money in ADR, when compared to litigation, will have been reduced, and their opportunity to control their own destiny enhanced.

51. Judicial review of an arbitrator's decision is normally only available to raise issues of fraud or misconduct, to challenge the validity of the arbitration agreement, or to assert that the claim was barred by the statute of limitations. *See* Kenneth R. Davis, *When Ignorance of the Law Is No Excuse: Judicial Review of Arbitration Awards*, 45 BUFF. L. REV. 49 (1997).