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Alternative dispute resolution services : a nonauthoritative guide; Consulting services practice aid, 99-1

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American Institute of Certified Public Accountants. Management Consulting Services Team

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CONSULTING SERVICES
PRACTICE AID 99-1

AICPA

AMERICAN INSTITUTE OF CERTIFIED PUBLIC ACCOUNTANTS

Technical Consulting

Alternative Dispute Resolution Services

A Nonauthoritative Guide

Consulting Services Team

NOTICE TO READERS

This Practice Aid is designed as educational and reference material for AICPA members and others who provide consulting services as defined in the Statement on Standards for Consulting Services (SSCS) issued by the AICPA. It does not establish standards or preferred practices. Other approaches, methodologies, procedures, and presentations may be appropriate because of the widely varying nature of consulting services as well as specific or unique facts about the client and engagement. Readers may need to consult with counsel about local requirements and state laws that may differ from the general guidance contained in the Practice Aid.

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PREFACE

This Practice Aid is one of a series intended to assist practitioners in applying their knowledge of organizational functions and technical disciplines in the course of providing consulting services. Although these Practice Aids often deal with aspects of consulting services knowledge in the context of a consulting engagement, they are also intended to be useful to practitioners who provide advice on the same subjects in the form of consultation. Consulting services engagements and consultations are defined in the Statement on Standards for Consulting Services (SSCS), *Consulting Services: Definitions and Standards,* issued by the AICPA.

This series of technical consulting Practice Aids should be particularly helpful to practitioners who use the expertise of others while remaining responsible for the work performed. It may also prove useful to members in industry and government in providing advice and assistance to management.

Technical consulting Practice Aids do not purport to include everything a practitioner needs to know or do to undertake a specific type of service. Furthermore, engagement circumstances differ and therefore the practitioner's professional judgment may cause him or her to conclude that an approach described in a particular Practice Aid is inappropriate.

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ALTERNATIVE DISPUTE RESOLUTION SERVICES

1. INTRODUCTION

.01 Alternative dispute resolution (ADR) comprises a variety of processes for resolving business and individual disputes outside the formal litigation process. In the past ten to fifteen years, the use of these techniques to resolve conflict has become rapidly accepted by national and international business communities. Since 1996, the velocity and volume of ADR use have increased to such an extent that ADR has become a mainstream process for dispute resolution. Parties in dispute have increasingly taken a less adversarial stance, choosing mediation, arbitration, and other alternatives to litigation to achieve their business and personal goals.

.02 ADR presents CPAs with an opportunity to expand their service offerings as well as avoid, and assist their clients in avoiding, the high cost associated with time-consuming litigation. Whether CPAs provide ADR services as professional neutrals,[1] they should be knowledgeable about ADR processes. The reason is many of their clients will inevitably be party to an ADR arrangement, either by contractual provisions or after-the-fact agreements.

.03 As advisers, CPAs also occupy a special level in the client advisory hierarchy. CPAs, unlike many outside professional advisers, maintain an ongoing and often candid relationship with their clients. Therefore, it is the CPA who is called upon to clarify business processes, standards, responsibilities, interests, and goals, and to help clients and their advisers and counsel uncover cost-effective solutions to their problems.

.04 CPAs themselves will be increasingly drawn into third-party privity issues and ADR situations as the CPAs become bound by clauses in engagement letters. Also, when employment, partnership, vendor, and other business agreements contain ADR provisions, the CPA must be knowledgeable of the ADR universe should a dispute arise. In these incidences, the CPA will be a disputing party, called upon to participate in, for example, mediation, arbitration, and minitrials.

.05 The various methods for conflict resolution under ADR create questions about the process, the persons who perform ADR, and evaluation. Importantly, each of the processes contains high-risk-benefits. ADR, therefore, is not a blanket mechanism for resolving all disputes. Participants who are not knowledgeable of the processes may end up at a distinct disadvantage.

.06 This Practice Aid is intended to provide the practitioner with three tools:

1. An understanding of the nature of conflict—a universal constant
2. A method for advising clients involved in a conflict-resolution process—both proactively and retroactively

[1] This Practice Aid provides no guidance to the CPA acting as a neutral provider of dispute resolution processes(that is, the CPA engaged as the actual mediator, arbitrator, or special master). See the "Scope" section for further disclosure.

3. An overview of the ADR universe, so the practitioner can assess the skills required to become an effective ADR provider

2. SCOPE OF THIS PRACTICE AID

.01 The purpose of this Practice Aid is to impart an understanding of the various alternatives to the formal adjudication process being used by parties in commercial and interpersonal disputes and how the CPA may be engaged to provide assistance. This Practice Aid sets no standards for the performance of such engagements or other litigation services.

.02 This Practice Aid has been designed only for the CPA engaged as an expert in consulting and testifying services for clients and attorneys. It is not intended to impart any guidance for the CPA who provides services as a mediator, arbitrator, or other process neutral. The providing of neutral services by CPAs, while affirmed and recommended by the AICPA, is outside the scope of this aid.

.03 Various ADR provider and administrative organizations are mentioned in this Practice Aid. These organizations are included only for clarification and resource purposes. Although the AICPA develops various strategic alliances with these organizations for the membership's benefit, it does not endorse any one ADR provider or administrative organization over any other.

3. PROFESSIONAL STANDARDS AND NONAUTHORITATIVE GUIDANCE

.01 Litigation and dispute resolution services are rendered by a CPA using accounting and consulting skills to assist a client in a matter that involves a pending or potential formal facilitative, legal, or regulatory proceeding before a neutral (for example, a mediator, arbitrator, or special master) or a "trier of fact" (for example, a judge or jury) in connection with the resolution of a dispute between two or more parties.[2] Litigation services may be provided by a CPA acting only as a consultant or expert witness.[3] The services provided may include fact-finding (such as assistance in the discovery and analysis of data), damage calculations, document management, preparation of demonstrative evidence, and expert testimony, as well as services associated with bankruptcy, reorganization, insolvency, and fraud investigations, among many others.

.02 Litigation services are classified as transaction services in the Statement on Standards for Consulting Services (SSCS) No. 1, *Consulting Services: Definitions and Standards* (AICPA, *Professional Standards*, vol. 2, CS sec. 100),[4] and are subject to the SSCSs as well as to the professional standards embodied in the AICPA Code of Professional Conduct. The communication standards promulgated by the AICPA that apply to litigation services are limited to the general

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[2] See Interpretation No. 3, "Applicability of Attestation Standards to Litigation Services," of Statement on Standards for Attestation Engagements (SSAE) No. 1, *Attestation Standards* (AICPA, *Professional Standards*, vol. 1, AT section 9100.48).

[3] The practice discipline of litigation services includes actual and potential disputes that may or may not proceed to formal litigation. Throughout this Practice Aid, the term *litigation services* includes litigation and dispute resolution services, unless otherwise indicated.

[4] Statement on Standards for Consulting Services (SSCS) No. 1, *Consulting Services: Definitions and Standards* (AICPA, *Professional Standards*, vol. 2, CS sec. 100.05[d]), effective January 1, 1992, states that litigation services as part of the full definition of consulting services are subject to the following standards: professional competence, due professional care, planning and supervision, sufficient relevant data, client interest, understanding with client, and communication with client. See paragraphs 6 and 7 of the Statement for further explanation.

requirement of communication with the client in SSCS No. 1. The SSCS states that the client be informed of—

a. Conflicts of interest that may occur pursuant to interpretations of rule 102 of the Code of Professional Conduct.[5]
b. Significant reservations concerning the scope or benefits of the engagement.
c. Significant engagement findings or events.

.03 The communication requirement in SSCS No. 1 is relatively broad and does not provide specific guidance to the CPA for satisfying this requirement. Practitioners may communicate concerns about conflicts of interest, serious reservations, or significant engagement findings and events to the client either orally or in writing.

.04 The applicable professional standards neither require a written report nor specify the nature of its contents when one is prepared for litigation services. However, the CPA may be subject to other requirements, such as the Federal Rules of Civil Procedure, which dictate that the written report contain at least certain elements that are addressed in the Federal Rules section titled "The Federal Rules of Civil Procedure and Written Reports by Experts."[6] Other potential report elements are described in the section titled "Elements of an Expert's Written Report." The CPA and attorney or client might discuss whether any federal, state, local, or other jurisdictional rules (for example, regulatory associations such as the National Association of Securities Dealers [NASD] and the New York Stock Exchange [NYSE]) apply to the format and content of the expert's written report in a mediation session, an arbitration tribunal, or a minitrial, or apply to the expert's reporting to the court as a special master, neutral fact finder, early neutral evaluator, or all three. These terms are defined in the "ADR Processes Between Mediation and Arbitration" section of this Practice Aid.

.05 In addition to this Practice Aid, other AICPA Practice Aids and special reports provide nonauthoritative guidance about engagements in litigation services to the CPA. These publications discuss the nature of litigation services more fully, including applicable professional standards, conflicts of interest, the differences between attest and consulting services, communication considerations for consulting engagements, and engagement letters.

Nonauthoritative Literature

.06 The nonauthoritative publications include the following:

a. Consulting Services Special Report 93-1, *Application of AICPA Professional Standards in the Performance of Litigation Services* (New York: AICPA, 1993)
b. Consulting Services Special Report 93-2, *Conflicts of Interest in Litigation Services Engagements* (New York: AICPA, 1993)
c. Consulting Services Special Report 93-3, *Comparing Attest and Consulting Services: A Guide for the Practitioner* (New York: AICPA, 1993)

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[5] Educational information on the topic of conflicts of interest is contained in Consulting Services Special Report 93-2, *Conflicts of Interest in Litigation Services Engagements*(New York: AICPA, 1993).

[6] Some states, it should be noted, have not adopted the standards set forth in the Federal Rules of Civil Procedure regarding expert reports and, therefore, these states have their own specific requirements.

d. Consulting Services Practice Aid 93-4, *Providing Litigation Services* (New York: AICPA, 1993)
e. Consulting Services Practice Aid 95-2, *Communicating Understandings in Litigation Services: Engagement Letters* (New York: AICPA, 1995)
f. Consulting Services Practice Aid 96-3, *Communicating in Litigation Services: Reports* (New York: AICPA, 1996)
g. Consulting Services Practice Aid 97-1, *Fraud Investigations in Litigation and Dispute Resolution Services* (New York: AICPA, 1997)
h. Consulting Services Practice Aid 98-1, *Providing Bankruptcy and Reorganization Services* (New York: AICPA, 1998)
i. Consulting Services Practice Aid 98-2, *Calculation of Damages From Personal Injury, Wrongful Death, and Employment Discrimination* (New York: AICPA, 1998)

Authoritative Literature

.07 CPAs should also be aware that the following authoritative literature applies to litigation services as well as any other service provided by CPAs in public practice:

- AICPA Code of Professional Conduct (particularly rule 102)
- Statement on Standards for Consulting Services No. 1

4. WHY USE ADR?

.01 If a negotiated solution is an acceptable outcome to a dispute, ADR is an option that should be considered before the dispute becomes a lawsuit. Studies show that 90 percent to 95 percent of all lawsuits are ultimately resolved without a trial. However, this point is often reached only after angry confrontations, delays, costly discovery procedures, and expensive trial preparations. In the process, the parties may have decided that the court system has become too slow, too overburdened, too public a forum. Many federal and state courts have become overloaded to crisis levels. Also, the past twenty years have shown a dramatic increase in criminal trials, which the courts must give priority by law.

.02 ADR generally offers a faster, more controllable, and more economical forum than the court system does to resolve disputes for litigants and their counselors. ADR is particularly effective in business disputes, in which the issues are generally unemotional, often technical, and the parties wish to maintain an ongoing relationship. Many professionals, including engineers, architects, and members of the financial services industry, such as bankers and stockbrokers, increasingly use these nonlitigious techniques.

.03 The Administrative Dispute Resolution Act of 1998 provided the federal government, including the Internal Revenue Service in large cases and transfer-pricing issues, with authorization to use alternative means of dispute resolution in the administration process. Congress has also encouraged the use of ADR in a growing number of statutes, including the Civil Rights Act of 1991 and the Americans with Disabilities Act of 1990. The court systems in more than half of the states now encourage the use of ADR to speed dispute resolution.

.04 A review by the CPR Institute for Dispute Resolution showed that 142 companies saved more than $100 million in legal costs by resolving major disputes through ADR. The 1994 report tracked how well law firms were responding to client interest in ADR. Of the 142 firms surveyed, nineteen firms had combined revenues in ADR of more than $19 million. The survey also revealed that mediation is rivaling or surpassing arbitration as a focus for law firm practices.

.05 Price Waterhouse LLP conducted the 1995 and 1996 *Law Department Spending Survey*. The 1996 survey statistics show that, of 241 participants, 37 percent increased the number of matters for which they used ADR voluntarily, and 24 percent increased the number of matters for which ADR was used pursuant to a court order. In the 1996 survey, 77 percent of the firms expected to make more frequent use of ADR.

.06 Many of the nation's Fortune 1000 companies are starting their second decade of a systematic adoption of customized dispute resolution processes—for either a class of disputes or the entire settlement process between them and company personnel, vendors, clients, and venture partners. Motorola, Aetna, Brown & Root, Bank of America, General Mills, Fairchild, CIGNA, IBM, and the American Red Cross—to name a few—have designed, formulated, and implemented comprehensive in-house and external ADR systems.

.07 Cornell University, the Foundation for the Prevention and Early Resolution of Conflict, and PricewaterhouseCoopers LLP published *The Use of ADR in U.S. Corporations*. This survey of America's 1,000 largest corporations, with 88 percent responding as of the 1998 survey results, revealed that—

- Nearly 100 percent of U.S. corporations use ADR.
- Ninety percent view ADR as a critical control technique.
- Eighty percent of respondents indicated that ADR is "a more satisfactory process" than litigation.
- Two-thirds of the respondents view ADR as an indispensable dispute resolution tool.
- Companies that choose to "litigate first and then move to ADR" are generally small to midsized companies.
- Corporate lawyers prefer mediation or other nonbinding third-party techniques over arbitration to resolve disputes.
- Although more corporations are including clauses requiring arbitration as a method of resolving business disputes in their standard contracts, legal mandates requiring the use of mediation are increasing.
- From 1993 to 1998, mediation has been the most popular form of ADR for U.S. corporations. The following summarizes the percentage of use of different ADR forms:

Mediation	87%
Arbitration	80%
Med-arb	40%
In-house grievance	23%[7]
Fact-finding	21%
Minitrial	21%
Peer review	11%
Ombudsperson	Less than 10%

.08 ADR's other benefits include the following:

- Encouraging the parties to explore alternative solutions thoroughly without basing settlements on the perceived expense of taking the case through litigation
- Giving the parties confidentiality and helping them avoid publicity and public scrutiny
- Preserving business relationships by relying on consensus and avoiding the hostility of a lawsuit
- Providing a mediator or arbitrator who, unlike a judge or jury, usually has expertise in the business involved and knowledge about complex or highly technical matters unique to the business

How Does ADR Apply to the Accounting Profession?

.09 The AICPA is increasing its efforts to educate CPAs on the use of ADR. The AICPA recently changed the name of its Litigation Services Subcommittee to the Litigation and Dispute Resolution Services Subcommittee (LDRS).

.10 The LDRS is charged with (*a*) establishing professional alliances with national and international ADR providers and associations, (*b*) developing professional guidance in ADR, (*c*) working with the AICPA and other professional development providers to develop high-quality and timely education, (*d*) monitoring legislation and regulation, and (*e*) following Institute and state society activities that may affect the practice of litigation and dispute resolution services offered by its members.

.11 Other examples of increased ADR incorporation into the accounting profession are the following:

- The AICPA is working to expand CPAs' services to include serving as neutrals, acting as expert witnesses in ADR proceedings, and consulting clients on the benefits of ADR to manage risk and reduce litigation.
- CPAs serve as neutrals on mediation and arbitration panels, such as the National Association of Securities Dealers (NASD) and the New York Stock Exchange (NYSE). The American Arbitration Association (AAA) has approximately 600 CPAs serving as neutrals on its various panels, which are classified under the master headings commercial and labor. Under the commercial umbrella are such specialty panels as finance, contract,

[7] Grievance procedures are for nonunion employment dispute resolution.

large and complex case, mass torts, international, partnership and joint venture, employment, and energy.

- The AAA convened the Professional Accounting Dispute Resolution Committee, comprising representatives from the nation's accounting firms, the professional liability insurers, and members of the legal community. The committee has developed rules and procedures for resolving accounting disputes and established guidelines for standard language to be used in engagement letters and partnership agreements.
- Many accounting firms have established divisions for ADR advisory services. These firms also offer further ADR services, such as identifying dispute issues; dual tracking, which means working with attorneys involved on the war (litigation) and peace (nonlitigated settlements) teams; and even serving as experts, mediators, and arbitrators.
- The New York State Society of CPAs established a core group of trained CPAs to serve as mediators in disputes between CPAs. The society also offers a videocassette of a mock mediation among an accounting firm, the firm's professional liability carrier, and the firm's client engaged in an accounting dispute.
- The New York, Florida, and Massachusetts state societies of CPAs have endorsed the use of ADR for member firms in disputes with clients.
- The Massachusetts State Society has developed a pilot program to resolve conflicts voluntarily through the use of mediation. The program involves including a standard mediation clause covering disputes with clients in engagement letters.
- Several of the larger CPA firms have implemented ADR programs for client–firm and staff–firm disputes. The program provides for a two-stage ADR process. The first stage involves facilitated negotiations using mediation services from a neutral third party. If, after sixty days, the negotiations are unsuccessful, binding arbitration is used. The two-stage system is noted in client engagement letters before any work is begun.
- Some professional liability insurance carriers are giving reduced policy fees to CPA firms that use mediation clauses in their engagement letters. The insurers may waive up to 50 percent of the CPA firms' deductibles, up to $25,000, if mediation is successful. Many of these insurers also offer the same credits if arbitration is used to resolve disputes, depending on the case, because the parties may prefer arbitration.
- Some CPAs are implementing a predispute commitment as part of a standard engagement letter, in the following situations:
  —Directly with clients to cover first-party claims in service and fee disputes
  —With third parties (such as lenders or significant investors) when privity can be established contractually (Third-party privity situations may cover attest or other services, such as litigation services or mergers and acquisition services, when use of work product is restricted to certain named parties.)

.12 ***Note:*** In any contractual situation, CPAs should obtain legal advice when drafting contract language or before undertaking the use of ADR in specific situations. Advice should also be sought from professional liability insurers.

CPAs' Concern With Dispute Resolution Use in CPA's Own Practice

.13 The accounting profession's biggest concerns about using ADR in CPA's own practice come from three sources: (*a*) the restrictions in most professional liability insurance policies that preclude certain forms of ADR (particularly arbitration), (*b*) the professionals' own skepticism about whether ADR will produce the presumed benefits, and (*c*) the impact the commitment or proceeding would have on CPAs' independence under AICPA rules, as described below.

.14 An editorial in *AccountingToday* raises the question about accounting professionals' low incorporation of ADR clauses into engagement letters and contracts. Also, *AccountingToday*'s 1994 survey of CPA liability insurance providers found that approximately only 6 percent of their accounting clients use ADR clauses.

The CPA's Independence in ADR

.15 The AICPA Professional Ethics Executive Committee issued rule 101.6 of the AICPA Code of Professional Conduct, and ethics rulings 95 and 96. These rules address the issues of independence when (*a*) a member and an attest client enter into an agreement to use ADR techniques, and (*b*) an ADR proceeding is begun.

.16 The rulings take the position that—

a. A predispute agreement to use ADR techniques would not impair independence.
b. The commencement of an ADR proceeding would not affect independence, unless binding arbitration is used.
c. When binding arbitration is used, the member and the client would be in positions of material adverse interests because arbitration proceedings are considered sufficiently similar to litigation for Ethics Interpretation 101-6, "The Effect of Actual or Threatened Litigation on Independence," of Rule 101, Independence (AICPA, *Professional Standards*, vol. 2, ET sec. 101.08) to be applied.

.17 Further, the Securities and Exchange Commission (SEC), consistent with the Administrative Dispute Resolution Act of 1998, the National Performance Review, and Executive Order 12988, has adopted the use of ADR to resolve appropriate disputes.

.18 Another consideration for using nonbinding dispute-resolution processes is the possibility of notification of adverse judgments and awards to the state board of accountancy.[8] Should the nonbinding process produce a settlement before a judgment against the CPA, he or she may not be required to report the proceeding to his or her state board or department of licensing and regulation. After a finding of liability on the part of the CPA in a lawsuit or binding arbitration has been rendered, the board or department likely will have to be notified.

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[8] Notification of state boards and licensing departments follows two paths: 1) upon license renewal, the licensee may need to certify that he or she continues to meet the regulator's standards, or must notify the authority of any infraction and have the authority rule on the matter, or 2) disgruntled clients, third parties, and competitors may file complaints against the licensee, which the authority may be required to investigate to completion and make a report of its findings.

.19 ***The Life of a Dispute.*** "There will always be enough conflict to go around" is a statement shared by many in the ADR profession. Erik Erikson, a developmental psychologist, recognized that humans pass through specifiable problems or conflicts at each critical stage of their lives. This rite of passage is an essential part in developing who we are and, according to Erikson, begins at infancy.

.20 Many psychologists now share the view that our survival instincts and intelligence are developed by a cyclical process of stress buildup and relaxation. In our mercantile society, there has always been a competition for action, called goal orientation or task accomplishment. When either cannot be realized as conceptualized, conflict is inevitable. The conflict becomes manifested internally, externally, or both. It should be noted that there is no "good" or "bad" in these manifestations—they simply exist; people add connotations to conflict.

.21 Conflict also develops in predictable stages. Although the stages are readily identifiable, they differ for each dispute because of many factors. The dispute resolution continuum (see appendix A) identifies the stages from peace to war; however, the continuum is valid for all conflict. In unresolved conflict, the ultimate result can be destructive.

.22 As the conflict progresses, the parties go from a recognition and discussion of the problem through negotiation and, traditionally, into litigation. Conflict, over time, may either snowball in intensity or simply dissipate as the issues lose their importance.

.23 Another aspect of conflict is the increase in risk and costs and the decrease in control the parties have as the conflict progresses. Also, the decision-making ability to resolve the conflict is taken away from the parties and awarded to others. Therefore, in many disputes, the value of resolving a conflict may be more than the cost of prolonging the dispute.

.24 Mediation and other nonbinding dispute resolution methods, outside of labor negotiations, are still in their adolescence in America. However, as the public, the courts, corporate officers, and their counselors become more educated in the advantages and positive results of these methods, the demand for these processes and for well-trained neutrals is increasing exponentially. Consequently, as an informed consumer begins to realize that the types of dispute deemed unique enough to reach the courts are few, they will demand earlier, nonlitigious resolutions.

5. PROFILE OF THE DISPUTE RESOLUTION UNIVERSE

.01 Dispute resolution alternatives to litigation include negotiation, mediation, neutral and expert evaluation, fact-finding, peer review, arbitration, minitrials, and other forms of ADR. Negotiation has consistently served as the keystone for dispute resolution. However, direct negotiations do not always result in acceptable settlements. A neutral third party can assist in these circumstances to facilitate a resolution to the dispute. The neutral's role in this process largely determines the impact the neutral will have in negotiations and settlement. In fact, what the third party neutral does defines the process. (See "The Mediation Session" section for further discussion.)

.02 ADR techniques generally fall into three broad categories (see appendix A):

1. Negotiation
2. Mediation
3. Arbitration

.03 The main distinction between the categories is the amount of control the disputing parties have over the process and the outcome. At one extreme is negotiation, in which the parties deal with one another and have maximum control. At the other is binding arbitration, in which a neutral third party renders a decision that the parties have usually agreed in advance to accept. In the middle is a host of nonjudgmental processes, in which a neutral third party helps the disputants reach an agreement but has no powers to order one. These consensual or nonbinding processes are further stratified into facilitated and evaluative processes.

.04 The "Negotiation," "Mediation," and "Abritration" sections of this Practice Aid contain a detailed analysis of the more widely used faciliative and arbitive processes. The following section discusses other evaluative processes between mediation and arbitration.

ADR Processes Between Mediation and Arbitration

.05 Between mediation and binding arbitration are the evaluative processes, which involve providing the parties and their advisers with data and opinions on the merits of their case. Advocates of and experts for the parties present their interpretation of the dispute to one or a panel of neutrals. The neutrals then evaluate the merits of the presentations. The purpose of this process is for the neutrals to render an objective, nonbinding, confidential evaluation of the strengths and weaknesses of each side's case. The advisers and the disputants can use these evaluations in further settlement negotiations.

.06 These techniques differ from mediation and arbitration. In the evaluative approaches, the neutrals can render opinions and give legal, financial, operational, and social (for example, industry practice and corporate culture) advice on the dispute, the disputants, and the deviations from industry standards, as well as the possible outcome of a litigated case.

.07 ***Fact-Finding.*** Fact-finding is a process by which the facts relevant to a controversy are determined. Many cases turn on misunderstood technical issues and industry practices. Also, in disputes for which no body of case law exists, the disputants may not wish to have a court establish legal precedent by a ruling. This is often the case in such industries as computers, medical technology, securities, international commerce, and risk-management and risk-assessment services, as well as in areas where intellectual property disputes arise. Involving a neutral expert in the subject matter results in a more equitable resolution than going through the traditional judicial system.

.08 Fact-finding is a component of other ADR procedures and may take a number of forms. In neutral fact-finding, the parties appoint a neutral third party (for example, a CPA) to perform the function and typically determine in advance whether the results of the fact-finding will be conclusive or advisory only. With expert fact-finding, the parties privately employ neutrals to render expert opinions that are conclusive or nonbinding on financial, technical, scientific, or legal questions.

.09 Federal Rule of Evidence 706 gives courts the option of appointing neutral expert fact-finders. Although the procedure was rarely used in the past, courts increasingly find it an effective approach in cases that require special technical expertise, such as disputes over high-technology questions. The neutral expert can be called as a witness subject to cross-examination. In joint fact-finding, the parties designate representatives to work together to develop responses to factual questions.

.10 ***Confidential Listener.*** The parties submit their confidential settlement positions to a third-party neutral who, without relaying one side's confidential offer to the other, informs them whether their positions are within a negotiable range. The parties may agree in advance that if the proposed settlement figures overlap, with the plaintiff citing a lower figure, they will settle at a level that splits the difference. If the proposed figures are within a prespecified range of each other (for example, 10 percent), the parties may direct the neutral to so inform them and help them negotiate to narrow the gap. With figures outside the specified range, the parties may repeat the process.

.11 ***Early Neutral Evaluation (ENE).*** The neutral—a CPA, attorney, or retired judge experienced in the substance of the dispute—informally provides feedback to the parties' attorneys. Early in the litigation of the dispute, this neutral holds a brief, confidential, nonbinding session to hear both sides of the case. The goal of ENE is to force the parties and their counsels to realistically confront the issues and likely outcomes, should the litigation proceed to court.

.12 ENE also develops an effective discovery process and helps with the timeline and other administrative matters. The session typically lasts a few hours. After the session, the neutral evaluator identifies the main issues of contention and assesses the merits of each side's positions. Increasingly, the neutral evaluator is being called upon by the courts and the parties to engage in settlement negotiations. An experiment in the northern district of California yielded an increase of 33 percent in settlement rates when the evaluator participated in settlement negotiations.

.13 ***Special Master.*** Special masters are appointed by judges to assist the court in fact-finding and in understanding specialized knowledge. These judicial adjuncts also assist in case management and many pretrial duties.

.14 When CPAs serve as special masters for the courts, they may be requested to engage in settlement discussions, mediating or arbitrating the resolution of specific issues, and in conducting settlement conferences for large and complex cases. Special masters were created under Federal Rule of Civil Procedure 53.

.15 ***The Minitrial.*** The minitrial is not a trial in the traditional sense but a private, nonbinding settlement procedure, set in motion by a submission agreement between the parties. This mock trial is voluntarily conducted by the parties and presided over by a neutral selected by the parties. The parties also establish the procedure for conducting the minitrial. An expert lay person experienced in the subject matter and litigation process or a retired judge is selected as the neutral.

.16 After a brief period of case preparation, which frequently includes limited discovery, representatives from each side make summary presentations of their case to the disputants themselves, generally senior executives with settlement authority, at an informal hearing. The minitrial typically lasts one to two days.

.17 The summary presentations may also be heard by a "neutral adviser" of the parties. The neutral may moderate the hearing and offer an advisory opinion on the likely outcome, either at trial or within the related industry's standards or marketplace. The presentations enable the executives to assess realistically the strengths and weaknesses of each side's position, often for the first time.

.18 After the presentations, the executives meet to negotiate a settlement, which may well include mutually advantageous business arrangements. The goal is to let the clients achieve a prompt, practical resolution. The minitrial has been used with great success to resolve a variety of disputes involving corporations, mass torts, class actions, and public institutions.

.19 ***Summary Jury Trial.*** The summary jury trial (SJT) provides many litigants with "their day in court." This process is indeed a trial in front of a jury. A judge or magistrate presides over the hearing, and the attorneys make abbreviated presentations. The trial usually lasts for no more than one or two days. Typically, the rules of evidence are relaxed. The jury's verdict is nonbinding and advisory.

.20 In about 50 percent of the cases, the judge permits live testimony, usually limited to one witness per side. The witnesses are usually the primary parties in the dispute. The individuals tell the jury their stories in their own words. Business executives and other principals authorized to settle the case are required to attend. After the jury delivers the advisory verdict, it becomes the starting point for settlement negotiations. If no settlement is reached, the case may proceed to other ADR processes or to a regular trial.

.21 The SJT is, as a rule, more adversarial than the other forms of ADR because attorneys for both sides are trying to persuade the jury to return a verdict in their client's favor. Also, the SJT can be modified by advance agreement, so the jury's verdict can be binding or only certain issues in the litigation will be tried. For example, the SJT may be conducted on only the liability issues, leaving any potential damage issues to be addressed at a later date.

.22 ***Partnering.*** A preventative approach to dispute resolution, partnering is typically used in large construction projects and long-term joint venture undertakings. It is initiated at the beginning of a project in an effort to change the traditional adversarial relationship between owners and contractors into a more cooperative, team-based approach. Before work starts, the project principals and managers meet in retreat for several days. A third-party neutral helps the parties, away from their organizations, define common goals, improve communication, and perfect a problem-solving attitude among the people who must work together.

.23 The participants come to understand and appreciate the roles and responsibilities each will have in carrying out the overall project. The teams identify costs and qualify goals. They work together in mock conflict situations to achieve the goals and share the benefits when tasks are mutually accomplished. Once the project starts, the neutrals conduct tune-up sessions and assist in resolving any actual misunderstanding and disputes that arise during the life of the project.

.24 ***Negotiated Rule Making.*** Reg-neg, as this ADR method is called, is a different approach to the traditional regulation issuance of government agencies. Officials and affected private parties meet under the guidance of a neutral facilitator to negotiate old and draft new regulations. The outcome regulation is then submitted to the public for comment. The government, by encouraging the

participation of interested stakeholders, makes use of the additional expertise and perspectives. The result is a reduction in subsequent litigation over the adopted rule.

.25 The Administrative Dispute Resolution Act of 1998 (ADRA) provides authorization of the use of ADR in federal administrative processes. The ADRA eliminates the provision that agencies can terminate an arbitration proceeding or vacate an objectionable arbitral award before it becomes final. The ADRA provides that dispute resolution communication between a party and a neutral shall be exempt from disclosure under the Freedom of Information Act of 1974 (1993 edition). The ADRA further provides permanent authorization of the Negotiated Rulemaking Act of 1990, which sunset in November 1996.

.26 ***Ombudsperson.*** An ombudsperson is a neutral person with expertise and credentials in the relevant area, usually appointed by an institution to investigate complaints within the institution and either prevent disputes or facilitate their resolution. This person is usually an outside neutral or a manager whose office is located outside the ordinary line-management structures, to preserve neutrality. The ombudsperson is empowered with the authority to investigate but has no authority to compel. This ADR process is different because the ombudsperson may act before any dispute has ripened. He or she is also vested within the institution to conduct an independent investigation in whatever ways are appropriate for the problem.

.27 Many institutional disputes result from misperception, failure to communicate, corporate cultural clashes, and wrinkles in the organizational fabric that do not come readily to the attention of management. Such disputes breed apathy, lost productivity, and workplace violence. Ombudspersons receive, analyze, and pass upward information that will foster timely change in an institution. The individual complainant's confidentiality is protected. When outdated or unintelligible policies or new problems arise, an ombudsperson provides a cost-effective, steady-state change agent to the institution.

6. UNDERSTANDING CONFLICT

.01 To better understand the phenomenal rise in usage of, and satisfaction with, these nonlitigious methods of dispute resolution, an understanding of the nature of conflict is needed.

.02 Conflict is that feeling or condition that occurs whenever one person or group faces an interruption of goal fulfillment created by another. It can also be created internally by the person himself or herself. It always presents at least two possibilities (that is, do something or do nothing) and the one that occurs is not agreeable.

.03 It is little wonder that people in western culture have developed a style of communicating about conflict that is almost completely negative. As conflict escalates in the United States, the response has been more legislation and more court action.

.04 What typically comes to mind with conflict or dispute is manifest conflict—that which can be observed. However, in most situations, there is underlying, hidden, or denied conflict. This unexpressed conflict, referred to in many instances as the "hidden agenda" by the individuals, may truly drive the conflict. This concept has created methods for dealing with disputes that are

adversarial. Disputes are viewed as battles to be won, usually by force and deception, in a winner-take-all outcome.

Conflict Equals Opportunity

.05 Another viewpoint is that conflict equals opportunity. This view purports that parties engage in conflict only when they are interdependent. A person or institution that is not dependent upon another—that has no special interest in what the other does—has no conflict with that other party. Therefore, mutual interests must be present to keep the conflict going.

.06 Under this scenario, opportunity for gain exists based on each party's interests, not each party's rights, power, or position. In their landmark treatise, *Getting to Yes*, Fisher and Ury, of the Harvard Negotiation Project,[9] explore the positive rewards of collaboration in conflict resolution. In some instances, conflict may be an exciting and inspiring experience in which relationships can be established or strengthened. It can lead to a closer examination of issues and situational assessments. After all, conflict is the basis for all personal, social, and organizational change.

.07 The conflict-equals-opportunity concept is a paradigm shift for western civilization. When the disputing parties shift from a win-or-lose-at-any-cost strategy, they are able to abandon the traditional adversarial methods of adjudication and replace it with a win-win, or collaborative, process.

7. NEGOTIATION

Overview

.01 Negotiation, which is familiar to all advocates, is the least formal of all the dispute-resolution processes. Although few people have understood its fundamental dynamics, those who do are usually schooled in the competitive or the positional styles of negotiation, rather than the collaborative or principled styles.

.02 The adage that negotiators are "born and not made" is quite inaccurate. Although there are certain intuitive moments, the complexity of the negotiation process involves the learning and continual analyzing of many skills. These include process skills, procedural conditions, specific substantive knowledge, and professional standards of responsibility. Therefore, negotiation can be perfected after the practitioner understands the theories of bargaining and perfecting effective strategies through practice.

.03 The importance of negotiation skills in the dispute-resolution universe cannot be overemphasized. Negotiation is the foundation skill for successful implementation of many ADR processes, such as conciliation, mediation, facilitating, special masters, and the minitrial. Therefore,

[9] Roger Fisher and William Ury, *Getting to Yes: Negotiating Agreement Without Giving In*, 2nd ed., ed. Bruce Patton (New York: Penguin Books, 1991). The project began at Harvard in 1981 as a series of workshops on negotiation. The project, and its corresponding Negotiation Network, have developed into an international institution serving corporate executives, labor leaders, and government officials around the world.

a theoretical and practical understanding of negotiation enhances the practitioner's effectiveness in these procedures.[10]

Positional Versus Principled Negotiation Styles

.04 ***Positional Bargaining.*** Positional bargaining arises from a belief that there are a limited number of resources to divide, that both sides have to lose part of the pie—it is just a question of who and how much. This competitive style is the most common form of negotiation. Its goal is to emphasize individual, rather than joint, gain.

.05 The success of positional bargaining involves initially taking extreme positions and progressively making strategic concessions so the desired position is finally arrived at through compromise. Compromise, itself, means a trade-off.

.06 Each side attempts to claim as much value for itself at the expense of the other side in what is referred to as a zero-sum game. For example, the successive sequence of positions in a typical negotiation for settlement of a breach of contract claim when liability is not an issue might go like this:[11]

Plaintiff's Opening Demand		**Defendant's Opening Offer**
$50,000		$15,000
	$35,000	
	(Value to be claimed)	
$47,500		$17,500
$42,000		$22,500
$37,500		$27,500
$35,000		$30,000
	$32,500	

.07 Positional bargaining has some benefits, such as letting one side tell the other what it wants and providing an anchor in an uncertain and pressured situation. This method of bargaining, however, usually fails to meet the criteria of producing a wise agreement, efficiently and amicably, for the following reasons.

.08 First, when people bargain over positions, they have a tendency to lock themselves into their positions and focus on them at the expense of their underlying concerns. Additionally, peoples' egos become identified with their positions, thus creating a new interest, saving face, which again often has little to do with their underlying concerns.

.09 Second, positional bargaining is inefficient because, in the hopes of reaching a settlement favorable to them, people start with an extreme position, stubbornly hold to it, deceive the other party

[10] Jacqueline M. Nolan-Haley, *Alternative Dispute Resolution in a Nutshell* (St. Paul, Minn.: West Publishing Co., 1992).
[11] Thomas R. Colosi. *On and Off the Record: Colosi on Negotiation* (New York: American Arbitration Association, 1993).

as to their true views, and make only small concessions as necessary to keep the negotiation going. All this works against reaching a settlement promptly.

.10 Third, positional bargaining easily becomes a contest of wills, with each side trying, through sheer willpower, to force the other to change its position. If one side sees itself having to yield to the rigid will of the other, at the expense of its own concerns, hostility and resentment can build, potentially resulting in irreparable damage to the relationship.

.11 Finally, in positional bargaining, being nice is no answer. Pursuing a soft and friendly form of positional bargaining makes one vulnerable to someone who plays a hard game of positional bargaining.

.12 ***Principled Negotiation.*** As an alternative to positional bargaining, Fisher and Ury propose the better avenue is to change the game.[12] Instead of employing different styles of positional bargaining, they suggest negotiators employ principled negotiation or principled bargaining (that is, negotiation on the merits).[13]

.13 Also called interest-based bargaining, the concept changes from battling over fixed resources to collaborating on mutual long-term gains that are not necessarily at odds with each of the parties. Interest-based bargaining often comprises multiple issues, leading to several alternative solutions based on the interests of the parties, not their positions.

.14 Interest-based bargaining employs four principles, which can be remembered by the key words *people, interests, options,* and *criteria.*

1. *People: Separating the People From the Problem.* The participants should come to see themselves working side by side on a problem, attacking the problem instead of each other. The overarching process goal is "We, working together, can solve this problem that is confronting us." An example would be a divorcing couple who, instead of asking, "Why are you causing me difficulties?" would ask, "What can we, working together, create that will be in the best interests of the children?"
2. *Interests: Focusing on Interests, Not Positions.* When people state their goals in terms of positions that have to be defended, as in positional bargaining, they are less able to produce wise agreements. Whether a negotiation concerns a contract, a family quarrel, or a peace settlement among nations, people routinely engage in positional bargaining. Each side takes a position, argues for it, and makes concessions to reach a compromise. Focusing on interests that underlie the positions creates many possible positions that can be derived from one's interests. Interests are more diffuse than positions and sometimes are difficult to identify, but they keep the process of collaboration in motion when the parties focus on them.
3. *Options: Generating a Variety of Possibilities Before Deciding What to Do.* Trying to resolve a conflict in the face of an adversary narrows one's vision. Pressure reduces creative thinking at the very time when creativity is most needed. Searching for the one right solution may be futile. Parties can get around this problem by brainstorming new

[12] Fisher and Ury, *Getting to Yes: Negotiation Agreement Without Giving In.*
[13] Neil G. Carmichael, ed. *Fundamentals of Negotiation, Mediation and Arbitration* (New York: American Arbitration Association, 1997).

solutions instead of endlessly defending prospective positions. A satisfactory decision is one that springs from the many options generated from concerned conflicting parties.

4. *Criteria: Insisting That the Result Be Based on Some Objective Standard.* One person's will is not enough to justify a conflict solution. Some principle of fairness or judgment should be used. The parties involved can develop objective criteria by using fair procedures (equalizing power in the process) and by seeking fair standards. Some external factors for fairness are simple success at reaching an agreement, compliance with the agreement, cost of the agreement, the efficiency through which the agreement is reached, access to justice presented to disputants, and the stability of the agreement over time. These standards might be important to a court, a branch of government, or managers overseeing an agreement in their department. Other fair standards can be based on the following:
   —Market value
   —Precedent
   —Scientific judgment
   —Professional standards
   —Efficiency
   —Costs
   —What a court would decide
   —Moral standards
   —Equal treatment
   —Reciprocity

.15 ***The Language of Common Interests.*** The following phrases are useful in the search for common interests:

- What if we tried . . . ?
- What will it take?
- Why?
- Why not?
- What would be the perfect situation?
- What problems are we trying to solve?
- What is your goal?
- What concerns you the most?
- When are you most irritated? Most satisfied?
- What do you want? What would it mean if you got it?
- Would you listen to what I want?

.16 Any individual may effectively use the four principles of collaboration. They may be informally adopted and used even in one-on-one conflicts that arise. Table 1 contains some statements that might be used during conflict to talk about perceptions of incompatible goals.

Table 1

Collaborative Principle	Sample Statements
People	"This is a problem you and I haven't had to face before. I'm sure we can work it out."
Interests	"What is it that you are hoping for most?" or "Let's figure out where we agree, and that will give us a base to work from."
Options	"I'd like to postpone making a decision about filing a grievance until our next meeting. Today I want to explore all the options that are available to us in addition to filing a grievance. Is that all right with you?"
Criteria	"I can't be satisfied with getting my way if you're disgruntled. Let's get an example of market value from an objective source."

.17 ***Disadvantages of the Collaborative Approach.*** As with competitive tactics, collaborative approaches have some disadvantages. Probably the biggest overall difficulty is that they may require "a high order of intelligence, keen perception and discrimination, [and] more than all—a brilliant inventiveness."[14] Also, without having seen collaboration modeled in the home or on the job, bargainers may require specific training. For the beginning bargainer (whether an attorney, CPA, spouse, corporate executive, or coworker), unless one has some level of training, the usual approach is to equate good bargaining with competitive tactics. Some other downside risks are that collaborative, problem-solving, principled bargaining approaches—

- Are strongly biased toward cooperation, creating internal pressures to compromise and accommodate that which may not be in one's best interests.
- Avoid strategies that are confrontational because they risk impasse, which is viewed as failure.
- Focus on being sensitive to other's perceived interests, increase vulnerability to deception and manipulation by a competitive opponent, and increase the possibility that settlement may be more favorable to the other side than fairness would warrant.
- Increase difficulty of establishing definite aspiration levels and bottom lines because of reliance on qualitative (value-laden) goals.
- Require substantial skill and knowledge of process to do well.
- Require strong confidence in one's own assessment powers (perception) regarding interests and needs of the other side and the other's payoff schedule.[15]

[14] M.P. Follett, *Dynamic Administration: The Collected Papers of M.P. Follett,* ed. H.C. Metcalf and L. Urwick (New York: Harper and Brothers, Publishers, *1940*). [*Emphasis added.*]

[15] J.A. Murray, "Understanding Competing Theories of Negotiation," *Negotiation Journal* (April 1986): 179–186.

.18 Collaborative negotiations, then, are not easily used in every conflict. They require considerable skill on the part of the negotiator, who strives to keep the negotiations from disintegrating into a win-lose approach.

Developing a Collaborative Framework

.19 No specific set of techniques will ensure collaboration. Collaboration is an approach, a mindset, or even a philosophy, as much as it is a set of techniques. If one does not believe that energetic mutual cooperation will provide better solutions than competitive techniques, all the language of collaboration that could be memorized will not ultimately produce collaboration.

.20 ***Moving from Competition to Collaboration.***[16] The central finding from research is that *successful* negotiations eventually move to collaborative or integrative processes.[17] The bargainers can be seen as moving from (*a*) differentiation—stressing their differences with the other, attacking the other positions, and venting emotions, to (*b*) integration or collaboration—taking a problem-solving orientation. In the commercial setting, these processes follow this sequence:

1. Initial extreme statements of positions
2. Clash (that is, arguments about positions)
3. De-emphasis of differences and decreased use of antagonistic tactics

.21 An almost identical set of stages has also been observed in the public sector:

1. Lengthy public orations characterized by a high degree of spirited conflict
2. Tactical maneuvers and arguments for and against proposals
3. Alternatives reduced to formal agreements

.22 These are phases that have been used in negotiations that resulted in agreements. Also, they are more characteristic of explicit bargaining situations, such as negotiations over contracts or formal mediation sessions. However, successful negotiations typically arrive at collaborative phases to accomplish workable agreements.

.23 How, then, can one learn to take collaborative steps at some point in the negotiations process? In most cases it is the individual's orientation toward negotiating, rather than the objective facts about the case, that predetermines one's style of negotiating. Practiced collaborative negotiators are able to work with each other even when resolution objectively seems to be a zero-sum or win-lose outcome.

.24 The mindset one has toward collaboration, however, works in a conflict situation only if he or she can communicate collaboratively. Although there are limits to learning collaboration from reading about it, some collaborative communication moves can be learned. These specific communication moves can lead one to a collaborative stance in negotiations. The following steps may be helpful in a collaborative approach to negotiations.

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[16] Adapted from Joyce L. Hocker and William W. Wilmot, *Interpersonal Conflict* (Madison, Wis.: Brown & Benchmark, 1995).
[17] P.H. Guliver, *Disputes and Negotiations: A Cross-Cultural Perspective* (New York: Academic Press, 1979).

1. Join "with" the other:
   —Use "we" language.
   —Seek common interests.
   —Consult before acting.
   —Nonverbally move closer.

2. Control the process, not the person:
   —Use setting, timing, and other factors creatively.
   —Limit or increase the number of people involved to help the collaborative effort.
   —Encourage the other to expound fully; listen actively even when disagreeing.

3. Use principles of productive communication:
   —Be unconditionally constructive.
   —Refuse to sabotage the process.
   —Separate the people from the problem.
   —Persuade rather than coerce.
   —Refuse to hate the other.

4. Be firm in your goals, flexible in your means:
   —Be provisional; seek alternate means to the goals.
   —Separate content and relationship issues.
   —Focus on interests, not positions.

5. Assume there is a solution:
   —Invent options for mutual gain.
   —Tackle issues first where agreement is easy.
   —Take issues one at a time.
   —Refuse to be pessimistic.

Summary

.25 The two major types of negotiations are (*a*) competitive and (*b*) collaborative. The assumptions, communication patterns, and downside risks of each type of negotiation have been explained. Negotiations also move between phases, often beginning on a competitive footing and concluding with a collaborative tone. Successful negotiators eventually are able to work collaboratively with the other party, even if the initial stance has been one of taking extreme positions, not conceding, and being hostile.

.26 Principles and suggestions for collaborative negotiation have been covered. There are specific communication moves that bring on a collaborative atmosphere. Some essential steps of negotiations are: (*1*) join with the other; (*2*) control the process, not the people; (*3*) use principles of productive communication; (*4*) be firm in goals, flexible in means; and (*5*) remain optimistic about finding solutions to the conflict.

8. MEDIATION

.01 Mediation is an approach to conflict resolution in which an impartial third party, with no decision power, acts as facilitator to encourage a restructuring of the relationship between the disputants to reach a mutually satisfactory resolution.

Understanding the Mediation Process

.02 CPAs are called on to counsel clients in, and they themselves experience, two broad categories of disputes: commercial and interpersonal. Each of these categories is handled differently in mediation.

.03 ***Commercial Disputes.*** According to the federal Council on Competitiveness, lawsuits now cost American business $80 billion a year, with much of the burden falling on small businesses. Not only is litigation costly to parties in terms of attorney and expert fees, it is also often a great drain on executive time and energy. Long-standing customer relations, valuable human capital, and most important, a company's public image can be harmed or destroyed by litigation.

.04 It is not surprising that more than 400 of the nation's top companies have developed dispute resolution systems, especially for participating in mediation before proceeding to arbitration or litigation. What is surprising is that, whereas the largest American corporations—which can readily afford litigation—have adopted mediation, smaller businesses have not.

.05 The typical commercial mediation model is generally one of conciliation. That is, the mediator meets separately with each of the parties in caucuses, after an initial joint meeting to establish the issues in the dispute. These confidential meetings allow each side to reveal information and positions to the mediator without discovery by the opposing side. The commercial model is also known as "shuttle diplomacy," and is the ADR model most often used by governments. It should be noted that some commercial sessions are conducted with all parties present and the private caucus used as the mediator deems appropriate. However, care and forethought to downside risks are advised for business disputes conducted in open sessions. The open session is discussed in the next section.

.06 ***Interpersonal Disputes.*** Interpersonal disputes, or disputes between individuals, are fraught with a great deal of emotional issues. They include divorce and disagreements between neighbors, parents and child, employees, partners and shareholders, and even boards of directors. Also, other commercial situations, such as those involving closely held businesses, where personal relationships play a significant role in the dispute, can be viewed more as interpersonal than strictly commercial. Unlike the commercial model, interpersonal mediation sessions usually take place with all parties present.

.07 At times the mediator may call a caucus (a private, confidential meeting with only one of the parties) to discuss issues and options with that party. However, the strength of the interpersonal model is having the parties first vent their emotions, then begin to understand each side's needs. In understanding each side's needs, a process called reframing takes place.

.08 Reframing is not only a process but also a point at which the parties begin to see the issue(s) of conflict and their solutions in a different way than they saw them when they first entered the

mediation process. This is similar to the paradigm shift from compromise to collaboration discussed earlier, in the "Negotiation" section.

.09 An in-depth discussion of the interpersonal model is outside the scope of this Practice Aid. However, the dynamics of the commercial model are similar in many ways to those of the interpersonal model. In the interpersonal model, the mediator's communication and facilitation skills should be highly developed, because of the higher emotional conflict levels explored during the mediation sessions.

Getting to the Mediation Table

.10 ***General Appropriateness.*** Participation in mediation is voluntary. Therefore, it may be accepted that such a procedure as mediation would serve the parties' interests, or there exists a pre-dispute pledge to use mediation.

.11 Essentially, every matter in which negotiation is appropriate, but difficult, is appropriate for mediation. Even if unassisted negotiations have taken place or litigation is pending between the parties, mediation can be recommended. Mediation is particularly helpful when the opportunity exists to structure a creative business solution. Often, mediation is not seriously considered until the plaintiff has filed litigation with the courts and pretrial discovery is often well advanced. However, attitudes are changing, especially when ADR clauses govern in contracts and engagement letters, where claims go to mediation before the complaint is filed in court.

.12 The informality, limited discovery, privacy, and flexibility that characterize mediation proceedings make them appealing to many business disputants. Mediation can be effective at any stage of the dispute. Maximum savings can be realized by having ADR clauses in business contracts and engagement letters or, failing this safeguard, by getting the parties to the mediation table before litigation is even commenced, or promptly thereafter.

.13 It is crucial that all parties share a genuine commitment to resolve the dispute and put it behind them. Attorneys and CPAs for the parties must respect each side's professionals. They should be prepared to cooperate on procedural matters, even while maintaining strong adversarial positions on substantive issues.

.14 Another crucial component of a successful mediation is the selection of a highly qualified neutral. The parties must have confidence in the mediator's impartiality, facilitation skills, and knowledge in the subject of the dispute.

.15 The CPR Institute for Dispute Resolution has developed lists of factors that the CPA should consider in advising clients on whether mediation is appropriate (see appendix B). These factors are discussed in the following sections.

Suitability Factors for Mediation

.16 ***The Parties' Relationship.*** If the parties have a continuing business relationship, or if the potential for a business relationship exists, not only are the business executives more likely to regard

the dispute as primarily a business problem, but they also will have settlement options other than money that could be far more agreeable to the disputants—especially the defendant.

.17 Some believe a balance of power is necessary; however, imbalances in size or financial resources can be redressed by other factors, such as the strength of the smaller party's case, the high quality of its counsel, and the aversion of the larger party to the risk of an adverse precedent. In any event, ADR procedures between parties of radically disparate size and resources have succeeded. Personality and emotional factors are a consideration; however, tempers do cool. Anger gives way to the need for a rational approach; distrust can give way to wary cooperation.

.18 Executives who do not feel a need to vindicate past business judgments, or to defer "biting the bullet," are best suited to decide on and participate in mediation.

.19 Mediation is also appropriate when—

- The parties, their advocates, or both need assistance with the negotiations or in communication and informational exchange.
- The parties have difficulty in identifying common interests.
- There is a need for creativity in the resolution.
- One or both parties, or their advocates, have made an unrealistic assessment of the dispute or its resolution.
- The parties are capable and have a desire for self-determination, or there is a mutual goal of a mutually satisfactory resolution.

.20 ***The Dispute.*** Disputes predominantly involving fact issues or mixed questions of fact and law are suited for mediation, for example, claims arising out of a construction project. Disputes in which the parties wish to avoid setting a legal precedent are also candidates for medication.

.21 Complex cases or those of a technological nature as a rule are very well suited for minitrials or mediation. Carefully selected neutrals and senior executives are more likely to grasp sophisticated technical arguments than a jury or a non-sitting judge are.

.22 The amount of money at issue or the importance of the controversy are considerations. Even most of the largest cases are settled eventually, in part because of reluctance to leave the decision to a court. High litigation costs usually seem less important in a case involving very high stakes or a vital corporate interest, and either or both of the parties may be reluctant to take part in a collaborative effort at an early stage. If so, the prospects for mediation are likely to be better after discovery has begun and the issues are more focused.

.23 A settlement agreement can provide for injunctive relief, which would be enforceable as a contractual obligation. If litigation is pending, such injunctive provisions also can be incorporated in a consent decree.

.24 When settlement negotiations already have taken place, a wide gap between the parties' positions argues for, not against, ADR. The gap suggests that at least one of the parties is taking an unrealistic view of the case. A well-conducted mediation is likely to lead to a much better understanding of the case and to a more realistic approach, which in turn may well bring the parties

within negotiating range. It is also not uncommon for settlement to occur after the mediation concludes unsuccessfully, but as a direct beneficiary of the mediation.

.25 When the parties wish to avoid placing the details of their transactions or the settlement in the public record and exposing them to publicity, mediation is likely to be seen as a significant advantage.

Nonsuitability Factors for Mediation

.26 ***The Parties.*** The following are considerations that may indicate nonsuitability for mediation:

- The decision maker will not attend the mediation.
- One or both of the parties cannot effectively represent its best interests and is not represented by counsel.
- One of the parties wishes to delay resolution.
- If one of the parties perceives a strong need for a judicial precedent and is confident of success in court, that party is less likely to agree to ADR.

.27 ***The Dispute.*** The CPA is urged to consider the following factors in deciding how to advise the client on whether to engage in mediation. However, many incidences and continued research have indicated that disputes with the following types of difficulties have been successfully mediated.

- When the issues are governmental or political and the agency does not have an ADR program or is not authorized to settle the matter unless litigated
- When budgetary constraints may obstruct the settlement or a settlement had been previously reached but broken
- When setting a legal precedent is desired
- When a party, by statute, is entitled to legal fees
- When there is a strong business competition between the parties in concentrated markets
- When discovery is needed
- When there is criminal action
- When there is a likelihood of bankruptcy
- When enforcement of the outcome will be necessary

The Referral Process

.28 Disputants find their way to the mediation table in several ways, ranging from the parties' voluntary desire to mediate a settlement to a court-ordered mediation, over the objections of one or both of the parties.

.29 Mediation can be entered into voluntarily. This may be done with or without the representation of an attorney. Mediators can be contracted, or in many localities, a not-for-profit mediation center can be found. The centers are usually staffed with volunteers and mediators-in-training. There should be some concern that the parties understand the mediation process and that mediation is the preferred ADR method to be used, because the centers do not provide any representation or advising.

.30 In many business transactions, and increasingly in prenuptial agreements, mediation is contracted in advance. Here the parties are somewhat familiar with the process and are usually predisposed to using it as a "first line" of resolution. To give comfort to employees, customers, and clients, many businesses go directly to mediation by an outside professional mediator or mediation organization. The fees are controllable, and the claimant feels from the beginning that he or she will get a fair process that may not be had from either the company's human resource department, corporate counsel, or another in-house party. After all, the outcome depends on both parties knowing that the resolution agreement has been reached jointly in a collaborative effort.

.31 ***Court-Ordered Mediation.*** The initial issue is whether a party in a pending litigation can be compelled to mediation. The question is whether individuals, against their will, should be forced to participate in a system of justice that does not include such safeguards as equal access for all, openness to public scrutiny, and neutrals appointed by someone other than the parties themselves.[18]

.32 State courts that refer cases to mediation do so by statutory authority. States are increasingly incorporating ADR procedures into their codes. Many states, however, require only that the parties attend a determination hearing that assists the parties in understanding the mediation process and the appropriateness of their case for mediation.

.33 Federal courts refer cases to mediation and other ADR procedures by their authority to manage cases or by rule 16 of the Federal Rules of Civil Procedure. Also, the Civil Justice Reform Act of 1990 and the Administrative Dispute Resolution Act of 1998, mandated by Congress, dictated that certain federal cases and certain U.S. departments and agencies establish ADR guidelines and procedures to resolve disputes.

.34 In civil matters, when ADR has been incorporated into contracts but one or both of the parties does not wish to honor the clause, courts have compelled the disputants to honor their ADR clause before bringing the case before the court. Several states (including Texas and Florida) have threshold limits, usually $25,000 and under, that require mediation. If the mediation does not result in an agreement, the parties may bring the matter before the court.

.35 Increasingly, the courts, as well as the parties, are requesting mediation or another nonbinding forum before arbitrating or litigating the case. Some progressive states now mandate that attorneys must counsel their clients in ADR settlement strategies as well as in the traditional adversarial strategies.

The Role of the CPA in the Mediation Process

.36 Few states require attorneys to inform clients of alternative methods to traditional litigation. Most often, it is up to individual judges to request mediation before or during the hearing of a case. However, in the majority of litigation, it has only been the attorney who has broached the feasibility of ADR to the client. This is usually when the parties agree to settle out of court. However, this point often comes only after angry confrontations, delays, costly discovery procedures, and expensive trial preparations. As the U.S. Council on Competitiveness discloses, fewer than 10 percent of all lawsuits are resolved through judicial decision.

[18] Kimberlee K. Kovach, *Mediation, Principles and Practice* (St. Paul, Minn.: West Publishing Co., 1994).

.37 Attorneys, however, are not totally accountable for not counseling their clients early on in the litigation process. All too often, when a client engages an attorney, he or she is typically looking for aggressive representation and results. Many lawyers hesitate to suggest mediation—no matter how appropriate—as a first-line solution for fear that the client will perceive the lawyer as not being aggressive or as lacking confidence in the client's case. This understanding among litigators, known as avoiding the "weak knee" appearance, is common.

.38 Therefore, it is the CPA, considered neutral by both the client and the client's legal advocates, who may broach the feasibility of using ADR when disputes proceed toward litigation. This may take the form of simply counseling the client or a more formalized engagement to report on opportunity costs, risk factors, and alternatives.

.39 In addition to playing the advisory role, the CPA may serve as a process neutral in resolving disputes or work with counsel and the client in an expert capacity, consulting or testifying. As a process neutral, the CPA serves as the actual negotiator, mediator, evaluator, or arbitrator.[19]

The Dispute Resolution Engagement

.40 CPAs who enjoy an ongoing relationship with their clients can explore the various factors of the dispute in a nonofficial and objective manner. They can also do something that few other professionals can do: They can demonstrate to the client in dollars and (business) sense the projected effects of the various methods in settling the conflict.

.41 CPAs may also use checklists and rules as guides to formulate informal discussion or written reports as a component to a dispute-resolution engagement (see appendixes C through K). These guides allow the CPA to identify, collect, and present a compilation of the dispute. The client and the attorney can better make an informed and rational decision on how best to spend the company's resources when the compilation is incorporated into a report with cost-benefit projections; sunk cost studies; specified reasonable settlement ranges; analyses of responses from the parties, attorneys, and ADR providers; and analyses of the tax and audit impact issues.

.42 Although this section on formulating a dispute-resolution engagement is under the "Mediation" heading, these services can be incorporated into and adapted to any ADR process and may even be incorporated into the standard litigation-services engagements.

.43 ***Consulting Opportunities in the Commercial Dispute Resolution Process.*** Typically, six major phases are involved in resolving business disputes. The CPA can view each of these as part of a continuum for providing a range of services or for specialization in a particular dispute-resolution (DR) service.

1. *Dispute-Issue Identification.* Dispute-issue identification involves identifying key issues, developing work plans, collecting relevant data, and assessing the opposition's claim. DR services involve helping counsel and client identify important damage-related issues and in assessing their importance.

[19] This Practice Aid provides no guidance to the CPA acting as a neutral provider of dispute resolution processes. See the "Scope" section for further disclosure.

2. *Fact and Financial Analysis.* CPAs can assist in discovery issues and in preparation for interrogatories. Also, at this stage much of the document requests, fact analysis, data gathering and interpretation, document organization, damage evaluation, and deposition assistance takes place.
3. *Prelitigation DR Alternatives.* Here the focus is on nonlitigated resolutions—resolutions that provide cost-efficient solutions—and designing the forum to have them discussed. CPAs with experience in mediation, arbitration, minitrials, and settlement consulting can help either as a neutral or as a member of the team.
4. *Prelitigation Preparation.* The traditional value-added services of litigation services can be offered at this phase. Expert consulting, development of court exhibits, testimony, and cross-examination assistance are services that can be offered to the team.
5. *Litigation.* CPAs acting as expert witnesses need communication skills to explain complex financial and industrial concepts and trial exhibits to judges, juries, arbitrators, and other triers of fact.
6. *Postdispute Consulting.* CPAs can assist with tax, operational, and financial issues. There are also appeal issues and postjudgment or prejudgment interest calculations.

.44 ***Other Consulting Functions in DR Engagements.*** Other functions the CPA may consider are as follows:[20]

- Counseling on the advisability and importance of various settlement strategies
- Analyzing significant documents for facts
- Analyzing unexplained data and the misuse of statistics, and using statistical sampling to narrow the range of disputed numbers
- Educating the client in the financial and other cost issues
- Meeting with opposing parties to explain difficult tax and financial issues
- Working with insurers that have policies with the client on the settlement parameters
- Defining the tax implications on damage awards or settlements
- Assisting in drafting statements for submission to the neutral and preparing effective exhibits
- Serving as a sounding board on settlement discussions
- Assuring confidentiality of the proceedings and avoiding compromising the company's litigation position, should the mediation fail
- Assisting in the drafting of the settlement agreement and safeguarding its enforceability
- Reviewing proposed settlements for tax and financial responsibilities and consequences
- Structuring, managing, and auditing the payout of settlements
- Providing document management services and databases for the capture and analysis of data
- Conducting surveys of consumers and industries and analyzing economic trends in competitive markets
- Preparing to serve as an expert witness or consultant should the mediation fail and litigation commence or resume
- Serving as a neutral in a mediation or arbitration, or as a court-appointed neutral evaluator

[20] These functions may be performed in conjunction with the client's counsel.

9. THE MEDIATION SESSION

.01 The ADR community is involved in much philosophical discussion and analysis concerning the model procedures for mediation. There are quite a few models that range from four to nine stages. Also, there are the interpersonal or family model and the commercial or business model.

Differences Between the Commercial and Interpersonal Sessions

.02 The differences in the interpersonal and commercial models can be described in how the parties communicate with the neutral. In the interpersonal model, the parties are all present throughout the session(s). Should the neutral call a caucus (a confidential or ex parte meeting with only one of the parties), the other person is asked to wait in another room.

.03 Also, because the interpersonal model is often used in divorce and custody cases and increasingly in employment-related (for example, discrimination, harassment, partners, and staff-supervisor) disputes, the neutral is trained to cope with the increased emotional issues that interpersonal disputes entail.

.04 Conversely, the commercial model may have the neutral conduct the majority of sessions with each party independently. The private session, called a caucus, is used to discuss positions, explore options, and protect party confidentiality. In the commercial model, it is not unusual for the neutral to conduct sessions over the telephone or through the mail—some mediations are even being conducted over the Internet.

.05 The five-stage model is an appropriate model to demonstrate both the interpersonal and the commercial processes. The CPA may want to refer to the commercial mediation stages guide while reading the Five-Stage Process (see appendix F). Also, some neutrals make no distinction between the models, structuring the joint- and single-party sessions as they see fit.

Differences Between the Facilitative and Evaluative Mediator Styles

.06 Within the last few years, many lawyers and judges have entered the practice of mediation, bringing with them their training in advocacy and case assessment. Before this migration of the legal profession, the fundamental principles of mediation centered on the tenet of transformative conflict resolution. In the transformative model, the process is built on the premise that "disputes can be viewed not as problems at all, but as opportunities for moral growth and transformation."[21] Incorporated in this model was also the belief that private parties are capable of making their own decision and thoughtfully managing their own disputes if they are given the place and opportunity to do so.

.07 Pure faciliative mediation adheres to the transformative model. Faciliative mediators explore a full range of parties' real underlying business interests to help parties generate their own settlement options. These options include legal interests, long- and short-term economic interests, social and relational interests (for example, business reputation), and psychological interests (for example,

[21] Robert A. Baruch Bush and Joseph P. Folger, *The Promise of Mediation Responding to Conflict Through Empowerment and Recognition* (San Francisco: Jossey-Bass Publishers, 1994).

corporate culture changes to workers and the workplace). Such mediators will not initiate settlement terms or evaluate issues, even at a party's request.

.08 Pure evaluative mediation assumes the participants want and need the mediator to provide direction as to the appropriate grounds for settlement. These needs for direction grow out of essential disagreements among the parties about the law, industry practice, or other matters.

.09 The evaluative mediator helps the parties explore the strengths and weaknesses of their legal positions and their likely outcome at trial. Mediators offer opinions about the outcome so that parties can shape a solution centered on legal interests that will mirror a court outcome.

.10 Evaluative mediation is often sought by commercial parties, especially the parties' legal counsel, but this style has some risks, such as the following:

- Evaluations can be perceived as compromising the impartiality of the mediator neutral as one party is favored and the other party is disfavored by the evaluation. Typically, once an evaluative opinion is given, the process begins to split the parties into two positions: one with vindication and the other with resignation. This has derailed many mediations or has left at least one of the parties feeling coerced into a forced settlement.
- Evaluators, based upon party-provided selective information, may give an inappropriate opinion, skewing the negotiations of the parties and diminishing the zeal the parties need to reach "outside the envelope" solutions that truly create the win-win resolutions of collaboration.
- The mediation process, with limited discovery, documentation, and witness testimony, does not lend itself to a comprehensive third-party evaluation. Therefore, the evaluator evaluates based on limited knowledge and other legal precedents or technical standards that may not be applicable.
- Evaluation efforts focus on resolving the disagreement over the legal issues of the case and ignore many of the real issues that prevent mutual resolution. The majority of business and domestic disputes are driven by other issues, such as desire for power, personality clashes, hidden agendas, grief, and anger.
- Evaluation robs the parties of working toward their own solution. When the parties look to a third party to decide, they are participating not in mediation but rather in a form of nonbinding arbitration. Also, evaluative mediators tend to overuse evaluation as they themselves become conditioned to giving and defending their own evaluations.

.11 Therefore, care and consideration should be taken by the parties and their advisers when selecting mediators using the evaluative style in the parties' decision-making process.

The Five Stages of the Mediation Process

.12 ***Introduction.*** The mediator introduces himself or herself and makes general introductions. The purpose of the introduction stage is to describe the process and the roles of the mediator and the parties. The mediator will also use the introduction to establish his or her most important goal, and to establish control of the proceeding by earning the parties' confidence.

.13 The three components to all mediations are: (*1*) the parties, (*2*) the issues, and (*3*) conducting the process itself. The mediator is in control of only one of these components—the process.

.14 Among the items discussed by the mediator are the following:

- The process is voluntary and any party may withdraw at any time.
- The mediator is neutral and impartial; has no vested interest in the outcome; has no decision-making authority; and will not give advice, opinions, or a ruling on any matters discussed. (Some rules permit CPA and legal mediators to give their views on financial, tax, and legal issues of the dispute, respectively. See the "Differences Between the Facilitative and Evaluative Mediator Styles" of this Practice Aid.)
- The mediator sets the ground rules or reminds the parties of the ground rules if they are operating under rules from a mediation group.
- The mediator maintains confidentiality in all matters discussed in caucus and transmits information authorized by each party to the other.
- The mediator may terminate the process at any time, including in situations where he or she believes that the parties are not acting in good faith, or if the mediator feels that further efforts at facilitation are not useful.
- The mediator will not be called as a witness and all documents produced by the mediation shall be nondiscoverable and shall not be subpoenaed from the mediator, should future legal or authoritative proceedings arise.[22]

.15 *Practice Tips.* All present should—

- Use the mediator's introduction as a time to become relaxed and comfortable.
- Listen carefully to how the process will be conducted, the ground rules, and the introduction of the other parties in attendance. Each party will have a turn to speak.

.16 ***Problem Identification.*** This stage has been called the storytelling stage or the opening statement segment. The purpose is twofold: 1) to allow each party to present—usually for the first time—an uninterrupted and complete statement on their view of the dispute, and 2) to allow the parties to hear the others' complete view as they see it. This stage is usually quite emotional, even in business cases, giving the parties a opportunity to unburden pent-up hostility. This is one of the panaceas that mediation provides. Each party wants to be heard completely, to be understood in its own terms and fashions. In court this does not always happen, because parties are interrupted with questions and objections.

.17 The mediator encourages the parties to share information about the dispute. He or she enables each of the parties to hear what the dispute has meant to the other. This storytelling is not about only the factual wrongs, but also the emotional impact the dispute has had on them and their enterprises.

.18 Venting (the expression of anger, frustration, and other emotions) is a part of the process. Disclosures in this phase also play an important part in crafting an equitable resolution. A good mediator even encourages venting and is able to control the dynamic so it does not degenerate into

[22] Care should be taken in the production of information, especially documents, as they may be requested in litigation should the mediation fail.

negativity or direct attacks. Sometimes, a truly productive discussion can be conducted only after emotional outbursts, or "getting it off your chest."

.19 Clients should be counseled and rehearsed in their opening statements. Some guidelines for the party are to—

- Open with a positive greeting to the mediator and the other party.
- State that he or she is grateful to be there in such a voluntary forum.
- Make the statements of the dispute follow a chronological sequence.
- Produce evidence during the statement (remembering that mediation is not a fact-finding or a decision-making process—it is a resolution process that deals with the present and the future and only incidentally with the past).
- Keep a time limit on the statement, as he or she will not be interrupted. If the party imparts only the facts and the impact this dispute has had, he or she will have accomplished a great deal. The mediator will keep each party on task, so CPAs should counsel their clients not to become offended if an intervention happens. The mediator will also prevent interruptions by the other party.
  (A detailed checklist is provided in appendix D.)

.20 *Practice Tips.* At this stage, the speaker should—

- Not lock himself or herself into a settlement position by concluding with a demand.
- Not assume he or she knows what the other party's position will be.
- Listen to the other party, even if he or she is venting.
- Try to understand, from the other's point of view, (*1*) the issues and (*2*) how the dispute has affected him or her. These items will play significantly in the problem-solving and the resolution stage.

.21 ***Clarification.*** This is the discussion stage in interpersonal and the first private caucus (of several) in the commercial models. The purpose of this stage is for the mediator to gather more information so he or she can assist each of the parties in focusing on the issues and the options available for settlement.

.22 *Practice Tips.* The mediator assists the parties in moving beyond the positions they have taken by—

- Empathetic listening, noting how the parties feel as well as what they are saying. An empathetic mediator conveys understanding and respect for the party's position without taking sides. The following is an example of an empathetic statement from the mediator:
  Party 1: The ABC Company has never honored its end of any contract. I will never work with them again as long as I live!
  Mediator: Your trust in the ABC Company is so low right now that you don't think you can work with them.
- Ranking issues in order of importance for each party.
- Reality testing; making queries about weaknesses of the claim and the potential losses suffered, should the dispute continue to arbitration or court.
- Gaining confidential information.

- Identifying the underlying interests and beginning the conciliation or collaborative process.
- Identifying each party's "real" issue(s), hidden agendas, and throw-away issues. Almost always, the real issue is different from what each of the parties claim it is, no matter what kind of dispute it is. This is because the real issue, often emotional and often negative, has not been discussed or resolved. If it had been, the parties would not be in dispute.

.23 ***Problem Solving.*** The interpersonal model, in which the dispute itself deals with people working through behavioral differences, is usually a time-consuming stage. In commercial situations, the problem-solving or negotiation stage can also be time-consuming. However, in the commercial model, the parties are usually not in face-to-face negotiations. Either the mediator has one of the parties wait in a separate area (usually another room or waiting area), or he or she shuttles between the parties, in their own areas.

.24 At this stage, the mediator assists the parties in understanding their individual best alternative to a negotiated agreement (BATNA). A party's BATNA is the standard against which any proposed agreement should be measured. The reason a party negotiates is to produce something better than what would be obtained without negotiating. What are those results? What is the alternative? The parties compare each offer and counteroffer with their BATNAs to see whether it better satisfies their interest.

.25 If both parties' BATNAs are extremely negative, the likelihood of a settlement is relatively high. For example, each party independently feels that his or her risk of losing at trial is either too great or too costly. Also, if each party's only alternative relief to a failed mediation is through the court system, he or she will be more likely to make the effort to reach a settlement in the mediation.

.26 Conversely, if both parties' BATNAs are more appealing than what is attainable in the mediation — each feels they can do better elsewhere — the result will likely be an impasse. In these instances, there is little a mediator can, or even should, do to overcome the impasse.

.27 *Practice Tips.* Fisher and Ury present several tips that cannot be put more succinctly or more accurately.[23] The parties should—

- Not bargain over positions.
- Separate the people from the problem.
- Focus on interests, not positions.
- Invent options.
- Insist on using objective criteria.

.28 It should be added that parties need to structure their discussions on their future, not on the past or who was right or wrong.

.29 ***Resolution.*** Once the issues have been identified and the underlying interests have been discussed, the parties can explore a variety of options and their consequences. Because problem-solving and alternative-solutions generation are not viewed by many people as a process, the mediator is most instrumental in this stage.

[23] Fisher and Ury, *Getting to Yes*, p. 189-198.

.30 This Practice Aid has discussed being creative in generating options for conflict resolution. Creative option generation under pressure is difficult, if not impossible, for many people in a mediation session. It may be more common in the interpersonal model because of the overall longer period (many can go for months, with several weeks between sessions, and sessions last about two hours in duration). However, in commercial mediation, in which time and resource constraints compress the session(s) into one or two days, the parties need some help in "turning on the light bulb." Another adage may be, "I know what I like, or what works, when I see it."

.31 The mediator can accomplish this in a neutral manner by an approach known as reality testing. He or she can—

- Encourage the parties to freely brainstorm the entire range of options open to them.
- Encourage the parties to freely brainstorm each interest that has been identified.
- Help the parties explore the strengths and consequences of each alternative solution.
- Assist the parties in evaluating their satisfaction with reaching the various alternative solutions that satisfy their interests.
- Transmit, when authorized, settlement offers and counteroffers.
- Keep the negotiations going and maintain a momentum toward a collaborative settlement.
- Assist the parties in closure and in drafting the final agreement.
- Acknowledge the beneficial work that was done.

.32 *Practice Tips.* Parties should—

- Do their own reality testing. If an attorney does not represent them, or if he or she is not present, the parties can have the mediated agreement drafted but should not sign it until it has been reviewed by counsel.
- Know that mediation is a process. Not all issues have to be solved and not all interests have to be met for the process to be successful. Many disputes, such as labor, contract, and domestic controversies, use mediation on a continuing basis. Therefore, mediation, unlike a judicial proceeding, can be developed into an ongoing system within and among businesses.
- Contemplate the following words of wisdom:

> *The most constructive way of resolving conflicts is to avoid them.*
>
> —Chief Justice Felix Frankfurter

> *Traditional litigation is a mistake that must be corrected.... For some disputes, trials will be the only means, but for many claims, trial by adversarial contest must go the way of the ancient trial by battle and blood. Our system is too costly, too painful, too destructive, too inefficient for a truly civilized people.*
>
> —Chief Justice Warren E. Burger

> *You can't always get what you want. But if you try, sometimes, you just might find, you get what you need.*
>
> —Keith Richards and Mick Jagger

10. INSIDE THE MEDIATION SESSION

.01 Although this section addresses a mediation session, the same guidance may be applied, when applicable, to many of the nonbinding processes.

Preliminary Procedures

.02 CPAs may not be steeped in many of the legal issues and the rationale for the parties' positions in a dispute. When the CPA does not understand such issues, he or she should not hesitate to ask the client and the attorney for an explanation; it is their responsibility to acquaint the CPA with the particulars he or she needs to assist them.

.03 CPAs should undertake a due diligence review to ascertain any conflict of interests. It is natural for a CPA or his or her firm to have had contact with parties that may be involved with the dispute either as principals or counselors. Disclosing any potential or direct conflicts to the client may not necessarily disqualify the CPA from assisting in the dispute resolution, especially if the disclosure is done as soon as he or she becomes knowledgeable of any potential conflict.

.04 CPAs, like attorneys, are problem solvers. Many times solutions, on first thought, are crafted with a win-or-lose scenario with the client's best interests in mind. This "best interests" way of thinking may be adversarial in nature and, therefore, counterproductive to the dispute-resolution process.

.05 Mediation, unlike litigation, is not an adversarial process, but one of conciliation and collaboration. Care should be taken that counsel to the client is not formulated as ultimatums or "bottom lines." The parties should be encouraged to accept solutions they believe are reasonable, not ones that the CPA thinks are best. A good rejoinder to queries from the client on a potential settlement might be, "This is your mediation process. I will be glad to discuss with you the impact of this potential settlement, but the decision to settle must be yours. The ultimate goal is that you are satisfied with the final outcome."

.06 CPAs must understand that mediation sessions are relaxed in many ways that litigation and arbitration proceedings are not. Rules of evidence are usually dispensed with and hearsay is permitted. Therefore, CPAs should avoid accounting jargon and speak in language for all to understand. This is true in the private caucuses CPAs may have with their clients during breaks in the session. The client is looking for readily assimilated knowledge that he or she can take to the table and use to craft a collaborative solution.

.07 ***Counseling the Client.*** CPAs, along with the attorney, should counsel their clients in selecting the right person to represent the client at the mediation table. This person will play a more active role than in litigation or arbitration because he or she will be working directly with his or her counterpart for a collaborative solution. This person should have—

- Excellent communication and negotiation skills.
- Full settlement authority.
- Command of the subject matter.

- An open and nondefensive manner, that is, the ability to look forward and not justify past actions or corporate decisions.
- The ability to conceive proactive and creative business-oriented solutions in which both sides benefit.
- Neutrality and preferably be someone not involved in the origins of the dispute.

.08 Information, documentation, and discovery in mediation are traditionally limited to the essentials that each party requires to demonstrate need. The neutral usually requests only that information that can be delivered in the most expeditious and cost-effective manner. Either before or at the initial premediation session, the parties attempt to agree on the scope of discovery to which each will be entitled and a timeline on the completion. The CPA can play an active role in discussions with the client and the attorney on informational issues.

.09 ***Preparations for the Parties and Their Support Teams.*** Mediation is not litigation or arbitration. Discovery and documentation are either not required or kept to a minimum. The advantage of the mediation process is that as long as the client is knowledgeable about the facts of the dispute and works in a collaborative manner with the other party or parties and the neutral, the likelihood of a satisfactory settlement is good. Because mediation is confidential, statistics are scarce. However, the accepted success rate among ADR professionals for all mediations is 80 percent to 85 percent. For voluntary mediations (not court mandated) the success rate is in the 90 percent range. Another statistic of interest is that less than 15 percent of all adjudicative (resolved through court) awards are fully satisfied (paid in full), while 85 percent of voluntary mediated agreements result in full compliance.

.10 Although mediation depends greatly on interpersonal communication, preparation for mediation is still necessary. The parties, their representatives and counsel, and in large or complex cases, other affected third-party constituents—who may not be at the table—should work out whatever premediation submissions will be necessary, remembering that mediation is the parties' process and they know more about the subject matter of their dispute and what evidentiary matters will be necessary.

.11 Other considerations to the preparations are the following:

- There is no time limit on mediation sessions. Interpersonal sessions generally continue for several sessions, usually five; commercial sessions, depending on the complexity, go for either one or several sessions. The difference is that commercial sessions may last until settlement is reached, whereas interpersonal sessions last two hours each. Therefore, participants should be prepared to commit a whole day and night for a commercial session.
- The mediation sessions should be conducted on neutral territory agreed to by all parties.
- There should be several rooms, one large enough for the beginning and ending sessions where all of the parties conduct a "joint session," and other rooms and amenities for parties to retire to when they are not in caucus with the neutral.
- The CPA should work with the client to prepare the bottom-line goals and objectives and how to achieve them—that is, what does the client need, not what does the CPA think he or she can get or offer as a negotiation starting point.

- The parties should decide upon a jointly agreeable neutral (see the "How to Choose an ADR Provider" section).
- The CPA may assist in planning the presentation, especially the opening statement.
- The CPA should know who the decision makers are. This is not a trial in which a neutral third party decides who is right or wrong or innocent or at fault. In mediation, the decision maker is always the other side—that is, the other party or parties to the dispute. Therefore, each decision maker must be prepared to work with the other so collaborative decisions will result in agreeable settlements.
- The CPA and the client should get a good night's sleep before the first day's session. Mediation is about both parties winning, so each person on the team needs to be relaxed and prepared to collaborate, not to engage in a fight.

11. ARBITRATION

Overview

.01 Arbitration is the process by which parties to a dispute agree to submit the dispute to a third party, known as an arbitrator, and confer upon the arbitrator the authority to review the evidence and render a decision. The decision can be final and binding (enforceable) or nonbinding (advisory).

.02 The party requesting relief in arbitration is the claimant. The claimant initiates arbitration by filing an arbitration demand, a statement or letter that contains the basis and amount of its claim.

.03 The party against whom the arbitration demand is made is known as the respondent. The respondent may defend against the claimant's claim, by filing an answer to the demand, and the respondent may also have its own claim against the claimant. If the respondent has its own claim, it files a counterclaim.

.04 The parties may designate an administering organization in advance to administer the arbitration. The arbitration demand is filed with the administering organization (for example, the NASD regulator) and an individual, known as a case administrator, is responsible for overseeing the application and enforcement of rules and procedures and aiding the parties in choosing the arbitrator(s) from the list maintained by the administering organization. The case administrator also acts as the liaison among the claimant, respondent, and the arbitrator.

.05 If an administering organization is not used, the parties themselves will choose the arbitrator, and the arbitrator will communicate with the parties without the facilitation of the administering organization and the case administrator.

.06 The arbitration rules will set the number of arbitrators. Usually claims under $50,000 have one arbitrator and those over $100,000 have three. In cases in which the parties request more than one arbitrator, a panel of three or more (in odd numbers to prevent deadlock) arbitrators is appointed. Usually, an arbitration panel consists of three members, one of whom is designated the chairperson of the panel. The arbitrators and the arbitration process—presession, session, and postsession phases—are called the tribunal.

.07 The arbitrator's decision is called an award. If the parties have entered into binding arbitration, in which they agree in advance to abide by the arbitrator's award, a prevailing party may go to court and seek to enforce an award if the terms and conditions of the award are not satisfied. Procedurally, many prevailing parties have the awards confirmed by a court to avert future disputes relating to the arbitrator's award.

.08 A nonprevailing party that is dissatisfied with an award may request a court to vacate all or part of an award under truly limited circumstances.

.09 Arbitration is the most formalized of the ADR processes. Much like litigation in its goals, arbitration is a private adversarial process. It is used when the parties have either specified its use in contracts or suffered such a communication breakdown that they are no longer able to solve their own problems. The process varies according to the needs of the parties and the type of dispute. For example, rights arbitration is usually incorporated into employment contracts under which workers and contract employees with grievances are required to resolve disputes through arbitration. Interest arbitration involves settling the terms of a contract between the parties. When an impasse occurs, and the parties are unable to agree on the terms of a contract, an arbitrator decides the terms.

The Different Forms That Arbitration Can Take

.10 ***Nonbinding Arbitration.*** Nonbinding arbitration shares some of the attributes of both the minitrial and arbitration. Usually a nonbinding arbitration is an abbreviated procedure, with summary "best case" presentations or offers of proof by attorneys, representatives of the parties, or the parties themselves before a single neutral or perhaps a panel of three neutrals. After the presentations, the arbitrator(s) issue an advisory award, many times verbally.

.11 Unlike the typical arbitration award, the award in a nonbinding arbitration can consist of a detailed analysis of the perceived strengths and weaknesses of each party's case. This device provides counsel and the parties with a realistic assessment of the case, which usually results in a settlement of the matter. Sometimes an arbitrator, once the arbitration procedure is concluded, can usefully serve as a mediator to help bring the parties to closure on a settlement, because this neutral may have already become familiar with the facts and positions, having had the benefit of hearing the presentations of the parties.

.12 The parties might also agree in advance that if one of them accepts the advisory award and the other dissents through litigation or binding arbitration, and the binding outcome is not significantly more favorable, then the dissenting party shall pay the other party's costs of the further proceeding. This is sometimes called Michigan mediation.

.13 ***Binding Arbitration.*** Binding arbitration is a private adversarial process in which the disputing parties choose a neutral person or a panel of three neutrals to hear their dispute and to render a final and binding decision or award. The process is less formal than litigation. The parties can craft their own procedures and determine if any formal rules of evidence will apply. Unless there has been fraud or some other defect in the arbitration procedure, binding arbitration awards typically are enforceable by courts and are not subject to appellate review.

General Considerations for Using Arbitration

.14 ***Advantages, Objectives, and Guidelines.*** Arbitration has several advantages over litigation. Arbitration, like mediation, is nonpublic in its proceedings and outcome. Privacy may be advantageous to the resolution of certain disputes. Both processes permit the selection of neutrals with special expertise by mutual agreement. Arbitration, when binding, presents a certain final outcome. Typically, agreements to arbitrate are entered into in predispute clauses in the parties' business agreements. Therefore, even if one of the parties refuses to participate in the process, a final resolution and award can be issued.

.15 Primary objectives of arbitration are to arrive at a just and enforceable result, based on a private procedure that is—

- Fair.
- Flexible.
- Expeditious.
- Economical.
- Confidential.
- Less burdensome, less formal, and slightly less adversarial than litigation.

.16 The above objectives are most likely to be achieved if the parties, advisers, and their attorneys—

- Adopt well-designed rules of procedure.
- Select skilled arbitrator(s) able and determined to actively manage the process.
- Limit the issues to focus on the core of the dispute.
- Cooperate on procedural matters, even while acting as effective advocates on substantive issues.

.17 The proceeding is likely to be substantially more expeditious and economical if the parties select one arbitrator rather than three. If a panel of three arbitrators is to be selected, it is important to obtain assurances as to their availability. Conflicting time commitments can be a major problem.

.18 Accounts of arbitrations that went awry are not uncommon. These failures can usually be traced to nonobservance of one or more of the above guidelines, especially (when arbitration is self-administered) the failure to explicitly assign the duty of case management to an arbitrator and to set and enforce time limits on the various phases of the procedure.

.19 Selection of a competent, sophisticated arbitrator mitigates concerns that the arbitrator may issue a clearly erroneous award or may engage in "splitting the baby." Such concerns can be alleviated further by specifying the technical standards or applicable law and by requiring the arbitrator to apply the standards or law and to issue findings of fact or conclusions of law.

.20 Consideration should also be given to the breadth of arbitrator authority in awarding damages. Whether it is desired to limit the arbitrator to awarding only compensatory damages or to authorize other measures of damages as well, the arbitration agreement should state explicitly that the arbitrator is or is not empowered to award other damages recoverable in a court of law.

.21 Given the limited scope of the right to obtain prehearing discovery, arbitration reduces the risk that one disputant will obtain broad discovery into another's records, trade secrets, and methods of business operation. This may not always be the case, but the parties can use the process to stipulate to what depth discovery may be conducted or used in the tribunal.

.22 Many sophisticated users of arbitration believe that the costs and the expedition with which the process is conducted are inextricably related. Many administering organizations (such as the American Arbitration Association, JAMS/Endispute, and the CPR Institute for Dispute Resolution, a nonadministering organization) have proposed specific rules for various types of arbitration hearings. These rules have many common components but are crafted to fit the type of dispute, for example, accounting and related services, antitrust, business, technology, employment, products liability, loss allocation, software, joint ventures, construction, equipment, and various medical, health care, and professional-liability disputes.

.23 In cases in which at least one side does not wish to disclose its trade secrets to the other, even under covenant of confidentiality, the proceedings could be simplified greatly if hearings are avoided altogether. Some technology disputes are suitable for a decision based on written submissions alone. The parties are urged to consider whether their case lends itself to this approach. If so, the savings in cost and time will be substantial.

.24 In some cases the parties opt to appoint their own arbitrators. In turn, the two arbitrators, one from each party, select a nonparty-appointed arbitrator. The nonparty arbitrator is then appointed as chair of the tribunal. Although all arbitrators should be totally independent and impartial, a party-appointed arbitrator nevertheless may lean toward the party that appointed him or her or may be perceived by the other party as being biased.

.25 Other key features of common arbitration rules are as follow:

- The parties are given ample opportunity to select arbitrators without intervention of the administering organization. If they fail, either party may then request administrator assistance.
- All arbitrators, including those appointed by either party, are required to be independent and impartial.
- Early disclosure by each party of key documents is required.
- The tribunal is given great leeway in matters of procedure.
- If the parties so agree, the tribunal is required to state the reasoning on which its award rests.
- Settlement efforts during the proceeding are encouraged.
- The tribunal may apportion costs, including attorneys' fees, between the parties.

.26 ***Disadvantages to Arbitration.*** Although arbitration has some distinct advantages over mediation or going to court, this process, because of its decision making by a third party, has some limitations. Therefore, the CPA should review the following items.

- Arbitration tends to resolve disputes solely on a content basis and may not address the interpersonal or emotional aspects or the business relationships of the conflict. When

parties can reach some accord on their relationship issues, they have a better opportunity to resolve the content issues themselves.

- Arbitration tends to reinforce the "cradle to grave" concept that someone else—usually the "government"—is there to provide the right relief. Parties consequently assume they are not capable of learning to manage their own conflicts.
- Adversarial concepts and methodologies are used to "sway" the award and a win-or-lose style of thinking ensues.
- Higher costs may be associated with arbitration: filing and administration fees (some providers also charge early adjournment and cancellation fees), the arbitrator's fees, and facility fees.
- Award delays can occur when the arbitrator is required to substantiate the rationale used or the interpretation of case law. Many arbitrators avoid disclosing the basis of how the award was reached.
- The discovery process has been recognized by courts, attorneys, and parties as being a drawback. Arbitrators, unlike judges, generally have little authority to compel the discovery of documents and testimony.[24] They also have no authority to compel outside third parties to produce witnesses and documents that may be crucial to the arbitration.
- Confidentiality abuses can occur with proprietary business methods, trade secrets, and customer lists, among other items. Parties should consider the need for additional measures to protect confidentiality through confidentiality agreements with persons who may have access to restricted information, including the arbitrator. The parties may request the arbitrator or a court to issue a protective order.
- In binding arbitration, the award is enforceable. However, losing parties increasingly move to have a court set aside the judgment. This entails further costs in defending the subsequent action in court. This is becoming commonplace in employment, Equal Employment Opportunity Commission, insurance, product-liability, malpractice- and securities-related cases.
- The unknown quality or bias of the arbitrator is a major consideration. Attention should be paid to the following in the selection process:
  —Substantive issues, such as knowledge and experience in the industry, the case law, or industry standards; arbitration procedures and the modification to these procedures that the parties agree to put in place for their proceeding; and written decisions issued in a timely and comprehensible manner.
  —Subjective issues, for which due diligence is required to gain comfort that the arbitrator is neutral and unbiased; is not associated with either of the parties' organizations, political, trade, or social groups, unless both parties are aware of the association and jointly agree to the possible lack of independence; and has adequate communication skills. The arbitrator's skills in listening, comprehension, and articulation play an important role in the process.

.27 Other considerations may be found in the "Interviewing the Neutral" section.

[24] Securities arbitrators (for example, the National Association of Securities Dealers, or the New York Stock Exchange) have power to compel discovery.

The Difference Between Mediation and Arbitration

.28 Both mediation and arbitration are consensual ADR processes. That is, without the consent of both parties, neither process can be forced upon the parties. The process can be initiated either through contract or engagement clauses or after the fact, by agreement.

.29 In arbitration, the parties to the dispute confer upon the neutral the authority to hear evidence and render an award. The arbitrator controls the outcome. The award can be binding and enforceable in a court of law, or it can be advisory only. In mediation, the neutral has no authority to decide the outcome of a dispute or to render any awards. The parties control the outcome. The mediator acts as a facilitator to the parties' settlement discussions, and therefore does not necessarily see all the evidence pertaining to the dispute. The arbitration process is fact driven, and awards are based on evidence and the parties' presentations at the hearing.

The Difference Between Arbitration and Litigation

.30 The arbitration process is different from the formality of litigation and trial in a number of respects.

- Arbitration fact-finding is generally not equivalent to judicial fact-finding.
- Written transcripts may be unnecessary, unless the parties decide to order them.
- The usual evidentiary rules are not applicable, because the arbitrator has considerable discretion in the admission of evidence.
- Finally, such rights as discovery, compulsory processes (subpoena and document production), cross-examination, and testimony under oath are sometimes limited.

The Arbitration Process

.31 Although the arbitration rules and procedures can be modified, the arbitration process has become fairly standardized. This section outlines the process and what the parties and their professional teams may encounter at each stage.

.32 ***Initiation of the Process.*** Arbitration may be initiated pursuant to a contractual provision or as a result of an ad hoc agreement to arbitrate during the dispute. Generally, a party notifies another party of his or her intent to arbitrate by sending a written demand for arbitration. The demand would identify the parties and describe the dispute and the type of relief that is claimed. Although the demand need not comply with the formalities of a complaint in a civil action, it must be sufficiently clear to inform the opposing party of the specific issues to be arbitrated. The opposing party usually responds in writing, indicating whether it believes the dispute was suited for arbitration.

.33 ***Provisional Relief.*** After the demand, a party may challenge jurisdiction of the tribunal or raise issues of the ability to arbitrate in court. These, and other delaying actions, may happen because many arbitration rules do not give authority to the administrative organizations or the as-yet-unselected arbitrator(s) to rule on such challenges. Therefore, consideration should be given in predispute agreements to provide for provisional relief in such matters.

.34 Provisional relief is a short-term remedy ordered by a court before a case is finally decided by the court system. It is not uncommon in a commercial arbitration agreement for the parties to request such a ruling from a court while awaiting the outcome of the arbitration hearings.

.35 ***Selection of Arbitrators.*** United States arbitration laws impose no restriction on who may serve as an arbitrator. Traditionally, arbitrators are chosen based on their knowledge in a specific industry.[25] They resolve disputes through their understanding of substantive and technical issues. The necessary prerequisites for an arbitrator are neutrality, impartiality, and the ability to perform the task to which one has been appointed.

.36 However, in certain arbitration proceedings, not all arbitrators are required to be neutral. A party may select arbitrators, who are deemed party-appointed arbitrators and need not be neutral.[26] They may engage in ex parte contact and support their party's position in the private tribunal process. Rules permit parties to agree otherwise about arbitrator neutrality. When arbitrators are selected through an administering organization, they are charged with being neutral and unbiased in discharging their arbitral duties.

.37 Arbitrators are required to disclose any relationships and conflicts of interest likely to affect their neutrality. The courts have made judgments about what constitutes bias or prejudice sufficient to disqualify an arbitrator. The criteria for breach are as follows:

- The award was procured by fraud or undue means.
- The arbitrator was biased.
- The arbitrator exceeded his or her powers.
- The arbitrator refused to receive evidence material to the controversy.
- The arbitrator denied fundamental due process to one or more parties.

Barring these breaches, courts defer setting aside an award.

.38 In *Wilkins v. Allen*,[27] the New York Court of Appeals exemplified this deference to setting aside the arbitrator's decision. The court held:

> Where the merits of a controversy are referred to an arbitrator selected by the parties, his determination, either as to law or to the facts, is final and conclusive, and a court will not open an award unless perverse misconstruction or positive misconduct upon the part of the arbitrator is plainly established, or there is some provision in an agreement of submission authorizing it. The award of an arbitrator cannot be set aside for mere errors of judgment, either as to law or as to facts. If he keeps within his jurisdiction and is not guilty of fraud, corruption or other misconduct affecting his judgment, and however disappointing it may be the parties must abide by it.

.39 Arbitration awards are predominately delivered to the parties in written form and signed by

[25] An individual may be selected as an arbitrator based upon his or her industry experience (for example, construction project manager), functional expertise (for example, pension accounting), or transactional expertise (for example, mergers and acquisitions issues).

[26] Usually, party-appointed arbitrators are used in tribunals. These appointed arbitrators then select a third arbitrator, who is truly impartial in the matter, to chair the tribunal.

[27] 169 N.Y. 494, 62 N.Y.S. 1068, 62 N.E. 575 [1902].

all the arbitrators. However, some awards—depending on the rules and contract clauses governing the arbitration—may be delivered orally. Many arbitrators will render only unreasoned awards, because arbitration awards are subject to judicial review. Unreasoned awards carry only the decision of the tribunal, but they do include the basis or rational behind arriving at the award. Reasoned awards carry disclosures on the evidence considered, points of law, and industry practice considered in arriving at the binding decision. Needless to say, reasoned awards subject themselves to challenge, appeal, and vacating by a jurisdictional court, spinning the parties back to a judicial process they were trying to avoid in the first place.

.40 Nevertheless, parties entering into an agreement to arbitrate may desire a broader judicial review of the award than permitted by statute. To make such a provision meaningful, they also would need to require the arbitrator to specify the factual and legal bases for the award and may need a hearing transcript. The desired standard for review also should be specified. One might permit a court to vacate or modify the award if (*1*) an error of law appears on the face of the award, (*2*) an error of law causes substantial injustice, or (*3*) the award is not supported by substantial evidence.

.41 If the disputing parties agree to arbitration, they will begin the arbitrator-selection process. The general matters in arbitrator selection have already been discussed; however, other methods for selecting arbitrators are included in the Uniform Arbitration Act, the Federal Arbitration Act, and various state arbitration statutes and agency rules.

.42 ***Qualifications of the Arbitrator.*** The personal qualifications of arbitrators include: honesty, integrity, and impartiality, as well as general competence, specific competence, or both, in the subject matter of the dispute. Beyond these requirements, arbitration practice is generally an open field.

.43 Because arbitrators act in a quasi-judicial capacity, they are held to the same high standards of impartiality by which judges are bound. In general, this means that arbitrators must avoid both the appearance and reality of conflict of interest and should uphold the integrity and fairness of the arbitration process. They should conform their conduct to the relevant code of ethics, such as the Code of Ethics for Arbitrators in Commercial Disputes. This code was prepared by a joint committee of the American Arbitration Association and the American Bar Association. The code has been approved and recommended by both organizations.

.44 ***Immunity.*** Both state and federal courts recognize that arbitrators enjoy quasi-judicial immunity from legal liability for actions taken in their arbitral capacity. This principle has also been observed in the international commercial setting. Arbitral immunity is justified with the same policy justifications that apply to judicial immunity, namely, that arbitrators perform an important societal function and therefore need to be protected from reprisals that could have a negative impact on their adjudicatory powers.

.45 Also, as a general rule, an arbitrator enjoys testimonial immunity and may not be required to testify regarding the merits of an award. There are, however, exceptions to this rule. For example, an arbitrator's testimony is permitted to show that particular issues were submitted to arbitration for a decision. An arbitrator may also testify on wrongful acts by one of the parties to the arbitration or even by other arbitrators on the panel.

Prehearing Conferences

.46 Prehearing conferences are not required unless parties agree otherwise or if the case is considered "large or complex." Large or complex cases are determined by the number of parties, the number of issues involved, the complexity of those issues, and the monetary size of the claims. These hearings are beneficial for getting the cases on the right course at an early stage in the arbitration process.

.47 The conferences are usually conducted in person, although they may be conducted by telephone or through the Internet. These preliminary hearings are to plan for the smooth scheduling of the arbitration process and can address—

- Submission of a detailed statement of claims, positions, and legal authorities.
- Stipulations to facts.
- Decisions and limitations on discovery.
- Exchange and premarking of documents.
- Identification and availability of witnesses.
- Use of sworn statements, depositions, or both.
- Creation of a stenographic or other official record.
- Use of mediation or other nonadjudicative dispute resolution.
- Expenses and compensation of the tribunal.

.48 The arbitrator in a prehearing conference is given great leeway in matters of procedure. For example, he or she is specifically empowered to—

- Establish time limits for each phase of the proceeding and penalize dilatory tactics.
- Limit the time allotted to each party for presentation of its case.
- Make prehearing orders.
- Permit disclosure deemed appropriate.
- Require the submission of prehearing memoranda.
- Require evidence to be presented in written form.
- Take interim measures to preserve assets or for other interim relief.

Fast-Track Arbitration

.49 Increasingly, small amount claims and counterclaims cases and certain strategic issue cases are being arbitrated without a formal hearing. Fast-track arbitration is designed to radically speed up and simplify the arbitration process. Awards can be issued within days after the submission closure deadline. The parties' position statements, exchange of exhibits, and rebuttal submissions are performed only in writing. Strict time lines and procedures for discovery and document submission are enforced, to be altered only by agreement of all parties and the arbitrator.

The Arbitration Hearing

.50 ***Opening Statements.*** Requirements for arbitration hearings vary from state to state, but generally the hearing is similar to a trial, only less formal and usually less costly. The hearing begins

with brief opening statements from the parties or their lawyers. The typical order of party presentation throughout the process is claimant, then respondent.

.51 ***Claimant's Witnesses Called.*** After opening statements are made, the claimant calls its witnesses and asks questions of each witness in direct examination. The respondent is allowed to cross-examine the witness, and the claimant can then conduct redirect examination on issues raised in cross-examination. The respondent may then cross-examine the witness again on issues raised in redirect examination, if necessary.

.52 ***Respondent's Witnesses Called.*** After the claimant presents its witnesses, the respondent calls its witnesses. The respondent may have a counterclaim; if so, it presents testimony to support the counterclaim. If the respondent does not have a counterclaim, the testimony will be to rebut and defend against the claimant's claim.

.53 ***Rebuttal Witnesses Called.*** After the parties present their witnesses, they each have an opportunity to call rebuttal witnesses, to rebut testimony that was presented at the hearing. Such witnesses may be people who have already testified, or they may be new witnesses, depending on the subject matter being rebutted.

.54 ***Presentation of Closing Arguments.*** After all testimony has been presented, the parties may present closing arguments. Closing arguments summarize what each party believes it has proved in the hearing and what the other has failed to prove. In lieu of closing arguments, they may file post-hearing briefs. After closing arguments or receipt of post-hearing briefs, the arbitrator closes the record, and the case is ready for an award to be rendered.

Variations on Traditional Arbitration

.55 Several variations on traditional binding arbitration have become popular and should be considered in appropriate cases, particularly when monetary damages are sought.

.56 ***"Baseball," or Final Offer, Arbitration.*** Each party submits a proposed monetary award to the arbitrator before or at the conclusion of the hearing. The arbitrator chooses one award without modification. This approach imposes limits on the arbitrator's discretion and gives each party an incentive to offer a reasonable proposal, in the hope that it will be accepted by the decision maker. If the submissions take place early in the proceeding and the two figures are close, the arbitrator should encourage the parties to try to settle the case without engaging in further arbitration activities.

.57 ***"High-Low" Arbitration.*** The parties agree privately without informing the arbitrator that the arbitrator's final award will be adjusted to a bounded range. For example, Party C wants $200,000. Party R is willing to pay $70,000. Their high-low agreement would provide that if the award is below $70,000, R will pay at least $70,000; if the award exceeds $200,000, the payment will be reduced to $200,000. If the award is within the range, the parties are bound by the figure in the award.

.58 ***Mediation Against the Box.*** This type of mediation provides for the arbitration award to be sealed while the parties attempt to arrive at a settlement, with or without neutral facilitation. If no settlement is reached, the award is unsealed and becomes binding.

.59 ***Med-Arb.*** Med-arb is a shorthand reference to the procedure called mediation-arbitration. The parties agree to mediate with the understanding that any issues not settled through the mediation will be resolved by arbitration using the same individual to act as both mediator and arbitrator. However, that choice may have a chilling effect on full participation in the mediation portion. A party may not believe that the arbitrator will be able to discount unfavorable information learned in mediation when making the arbitration decision.

.60 ***Co-Med-Arb.*** This process addresses the problem (that is, concern that the person cannot act impartially as both arbitrator and mediator) by having two people perform the roles of mediator and arbitrator. They preside jointly over an information exchange between the parties, after which the mediator works with the parties in the absence of the arbitrator. If mediation fails to achieve a full settlement, the unresolved issues can be submitted to the arbitrator for a binding decision.

Preparing for an Arbitration Hearing

.61 There are several areas of consideration when preparing for an arbitration hearing. Allan H. Goodman, a mediator, arbitrator, judge, and adjunct professor of law at Georgetown University, has compiled the following information.

.62 ***What Questions to Ask.*** The CPA may begin with the following questions:

- Who or what are the parties to the dispute?
- Who or what are the affiliates or subsidiaries of the parties?
- Who or what are the major subcontractors or other interested parties involved in the dispute?
- Who are the attorneys, other CPAs, and fiduciaries involved?
- Who are the expert witnesses or consultants known at the time the arbitration demand is made?
- Does the CPA need to do due diligence to see if there is a conflict of interests? If there are no conflict of interests, the CPA may accept the engagement. If there are conflicts, the CPA should disclose the conflict to his or her client. Disclosure is best done in writing. However, a written disclosure is not required under SSCS No.1. Past contacts with parties associated with the dispute may not necessarily disqualify the CPA from participation, but failure to disclose may take on greater significance the longer the disclosure is withheld.

.63 ***What Documents Does a CPA Assist in Reviewing or Preparing?*** The claimant files an arbitration demand, or objection letter, to initiate the arbitration. This may be a simple document alleging wrongs and a request for a dollar amount in damages. This demand may also be a detailed document similar to a civil complaint filed in a lawsuit. If the CPA is part of the respondent's team, he or she should review the demand for accuracy and the possible scope that the engagement requires.

.64 The CPA should also review any contracts between the parties, especially the ADR clause for specific rules of procedure. If there are no specific rules of procedure, the CPA may advise on appropriate rules from one of the administering ADR organizations. If the arbitration is to be nonadministered (the parties select the arbitrator), the CPA may counsel on rule setting or have the selected arbitrator devise procedures for the team's review and approval.

.65 A counterclaim may also be filed. Usually both the claim and the counterclaim are decided in the same arbitration proceeding. The CPA, working with the client's counsel, may advise on the analysis or preparation of such a claim or counterclaim.

.66 The CPA will find that many of the documents that are in question or will be requested in the discovery process are already in existence. He or she should review all documents and make recommendations on their ability to stand alone or whether supplementary or supporting documentation will be needed.

.67 Not all documents requested by the discovery process will be used as exhibits at the hearing. If necessary, the CPA will need to prepare documents deemed as exhibits in the proper manner and to present this evidence at the hearing as an expert witness or as a consultant.

.68 The CPA may be required by the arbitrator to prepare a detailed itemization of all elements of the claim, if the claim has many items. The itemization assists in the testimony and in the amount of time devoted to each item. That is, the smaller the item, the less time allowed by the arbitrator for testimony.

.69 Also, many of the documents subpoenaed in the demand are delivered to the prehearing conference. This conference is an opportunity for the parties to review the documents before the hearing begins. The benefits are twofold: (*a*) the CPA is better able to advise on the completeness of the documents and speculate on the ones not present, and (*b*) this permits the hearing to commence without costly recesses and delays for document delivery and analysis.

.70 ***Should the Parties Be Represented by Attorneys?*** Arbitration is different from mediation. In mediation, the attorneys play more of an advisory role. In arbitration, in which one party is represented by an attorney and the other party is *pro se* (representing himself or herself), the *pro se* party is at a distinct disadvantage. However, in arbitration, with its less formalized rules and procedures, a party that can provide the burden of proof to successfully establish or defend a claim may prevail. However, again, there is much truth to the adage "He who defends himself has a fool for a client."

.71 ***Assisting Counsel in Preparing the Client for the Hearing.*** The importance of preparation for the arbitration sessions cannot be overemphasized; it is singularly important to a successful outcome in arbitration. The client, attorney, and key advisers should develop a theory and a theme for the client's "story." The theory should encompass the legal issues in the dispute, answering three logical questions:

1. What happened?
2. Why did it happen?
3. Why does that mean the client should win?

.72 The theme, on the other hand, should be presented in a single sentence, justify the morality of the theory, and appeal to a sense of justice.

.73 Some other important considerations in preparing the client (and the CPA, if he or she is going to testify in the hearing) are as follow:

- Explain the arbitration process.
- Help the client to feel at ease.
- Role play a mock arbitration session in which the CPA asks the client direct questions as well as opposing questions (that is, direct questioning and cross-examination).
- Encourage the client to fully disclose both the positive and negative information relating to the dispute so that the CPA can help prepare adequate responses.
- Avoid being judgmental.
- Be aware of known facts, industry standards, or prior testimony given in depositions or other trials by the client or witness.
- Review the details of all documents and exhibits.

.74 Once the members of the arbitration team—the client, attorney, counselors, and witnesses—have developed an attitude of thoroughness and attention to detail, a persuasive dynamic to the presentation will develop.

.75 ***What Are the Seating Arrangements at an Arbitration Hearing?*** In most commercial ADR processes, a long rectangular table is preferred. The arbitrator sits at an end with the parties on either side. There is usually a discreet distance between the parties and the arbitrator, allowing him or her room to make notes and view the exhibits. The arrangement of the parties at an arbitration hearing puts the parties furthest from the neutral (instead of the closest, as in mediation). The seating may look like this:

Witness Attorney Party

Arbitrator(s)

Vacant Attorney Party

.76 A court reporter, if present, may sit either in a witness position or to one side of the conference table.

.77 Because arbitration is a private process, only the parties and their attorneys are allowed in the hearing room. The parties and the arbitrator agree on the allowances for witnesses and consultants. They are usually allowed in the room only when they are aiding in the presentation or preparation of the party's case.

.78 This follows the "rule on witnesses," which states that a witness should offer testimony only if not influenced by the testimony of other witnesses. However, if the parties so agree, everyone involved may be present in the hearing room throughout the hearing.

.79 ***Do Witnesses Testify Under Oath?*** Yes, generally. The oath is usually a rendition of the standard court oath. The arbitrator or a court reporter, if present, may administer it. The following is a representative oath that might be expected at a hearing:

"Please state your full name.
"Please raise your right hand.

> "Do you solemnly swear or affirm that the testimony you are about to give in this proceeding will be the truth, the whole truth, and nothing but the truth?"

Using Arbitration Clauses in Engagement and Business Agreements[28]

.80 In many business relationships, the majority of interactions that give rise to disputes are created or governed by contracts entered into in advance. It is possible to plan for dispute resolution and conflict management in advance, too. This is done by the incorporation of ADR clauses in engagement letters, business contracts, partnership agreements, and joint-venture dealings.

.81 However, care should be taken when these clauses are drafted. The specification of particular disputes must be precise, especially in threshold amounts or underinclusive language. It is not enough to state that "disputes arising out of or relating to the agreement shall be settled by arbitration." Although this language indicates the parties' intent to arbitrate and may authorize a court to enforce the clause, it leaves many issues unresolved. Issues such as when, where, how, and before whom a dispute will be arbitrated are subject to disagreement, with no way to resolve them except to go to court.

.82 It is for these reasons that an established administrating organization's arbitration rules should be used. Rules from such organizations as American Arbitration Association, CPR Institute for Dispute Resolution, and JAMS/Endispute have been consistently upheld in court as having precedent and being complete. This may not be the case with a local provider.

.83 The standard arbitration clauses suggested by these organizations address those questions. These clauses have proven highly effective in more than a million disputes. The parties can provide for the arbitration of future disputes by inserting the following in their contract:

> Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be settled by arbitration administered by [*ADR organization*] in accordance with its applicable rules, and judgment upon the award rendered by the arbitrator may be entered in any court having jurisdiction thereof.

.84 The arbitration of existing disputes may be accomplished by the following:

> We, the undersigned parties, hereby agree to submit to arbitration administered by [*ADR organization*] under its applicable rules the following controversy. (Cite briefly.) We further agree that we will faithfully observe this agreement and the rules, and that we will abide by and perform any award rendered by the arbitrator(s), and that a judgment of the court having jurisdiction may be entered upon the award.

[28] Any ADR clause inclusions in contracts and engagement letters, especially binding arbitration, should be reviewed by the firm's professional liability carrier and attorney before use with clients, vendors, and others. The firm should also require the carrier to provide a written response to the acceptability of the clause(s).

.85 Therefore, by invoking the time-tested organization's rules, these clauses, by reference, meet the requirements of an effective arbitration clause. The well-drafted arbitration clause—[29]

1. Makes clear that all disputes can be arbitrated. Thus, it minimizes deliberate court actions to avoid the arbitration process.
2. Is self-enforcing. Arbitration can continue despite an objection from a party, unless the proceedings are stayed by court order or by agreement of the parties.
3. Provides for a complete set of rules and regulations. This feature eliminates the need to spell out rules and regulations in the parties' agreement.
4. Provides for the appointment of an impartial neutral. Arbitrators are selected by the parties from the provider organization's pool of available experts.
5. Settles disputes over the locale of the proceeding. When the parties disagree, locale determinations are made by the provider organization as administrator, alleviating the need for direction from the courts.
6. Can provide for administrative conferences. If the clause provides for the organization's various industry (for example, accounting, construction, commercial disputes, and energy) rules for resolving business disputes, there is a provision for an administrator to expedite the arbitration proceedings.
7. Can provide for preliminary hearings. Especially in large and complex cases, preliminary hearings are needed to specify the issues to be resolved, clarify claims and counterclaims, provide for an exchange of information, and consider other matters that will expedite the arbitration proceedings.
8. Makes mediation available. Many, if not all, provider organizations' arbitration rules provide for mediation conferences.
9. Establishes time limits to ensure prompt disposition of disputes. Also, expedited procedures are used to resolve smaller claims.
10. Insulates the arbitrator from the parties. Under the vast majority of rules that provide for the resolution of business disputes, the case administrator channels communications among the parties and the arbitrator, which serves to protect the continued neutrality of the arbitrator and the process.
11. Establishes a procedure for the serving of notices. Depending on the rules used and the type of the case, notices can be served by regular mail, addressed to the party or its representative at the last known address. The parties may use facsimile transmission, telegram, or other written forms of electronic communication to give the notices required by the rules.
12. Gives the arbitrator the power to decide matters equitably and to fashion any appropriate relief, including specific performance. The rules allow the arbitrator to grant any remedy or relief that the arbitrator deems just, equitable, and within the scope of the agreement of the parties, including but not limited to specific performance of a contract.
13. May allow ex parte[30] hearings. A hearing can be held in the absence of a party who was given due notice. Thus, a party cannot avoid an adverse award by merely refusing to appear.

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[29] The following features of a well-drafted arbitration clause are from the American Arbitration Association's *Drafting Dispute Resolution Clauses for Professional Accounting and Related Services.* See the Bibliography.

[30] Normally, an arbitrator will not allow *ex parte* communication (that is, with only one of the parties present) during the course of the arbitration.

14. Provides for enforcement of the award. The award can be enforced in any court having jurisdiction, with only limited grounds for resisting the award.

.86 Arbitration clauses may be combined with a clause calling for mediation before resorting to arbitration. Even if the arbitration clause does not provide for mediation, parties can, by mutual agreement, engage in mediation first. Use of mediation as a first resort aids in many ways:

- A successful mediation may resolve many of the issues in the conflict, most notably the larger disputed points.
- Costs are reduced in preparation for arbitration.
- The need for discovery may be lessened.
- The pent-up anger and frustration in the conflict can be discharged, thereby permitting the arbitration to proceed more efficiently after a cooling-off period.
- Mediation can prevent a party from seeking judicial intervention, which is sometimes used as a delaying tactic.

International Arbitration Agreements

.87 Arbitration is a favored method of resolving international commercial disputes. Many business professionals believe that they should control their international disputes. Most often the controversies are about business issues that need creative business solutions, such as new financing and buy-sell agreements. Correspondingly, the multi-step ADR processes, such as med-arb and co-med-arb, are increasingly being deployed.

.88 At the international level, arbitration has additional advantages that include avoiding the unknown in a foreign courtroom and obtaining jurisdiction over foreign parties. The Commercial Arbitration and Mediation Center for the Americas (CAMCA), the United Nations Committee on International Trade Law (UNCITRAL), the American Arbitration Association, and the International Chamber of Commerce each has established arbitration rules that enjoy extensive international acceptance.

.89 Other institutions primarily involved in international arbitration are the London Court of International Arbitration, the Stockholm Chamber of Commerce, and the CPR Institute for Dispute Resolution (nonadministered). International arbitration law in the United States is governed by both state and federal statutes. At the federal level, the Federal Arbitration Act (FAA) applies to contracts involving interstate and foreign commerce, as well as maritime transactions. The FAA has provisions that implement the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, also known as the New York Convention. This significant international agreement, to which the United States is a party, provides for the recognition of arbitration agreements and for the enforcement of foreign arbitral awards. Article III states:

> Each Contracting State shall recognize Arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles. There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of Arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic Arbitral awards.

.90 The newest of the international forums is CAMCA, formed in 1995 to resolve private commercial disputes arising in the sphere of the North American Free Trade Agreement (NAFTA). Article 2022 of NAFTA specifically provides for use of ADR as the desirable means of resolving such controversies.

.91 Other treaties include the 1961 European Convention on International Commercial Arbitration, the 1975 Inter-American Convention on International Commercial Arbitration, and the 1965 Convention of the Settlement of Investment Disputes. These conventions may be applicable when the New York Convention does not apply.

.92 At the state level, each state has enacted its own arbitration statute that applies to intrastate arbitrations. In recent years, a number of states have enacted laws specifically governing international arbitration, in an effort to create a hospitable climate for international commerce and trade. Several of these statutes are more detailed than the FAA and include provisions for such items as jurisdiction, choice of law, grounds for challenging the arbitrators, and arbitrator appointment procedure. However, due to the potential for conflicts, state arbitration statutes are seldom referenced.

12. HOW TO CHOOSE AN ADR PROVIDER

Choosing the Proper ADR Process

.01 If a contract does not provide for a dispute-resolution forum, the parties and their counselors must agree to the appropriate ADR process before a neutral can be selected. This is called "matching the forum to the fuss." This responsibility of structuring an appropriate ADR process involves the following steps:

1. A party must decide what its interests and goals are for the dispute. Parties must determine their interests and the ultimate goal those interests dictate: a collaborative settlement or an adjudicated pronouncement of rights and obligations.
2. If litigation is not in the parties' best interest, what ADR process is appropriate? If settlement is sought, a form of nonbinding ADR can be used. If the central issues are of a technical or factual nature, a nonbinding neutral expert in fact-finding is appropriate. If a final resolution of rights is sought in a nonpublic forum, a binding ADR process may be the right solution.
3. Once the proper ADR process is selected (binding or nonbinding), the process is shaped to fit the resolution requirements of the dispute. For example, in using a nonbinding process, the parties decide if mediation, with its facilitation of communication and exchange of possible resolutions, or neutral evaluation, which entails an advisory opinion, would be best.
4. After selecting the initial ADR process, the parties consider whether there is a need for a multistep process. Solutions may begin with nonbinding processes. Unresolved items can be escalated into binding processes. The multistep resolution begins within the usual decision-making structure of the contracting parties and escalates outward. For example, the first step would establish negotiations between line managers before escalating to executives. Next, unresolved matters would be submitted to mediation and then to minitrial. A third step would provide for nonbinding or binding arbitration. (See the sample dispute clause in appendix H.)

Choosing a Qualified ADR Provider

.02 In choosing any ADR provider, the CPA and the attorney may have difficulty compiling a list of suitable neutrals. Just as the ADR movement began with the certainty that it is inappropriate to use a single, fixed dispute method—litigation—for disputes that come in a large array of shapes and sizes, so is there certainty that a neutral cannot competently practice in all ADR forums.

.03 No easy formula predicts the competence of the neutrals selected to facilitate the resolution of a dispute. Some research must be conducted and evaluated before a comfort level can be reached. This is further complicated because there are no uniform standards or licensing for anyone holding himself or herself out as an ADR provider. Therefore, ADR is still a buyer-beware market.

.04 The following neutral-selection guidelines may be useful in not only selecting the appropriate forum for resolution, but also determining the common qualifications for many of the ADR processes. The following steps and analyses are suggested in choosing qualified neutrals.

Deciding What Is Required From Mediation

.05 Many mediators and ADR administration program providers can assist in the selection of the proper process and a selection of neutrals suited for the dispute. To assist in this process, the CPA with the assistance of counsel should—

- Assess the goals. Does the situation require a neutral that offers opinions or one who resists offering opinions so the parties assume responsibility for their resolution and keep control over the outcome?
- Assess the abilities and team resources. What are the CPA's strengths and weaknesses as a negotiator? What are the other party's strengths and weaknesses? What is the time frame for resolution? Is this a business dispute with experienced legal, financial, or risk management advisers or a domestic divorce involving emotional issues and child custody?
- Consider the budget. How much is available to spend may limit the choice of neutral or ADR program administrator.

Compiling a List of Names

.06 The following sources can provide a list of neutrals.

- *Word of Mouth.* The CPA can ask a friend, his or her attorney, or other relevant professionals. The CPA should describe the case to a neutral and ask, "Other than yourself, who are the most skilled neutrals in this kind of case?" People who have been in a mediation are another source.
- *Written Lists.* Local listings appear in the Yellow Pages. Martindale-Hubbell publishes the *Dispute Resolution Directory*, which contains the names of some service providers nationwide. Many local mediation organizations maintain directories of member neutrals. Many state and federal courts also maintain profiles of neutrals who are certified or otherwise approved by the court.
- *Referral Services.* Many national neutral membership organizations and trade organizations keep lists of practitioner members and offer referral services. Some may

charge for their services. In some states, the local bar association makes referrals should an attorney, judge, or neutral be needed.

Evaluating Written Materials

.07 The next step is to call or write several neutrals on the list and ask them to send their promotional materials, résumés, references, and samples of their written work. A community mediation center may send only materials about the center itself.

.08 The CPA, along with the client's advisers, can then analyze the material in relation to the particular situation, for the following:

- *Mediation Training.* Some neutrals receive formal training from professional organizations. Some participate in apprenticeships or in mentoring programs. Although training alone does not guarantee a competent neutral, most expert neutrals have had some type of formal training. How many hours of training has this neutral had? How recent was the training?
- *Experience*. The neutral's type and amount of experience include the number of years of mediation, number of mediations conducted, and types of mediations conducted. How many cases similar to the case at hand has the neutral handled? A neutral's experience is particularly important if he or she has limited formal training.
- *Written Work.* Some neutrals write up notes about agreements or even draft agreements for the parties. Other neutrals do not prepare written agreements or contracts. If the neutral prepares written work, the CPA may want to review a sample. Samples could include letters, articles, or promotional materials. Any sample of the neutral's written work should be clear and well organized and use neutral language. Agreements or contracts should have detailed information about all items upon which the parties have agreed.
- *Orientation Session.* Some neutrals offer an introductory or orientation session, after which the parties decide whether they wish to continue. Is it offered at no cost, reduced cost, or otherwise?
- *Cost.* The CPA should understand the neutral's fee structure. Does the neutral charge by the hour or the day, and how much?
- *Other Considerations.* Does the neutral or the mediation center carry professional liability insurance, which specifically covers mediation, arbitration, or both? Is the neutral certified, and if so, by whom? Whereas certification usually shows the neutral has completed a specific amount of training or education, training and education do not guarantee competence.

.09 The CPA should beware the neutral who claims a statutory immunity from liability in a "for hire" engagement and check the state's code for statutory immunity. Many states may grant immunity only to neutrals in court-mandated cases. Hired neutrals mediate by a contract with the parties (see appendix I). As with the engagement letter, the mediation contract should state what the responsibilities and limitations are for both the neutral and the parties.

.10 Does the neutral belong to national or local mediation organizations, and is the neutral a practicing or general member? Rarely does cost prevent a competent neutral from joining organizations, becoming certified, and carrying liability insurance.

Interviewing the Neutral

.11 The CPA, or an appointed member of the client's dispute resolution team, should consider talking to the neutral in person or by phone about certain matters, observing the neutral's interpersonal and professional skills. Qualities often found in effective neutrals include neutrality, emotional stability and maturity, integrity, and sensitivity. Also important are interviewing skills, verbal and nonverbal communication, the ability to listen, the ability to define and clarify issues, problem-solving skills, and organizational skills. Care should be exercised not to describe specific facts of the matter that could affect the objectivity of the prospective neutral.

.12 During the conversation, questions should be asked about matters covered in the written materials and other topics. Some topics to discuss in the interview include training, knowledge, experience, and style.

.13 ***Training, Knowledge, and Experience.*** How have the neutral's education and experience prepared him or her to work out this specific dispute? If the neutral had formal training, did it include role play and observations of skilled neutrals? Although training and education do not guarantee competence, training is most effective when it includes practice-oriented segments, such as role play and observation.

.14 Does the neutral participate in continuing education, ongoing supervision, or consultation? Many professional mediation organizations encourage or require their members to participate in ongoing education or other professional development.

.15 People often ask whether a neutral should be an expert in the subject of the dispute. For example, should the neutral in a commercial mediation be an expert on industry standards and practices? The answer depends on the type of dispute, the mediation program (for example, court-referred or administrative agency), and the parties' expectations and needs. The neutral should be asked if he or she thinks subject-matter expertise is necessary for this dispute, and why or why not.

.16 In some cases, the parties may prefer a neutral with no special knowledge of the subject matter or the case law involved. Benefits of this approach include avoiding a neutral's preconceived notions of what a settlement should look like, thereby letting the parties come up with unique or creative alternatives. Using a neutral who is not an attorney reduces the risk of an additional legal opinion, allowing the focus of the process to be on the facts and the issues of the dispute.

.17 In other cases, for example, when the subject of the dispute is highly technical or complex, a neutral who comes to the table with some substantive knowledge could help the parties focus on the key issues in the dispute. The parties may want co-neutrals: one with faciliative skills and one with substantive knowledge. Co-mediation is increasing in many employment, partnership, and divorce mediations when emotional and operational issues collide.

.18 ***Style.*** What values and goals does the neutral emphasize in his or her practice? For example, does the neutral encourage the parties to communicate directly with each other, or does he or she control the interchanges?

.19 Caucuses and ex parte communications are generally not appropriate in binding arbitration proceedings and may even be grounds for setting aside (overthrowing) the arbitral award.

Skills, Abilities, and Other Attributes of Effective Neutrals

.20 Studies have shown that, regardless of mediation orientation or individual style, neutrals should possess and demonstrate certain skills, abilities, and other attributes to be effective. The following list is not exhaustive (see appendix C on mediator selection guidance), but it includes what are considered to be the most significant factors.

- Reasoning—To reason logically and analytically, effectively distinguishing issues and questioning assumptions
- Analyzing—To assimilate large quantities of varied information into logical ideas or concepts
- Problem solving—To generate, assess, and rank alternative solutions according to priority, or help the parties to do so
- Oral communication—To speak with clarity and listen carefully and with empathy
- Nonverbal communication—To use voice inflection, gestures, and eye contact appropriately
- Interviewing—To obtain and process information from others, eliciting information, listening actively, and facilitating an exchange of information
- Emotional stability and maturity—To remain calm and levelheaded in stressful and emotional situations
- Sensitivity—To recognize a variety of emotions and respond appropriately
- Integrity—To be responsible, ethical, and honest
- Recognizing values—To discern own and others' strongly held values
- Impartiality—To maintain an open mind about different points of view[31]
- Humor and distraction—To prevent a "set" mentality from derailing the session, timing, humor, and the ability to steer around situations that lead to impass

.21 ***Rules and Ethics.*** The neutral should be asked for a copy of the rules and ethical standards he or she follows. Many states that certify neutrals and the various ADR organizations have well-developed written codes of conduct. All neutrals should be able to show or explain their rules for conducting sessions and their ethical standards (sometimes called a code of conduct). If the neutral is a lawyer or other professional, it should be determined what parts of the professional code of ethics will apply to the neutral's services. The neutral also should reveal any prior relationship or personal bias that would affect his or her performance, and any financial interest that may affect the case.

.22 ***Confidentiality.*** The neutral should explain the degree of confidentiality of the process. The neutral may have a written confidentiality agreement for the parties to read and sign. It is of the highest importance to clarify that any documents produced, such as settlement drafts, remain privileged (nondiscoverable) workproducts until signed into final, binding agreements. Cases have been lost when unresolved issues were litigated and an unsigned draft settlement agreement or dialogue during the mediation process was introduced into evidence during trial. All drafts can be

[31] Adapted from *Performance-Based Assessment: A Methodology for Use in Selecting, Training and Evaluating Mediators* (Washington, D.C.: National Institute for Dispute Resolution, 1995).

labeled "Discussion draft, only. This document is inadmissible as evidence and may not be used outside of the mediation process," or with similar protective language suggested by legal counsel.

.23 If the court has ordered the mediation, the neutral should say whether he or she will report back to the court at the conclusion of the mediation. How much will the neutral say about what happened during mediation? How much of what the CPA says will the neutral report to the other disputants? Does the confidentiality agreement affect what the disputants can reveal about what was said? If the parties' attorneys are not present during the mediation, will the neutral report back to them, and if so, what will the neutral say? The neutral should be able to explain these things.

.24 ***Logistics.*** Who will arrange meeting times and locations, prepare agendas, and make other such arrangements? Will the neutral prepare a written agreement or memorandum if the parties reach a resolution? What role do the parties' lawyers or experts play in the mediation? Does the neutral work in teams or alone?

.25 ***Cost.*** The neutral should disclose how he or she would estimate costs for this case. How can costs be kept down? Are any other charges associated with the mediation? Does the neutral perform any pro bono services or work on a sliding fee scale? If more than one neutral attends the session, must the parties pay for both? Does the neutral charge separately for mediation preparation time and the actual session?

Evaluating Information and Making Decisions

.26 During the interviews, the CPA had the opportunity to observe the neutrals' skills and abilities at several important tasks. These tasks, which neutrals perform in almost all mediations, include—

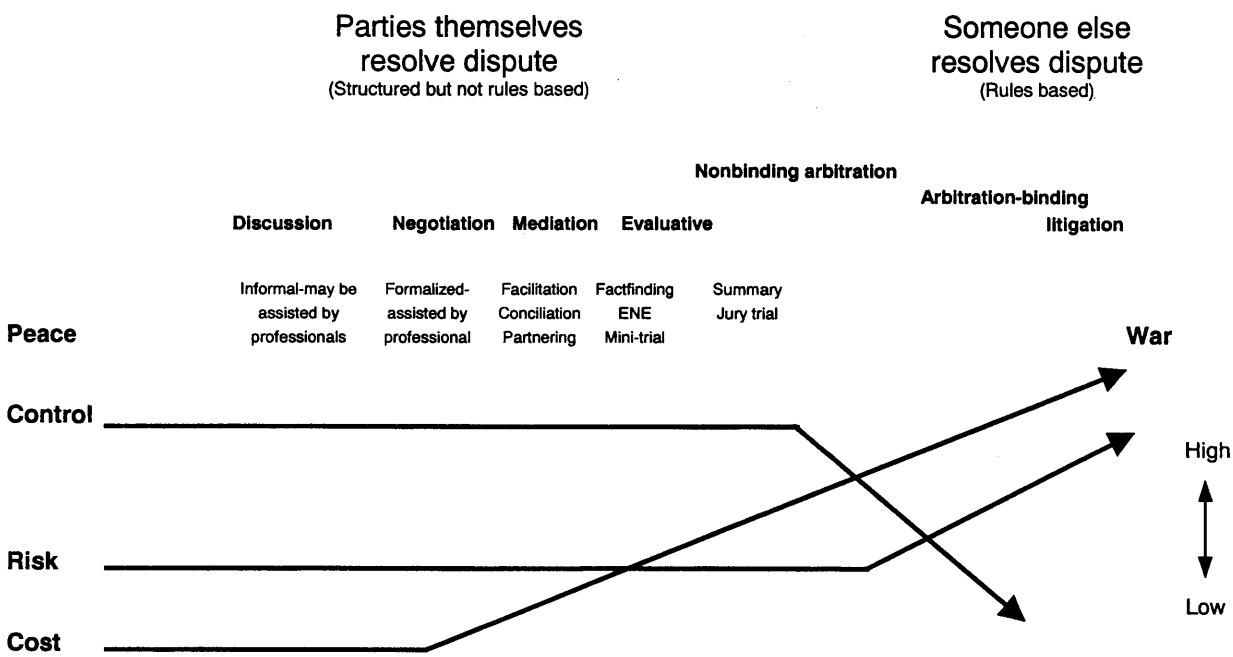
- Gathering background information.
- Communicating with the parties and helping the parties communicate between themselves.
- Referring the parties to other people or programs when appropriate.
- Analyzing information.
- Helping the parties agree.
- Managing cases.
- Documenting information.

.27 Which of the neutrals best demonstrated these skills? Did the neutral understand the problem, understand the questions, and answer them clearly? If the other party was present, did the neutral constructively manage any expressions of anger or tension? Did the neutral refer those involved to other helpful sources of information? Pick up on any undiscovered aspects of the conflict? Understand the scope and intensity of the case? Did the neutral inspire trust? Of course, not every orientation interview permits the neutral to demonstrate all these skills, and every neutral has relative strengths and weaknesses, but the CPA and the client's other advisers should be satisfied that the neutral can perform these tasks before beginning.

.28 The CPA should review the other questions on this checklist, making sure that the neutral's cost and availability coincide with available resources and the time frame. The other parties to the mediation must agree to work with this person, too. The CPA and the client's advisers may want to suggest two or three acceptable neutrals, so all parties can agree on at least one.

APPENDIX A

THE DISPUTE RESOLUTION CONTINUUM



APPENDIX B

MATRIX OF ADR PROCESSES

Mediate	Arbitrate	Litigate
When parties' interests include:	**When parties' interests include:**	**When parties' interests include:**
• Mutual settlement • Overcoming negotiation barriers • Protecting confidentiality • Fostering ongoing relations/ communications • Generating creative business-oriented solutions • Maintaining control over outcome • Slashing time & costs of resolution • Resolving multiparty cases • Keeping litigation option open if settlement fails	• Closing case despite outcome • Using expert decision makers • Adjudicating in private • Avoiding jury outcomes • Reducing time & costs associated with litigation • Securing a decision from a third party • Providing full examination of parties/witnesses • Using arbitration as a final step in a multistep ADR process	• Maximizing procedural protections in "bet the company" case • Seeking preclusion/ collateral estoppel when related claims are likely • Telegraphing nonsettlement posture • Requiring articulation of judicial precedent or novel public policy ruling • Securing summary judgment based on settled law • Publicly –vindicating reputation or position –exposing wrongdoing –maintaining reputation –defeating bad faith or unmeritorious claims • Delay

APPENDIX C

CHECKLIST FOR SELECTING AN ADR PROVIDER*

Selecting the right neutral is of primary importance to the success of the process. This checklist may be used with the client and counsel. This checklist presents questions that can assist in targeting the objectives of both the client and the opponent, and the appropriate ADR forum; and for selecting a neutral to facilitate resolution of the dispute.

1. What do you want?

- What are your goals?
- What mediation approach do you prefer?
- What are your strengths?
- What are your weaknesses?
- What is your time frame?
- What is your budget?

2. What is the nature of the dispute?

___ Area requiring special knowledge, experience, or ability to modify the process
___ Mostly factual issues
___ Mostly legal issues
___ Mixed factual and legal issues

3. What is the nature of the parties?

___ Two parties
___ More than two parties
___ All parties represented by counsel
___ One or more parties not represented by counsel
___ Engaged in a friendly disagreement
___ Stubborn, but rational
___ Extremely hostile and irate
    ___ Hostility developed over a long period
    ___ Hostility developed in a brief encounter
    ___ Have acted in bad faith in the past
___ Holding substantially differing interests and positions
___ Holding overlapping or identical interests and positions
___ Will have a continuing relationship after the mediation
___ Will not have a continuing relationship after the mediation

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* Although this checklist has been prepared for mediation, it may be reviewed for applicability to other ADR processes, such as arbitration. The items noted in these checklists are not meant to be inclusive but to serve as a guide in preparing for ADR.

4. Considering the nature of the dispute and the parties, what type of neutral would be appropriate?

___ Former judge
___ Attorney
___ CPA
___ Other professional
___ Combination
  ___ Cross-trained single neutral
  ___ Co-neutrals
  ___ Panel of three or more

5. Considering the nature of the dispute and the parties, what style of mediation would be appropriate?

___ Facilitative
___ Evaluative
___ With caucuses
___ Without caucuses

6. How will you get names?

- Ask people and professionals whom you know.
- Look at directories.
- Call referral services (ask first whether they charge to refer you to a neutral).
- Interview prospective neutrals.

7. Does the neutral you are considering possess the most important basic qualities of a good ADR provider?

___ Impartiality, neutrality, and confidentiality
___ Patience
___ Flexibility
___ Open-mindedness
___ Creativity
___ Good listening and communication skills
___ Appropriate sense of humor
___ Optimism
___ Respect for professionals and clients
___ Tenacity without coercion
___ Good judgment
___ Ethical standards
___ Confidentiality

8. Does the neutral you are considering have training, experience, or both?

___ Has received training in mediation from qualified training organizations
___ Is certified or approved by a court system or dispute-resolution organization
___ Conducts training in mediation, negotiation, or conflict resolution
___ Has substantial ADR experience as a facilitative or evaluative neutral, as appropriate to the present dispute
___ Has been appointed by the court as a neutral
___ Has sufficient litigation experience, if useful
___ Will provide references from prior mediations
___ Will provide the degree of confidentiality with which the process will be conducted
___ Will provide written ethical standards under which the process will be conducted
___ Is listed on the panels of one or more dispute-resolution organizations
___ Has a reputation for professional excellence among dispute-resolution practitioners
___ Is a member in state or national ADR professional associations

9. Can the neutral satisfy the practical needs of the parties?

___ Neutral covered by ADR liability insurance (what kind and how much)
___ Neutral covered by ADR liability insurance for this ADR process
___ Affordable fees (hourly, daily, or by sessions)
___ Policy on fees if a session is canceled or postponed
___ Willing to conduct premeditation caucuses if parties believe it necessary
___ Willing to travel to provide mediation services
___ Fees charged for travel time
___ Types of expenses
___ Able to provide, schedule, or suggest facilities where the mediation can be held
___ Available to serve as neutral for the number of sessions and at the times the parties and their counsel are available

Source: Adapted from *Mediation Advocacy,* by John W. Cooley (South Bend, Ind.: National Institute for Trial Advocacy, 1996). Checklist includes material not appearing in the original.

APPENDIX D

CHECKLIST FOR PREPARING FOR ADR*

This checklist may be used with the client and counsel to prepare the case for the mediation session. The CPA can advise on identifying the issues, qualifying and quantifying damages, structuring reasonable settlement offers and counteroffers, and ensuring that necessary elements are included in the written settlement agreement. Many of the procedures in this checklist are the attorney's responsibility, but the CPA may wish to review them with the attorney and client.

1. Reviewing the case file with counsel

- Review pleadings chronologically.
  —Claims of parties and relief requested
  —Counterclaims and relief requested
  —Motions and related orders and opinions
  —Nature and status of pending undecided motions
  —Status of discovery
  —Order setting trial date, if any
- Review important documents and deposition transcripts.
  —Note items strongly supportive of your position.
  —Note items strongly unsupportive of your position.
- Review correspondence file.
  —Read history of demands and offers to settle.
  —Note last demand and last offer figures.
  —Read correspondence regarding any limitations on settlement authority.
- Review important case law if needed.

2. Ensuring you have all pertinent information

- Photographs
- Deposition transcripts
- Contracts
- Leases
- Waivers
- Releases
- Bills
- Work orders
- Liens
- Verification of lost wages
- Other

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* Although this checklist has been prepared for mediation, it may be reviewed for applicability to other ADR processes, such as arbitration. The items noted in these checklists are not meant to be inclusive but to serve as a guide in preparing for ADR.

3. Considering any time constraints

- Opponent's business or personal deadlines
- Your own business or personal deadlines
- Discovery cutoff date
- Trial date
- Time constraints that you can create or impose

4. Understanding the parties' underlying positions, issues, needs, and interests

- Consider the legal positions of the parties with the attorney's assistance.
  —Identify the claims of the parties.
  —Identify the defenses of the parties.
  —Identify the parties' claims for relief.
  —Identify the legal issues.
- Identify the present and potential negotiating positions of the parties.
  —What are the respective parties' needs?
  —What are the respective parties' interests?
  —Ask yourself why the opponent may be taking a particular negotiating position.
  —Ask yourself why the opponent may not want to embrace your negotiating position.
  —What are the available resources to satisfy the parties' respective interests?
  —What resources does your client have available to satisfy his or her own interests?
  —What resources does your client have available to satisfy the other parties' interests?
  —What resources do other parties have to satisfy their own interests?
  —What resources do other parties have to satisfy your client's interests?
  —What resources are available outside the circle of disputants to satisfy the other parties' interests?
  —What resources are available outside the circle of disputants to satisfy your client's interests?

5. Determining the overall goal, plan, and theme

- Overall goal
  —Monetary goals
  —Acceptable settlement range
  —Reasoned basis for the range
  —Nonmonetary goals
  —Integrated monetary and nonmonetary goals
- Overall plan
  —Succinct opening statement
  —Summary of damages (plaintiff)
  —Summary of contested damages (defendant)
  —Booklet of documentary evidence, organized and tabbed, with a table of contents
  —Demonstrative evidence
  —Analysis of opponent's relevant legal and negotiating positions and the responses to them
  —Consideration of the nature and amount of client's participation in the mediation

- Overall theme
  —Focus of parties' disagreement
  —Replies to opponent's potential counter themes

6. **Selecting documents for presentation to the mediator**
(Discuss with counsel, experts, and party's mediation representative.)

- Documents defining the rights and duties of the parties
  —Business contract
  —Commercial lease
  —Residential lease
  —Warranty
  —Release
  —Will
  —Trust
  —Operator's manual
  —Ordinance
  —Court rule
  —Statute
  —Court opinion
- Documents confirming the occurrence or nonoccurrence of certain events
- Documents confirming the type of conduct engaged in or not engaged in by the parties
  —Eyewitness statements
  —Excerpts from deposition transcripts
  —Monthly securities account statement
  —Monthly bank account statement
  —Videotape
  —Letter
  —Notes
  —Other correspondence
- Documents containing admissions of wrongdoing, knowledge, or lack of knowledge
  —Correspondence between the parties
  —Deposition transcripts
  —Statements given to the police
  —Completed application forms
  —Performance evaluations
  —Releases
- Documents verifying the nature and extent of damage, loss, or injury
  —Photographs
  —X-rays
  —Doctors' reports
  —Estimates
  —Time sheets
  —Attendance records
  —Accountants' reports
  —Billing statements
  —Worklogs

—Sketches
—Blueprints
—Organizational diagrams
—Modified work schedules
—Flow charts
—Models
—Benefits manuals
—Annuity schedules
—Catalogs

7. Deciding the format of the presentation

- What are the format needs related to the substance of the dispute and the relationship between the parties?
- Is there a need for premediation in person or telephone conference with mediator?
- What should the format at mediation conference be?
  —Who is designated as the negotiating party?
  —What motivates this party?
  —What are the strengths of the negotiating party?
  —What are the weaknesses of the negotiating party?
- What is the sequence of document presentation?
- What are the documents to be initially withheld?
- Is there a need for break-out rooms?
- Is there a need for equipment for visual aids?

8. Determining what information should be kept confidential

- Identification of confidential information
- Documents not to be disclosed
- Timing of disclosure of certain confidential documents

9. Determining which type of premediation meeting or caucus would be helpful

- Meeting with opposing counsel only
- Meeting with opposing counsel and clients
- Meeting with opposing counsel and the mediator
  —Explore areas of emphasis in mediation.
  —Determine who should be present.
  —Determine what premediation materials the mediator needs.
  —Determine the agenda, format, and logistics for the mediation.

10. Knowing the status of the litigation and negotiations

- Status of litigation
  —Parties' depositions
  —Witnesses' depositions
  —Experts' depositions
  —Document production
  —Discovery cutoff date
  —Trial date
- Status of negotiations
  —Read correspondence to determine last demand and last offer.
  —Confirm with opposing counsel by telephone.

11. Knowing the limits of settlement authority

- Confirm limits of settlement authority with client in writing.
- If multiple clients, meet with them to confirm limits orally and afterward in writing.

12. Determining reasonable settlement value, opening positions, and bottom lines

- Establish rules of thumb.
- Calculate fair settlement value.
- Determine reasonable settlement range.
- Set opening position.
- Set bottom line.
- Estimate opponent's opening position.
- Estimate opponent's bottom line.

13. Considering potential for creative solutions

- Generate alternatives.
- Challenge assumptions.
- Suspend judgment.
- Try thought reversal.
- Try brainstorming.
- Use analogies.
- Use random stimulation.

14. Determining negotiating strategy and related tactics

- Determine strategy.
- Review and determine tactics.
- Competitive tactics are—
  —Alternative opportunities.
  —Bluffing.
  —Creating deadlock.
  —Fait accompli.

—Feigning.
—Playing good cop/bad cop.
—Limiting authority.
—Applying media pressure.
—Establishing preconditions.
—Attempting reversal.
—Threatening or showing power.
—Applying time pressure.

- Cooperative tactics are—
  —Establishing association.
  —Setting forth conditional proposals.
  —Creating movement.
  —Saving face.
  —Focusing on process.
  —Demonstrating flexibility.
  —Participating.
  —Maintaining psychological commitment.
  —Establishing reasonable deadlines.
  —Demonstrating reciprocity.
  —Splitting the difference.
- Avoidance tactics are—
  —Demanding to negotiate monetary issues first.
  —Demanding to negotiate nonmonetary issues first.
  —Declining to negotiate a related matter.
  —Withdrawing issue(s) from consideration.
  —Walking out of mediation session.

15. Deciding who should attend the mediation session

- Party plaintiff(s)
- Party defendant(s)
- Witnesses
- Expert(s)
  —Corporate in-house
  —Independent
  —Structured settlement expert

Source: Adapted from *Mediation Advocacy,* by John W. Cooley (South Bend, Ind.: National Institute for Trial Advocacy, 1996). Checklist includes material not appearing in the original.

APPENDIX E

CHECKLIST FOR PREPARING THE CLIENT*

This checklist should be used to prepare the client for the mediation session. A client who does not understand the intricacies of the process and the potential results may be unable to participate effectively or to his or her benefit. Even though many of the procedures in this checklist are the attorney's responsibility, the CPA may wish to review them with the attorney and client.

1. Advising the client about the nature of the mediation process

- Clarify whether it is voluntary or court-mandated mediation.
- Identify the stages of mediation process.
- Identify the mediation participants.
- Define caucusing.
- Clarify when there will be confidentiality.
- Clarify that mediation is not a trial.
- Stress that the client may discontinue mediation at any time.
- Identify the primary and secondary purposes of mediation.
- Highlight the difference between facilitative and evaluative mediation.
- Define the type of mediation selected.
- Define the premeditation agreement—purpose and content.
  —Confidentiality
  —Immunity of mediator from a lawsuit or subpoena
  —Manner and timing of payment for mediator's services
- Stress the informal atmosphere of mediations.
  —Who talks, when
- Discuss possible alternative discussion formats.
  —Parties and counsel negotiating directly without mediator present
  —Counsel meeting with opposing counsel without the parties being present
  —With the agreement of counsel, the mediator meeting privately with the parties without counsel being present

2. Advising the client about the role of the mediator

- Mediator's qualifications, background, practice experience, and style should be described.
- Mediator's duty is to be neutral and impartial with respect to the parties and the subject matter of the dispute.
- Mediator gives no legal advice.
- Mediator does not determine who is right or wrong.

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* Although this checklist has been prepared for mediation, it may be reviewed for applicability to other ADR processes, such as arbitration. The items noted in these checklists are not meant to be inclusive but to serve as a guide in preparing for ADR.

- Mediator assists the parties by—
  —Identifying issues, needs, and interests.
  —Exploring alternative solutions.
  —Focusing the discussion.
  —Controlling any emotional outbursts.
- Mediator lends structure to the conference by—
  —Chairing discussions.
  —Clarifying communications.
  —Educating the parties.
  —Translating proposals into nonpolarizing terms.
  —Expanding the resources available for settlement.
  —Testing the reality of proposed solutions.
  —Ensuring the parties can comply with the proposed settlement terms.
  —Serving as a scapegoat for the parties' vehemence or frustration.
  —Protecting the integrity of the mediation process.
- Mediator is ethically bound not to disclose information received in confidence.
- Mediator is most effective when parties share suggestions for creative settlement solutions.
- Mediator may play devil's advocate in caucuses to help parties "reality test" their claims, defenses, and settlement proposals.
- Client may have long waiting periods while the mediator is caucusing with the other side.
  —This is not an indication of mediator bias.
  —Parties should consider bringing reading material or work to do during waiting periods.
- Mediator will do a lot of listening.
- Mediator may ask many types of questions:
  —Probing
  —Clarifying
  —Hypothetical
  —Open-ended

3. Advising the client about the role of the advocate[1]

- If the mediation is facilitative—
  —The goal is to obtain the best possible resolution for client.
  —Respectful conversation takes place in a problem-solving atmosphere.
  —Discussion of weaknesses as well as strengths of case takes place.
  —It involves listening as well as speaking.
  —Empathy toward opposing party or counsel could be expressed.
  —Case law normally will not be discussed
  —Creative solutions will be explored.

[1] The advocate may be any member of the client's dispute-resolution team. This includes the attorney and any other adviser, spokesperson, or person who advocates for one party. A CPA may be a client advocate, providing the CPA is not engaged as an expert witness. As an expert witness, the CPA can advocate his or her own position based on the finding of an investigation; however, he or she must be objective about whether those findings support the goals being advocated by the client and the client's attorney.

- If the mediation is evaluative—
  —The goal is to obtain best possible resolution for client.
  —Relative strengths or weaknesses of the parties' legal positions will be emphasized.
  —Pertinent case law may be discussed.
  —Approach to problem is more legalistic.
  —More traditional courtroom persuasion skills are used.
- Advocate will speak privately with client during course of mediation to—
  —Seek the client's impressions, feelings, and input.
  —Jointly determine what move to make next.
  —Remind the client that flexibility is key to strategic and tactical success.
- The ultimate decision about whether to accept a settlement proposal is the client's.
- Advocate will work with opposing counsel in drafting an agreement if a settlement is reached.

4. Advising the client about the client's role

- Delineate the extent of the client's verbal participation.
- Tests for allowing the client's verbal participation are—
  —Is the client credible?
  —Is the client likable?
  —Is the client persuasive?
- Tests for not allowing client's verbal participation are—
  —Is the client easily confused?
  —Is the client unsure?
  —Is the client less than credible?
  —Is the case too complex, technically?
  —Is the case too complex, legally?
  —Does the case have too many emotional or sentimental aspects?
  —Are the opponents too aggressive or is the client too meek?
  —Are the opponents too aggressive or is the client too reactive?
- Discuss which documents to use and how.
- Advise client on participation ground rules.
- Rehearse client on potential routine questions from mediator or opposing party.
  —Client should face the mediator when speaking, otherwise, opponents may interpret your client's words as accusatory and demeaning. Client's message is more persuasive and helps building trust and rapport with mediator.
  —Client should speak to be understood.
- Rehearse factual presentation with client
  —Is it organized?
  —Does it begin at the beginning and touch on all necessary points?
  —Is it a fair, honest statement of what occurred?
  —Does the client use terms whose meanings are not commonly known?
  —Client should state only facts.
  —Client should never argue.
  —Client should be himself or herself.

—Client should neither answer nor ask difficult questions. Difficult questions are ones that: require some knowledge of the law to answer; seek information beyond the expertise of the client; or require the client to make or imply an admission against interest without the availability of explanatory information.
—Client should defer to advocate when a difficult question is posed.
—Client should always pause slightly when asked any question to give advocate an opportunity to interject.
—Client should not ask difficult questions of the other side or of the mediator. Such questions can undermine a negotiation strategy; expose a negotiation tactic; reveal the client's gullibility; threaten the other side; reveal clues to the bottom line; demonstrate the client's lack of knowledge, skill, ability, or competence.
—Client should listen carefully to the statements of the opposing party and should not interrupt.

5. Review of the case, settlement goals, strategies and tactics

- Treat initial planning decisions as tentative.
- Be flexible about changing them after speaking with client.
- Be alert to changed circumstances, such as:
  —Client has redefined needs or interests.
  —Client has discovered new evidence, favorable or unfavorable.
  —Client has thought of some creative solution.
  —Client has identified other persons who should be brought into the mediation process.
- Consider whether mediation conference needs to be rescheduled.
- Reconsider whether premediation meetings with opponents or caucusing with mediator would be helpful.
- Consider whether changed circumstances would require accelerating the mediation process.
- Review the probabilities of succeeding in litigation and related costs as compared with those in mediation.

Source: Adapted from *Mediation Advocacy,* by John W. Cooley (South Bend, Ind.: National Institute for Trial Advocacy, 1996). Checklist includes material not appearing in the original.

APPENDIX F

COMMERCIAL MEDIATION STAGES: THE MEDIATOR'S POINT OF VIEW

This overview of a commercial mediation session is from Allan H. Goodman' *Basic Skills for the New Mediator* (Rockville, Md.: Solomon Publications, 1993) and is presented from the point of view of the mediator. "You" means you in the role of mediator.

1. Preliminary conference call

- Introduce yourself.
- Briefly explain the mediation process.
- Request a brief memorandum summarizing the issues and a limited number of relevant documents.
- Determine location and schedule the mediation session.

2. The joint mediation session: Fact-finding and issue definition

- **Mediator's opening statement**
  —Briefly describe your background.
  —State basis of empathy.
  —Describe the mediation process.
  —Praise the parties for choosing to mediate.
- **Parties' opening statements**
  —Parties vent their emotions and frustration.
  —Parties state factual basis of dispute.
- **Clarification questions and issues of the dispute**

3. First private caucus: Factfinding and issue definition, continued

- Parties continue to vent emotion and frustration.
- Mediator asks the parties to rank the issues in order of importance.
- Parties divulge confidential information.
- Mediator plays "devil's advocate," to determine strengths and weaknesses.
- Mediator determines hidden agenda items and throwaway issues.

4. Second private caucus: Beginning to seek resolution

- Mediator explores the parties' initial settlement offer.
- Parties do not authorize transmission of settlement offer.
- Mediator determines disparity in range of initial settlement offers.

5. Third private caucus: Negotiation

- Request permission to make settlement offer.
- Discuss possible solutions with the parties.
- Brainstorm possible solutions.
- Suggest possible solutions.

6. Fourth private caucus: Negotiations continue

- Parties make counteroffers and authorize you to transmit the offer.
- Transmit settlement offers and review parties' reactions to settlement offers.

7. Impasse in negotiations

- Recommend the parties take a break and resume the next day, or if parties believe further mediation would not be fruitful, request that they inform you within a specified period to discontinue the mediation.
- Leave door open for resuming mediation.

8. Nth private caucus: Final offer

- Request final offers and ask parties if you should transmit the offer or if they want a joint session.

9. Joint session: Final settlement

- Parties meet in joint session, to make final offers.
- Parties agree on settlement.

10. Closure

- Have parties list points of agreement and sign the list.
- Make sure there are no unsettled issues.
- Thank and commend everyone.

11. Formal drafting of settlement agreement

Settlement agreement is drafted by parties or their attorneys, not by the mediator.[1]

[1] More mediators are using tape-recorded settlement agreements when complex resolutions or written formal agreements are not practical. Also, draft agreements made "late in the night" after strenious negotiation have a tendency to change and fall apart by the time they are reduced to a formal writing. A recording of the agreement will assist in preventing such fallout.

APPENDIX G

CHECKLIST FOR INTERIM AND POST-ADR SESSIONS*

Even though many of the procedures in this checklist are the attorney's responsibility, the CPA may wish to review them with the attorney and client.

1. Continuing the negotiations

- General techniques for dealing with the parties' emotions
  —Focus on the process, to acknowledge the legitimacy of feelings, to enhance understanding, and to depersonalize the situation.
  —Use selective information disclosure and information bargaining, instead of making accusations.
  —Create an environment for a "fresh start."
  —Redefine the issues.
  —Emphasize the problem-solving approach.
  —Jointly develop win-win proposals.
- Specific focusing tactics to allow parties to deal more effectively with problem solving
  —Modifying the payment terms
  —Altering the allocation of risk
  —Modifying the time of performance
  —Adding guarantees of satisfaction
  —Adding a grievance mechanism
  —Changing the specifications
  —Adjusting the terms
  —Recognizing inaccurate information
  —Obtaining correct information

2. Drafting the settlement agreement

- Reasons to have opposing counsel draft agreement
  —Client cannot afford it.
  —Let other side explore alternatives; you refine them.
  —Courts may interpret contract against drafter.
- Reasons for your counsel to draft agreement
  —Choice of terms is critical to your client's interests.
  —Your counsel will be able to include provisions not specifically negotiated.

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* Although this checklist has been prepared for mediation, it may be reviewed for applicability to other ADR processes, such as arbitration. The items noted in these checklists are not meant to be inclusive but to serve as a guide in preparing for ADR.

- Topics covered in the settlement agreement
  - —Description of the parties
  - —Background and purpose of the agreement
  - —Rights of the parties
  - —Responsibilities of the parties
  - —Terms of payment
  - —Disposition of liens
  - —Law to govern contracts
  - —An ADR clause
  - —Confidentiality
  - —Severability clause
  - —Releases
- Basic rules of contract construction
  - —A general release will void all future claims arising out of the dispute.
  - —Specific releases will void specified future claims but allow other unspecified (or specified) future claims.
  - —Courts will view the agreement as a whole, interpreting each part in light of the other parts.
  - —Courts favor interpretations that hold the agreement to be lawful.
  - —Courts favor interpretations that reflect the public interest.
  - —Courts may interpret contracts most strongly against parties who draft them.
- Does the settlement agreement need to be approved by the court?
- Should a consent judgment (a decision of a court that the provisions and terms of settlement are agreed to by the parties to the action) be entered?

3. Enforcing the settlement agreement

- Should a dispute over settlement interpretation or compliance erupt, provide for an appropriate remedy, such as—
  - —Arbitration.
  - —Court proceeding; if so, file motion in pending action or file separate new action regarding enforcement of agreement.

Source: Adapted from *Mediation Advocacy,* by John W. Cooley (South Bend, Ind.: National Institute for Trial Advocacy, 1996). Checklist includes material not appearing in the original.

APPENDIX H

COMMERCIAL CONTRACT CLAUSES*

For CPA Firm Use: Sample Clause for Inclusion in Client Engagement Letter

We agree that any dispute arising out of or relating to this agreement or any interpretation of this agreement that we are not able to resolve ourselves shall be submitted to mediation under the American Arbitration Association Rules for Professional Accounting and Related Services Disputes before any other legal action is taken.

Costs and expenses of the mediation shall be borne equally by each of us. Mediation shall take place within two weeks after notification by the aggrieved party of a request for mediation unless extended by the mediator. If the mediation does not result in an agreement acceptable to all sides, any party may take such other further action as he, she, or it deems advisable under law or equity. In the event any party takes such legal action without first submitting the issue(s) to mediation as required by this clause, that party shall pay the legal expenses of the responding party plus all court costs incurred by said action.

If a dispute arises out of or relates to this contract or engagement letter, or the obligations of the parties therein, and if said dispute cannot be settled through negotiation, the parties agree first to try in good faith to settle the dispute by mediation administered by _____ under the _____ Rules, before resorting to arbitration, litigation, or some other dispute resolution procedure.

For Client Use: Mediation/Arbitration—Long Form

X.1 To expedite the prompt resolution of any dispute, controversy, or claim (hereafter referred to as "dispute") that may arise under this agreement, the parties mutually agree that the procedure set forth below will be used by each before any party instituting any legal proceedings against any other party:

(a) In the event a dispute shall arise between the parties under this agreement, the aggrieved party shall provide the other party(s) with a written notice (pursuant to the notice provision of this agreement) setting forth the nature of the problem and parties or contact persons identified in paragraph X.4 as the dispute resolution representative. The party's representative will be of such senior management as to have authority to settle the dispute (and will not have direct responsibility for administration of this agreement).

(b) The dispute-resolution representative shall immediately attempt to resolve the dispute by communication within his or her own firm and with the authorized representative of the other firm(s).

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* In any contractual situation, CPAs should obtain legal advice when drafting contract language or before undertaking the use of ADR in specific situations. Advice should also be sought from professional liability insurers.

(c) If the parties are not able to effectuate a resolution of the dispute within fifteen days of receipt of written notice, either party shall submit the issue to mediation under the Rules of Submission of [*name the mediator*] or through another mediator or dispute resolution firm acceptable to both parties.

(d) The mediation process described in (c) above shall commence within fifteen days of failure to reach agreement by direct discussion (a maximum of thirty days from receipt of written notice of the dispute pursuant to (a) above). This time limit may be extended by mutual agreement of the parties.

(e) Mediation of the dispute shall be conducted promptly with the full cooperation of the parties and shall be completed within fifteen days of commencement unless (*1*) the mediator shall declare the parties at an impasse, (*2*) the time period is extended by the mediator, or (*3*) the parties mutually agree to extend the time period for mediation.

X.2 In the event the parties are unable to resolve their differences by the process outlined in paragraph X.1, they shall:

(a) Submit to arbitration through [*name the arbitrator*], the American Arbitration Association, JAMS/Endispute, or another arbitrator acceptable to both parties by [*a sole arbitrator or three arbitrators, of whom each party shall appoint one*]. The arbitration shall be governed by the United States Arbitration Act, 9 U.S.C sec. 1-16, and judgment upon the award rendered by the Arbitrator(s) may be entered by any court having jurisdiction thereof.

(b) The place of the arbitration shall be *[specify location or that location decided by agreement]*.

(c) The Arbitrator(s) [*are/are not*] empowered to award damages in excess of actual damages, including punitive damages.

X.3 The procedures specified in this Article X shall be the sole and exclusive procedures for the resolution of disputes between the parties arising out of or relating to this agreement, provided, however—

(a) That a party may seek a preliminary injunction or other preliminary judicial relief if in its judgment such action is necessary to avoid irreparable damage.

(b) Despite such action, the parties will continue to participate in good faith in the procedures specified in this Article X.

(c) All deadlines specified in this Article X may be extended by mutual agreement.

(d) All applicable statutes of limitations shall be tolled while the procedures specified in Article X are pending. The parties will take such action, if any, required to effectuate such tolling.

X.4 The designated dispute representatives for each party are set forth below:

For ABC Company:	[*Name*], Managing Director
For XYZ Company:	[*Name*], Vice President, Sales

APPENDIX I

SAMPLE AGREEMENT TO MEDIATE BETWEEN MEDIATOR AND PARTIES*

(This is a typical sample contract between the mediator and the parties for the mediator to provide services.)

AGREEMENT TO MEDIATE

MEDIATION AGREEMENT

AGREEMENT, dated _____ 19___,
between _____ and
_____

WITNESSETH:

WHEREAS, the parties are presently [engaged in litigation] [involved in a dispute] relating to _____
_____
_____; and

WHEREAS, the parties desire to attempt to settle their dispute through nonbinding mediation with the assistance of _____ as mediator (the "Mediator").

NOW, THEREFORE, the parties mutually agree as follows:

1. Impartiality of the Mediator. The parties and their counsel represent and warrant that they have made a diligent effort to determine all prior contacts between them and the Mediator, and all such contacts have been disclosed to counsel for the opposing party and the Mediator. The parties acknowledge that the Mediator is impartial and cannot act as advocate, representative or counsel for either party and has no authority to make binding decisions, impose settlements or require concessions by either party, it being understood and agreed that any agreements which may be reached between the parties as a result of the

* In any contractual situation, CPAs should obtain legal advice when drafting contract language or before undertaking the use of ADR in specific situations. Advice should also be sought from professional liability insurers.

mediation process shall be embodied in a separate written agreement between the parties prepared with the assistance of their respective counsel.

2. Caucuses and Conferences. The parties understand and agree that, in connection with the mediation process, the Mediator may meet in confidential caucus sessions separately with each party. The Mediator will treat as confidential and refrain from disclosing to the other party or its counsel any information conveyed to the Mediator during the caucus sessions unless the party conveying such information authorizes the Mediator to disclose it to the other party. The Mediator may, at the request of either party or on his or her own initiative, conduct any conference pursuant to this Agreement by telephone, facsimile transmission or other means of communication.

3. Confidentiality, Immunity, and Indemnification. To enable the parties to discuss all aspects of their dispute freely and to enable the Mediator effectively to assist the parties in reaching a voluntary resolution of their dispute, the parties agree as follows:

a. Conferences and discussions that occur in connection with mediation services provided pursuant to this Agreement shall be deemed settlement discussions, and nothing said or disclosed, nor any document produced, which is not otherwise independently discoverable shall be offered or received as evidence or used for impeachment or for any other purpose in any current or future litigation, regardless of the law of the forum. No statement made or document disclosed in the course of the mediation process shall be disclosed by the parties or the Mediator to any person who is not associated with such party except as may be required by law; provided however, that nothing contained herein shall prohibit any party from disclosing to parties outside of the mediation process (i) any information contained in any such statement or document as long as such information was obtained, or could be obtained, from sources other than the mediation process and the party disclosing such information does not reveal the fact that such information was discussed, disclosed or otherwise revealed during or in connection with the mediation or (ii) any document as long as such document was obtained, or could be obtained, from sources other than the mediation process and the party disclosing such document does not reveal the fact that such document was delivered or otherwise obtained during or in connection with the mediation.

b. The Mediator shell have the same common-law immunity as judges and arbitrators from suit for damages or equitable relief and from compulsory process to testify or produce evidence based on or concerning any action, statement, or communication in or concerning the mediation conducted pursuant to this Agreement.

c. The parties understand that there is no attorney-client relationship between the Mediator and any party to this Agreement, and each party acknowledges that it will seek and rely on legal advice solely from its own counsel and not from the Mediator.

d. The parties agree, on behalf of themselves and their attorneys, that none of them will call or subpoena the Mediator in any legal or administrative proceeding of any kind to produce any notes or documents related to his or her mediation services or to testify concerning any such notes or documents or his or her thoughts or impressions. If any party attempts to compel such testimony or production, such party

shall be liable for and shall indemnify the Mediator for any liabilities, costs and expenses, including attorneys' fees and lost professional time, which he or she may incur in resisting such compulsion.

4. Participation of Parties. At the request of the Mediator, each party shall have a corporate officer or representative, in addition to its counsel in attendance at least one mediation session who will have full power and authority to negotiate and conclude a binding settlement of the dispute on behalf of such party. If insurance company approval is required, a representative will be present or available by telephone with such authority.

5. Fees and Expenses. The fee for the Mediator's services hereunder shall be computed at the rate of $\$$_____ per hour for time spent in preparaton for, during, and in completion of the mediation, and one-half of the fees and expenses of the Mediator shall be paid by each party.

6. Benefit of Agreement. This Agreement shall enure to the benefit of and be binding upon the parties hereto, and the Mediator shall be deemed a third party beneficiary hereof.

IN WITNESS WHEREOF, the parties have executed this Agreement as of the date hereinabove first written.

_____	_____
Plaintiff (Claimant)	Counsel for Plaintiff (Claimant)
_____	_____
Defendant (Respondent)	Counsel for Defendant (Respondent)
_____	_____
Additional Party, if any	Counsel for Additional Party

With permission from Stephen A. Hochman's *Model Dispute Resolution Provisions for Use in Commercial Agreements Between Parties With Equal Bargaining Power* (Chesterland, Ohio: Business Law, Inc., 1997).

APPENDIX J

SELECTED WEB SITE REFERENCES

http://adrr.com. The ADR and Mediation Resources site contains substantial online materials for alternative dispute resolution. Mediation essays and online mediation newsletters are all at this site. Web sites for mediation professionals are also explained.

http://info.london.on.ca/learn/mediate.html. Family law resources can be found on London net, also known as the "Family Mediation Centre."

http://www.Colorado.edu/conflict. The Conflict Research Consortium touches on immigration, sexual harassment, taxes, crime, entitlements, and endangered species issues, among others.

http://www.ConflictNet.org. IGC Internet

http://www.DivorceNet.com. This is a divorce resource, and includes ADR resources, interactive bulletin boards, reading room and library, research, lawyer-to-lawyer contacts, and more.

http://www.findlaw.com. This site offers Internet legal resources.

http://www.nova.edu/ssss/DR/adrwwww.html. This site offers ADR resources on the Internet.

http://www.astd.org/virtual.community/top.page.html. ASTD's New Virtual Community provides trai...ng for professionals and opportunities for peer exchange, and more.

http://www2.conflictresolution.org/perc/perc101/perc101.html. PERC 101 is an Internet-based distance learning program on the mechanics of conflict resolution.

http://www.cpradr.org. CPR Institute for Dispute Resolution is a leading nonprofit initiative of global corporations, law firms, and law teachers developing new uses for ADR in business and public disputes.

http://www.adr.org. American Arbitration Association Dispute Resolution Services Worldwide.

http://www.igc.org/igc/issues/cr/. Conflict resolution resource on IGC & the Internet.

http://www.erols.com/arbmed/index.html. This Solomon publication is a self-instruction manual for new arbitrators and mediators, for individuals and groups.

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