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Getting to Yes in Specialized Courts: The Unique Role of ADR in Business Court Cases

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"Time is money," as the old saying goes. This is an oft-quoted and seemingly universal truth, especially in the legal profession. Time is money, and yet time is the one thing that can be easily overlooked when analyzing the costs of litigation. The time that it takes to get to trial; the time involved in discovery requests; the time where two businesses sit unable to move forward on a contract, a merger, or a services agreement; and the time billed by outside counsel are litigation realities which represent tremendous costs to businesses, both to the bottom line and in terms of lost opportunities. When there is no way forward and time drags on, there is an immediate, negative financial consequence.

Litigation, of course, is a cornerstone of our social and business structures. Even for those lucky enough to stay out of court, the threat of litigation shapes the landscape of negotiations, performance, and resolution of disputes. However, the role of litigation in resolving disputes has undoubtedly changed with many discussions swirling around the "vanishing

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trial"[1] and the single-digit percentage of cases that actually make it to trial.[2] The decline in the use of trials can be attributed in large part[3] to the prevalence of new ADR programs and techniques now available to parties through court-annexed and private providers. There have been other changes to the legal landscape affecting the nature of pre-trial litigation, such as the increased expertise and expedited resolution found in the growing trend of specialization in trial courts.[4] The prevalence of electronically created and stored information also has served to reduce fact disputes thus eliminating the need for fact finders.[5]

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1. *See, e.g.*, Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459 (2004) [hereinafter The Vanishing Trial].

2. "Although it defies popular images of the ubiquity of trials, an abundance of data shows that the number of trials–federal and state, civil and criminal, jury and bench–is declining." Marc Galanter, *The Hundred-Year Decline of Trials and the Thirty Years War*, 57 STAN. L. REV. 1255 (2005) [hereinafter *Decline of Trials*]. The number of federal cases going to trial fell from 11.5% in 1962 to 1.8% in 2002. *See The Vanishing Trial*, *supra* note 1, at 459. The comparatively small portion of cases going to trial is likewise found in criminal cases. David Wippman, *The Costs of International Justice*, 100 AM. J. INT'L. L. 861, 873 n.62 (2006) (less than 10% of criminal cases go to trial). Resolution by dispositive motion is likewise far from the norm. For example, one study showed only 3% of contract cases were dismissed on summary judgment in federal courts. Nicholas C. Soltman, *What about "Me (Too)"? The Case for Admitting Evidence of Discrimination Against Nonparties*, 76 U. CHI. L. REV. 1875, 1882 n.44 (2009). Whether cases are not being resolved at trial because of settlement, dispositive motion, withdrawal, or for some other cause, the reality is that going to trial as a form of dispute resolution is uncommon. This article neither addresses the explanations for this phenomenon, nor analyzes the ultimate benefit or detriment of relatively few matters being tried. Still, while relatively few cases go through disposition by trial, the number of civil cases collectively going to trial in federal and state courts each year is in the hundreds of thousands. *Decline of Trials*, *supra* at 1261 (though the number of contract cases going to trial is a fraction of that total). While not necessarily going to trial, the development of business courts is creating an increase in the number of publicly available opinions from state trial courts. *See, e.g.*, AMERICAN BAR ASSOCIATION COMMITTEE ON CORPORATE AND BUSINESS LITIGATION, ANNUAL REVIEW OF DEVELOPMENTS IN BUSINESS AND CORPORATE LITIGATION ch. 5 (2004-10) [hereinafter ABA LITIGATION DEVELOPMENTS] (addressing publicly available opinions).

3. In addition, "[t]his dramatic decrease in the trial rate may be attributed, at least in part, to business and public concerns about the high costs and delays associated with full-blown litigation, its attendant risks and uncertainties, and its impact on business and personal relationships." Thomas J. Stipanowich, *Arbitration: The "New Litigation,"* 2010 U. ILL. L. REV. 1, 4 (2010) [hereinafter *The New Litigation*].

4. Anne Tucker Nees, *Making a Case for Business Courts: A Survey of and Proposed Framework to Evaluate Business Courts*, 24 GA. ST. U. L. REV. 477, 480 (2007) [hereinafter *Making a Case for Business Courts*].

5. For example, it has been observed about the enduring nature of electronic factual data:"Computer-based discovery may reduce litigation costs and delays by saving time. Furthermore, electronic discovery may reveal even more evidence than in traditional discovery, as computers assist litigants in the collection, manipulation, analysis, and transmission of truths otherwise lost or destroyed." Jessica Lynn Repa, *Adjudicating Beyond the Scope of Ordinary Business: Why the Inaccessibility Test in Zubulake Unduly Stifles Cost Shifting During Electronic Discovery*, 54 AM. U. L. REV. 257, 269 (2004) (citing Kenneth J. Withers, *Advanced Discovery*

Numerous articles have explored, individually, the concepts of, rationales for, and resulting attributes and detractions associated with specialized courts and alternative dispute resolution (ADR).[6] Both tools serve to advance the goals of resolving disputes and administering civil justice. Both rely upon concepts of specialization, expertise, and speed of resolution. While some facial similarities are apparent, the differences between the two tools are significant. The real question is the extent to which the structural differences and conceptual similarities create an environment for unique collaboration between ADR and specialized courts. This article explores the availability and application of ADR to business cases in specialized business or complex litigation courts and whether or not ADR serves a unique and useful function in the context of business disputes.

ADR, with its stated goal of promoting party-driven solutions, which often means avoiding trial, may seem incompatible with specialized business courts where one goal is to provide the parties with expedited, expert judicial attention in the context of pre-trial motions, case management, and ultimately, a trial. Early evidence suggests, however, that there is certain compatibility between ADR and business disputes: "In 1997, a study of ADR use among Fortune 1,000 corporations was conducted by Cornell University . . . . [A] full 87% of responding companies reported some use of mediation in the prior three years, and 80% reported using arbitration during the same period."[7] The expedited resolution, preservation of the underlying business relationship, and decreased litigation/legal expenses offered with ADR were found to be appealing to those with business disputes.[8]

The assumed compatibility between ADR and specialized courts is largely unexamined. Without being able to statistically validate the motivations and preferences of individual disputants in a manner to draw generalized conclusions, this article examines the relationship between ADR and specialized business courts by looking at how the two are structurally

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Issues: Discovery and Protection of Electronic Data, ALI-ABA COURSE OF STUDY, WL SG101 ALI-ABA 835, 849-50 (2002)).

6. *See, e.g.*, *Making a Case for Business Courts*, supra note 4, at 480; *The New Litigation*, *supra* note 3, at 4.

7. Thomas J. Stipanowich, *ADR and the "Vanishing Trial": The Growth and Impact of "Alternative Dispute Resolution,"* 1 J. EMPIRICAL LEGAL STUD. 843, 879 (2004) [hereinafter *ADR and the Vanishing Trial*].

8. "The motivating concerns were not only the cost of judgments or settlements, but also transaction costs, including the expense of legal counsel, supporting experts, preparation time, and discovery—costs that are often a multiple of the amount of settlement." *ADR and the Vanishing Trial, supra* note 7, at 876.

intertwined through existing procedural rules and implementation practices. Part I of this article describes the foundational structures and concepts behind both ADR and specialized business courts, as well as the similarities and differences between them. Part II explores the existing formal structural relationship between ADR and specialized courts by examining the procedural rules facilitating ADR in both the general trial court and the specialized business courts in twenty-two jurisdictions. Part III observes the relationship between ADR and specialized courts through a judicial survey instrument investigating the use of ADR in specialized business cases and a discussion of the survey results. Part IV makes general observations about the existing collaboration between these two tools, in addition to reviewing trends and proffering suggestions.

I. CHANGES IN THE LITIGATION LANDSCAPE: ADR AND SPECIALIZED BUSINESS COURTS

The predominance of the civil trial has diminished with the rise of ADR and the reorganization of general trial courts into specialized programs.[9] Understanding these foundational changes to the litigation and resolution of business disputes requires an understanding of the forces shaping specialized courts and ADR.

A. Specialized Business Courts: Processes and Purposes

Specialization within trial courts is a growing trend, with most jurisdictions offering distinct family courts, probate courts, civil divisions, and criminal divisions, and many courts located in major metropolitan areas hosting specialized business courts.[10] For purposes of this article, "business

9. *See ADR and the Vanishing Trial*, *supra* note 7, at 843.

10. *See, e.g.*, Ad Hoc Committee on Business Courts, *Business Courts: Towards a More Efficient Judiciary*, 52 BUS. LAW. 948, 949 (1997); Mitchell L. Bach & Lee Applebaum, *A History of the Creation and Jurisdiction of Business Courts in the Last Decade*, 60 BUS. L. 147, 178 n.258, 204-05 (2004) [hereinafter *Business Court History*] (observing that in addition to basic specializations in family courts, orphan's or probate courts, civil divisions and criminal divisions, some state trial courts have created specialized programs for a variety of substantive and procedural areas including complex litigation generally, complex or mass tort cases, class actions, business and commercial cases, and construction defect cases); CHIEF JUSTICE'S COMMISSION, FUTURE OF THE NORTH CAROLINA BUSINESS COURT, FINAL REPORT AND RECOMMENDATION (2004), http://www.ncbusinesscourt.net/ncbc_website/otherrefdocs/final%20commission%20report.htm [hereinafter COMM'N ON N.C. BUS. COURT] ("In 1997, an ad hoc committee of the American Bar Association recommended that all states consider adopting some form of business court, stating that 'the movement toward specialized business courts' is 'gaining strength,' and 'that there appears thus far to be no criticisms in jurisdictions where business courts have been established.'"); Ben F. Tennille, Business and Commercial Courts Judges Committee, Civil Action (Nat'l Ctr. for State

court" means a specialized docket, division, program, or track within a state's trial court civil division, with a jurisdiction limited to business and commercial disputes. The hallmark of each business court is the designation of specific judges to sit as business court judges, and for each business court case to be assigned to a single business court judge from beginning to end. There are variations on the jurisdictional definitions in actual practice, e.g., some business courts limit jurisdiction to include only the most complex business and commercial disputes with minimum damages requirements, while others have a more expansive jurisdiction to include some consumer claims against businesses.[11] However, for instant purposes, the term "business court" represents a state tribunal chiefly dedicated to resolving business and commercial disputes involving business-to-business commercial claims, or intra-business disputes between owners, partners, members, etc. over the ownership or operational aspects of a business, with a specialized business court judge assigned to the case for its duration.[12] At this time, there are at least nineteen states with business courts either on a

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Courts, Williamsburg, Va.), Winter 2004, at 5; *Making a Case for Business Courts*, *supra* note 4, at 480. The acceptance of judicial specialization is not without critique.. *See, e.g.*, Richard A. Posner, *Will the Federal Courts of Appeals Survive Until 1984? An Essay on Delegation and Specialization of the Judicial Function*, 56 S. CAL. L. REV. 761, 778-80 (1983); *Making a Case for Business Courts*, *supra* note 4, at 488 n.34.

11. *Making a Case for Business Courts*, *supra* note 4, at 512-15; *Business Court History, supra* note 10, at 223-28.

12. For an overview of business courts in the United States, *see, e.g.*, MISSISSIPPI SECRETARY OF STATE DIVISION OF POLICY AND RESEARCH, SURVEY OF THE STRUCTURE OF BUSINESS COURTS BY STATE OR LOCAL JURISDICTION (2008) (on file with author); Lee Applebaum, *The "New" Business Courts: Responding to Modern Business and Commercial Disputes*, 17 BUS. L. TODAY 13 (2008); Ralph Peeples & Hanne Nyheim, *Beyond the Border: An International Perspective on Business Courts*, 17 BUS. L. TODAY 35 (2008); Donald F. Parsons, Jr. & Joseph R. Slights, III, *The History of Delaware's Business Courts: Their Rise to Preeminence,* 17 BUS. L. TODAY 21 (2008); *Making a Case for Business Courts*, *supra* note 4; *Business Court History*, *supra* note 10; Tim Dibble & Geoff Gallas, *Best Practices in U.S. Business Courts*, 19 CT. MANAGER 25, (2004) *available at* http://nacmnet.org/publications/Top10CourtMgrArticles/BestPractices_in_BusinessCts.pdf; COMM'N ON N.C. BUS. COURT, *supra* note 10; BUSINESS LITIGATION SESSION RESOURCE COMMITTEE, THE BUSINESS LITIGATION SESSION—MASSACHUSETTS SUPERIOR COURT: A STATUS REPORT (2003), [hereinafter BLS Status Report]; MARYLAND BUSINESS AND TECHNOLOGY COURT TASK FORCE, MARYLAND BUSINESS AND TECHNOLOGY COURT TASK FORCE REPORT (2001), http://www.courts.state.md.us/finalb&treport.pdf; ABA Ad Hoc Committee on Business Courts, *Towards a More Efficient Judiciary*, 52 BUS. L. 947 (1997). *See also* ABA LITIGATION DEVELOPMENTS, *supra* note 2. The American Bar Association's Subcommittee on Business Courts also maintains a website, http://www.abanet.org/dch/committee.cfm?com=CL150011, with numerous links to national and international business court resources.

statewide, regional, city, or county level.[13] There are also states with complex litigation courts, including three that are examined below. Such complex litigation courts' jurisdiction may encompass complex business and commercial cases among other types of complex cases, but these specialized court dockets are based upon procedural complexity, rather than subject matter specialization.[14]

As to the need for specialized business tribunals: "It must be generally admitted that hitherto our legal tribunals have been altogether inadequate to speedily investigate and promptly decide upon purely commercial and business disputes."[15] The dated language reveals that this is a comment from another time, marking a perennial issue. Even so, that the comment goes back to 1875 in the United States is something more than expected. The speaker,[16] making these remarks 135 years ago added, among other observations, that in controversies between businesses "they desire among all things that these controversies be rapidly as well as equitably decided," and "[i]n the vast majority of cases, promptness of decision by a competent and disinterested arbitrator is their ideal of justice."[17] He describes

13. These include: (1) Alabama, (2) Colorado, (3) Delaware, (4) Florida, (5) Georgia, (6) Illinois, (7) Maine, (8) Maryland, (9) Massachusetts, (10) Nevada, (11) New Hampshire, (12) New Jersey, (13) New York, (14) North Carolina, (15) Ohio, (16) Oregon, (17) Pennsylvania, (18) Rhode Island, and (19) South Carolina. West Virginia's governor recently signed into law a statute giving West Virginia's Supreme Court of Appeals the right to create business courts in certain judicial circuits. *See,* Chris Dickerson, *Thompson Pleased Business Court Bill Signed Into Law*, THE RECORD, May 20, 2010, *available at* http://www.wvrecord.com/news/226979-thompson-pleased-business-court-bill-signed-into-law (last visited June 12, 2010) (the new law "allows the state Supreme Court to establish a business court docket within the existing circuit court system, much like the court establishes separate docket systems for the management of criminal cases, civil cases, juvenile cases, abuse and neglect cases, and other specialized dockets"). In June, the Supreme Court created a Business Court Committee to evaluate the business court legislation. On October 28, 2010 the Business Court Committee "passed a resolution setting its mission, comprehensive plan[,] and vision." Press Release, Supreme Court of Appeals State of West Virginia, Business Court Committee Agrees on Mission, Schedules Public Forum (Oct. 28, 2010), http://www.state.wv.us/wvsca/press/oct28_10.pdf. The comprehensive plan includes, among other items, creating rules and guidelines for alternative dispute resolution.

14. These states include Arizona, California, Connecticut, Florida, and Oregon. The first three states specifically chose not to create business courts. The Lane County, Oregon, Circuit Court Commercial Court Program specifically lists business and commercial court cases within its jurisdiction. The 17th Judicial Circuit in Florida includes a multi-faceted Complex Litigation Unit, which includes distinct business and complex litigation tracks. *See also Business Court History, supra* note 10, at 204-16.

15. Elliot C. Cowdin, *Court of Arbitration, Argument in Favor of Proposed Amended Act*, NY TIMES, Feb. 11, 1875 [hereinafter *Court of Arbitration*].

16. These are the observations of Elliott C. Cowdin, a leader in New York State's Chamber of Commerce at that time. *See* NEW YORK CHAMBER OF COMMERCE, TRIBUTE OF THE CHAMBER OF COMMERCE TO THE MEMORY OF ELLIOTT C. COWDIN (1880).

17. *Court of Arbitration, supra* note 15.

prolonged lawsuits as "the tumors and cancers of business men, eating into the very substance of their [lives]."[18] His solution is "a single court, occupied exclusively with the settlement of business disputes, requir[ing] a special knowledge and experience on the part of the judge; and it is on such special knowledge and experience that prompt judgments, which shall in the main be satisfactory to both parties, should be based."[19] While that speaker's aim was a special arbitration forum, the goals speak to modern business courts, as well as some forms of ADR.

There are numerous sources stating the goals and objectives of modern business courts. The following examples provide generally accepted observations. "Business courts result in more cost-effective and timely case processing and an improvement in the quality of dispositions. They therefore foster a more favorable environment for creating and maintaining businesses, and as a result enhance the economic well-being of the nation."[20] In addition,

> Business courts ease pressure on overcrowded state court systems. Removing complex commercial cases from other parts of the courts allows those parts to function more efficiently and reduces the possibility that a few complicated commercial cases will displace the time and attention that the many other cases pending in those parts should receive. The legal issues in commercial litigation are often complex. Efficient resolution of these disputes requires the expertise of judges experienced in these areas and skilled at handling these cases.[21]

Similarly, businesses require predictability in order to maintain efficient organization and operation of resources. This predictability is required not only in determining a business's own internal procedures, but also with respect to a business's relationship to, and rights under, the law so that it may plan and accurately assess the risk of future litigation or liability. "To achieve this predictability, courts must develop expertise with respect to the applicable statutes and particular business disputes. The creation of a Business Court will serve this goal."[22] Because a business court's

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18. *Id.*

19. *Id.* In this conception, there is blending of court and arbitral.

20. Association of Corporate Counsel, Business Courts, (Oct. 18, 2009), http://www.acc.com/advocacy/upload/ACC-Statement-on-Business-Courts101809.pdf (last visited Mar. 25, 2010) [hereinafter ACC Statement].

21. *Id.*

22. REPORT OF THE SOUTH CAROLINA BAR'S TASK FORCE ON COURTS REGARDING THE CREATION OF A BUSINESS COURT PILOT PROGRAM 2 (Aug. 1, 2007), *available at* http://www.abanet.org/buslaw/committees/CL150011pub/materials/reports/SouthCarolinaBusinessCourtReport2007.pdf.

jurisdiction groups business and commercial case types together on its docket, the laws and conflicts repeatedly at issue in specialized business courts will likely affect all businesses operating within the state. In order to expeditiously and fairly resolve such business disputes, judges sitting on specialized business courts must have (or be able to develop) expertise in the business laws and case management procedures appropriate to control such legally and factually complex matters.[23] "Concentrating such litigation in a specialized docket, with one judge presiding, furthers the goals of predictability and efficiency. Such benefits have been recognized by a number of states that have already created specialized business or commercial litigation courts."[24]

Belief in the efficacy of judicial expertise and specialization serves as the foundational impetus for the creation and proliferation of specialized business courts.[25] The quality of legal rulings, ability to handle complex cases, speed and efficiency in reaching resolution, and establishing a valuable form of predictability all depend upon judicial expertise in both case management skills in business and commercial cases, as well as knowledge of the substantive business and commercial laws at issue. Thus, predictability includes establishing precedent,[26] but the precedent must be well-reasoned and explained, and it must become part of a coherent body of legal opinions for that predictability to be meaningful and to advance the goals of civil justice. The belief is that the specialized judge is much more likely to achieve these goals through greater depth of knowledge and

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23. J. Scott Vowell, *Creation of a Commercial Litigation Docket in the Birmingham Division Tenth Judicial District*, 71 ALA. LAW. 1, 56 (2010), *available at* http://www.alabar.org/publications/articles/Jan10/docket.pdf.

24. *Id.*

25. An important corollary to this would be the value of a court staff that becomes familiar with how business cases are processed.

26. Numerous business courts include publicly available opinions on their websites. *See, e.g.*, Baltimore (http://www.baltocts.sailorsite.net/civil/BTCMP/BTopinions.html); North Carolina (http://www.ncbusinesscourt.net/New/opinions/); Philadelphia (http://www.courts.phila.gov/apps/opinions/comcrtsearch.asp); Rhode Island (http://www.courts.state.ri.us); South Carolina (http://www.judicial.state.sc.us/busCourt/). Many of these are also available on Lexis and Westlaw. The purpose is well expressed as follows:

> All of the Business Court's decisions are posted on the Court's website. A search screen allows interested parties to search all of the Court's opinions for key words and phrases, thus creating a valuable online legal resource for all attorneys in this State. The creation of this large body of case law at the trial court level provides greater predictability for businesses, as well as helping to assure consistency in the Business Court's judgments and orders. Likewise, the concentration of all complex business cases into the dockets of one or a few Business Court Judges helps promote uniformity of legal decision.

COMM'N ON N.C. BUS. COURT, *supra* note 10, at 5.

experience, and also in being among those who are repeatedly addressing similar issues in court.[27]

The business court goals of improved decision making and case management in individual business cases are also aimed at improving the overall administration of justice. Additional specific objectives include attracting and/or keeping businesses within a jurisdiction,[28] reducing docket congestion and improving general case flow in the entire civil docket,[29] reducing litigation expenses through greater efficiency,[30] and establishing confidence in the court's overall quality of decision making and administration of justice.[31]

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27. *See generally*, *Making a Case for Business Courts*, *supra* note 4.

28. *See, e.g.*, COMM'N ON N.C. BUS. COURT, *supra* note 10, at 5; *Business Court History*, *supra* note 10, at 176-77. This should not be mistaken for the notion that a business court is designed to render pro-business rulings so businesses will want to come to a state. Business courts are chiefly designed for business-to-business disputes, so the concept that a business court is designed to rule in favor of a business against an individual or consumer makes no sense in most business court litigation. In instances where there are consumer claims in business courts, e.g., consumer class actions, there is no empirical evidence to show that the consumer efforts are always rejected in favor of businesses in these courts. *See, e.g.*, Lee Applebaum, *Letter to the Editor in Response to the Article "Do business courts really mean business?"* DOW JONES FACTIVA, Sept. 1, 2006.

29. *See* ACC Statement, *supra* note 20.

30. By way of example, a survey of business litigators taken in connection with practice in Boston's Suffolk Superior Court Business Litigation Session found that:

> 83% of the survey respondents reported that the existence of the Business Session had enabled them to provide better legal service to their clients. The primary reasons cited by the respondents were (i) the assignment of one judge throughout the case, (ii) the timeliness of hearings and decisions, and (iii) the establishment of firm trial dates . . . .

BLS STATUS REPORT, *supra* note 12, at 2. In New York, average disposition rates in contract cases fell dramatically with the advent of the Commercial Division. *Business Court History*, *supra* note 10, at 154.

31. A key motivator in creating business courts was the loss of confidence in state trial court systems to render timely and informed decisions in business and commercial cases. This purportedly caused, among other things, a flight from those courts to federal courts, Delaware courts, or private arbitration where possible. *See, e.g.*, *Business Court History*, *supra* note 10, at 152, 160, 183; *Making a Case for Business Courts*, *supra* note 4, at 480.

B. *ADR: An Overview*

"ADR" is an umbrella term used to encompass a wide variety of practices.[32] Some of these practices, addressed summarily below, provide a general overview of techniques likely to be employed by specialized courts handling business cases.

The most common forms of ADR associated with business and commercial disputes include neutral evaluation, judicial settlement conferences, and mediation. Arbitration, sometimes seen as a competitor for cases with courts,[33] is another form of ADR, but one that more closely mirrors the process of formal litigation.[34] Other forms of ADR, such as med-arb, mini-trials,[35] and summary jury trials will not be discussed at length in this article. Although these forms of ADR may be potentially useful in resolving business and commercial disputes, most business courts have not been called upon to use them.[36] There are business courts, most clearly the Delaware Court of Chancery, that use quasi-judicial special masters to serve various functions, including ADR functions.[37] These other forms of ADR are included in the discussion of survey results provided below in Section (1)(e).

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32. "The first obstacle to an understanding of the role of ADR is the sheer breadth and diversity of activities to be taken into account, a breathtaking range of approaches and strategies that we lump under the heading of 'ADR' (an outmoded acronym that survives as a matter of convenience)." *ADR and the Vanishing Trial*, *supra* note 7, at 845.

33. *See, e.g.*, Christopher R. Drahozal, *Business Courts and the Future of Arbitration*, 10 CARDOZO ONLINE J. CONFLICT RESOL. 491 (2009) [hereinafter *Business Courts and the Future of Arbitration*].

34. JAY FOLBERG ET AL., RESOLVING DISPUTES: THEORY, PRACTICE, AND LAW 537 (2d ed. 2010).

35. *See infra* note 44 and accompanying text. Mini-trials are available in some specialized business and complex litigation courts.

36. The authors are not familiar with any business courts using "community conferencing" as an ADR procedure. *See* Maryland Mediation and Conflict Resolution Office, Conflict Resolution Terms and Processes, http://www.courts.state.md.us/macro/terms.html#community (last visited Mar. 14, 2010).

> Community Conferencing: A multi-party process in which all of the people affected by a behavior or a conflict that has caused them harm meet to talk about the situation. The goal is to create an agreement that will repair the harm. All participants have a chance to discuss what happened, how it affected them, and how best to repair the harm. This process may be used in conflicts involving large numbers of people and is often used as an alternative to juvenile court.

Id.

37. *See, e.g.*, BUSINESS COURT PROCEDURES §7.3 (Fla. 9th Cir. 2004), *available at* http://www.ninthcircuit.org/research/orders/downloads/Business%20Court%20Procedures.pdf.

1. Forms of ADR

The subparts below look at the sliding scale of ADR techniques available in specialized business courts, beginning with the least formal:[38] (a) neutral evaluation, (b) judicial settlement conferences, (c) mediation, and (d) arbitration.

a. Neutral Evaluation

Neutral evaluation, meant here to encompass the terms early neutral evaluation (ENE), neutral valuation, and non-judicial "settlement conferences," is "[a] process in which an expert [n]eutral receives a presentation about the merits from each side and attempts to evaluate the presentations and predict how a court would decide the matter."[39] This may include giving a verdict range.[40] The neutral may be a private attorney, non-

38. The "formality" of each ADR technique is generalized for purposes of organization. There are, of course, instances where the procedures and requirements employed in one setting may be more or less formalistic than in others and erode the absoluteness of the following categorization. Thinking generally of these techniques in this order, however, provides a useful framework for the discussion herein.

39. SUPREME COURT, CIVIL BRANCH: NEW YORK COUNTY COMMERCIAL DIVISION, GUIDE TO THE ALTERNATIVE DISPUTE RESOLUTION PROGRAM 1 (2008), http://www.nycourts.gov/courts/comdiv/PDFs/NYCounty/Attachment2.pdf [hereinafter Comm. Div. Guide 2008].

40. Jay Folberg, Joshua Rosenberg, & Robert Barrett, *Use of ADR in California Courts: Findings and Proposals*, 26 U.S.F. L. REV. 343 (1991-1992). The neutral sometimes, though not always, plays the role of "putting a number on the case" for the parties after the parties make their presentations and hold further negotiations or discussions. This terminology is used in Philadelphia where co-author Lee Applebaum has served as a judge pro tempore/neutral for settlement conferences in Philadelphia's Commerce Court. In connection with early neutral evaluation,

> a neutral, usually a lawyer or retired judge, meets with litigants and their counsel shortly after a case has been brought. The neutral considers a summary of the major issues of liability and damages from all parties, and then gives them an advisory assessment of what he or she thinks of their positions. The notion of ENE is that the objective feedback from the neutral will set a benchmark for the parties to discuss settlement before the case advances too far into discovery. Such feedback can be useful if the disputing parties harbor vastly disparate visions about their prospects of victory at trial, or if the case involves intangible, subjective variables (e.g., unliquidated damages claims) that are hard for the parties to gauge on their own.

Jack M. Sabatino, ADR as *"Litigation Lite": Procedural and Evidentiary Norms Embedded Within Alternative Dispute Resolution*, 47 EMORY L.J. 1289, 1298 (1998).

attorney expert, or quasi-judicial court officer.[41] A variant on this form of evaluative ADR is neutral fact-finding, which has been defined as a "process by which a neutral . . . investigates and analyzes a dispute involving complex or technical issues, and who then makes non-binding findings and recommendations."[42] ADR may also include the use of a neutral expert:

> When a court-appointed alternative dispute resolution practitioner or one or both of the parties believe that it would be helpful to have the assistance of a neutral expert, the practitioner may select a neutral expert, with the consent of the parties and at their expense, to be present at or participate in the mediation at the request of the practitioner.[43]

Neutral evaluations are useful in providing business decision makers with relevant information concerning the risks associated with their legal dispute. It can result in adoption of more reasonable settlement positions by disputants, thus facilitating settlement.

b. Judicial Settlement Conferences

Judicial settlement conferences do not have one clear definition. They generally involve a process in "which the trial judge or a different settlement judge may employ various techniques to promote settlement."[44] With a

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41. The "neutral" may be called various names in different jurisdictions. For example, in Philadelphia, qualified lawyers who conduct pre-trial settlement conferences, which are most typically in the form of neutral evaluation though they may also be in the nature of mediation, are known as judges pro tempore. *Business Court History*, *supra* note 10, at 177. Judicial assignments to these judges pro tempore are often made on the basis of their area of specialization. *Id.*; *See also infra* note 74. Like the use of special masters for a variety of functions, see *infra* notes 63-64, and 66, judges pro tempore have served other functions as well. *See, e.g.*, COURT OF COMMON PLEAS OF PHILADELPHIA, CIVIL TRIAL DIVISION, ADMINISTRATIVE DOCKET NO. 02 OF 1993, JUDGE PRO TEMPORE PROGRAM, ORDER OF AUGUST 26, 1993 (wherein the Court authorized the appointment of qualified experienced trial lawyers to serve as judges pro tempore to hold settlement conferences, serve as trial judges if the parties so agreed, and hold case management conferences by agreement even if not the trial judge).

42. N.J. CT. R. 1:40-2(b)(2).

43. MD. CT. R.17-105.1. The neutral expert is defined as "a person who has special expertise to provide impartial technical background information, an impartial opinion, or both in a specific area." *Id.* at 17-105.1(a).

44. Harold I. Abramson, *Protocols for International Arbitrators Who Dare to Settle Cases*, 10 AM. REV. INT'L ARB. 1, 6-7 (1999). The judicial settlement conference may include evaluative techniques, but this is said to be acceptable if the judge is not the trial judge, and more circumspect techniques are required if the judge is the trial judge. *Id.* at n.21. This same author later observed that a judge at a judicial settlement conference might "hint[] at what she might do in court or urge[] a particular settlement." Harold I. Abramson, *Selecting Mediators and Representing Clients in Cross-Cultural Disputes*, 7 CARDOZO ONLINE J. CONFLICT RESOL. 253, 268 (2006). Where the trial judge is also the evaluator some concern has been raised. Edward Brunet, *Judicial Mediation and Signaling*, 3 NEV. L.J. 232, 249 *nn.*88-90 (2002) [hereinafter *Judicial Mediation*]. Others have stated of judicial settlement conferences that "judges often respond to comparably incomplete

judge serving as the neutral in this form of ADR, the parties often expect (and receive) the judge's opinion about the strengths and weaknesses of the case, allowing the parties to "reality test" their perceived position.[45] Additionally, the judicial perspective about the prospect of, and process for, trial can be another important facilitative tool for settlement in these contexts often encouraging parties to settle. The potential role of business court judges as mediators is set out by rule in Delaware's Court of Chancery.[46]

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presentations by proffering their reading of what a jury might do. Such readings are based on the judge's experience, as lawyer and judge, with juries, garnished by a mixture of 'jury knowledge' from various oral and published sources." Marc Galanter & Mia Cahill, *"Most Cases Settle": Judicial Promotion and Regulation of Settlements*, 46 STAN. L. REV. 1339, 1370 (1994) [hereinafter *Most Cases Settle*]. Some research shows that parties did not typically attend judicial settlement conferences, and that such conferences "usually focus[] on possibilities for compromise, not the liability or merits of the case, and that judges are free to adopt any procedure for running the conference that they choose." Lisa B. Bingham, *Why Suppose? Let's Find Out: A Public Policy Research Program on Dispute Resolution*, 2002 J. DISP. RESOL. 101, 120-21 (2002).

In the spirit of Wittgenstein's "meaning is use," the following admonition is well taken when considering what a judicial settlement conference means in any jurisdiction:

> Advocates must know the rules and customs of local judicial settlement conferences. A judicial settlement conference is a court-sponsored meeting of the attorneys and the judicial officer, and possibly the clients. Jurisdictions vary regarding whether the conferences are mandatory, the timing of conferences, the length of conferences, and the rules of confidentiality. Settlement judges vary in the methods and strategies they use, from those resembling a mediator or an evaluator, to those more like an arbitrator. In some jurisdictions, the settlement judge is never the trial judge. Advocates must know whether the rules require the attendance and good faith participation of the client, trial counsel, or others. Lawyers may also need to prepare pre-conference submissions. Of course, the advocate must prepare the client for negotiations during the conference, and determine the authority of the parties to settle.

Suzanne J. Schmitz, *Giving Meaning to the Second Generation of ADR Education: Attorneys' Duty to Learn About ADR and What They Must Learn*, 1999 J. DISP. RESOL. 29, 47 (1999) (citations omitted).

45. *See, e.g.*, Virginia's Judicial System, Frequently Asked Questions about Judicially Hosted Settlement Conferences, http://www.courts.state.va.us/courtadmin/aoc/djs/programs/jsc/jsc_brochure.html#whathappens (last visited June 2, 2010).

46. 10 DEL. CODE § 347; DEL. CH. R. 93-95. Voluntary mediation in all chancery cases, whether business or non-business, is governed by Rule 174. While Delaware's Court of Chancery is typically considered a business court, its jurisdiction is not solely limited to business disputes. *Business Court History*, *supra* note 10, at 216-18. In addition to business court judges serving as mediators, jurisdictions such as Philadelphia's Commerce Court, allow the use of judges pro tempore, lawyers who are qualified and have agreed to serve as neutrals in settlement conferences and other forms of ADR. *See generally*, 1st Judicial District of Pennsylvania, Philadelphia Court of Common Pleas Commerce Division, http://www.courts.phila.gov/common-pleas/.

Like neutral evaluations, judicial settlement conferences provide business decision makers with relevant information with which to assess the risks associated with trial. Judicial settlement conferences also offer the parties structure and evaluation from a judge, but avoid more formalistic components of case presentations involved in mediations and arbitrations.

c. Mediation

Mediation is "[a] process in which a [n]eutral attempts to facilitate a settlement of a dispute by conferring informally with the parties, jointly and in separate 'caucuses,' and focusing upon practical concerns and needs as well as the merits of each side's position on the issues in the case."[47] In this particular form of ADR, the parties are intimately involved in negotiating and constructing the final resolution of the case.

> Unlike judicial settlement conferences and negotiations, experienced mediators commonly include individual parties in the give and take of negotiations, allowing parties to discuss the past, but redirecting the focus of the session on the future. These mediators also spur new ideas for resolution, set agendas that build momentum toward settlement, and in general, engage in other activities that produce settlement earlier in the case and with more frequency than settlement conferences and negotiations.[48]

The theoretical distinction between neutral evaluation and facilitative mediation may not always exist in practice. Thus, e.g., a neutral may combine evaluative and facilitative practices to get the best results.[49] Mediation, however, assumes participation of the parties in identifying and

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47. COMM. DIV. GUIDE 2008, *supra* note 39, at 2. In Florida, a state with at least three business courts and a twenty-five year history of court-related mediation practice, mediation is defined by statute. *See* FLA. STAT. § 44.1011(2) (1994). According to § 44.1011(2), mediation

> means a process whereby a neutral third person called a mediator acts to encourage and facilitate the resolution of a dispute between two or more parties. It is an informal and nonadversarial process with the objective of helping the disputing parties reach a mutually acceptable and voluntary agreement. In mediation, decision-making authority rests with the parties. The role of the mediator includes, but is not limited to, assisting the parties in identifying issues, fostering joint problem solving, and exploring settlement alternatives.

Id.

48. Beverly Draine Fowler, et al., *Planning Mediation Programs, A Deskbook for Common Pleas Judges*, at 1-7 (2000), http://www.supremecourt.ohio.gov/Publications/pmd.pdf [hereinafter *Ohio Deskbook*].

49. Elizabeth S. Stong, *Some Reflections from the Bench on Alternative Dispute Resolution in Business Bankruptcy Cases*, 17 AM. BANKR. INST. L. REV. 387, 393 (2009) [hereinafter *ADR in Business Bankruptcy Cases*].

agreeing upon a mutually satisfactory, and often creative, solution guided by the in-caucus facilitative techniques of the neutral, such as reality testing, "expanding the pie," and acknowledging underlying emotions, motivations, and other techniques.[50]

d. Arbitration

Arbitration has been defined as "[a] process in which the parties present evidence to a [n]eutral or panel of [n]eutrals, who then issue a decision determining the merits of the case."[51] Arbitration encompasses private and public forms, and may be non-binding[52] or binding.[53] Private commercial arbitration, which is typically binding, is simply another form of (private) litigation where the arbitral serves as the adjudicating forum rather than a court.[54] Thus, it may run into many of the same infirmities that purportedly

50. "In the current 'toolbox' of approaches to conflict, mediation is the equivalent of a multifunctional Swiss Army knife." *The New Litigation*, *supra* note 3, at 27.

51. This definition comes from New York's Commercial Division. *See* COMM. DIV. GUIDE 2008, *supra* note 39, at 2.

52. *Id.* ("An arbitration may be binding or advisory, depending upon the agreement of the parties."). *See also infra* note 59, discussing non-binding arbitration in Pennsylvania's state and federal courts.

53. *See, e.g.*, DEL. CH. R. 96(a) ("'Arbitration' means the voluntary submission of a dispute to an Arbitrator for final and binding determination . . . ."); American Arbitration Association, Commercial Arbitration Rules and Mediation Procedures, Introduction, *available at* http://www.adr.org/sp.asp?id=22440#A1 (last visited June 3, 2010) ("Each year, many millions of business transactions take place. Occasionally, disagreements develop over these business transactions. Many of these disputes are resolved by arbitration, the voluntary submission of a dispute to an impartial person or persons for final and binding determination.").

54. In this regard,

> [a]rbitration is similar in many respects to a trial. Discovery may be available to the parties before the hearing. The arbitrator may hold a pre-hearing conference. Evidence and arguments are presented to the arbitrator, and witnesses may be called to testify and to be cross-examined. Depending on the forum procedures and the arbitrator's practice, the rules of evidence may not be strictly applied. Ex parte contacts with the arbitrator are not allowed, and while the arbitrator may encourage the parties to consider settlement, the arbitrator cannot become involved in settlement discussions. After the hearing is completed, the arbitrator issues a decision that is binding on the parties and enforceable in a court.

ADR in Business Bankruptcy Cases, *supra* note 49, at 396. *See also* Thomas J. Stipanowich, *Arbitration and Choice: Taking Charge of the "New Litigation,"* 7 DEPAUL BUS. & COM. L.J. 383, 421 (2009) [hereinafter *Taking Charge*].

drove litigants from judicial litigation in the first place.[55] A telling sign that arbitration is a potentially time-consuming adversary process akin to judicial litigation, especially in large or complex commercial cases that mark business courts, is American Arbitration Association Commercial Arbitration Rule L-3(i), which is applicable in such cases. This rule provides that the parties should address at their initial conference with the arbitrator(s) "the possibility of utilizing mediation or other non-adjudicative methods of dispute resolution . . . ."[56] This "ADR to ADR" recognizes the functional fact that binding private arbitration is adjudicative; mediation or other non-adjudicative models may prove valuable alternatives to arbitration litigants for the same reasons these more facilitative ADR forms are valuable to parties litigating in courts.

In addition to structural similarities with litigation, arbitration and litigation often share procedural commonalities as well. For example, both arbitration and litigation involve procedural elements such as prehearing motion practice, discovery, extended hearings, presentation of evidence, delay before an arbiter ultimately is presented with the case, and increasing

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55. *See, e.g.*, *The New Litigation*, *supra* note 3, at 8 ("By the beginning of the twenty-first century, however, it was common to speak of U.S. business arbitration in terms similar to civil litigation—'judicialized,' formal, costly, time-consuming, and subject to hardball advocacy."); *see also* L. Tyrone Holt, *Whither Arbitration? What Can Be Done to Improve Arbitration and Keep Out Litigation's Ill Effects*, 7 DEPAUL BUS. & COM. L.J. 455 (2009) [hereinafter *Whither Arbitration*].

Thus, a review of the AAA's Commercial Arbitration Rules shows a provision for a preliminary hearing under Rule R-20(b), an analogue to the judicial case management conference ("During the preliminary hearing, the parties and the arbitrator should discuss the future conduct of the case, including clarification of the issues and claims, a schedule for the hearings and any other preliminary matters."); information exchanges under Rule R-21, which is a more modest counterpart of Federal Rule of Civil Procedure 26(a) disclosures and federal discovery Rules 33-34; arbitrator investigation or inspection under Rule R-33; injunctive relief under Rule R-34; representation by counsel at hearings under Rule R-24; oaths at hearings under Rule R-25; rules governing the conduct of the hearing under Rule R-30, with references to the order of presentation by opposing parties referred to as claimant and respondent instead of the synonymous plaintiff and defendant, with reference to "adverse party," with each party given "a fair opportunity to present its case;" and two separate rules on evidence under Rules R-32-33. COMMERCIAL ARBITRATION & MEDIATION PROC., *available at* http://www.adr.org/sp.asp?id=22440#R3.

The AAA Rules governing "Large, Complex Commercial Disputes" take on even more characteristics of judicial litigation. These disputes would be akin to the cases going into many business courts. The rules designated "L-," include among others, an administrative conference with the AAA to determine, e.g., the nature and magnitude of the dispute and the "technical and other qualifications of the arbitrator." *Id.* at L-1. This expertise in selection is a clear parallel to the specialized business court judge. The later preliminary hearing (case management conference analogue) with the arbitrators includes ten non-exclusive categories of issues that the parties and arbitrators should address. *Id.* at L-3. Among these are such adversary proceeding staples as stipulations, the extent of discovery, witness identification and availability, whether hearings will proceed on consecutive days, and subpoenas. *Id.* at L-4.

56. COMMERCIAL ARBITRATION & MEDIATION PROC. R. L-3, *available at* http://www.adr.org/sp.asp?id=22440#R3.

availability of appeal rights.[57] Due in part to the structural and procedural similarities between arbitration and litigation, there is a growing trend of disenchantment with arbitration, even in the commercial dispute sphere where it had originally gained its broadest applications.[58]

Non-binding arbitration within an existing court system is often used where the sum at issue falls below a certain baseline figure and where there is a right to appeal the case de novo for adjudication by a trial court.[59] When the arbitration is non-binding, while adversarial in presentation, it actually performs an advisory function[60] because it can only influence the parties' opinion of their case and how they may choose to respond to the arbitrator's non-binding assessment in deciding whether to proceed with litigation or settle through subsequent direct negotiations or other forms of ADR.

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57. *See The New Litigation*, *supra* note 3, at 6.

58. *Id.* at 5.

> Yet for a variety of reasons, arbitration often falls short of popular expectations. Despite repeated evidence that business lawyers tend to view arbitration more favorably than litigation in key categories (fairness, speed to resolution, and cost), the literature frequently focuses on various perceived shortcomings, including unqualified arbitrators, uneven administration, difficulties with arbitrator compromise, and limited appeal. There are, moreover, frequent complaints regarding delay and high cost. In spite of efforts by national institutions to enhance arbitrator quality and provide guidance for improved practice, it appears that discontent with commercial arbitration has never been more palpable if not more widespread.

Id.

59. For example, civil cases solely for money damages subject to the jurisdiction of Philadelphia's Court of Common Pleas for sums below $50,000 must go to non-binding mandatory arbitration, but the arbitrators' awards are appealable de novo to the Court of Common Pleas. PHIL. CIV. DIV. R. 1301 ($50,000 limit); PA. R. CIV. P. 1311 (appeal is for trial de novo). The arbitrators are qualified lawyers. PHIL. CIV. DIV. R. 1302(a). Similarly, the United States District Court for the Eastern District of Pennsylvania's rule on arbitration, Local Rule of Civil Procedure 53.2, entitled "Arbitration – The Speedy Civil Trial," requires non-binding arbitration for damage cases below $150,000. E.D. PA. LOCAL R. CIV. P. 53.2.3.A. This compulsory arbitration is likewise subject to an appeal by trial de novo. E.D. PA. LOCAL R. CIV. P 53.2.7. The arbitrators are also qualified lawyers. E.D. PA. LOCAL R. CIV. P 53.2.1.B.

60. As stated by New York's Commercial Division: "An arbitration may be binding or advisory, depending upon the agreement of the parties." COMM. DIV. GUIDE 2008, *supra* note 39, at 2.

e. *Other Techniques*

Other forms of ADR include med-arb,[61] mini-trials and summary jury trials,[62] and the use of special masters.[63] As set forth in Delaware's recently

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61. *Judicial Mediation, supra* note 44, at 248 n.86 ("In med-arb, the parties mediate and, if unable to reach agreement, arbitrate. The mediator shifts roles and becomes the arbitrator. The theory of med-arb is that the parties will successfully mediate out of fear of the all or nothing result of a looming arbitration."); *see also* N.J. R. 1:40-2(d)(1) ("*Mediation Arbitration*: A process by which, after an initial mediation, unresolved issues are then arbitrated.").

62. Holly A. Streeter-Schaefer, *A Look at Court Mandated Civil Mediation*, 49 DRAKE L. REV. 367, 370 nn.25-29 (2000-2001). Mini-trial has been defined as:

> A forum in which each party and their counsel present their opinion, either before a selected representative of each party, before a neutral third party, or both to define the issues and develop a basis for realistic settlement negotiations. A neutral third party may issue an advisory opinion regarding the merits of the case. The advisory is not binding unless the parties agree that it is binding and enter into a written settlement agreement.

MICHIGAN SUPREME COURT DISPUTE RESOLUTION TASK FORCE, REPORT TO MICHIGAN SUPREME COURT, at 14 (1999) [hereinafter MICHIGAN REPORT]; *see also* N.J. R. 1:40-2(d)(2):

> *Mini-trial*: A process by which the parties present their legal and factual conditions to either a panel of representatives selected by each party, or a neutral third party, or both, in an effort to define the issues in dispute and to assist settlement negotiations. A neutral third party may issue an advisory opinion, which shall not, however, be binding, unless the parties have so stipulated in writing in advance.

"A Mini-Trial in its most common form involves representatives from each company presenting the evidence in their case to a panel made up of an AAA neutral or Panel Chair and senior executives from each of the companies in the dispute."American Arbitration Ass'n, Mini-Trials: Involving Senior Management, updated January 1, 2010, http://www.adr.org/sp.asp?id=22007.

Summary jury trial has been defined as: "A forum in which each party and their counsel present a summary of their position before a panel of jurors. . . . The panel may issue a non-binding advisory opinion regarding liability, damages or both." MICHIGAN REPORT at 13. The summary jury trial has also been described as a process where "a group of jurors drawn from the jury panel listens to summary presentations by both sides and provides an advisory response. The summary jury trial attempts, by eliminating such features as witnesses and cross-examination, to unlock early a genuine and direct jury signal." *Most Cases Settle*, *supra* note 44, at 1370.

63. *See e.g.*, OHIO CT. SUPERINTENDENCE TEMP. R. 1.05(a), *available at* http://www.sconet.state.oh.us/LegalResources/Rules/superintendence/Superintendence.pdf#TR1 (last visited June 3, 2010) (governing the use of special masters in its commercial docket cases; special masters, subject to party consent and judicial appointment, may:

> (a) Perform duties consented to by the parties; (b) Hold trial proceedings and make or recommend findings of fact on issues to be decided by the judge without a jury if appointment is warranted by some exceptional condition or the need to perform an accounting or resolve a difficult computation of damages; (c) Address pretrial and post-trial matters that cannot be addressed effectively and timely by the judge).

enacted statutes concerning voluntary arbitration of certain commercial disputes in the Court of Chancery, special masters[64] can act as arbitrators.[65] These Delaware special masters are full-time employees, akin to federal magistrate judges, rather than lawyers appointed by the court to serve in a single case. In the ADR context: "Special Masters are usually experienced private attorneys or law professors authorized by the court to conduct settlement negotiations."[66] Use of court-appointed private special masters

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See also GA. SUPER. CT. UNIF. R. 46, *available at* http://www.georgiacourts.org/courts/superior/rules/rule_46.html (setting out the broad range of possible uses the parties and court may make of a special master).

64. The Delaware Court of Chancery provides the following powers to its special masters:

> The Master shall regulate all the proceedings in every hearing before the Master upon every order of reference. The Master shall have full authority to administer all oaths in the discharge of the Master's official duties; to examine the parties and witnesses in the cause upon oath touching all matters contained in the order of reference; to summon and enforce the attendance of witnesses; to require the production of all books, papers, writings, vouchers and other documents applicable thereto; to cause such evidence to be taken down in writing; to order the examination of other witnesses to be taken under a commission to be issued upon the Master's certificate from the office of the Register in Chancery, or by deposition; to certify to testimony taken; to direct the mode in which the matters requiring evidence shall be proved before the Master; to grant adjournments and extensions of time; and generally to do all other acts, and direct all other inquiries and proceedings in the matters before the Master, which may be deemed necessary and proper, subject at all times to the revision and control of the Court.

DEL. CH. R. 136.

65. 10 DEL. CODE ANN. tit. 10, § 349(a) (2009). Delaware provides that "[t]he Court of Chancery shall have the power to arbitrate business disputes when the parties request a member of the Court of Chancery, or such other person as may be authorized under rules of the Court, to arbitrate a dispute." *Id.* Section 350 of the Delaware Code provides:

> The parties in any matter may stipulate to a final adjudication of the matter by a Master of the Court of Chancery. In such a stipulation, the parties shall consent that the decision of the Master shall have the same effect as a decision of a member of the Court of Chancery. Appeals from decisions of the Master in a matter governed by such a stipulation shall be determined in all respects by the same procedural and substantive standards as are applicable to appeals from decisions of members of the Court of Chancery.

DEL. CODE ANN. tit. § 350. Delaware Court of Chancery defines arbitrator as "a judge or master sitting permanently in the Court." DEL. CH. R. 96(d)(2).

66. Kenneth R. Feinberg, *Creative Use of ADR: The Court Appointed Special Settlement Master*, 59 ALB. L. REV. 881 (1996) [hereinafter *Special Settlement Masters*].

for settlement purposes is traced in recent times to mass tort litigation.[67] The use of judges pro tempore or other court-approved neutrals to conduct court-annexed ADR processes could well be included in this category of special master as described by Professor Feinberg, or vice-versa.[68]

2. Neutral Training and Expertise

Another essential point in analyzing the use of ADR in business disputes, and in comparing ADR to business courts, is the expertise and specialization of the neutral. As discussed above, a central premise in establishing business courts is to have a judge specializing in business and commercial cases deciding those disputes.[69] Similarly, an issue in any of the foregoing ADR processes is whether the neutral or arbitrator has special training, experience, or expertise in not only the process,[70] but also in the substance and subject of the parties' dispute.[71] For example, for a person to

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67. *Id.* at 881-85. Kenneth Feinberg is likely the most well-known special master in U.S. history for his work as special master for the 9/11 Compensation Fund. He stated in 1996:

> [T]he use of court-appointed Special Settlement Masters will likely increase. The sheer magnitude of the modern trial docket and the proliferation of creative litigation in such areas as mass torts place unprecedented burdens on the court system. The time-honored view of the judge as a detached, passive umpire, steeped in the law and patiently contemplating the correct legal ruling, has given way to a more activist judiciary, well versed in innovative case management techniques. Efficient disposition has given rise to creative judicial management. The court-appointed Special Settlement Master is one of the bolder initiatives implemented by the judiciary (along with complementary devices such as consolidated trials, common issues trials, and bifurcated or even trifurcated trials).

Id. at 886.

68. *See id.*

69. *See supra* Part I.A.

70. New York's Commercial Division originally had no training requirements for those providing court-annexed ADR services. *ADR in Business Bankruptcy Cases, supra* note 49, at 398. However, "now that court and all New York State courts require mediators in court-annexed mediation programs to have completed a minimum of forty hours of approved training and recent experience mediating cases in the relevant subject area." *Id.* (citing Administrative Order of the Chief Administrative Judge of the Courts, part 146.4(b) (June 18, 2008)).

71. *Id.* at 399.

> Experience in the particular subject matter can also assist an ADR neutral in performing effectively. For example, in the case of early neutral evaluation, a neutral that is recognized in the field may be able to give a far more credible assessment of the parties' positions than a neutral that is unfamiliar with the area.

Id.

be included on the mediation panel in New York County's Commercial Division,

> [a] person must have relevant professional experience and training in mediation. Specifically, mediators must be (i) attorneys who have been admitted for at least seven years and have had during that time substantial commercial law experience, transactional or in litigation; (ii) accountants with comparable level of experience; or (iii) persons with substantial, high-level, executive or similar business experience for at least seven years.[72]

Maryland's Business and Technology Case Management Program has mandated requirements for business court mediators,[73] as does Philadelphia's Commerce Court for its judges pro tempore.[74] Like New

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72. COMM. DIV. GUIDE 2008, *supra* note 39, at 3-4. That court also has specific sets of ethical guidelines for mediators on the one hand, and neutrals and arbitrators on the other. Under Rule 2 of the Nassau County Commercial Division's Rules of Alternative Dispute Resolution Program, to be eligible to serve as a mediator and be listed on the roster, one must have: "[(i)] successfully completed . . . training in an OCA-sponsored or OCA-recognized training program and; (ii) any other mediation training or experience deemed appropriate by the Administrative Judge. . . . Arbitrators and neutral evaluators serving on the roster shall possess such qualifications as shall be promulgated." NASSAU COUNTY CT. COMMERCIAL DIV. A.D.R. PROGRAM R. 2, *available at* http://www.nycourts.gov/courts/comdiv/nassau_ADR_Rules.shtml (last visited June 3, 2010). Westchester County's Commercial Division applies similar standards. WESTCHESTER COUNTY CT. COMMERCIAL DIV. A.D.R. PROGRAM R., *available at* http://www.nycourts.gov/courts/comdiv/PDFs/9th-ADR-Rules.pdf (last visited June 3, 2010).

73. Maryland Rule 17-104(c) provides that mediators serving in cases within the Business and Technology Case Management Program, in addition to the basic qualifications required of all mediators, must:

> (2) within the two-year period preceding application for approval . . . have completed as a mediator at least five non-domestic circuit court mediations or five non-domestic non-circuit court mediations of comparable complexity (A) at least two of which are among the types of cases that are assigned to the Business and Technology Case Management Program or (B) have co-mediated an additional two cases from the Business and Technology Case Management Program with a mediator already approved to mediate these cases; . . . agree to serve as co-mediator with at least two mediators each year who seek to meet the requirements of subsection (c)(2)(B) of this Rule; and agree to complete any continuing education training required by the Circuit Administrative Judge or that judge's designee.

MD. CT. R. 17-104(c).

74. Judges pro tempore (neutrals) assigned to Philadelphia Commerce Court cases must have "no less than fifteen (15) years of experience in litigation or alternate dispute resolution (ADR)" that includes a practice focused on the types of cases within that court's jurisdiction. IN RE: TRIAL DIVISION ADMINISTRATION DOCKET 02 OF 2003, COMMERCE CASE MANAGE PROGRAM (June 25, 2008), http://www.courts.phila.gov/pdf/notices/2008/notice-2008-Modification-to-02-of-2003-Commerce-Program.pdf (last visited June 2, 2010) [hereinafter PHIL. COMM. CT. ORDER].

York, North Carolina's Business Court provides for qualified non-lawyer mediators,[75] as does Rhode Island.[76] The recognized role of specialist neutrals goes beyond court systems and has long been the subject of party choice.[77] Private dispute resolution organizations similarly recognize the need to provide specialist neutrals as well.[78]

Expertise of the decision-maker or facilitator within the context of complex cases invoking technical and specialized areas of commercial and corporate law is vital to the success of any business dispute resolution program, whether in a court or through ADR.

3. ADR Timing

Timing is the third point of discussion with regard to ADR and business cases. Flexibility in the use of ADR is one of the most significant benefits of business courts. As a result of early case management conferences and assignment of a case to a single judge, business court judges are in a better position to pinpoint the stages at which ADR will be most fruitful, and can use ADR selectively to resolve specific issues within the case (e.g.,

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75. North Carolina Business Court Rule 19.2 provides:

> The Business Court maintains on its website a list of mediators who have had experience with cases within the jurisdiction of the Business Court. Parties are not, however, required to select a mediator from this list. In the event the parties to a Business Court case are unable to agree on a mediator, upon notice from a party, the Business Court will appoint a mediator from the Business Court's approved list to act as mediator in that case.

N.C. BUS. CT. R. 19.2. A list of North Carolina Business Court mediators includes a number of non-lawyer mediators. The list can be found on the North Carolina Business Court's website at http://www.ncbusinesscourt.net/New/aboutcourt/List_of_Mediators.pdf.

76. *Business Court History*, *supra* note 10, at 189. Business Calendar Justice Silverstein refers cases to non-binding mediation to lawyers and to "accountants and retired business people who may be particularly suited to helping the parties resolve their differences." *Id.* That business court has found "some substantial success in using these non-lawyers in the proper case, e.g., in a shareholder valuation dispute." *Id.*

77. *Whither Arbitration*, *supra* note 55, at 463.

78. For example, the American Arbitration Association's Commercial Arbitration Rules and Mediation Procedures provide at Rule R-3 that the AAA will establish and maintain a "National Roster of Commercial Arbitrators." COMMERCIAL ARBITRATION & MEDIATION PROC. R. 3, *available at* http://www.adr.org/sp.asp?id=22440#R3. Its Insurance Arbitration Rules and Mediation Procedures state at Rule R-10 that "[t]he AAA shall appoint a neutral knowledgeable in the area of the dispute, and provide the parties with biographical information about the neutral." INSURANCE ARBITRATION & MEDIATION PROC. R. 10, *available at* http://www.adr.org/sp.asp?id=28811. Similarly, its Construction Industry Rules and Mediation Procedures, Rule R-3, provide that the "AAA shall establish and maintain a National Panel of Construction Arbitrators." CONSTRUCTION INDUSTRY & MEDIATION PROC. R. 3, *available at* http://www.adr.org/sp.asp?id=22004#r3.

electronic discovery disputes, among other matters that may advance resolution of the case without being immediately dispositive).

As to timing the ADR event, one jurisdiction has concluded, after research, that "mediation can be set early in the case, even before completion of formal discovery, and result in the same settlement rates as reached when mediation is set after formal discovery or even close to trial . . . ."[79] As a result, the court can use mediation to move up the time of settlement.[80] In Philadelphia's Commerce Court, for example, the mandatory settlement conference is typically near the eve of trial, but "[a] settlement conference may be expeditiously scheduled in any case in which counsel concur that such a conference may be productive."[81] At one time, New York's Commercial Division "rules dictate[d] that a judge's order to send a case to ADR should be done as close as possible to the beginning of the proceedings."[82] Rule 3 of the current uniform Commercial Division rules, effective January 2006, takes a somewhat different approach, providing that "[a]t any stage of the matter, the court may direct or counsel may seek the appointment of an uncompensated mediator for the purpose of mediating a resolution of all or some of the issues presented in the litigation."[83]

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79. *Ohio Deskbook*, *supra* note 48, at 1-3.

80. *Id.*

81. PHIL. COMM. CT. ORDER, *supra* note 74. As to non-mandatory mediation, cases may be referred:

> [A]t the discretion of the Commerce Program Judge, who may make such referrals at the time of the Case Management Conference, at a Pretrial Conference . . . or at any other time. Where appropriate and whether or not mediation is pursued at an early stage of the litigation, the Commerce Program Judge has the discretion to refer cases to nonbinding mediation at a later stage of the proceedings.

Id.

82. Ari Davis, *Moving from Mandatory: Making ADR Voluntary in New York Commercial Division Cases*, 8 CARDOZO J. CONFLICT RESOL. 283, 289 n.43 (2006) [hereinafter *Moving from Mandatory*].

83. N.Y. SUP. CT. § 202.70 R. 3, *available at* http://www.nycourts.gov/rules/trialcourts/202.shtml#70 (last visited on June 2, 2010). *See* COMM. DIV. GUIDE 2008, *supra* note 39, at 2 (stating:

> After joinder of issue in other cases, any party anxious to proceed to ADR is encouraged to file a Request for Judicial Intervention and a request for a preliminary conference with the Commercial Division Support Office and to raise the ADR question at the conference. The Rules empower the Court, if it determines that ADR might be useful, to order the

Unlike a trial or binding arbitration as the final decision-making venue, mediation and other non-binding ADR processes are not necessarily limited in time to the actual ADR meeting. Resolution with these techniques may be the result of seeds planted during the process that may not bear fruit until a later date. Thus, while a case may not settle at the mediation or neutral evaluation conference, the process may have caused or enabled the parties to talk about settlement for the first time or renew stalled discussions, which could eventually lead to settlement with or without the neutral.[84] This may occur when, for example, the client is hearing for the first time the other side's position and arguments in detail, as well as a neutral party's perception of those arguments, and has to re-think her own position and outlook on litigation.[85]

> parties to proceed to ADR. The experience of those who have taken part in the Program confirms that cases that are perceived by the parties to be incapable of settlement and which might not be brought into ADR on a voluntary basis in fact often do settle, to the satisfaction of all concerned.)

As to timing, the New York County Commercial Division guidelines state that the judges are to "direct ADR at the earliest practical point in a case; as a general rule, the earlier a case is referred, the better." COMM. DIV. GUIDE 2008, *supra* note 39, at 2. The reasoning is that "[d]iscovery, of course, is a source of considerable delay in litigation and can cause expense and frustration for litigants. The Court will attempt whenever practicable to promote resolution by ADR before the discovery wheels begin to turn." *Id.* However,

> [t]he Court recognizes that some cases may require focused discovery before they realistically can be resolved by ADR; it may often be possible, though, for that discovery to take place most efficiently and expeditiously under the guidance of the Mediator, on consent of the parties, subject, however, to any disclosure order previously issued by the Justice assigned. The Rules encourage Mediators and parties to pursue just such information exchange.

Id. Even if assigned to mediation though, "[u]nless otherwise directed by the assigned Justice in a particular case, discovery will not be stayed during the ADR process." *Id.* at 2.

84. A 1997 study of 300 cases in New York Commercial Division's ADR system showed that 52% of the cases settled during the formal ADR process, and that an "additional 16% of the cases settled after the conclusion of the ADR process, but owed their settlement in some part to the ADR process." *Moving from Mandatory, supra* note 82, at 291.

85. "In mediation, parties can present their view of events to other parties, without the traditional constraints of the trial process. They often vent, clear the air and educate opponents as to case strengths and weaknesses, renewing settlement discussions in the process." Circuit Court of Cook County, Major Case Court-Annexed Civil Mediation, Benefits of Mediation, http://www.cookcountycourt.org/divisions/law/mediation1.htm (last visited on April 4, 2010) [hereinafter Cook County Mediation Rules].

4. ADR Goals & Objectives

As discussed above, ADR encompasses a variety of different practices, with more mutations and variations than can be documented in a single article. As a broad umbrella title, the spectrum of ADR encompasses many different techniques that employ different strategies and serve different goals. For example, while arbitration falls within the ADR rubric, it has much more in common with court-based litigation than mediation or neutral evaluation has in common with litigation.[86] Thus, arbitration will be addressed separately from other forms of common ADR techniques within specialized business courts.

In the context of mediation and neutral evaluation: "The primary objectives of ADR programs are to promote settlements, save resources and create just outcomes."[87] ADR programs "attempt to resolve the parties' dispute in a non-adversarial forum that is less resource intensive than the traditional trial."[88] "Promoting settlement is the most salient role of ADR programs across the Country."[89] Such settlements can have the effect of reducing trial court case-loads and preserving the litigants'—as well as the courts'—resources, not to mention providing the parties with a clear path forward.[90]

These general objectives are a means to the parties' more specific goals.

> The goals of ADR in business disputes always include resolving the parties' dispute, but they often go farther. An important goal in one situation may be preserving the parties' relationship. In another it may be managing and minimizing the costs and burdens of the dispute. And in yet another it may be addressing the underlying issues that gave rise to the dispute so that future disputes can be avoided. Or in the most common case there may be a combination of goals, some more apparent than others.[91]

86. JAY FOLBERG ET AL., RESOLVING DISPUTES: THEORY, PRACTICE, AND LAW 537 (2d ed. 2010).

87. Nicole L. Waters & Michael Sweikar, *Efficient and Successful ADR in Appellate Courts: What Matters Most?*, 62 J. DISP. RESOL., 42, 44 (2007) [hereinafter *Efficient ADR*].

88. *Id.*

89. *Id.*

90. *Id.*

91. *ADR in Business Bankruptcy Cases*, *supra* note 49, at 388. This comment comes from a former commercial litigator and mediator who helped establish court-annexed ADR in New York's Commercial Division, and who now has the perspective of being a judge. *Id.* at 387.

The mediation process is also spoken of as having an important cathartic[92] or therapeutic[93] quality. In Ohio, a state recently implementing a business court docket,[94] the supreme court provides its judges with a detailed set of guidelines on mediation.[95] Those guidelines state: "A meaningful benefit which flows from the mediation process and is not quantifiable in dollars or time savings is simply that the individual parties are given an opportunity to tell their story to a representative of the court, and then may resolve their dispute to their satisfaction."[96]

The principle characteristic of non-binding ADR also embodies one of its purported goals: providing the parties with a greater role in determining the dispute's outcome. This also can be described as increasing the parties' ability to control their own risks in reaching an outcome. This goal includes, the ability to manage otherwise unknown litigation process costs, thus avoiding the expense of an adverse decision (both in the case at hand and as precedent in future cases), the risk of public dissemination of unproven allegations or proven negative facts, and a potentially adverse outcome on a party's dignity and reputation. The belief that parties have greater control in mediation than litigation has been empirically questioned, at least with regard to American litigants faced with court-mandated ADR.[97] For

92. "One reason that mediation succeeds is that it can have a cathartic effect on the participants." Andrew C. Simpson, *Preparing Clients for Litigation*, 25 GP SOLO 34, 38 (January/February 2008), *available at* http://www.abanet.org/genpractice/magazine/2008/jan-feb/preparingclients.html. "[M]ediation is frequently considered a 'cathartic equivalent' to a 'day in court,' as it 'offer[s] parties the first opportunity to express their point of view in the presence of others and be heard by the other party . . . .'" Stephen P. Anway, *Mediation in Copyright Disputes: From Compromise Created Incentives to Incentive Created Compromises*, 18 OHIO ST. J. ON DISP. RESOL. 439, 460 n.107 (2003) (also citing the proposition that mediation is a superior cathartic medium to hearings). These commentators acknowledge that a hearing or trial may also have a cathartic effect. *See also infra* note 97 (observing research that favors the view that a trial may provide a venue for greater personal satisfaction than court-mandated ADR).

93. Gary Paquin & Linda Harvey, *Therapeutic Jurisprudence, Transformative Mediation and Narrative Mediation: A Natural Connection*, 3 FLA. COASTAL L.J. 167 (2002).

94. *See* FRANKLIN COUNTY CT. COMMON PLEAS GENERAL DIVISION, TEMP. R. SUPERINTENDENCE 1.01-1.11 (July 1, 2008), *available at* http://www.fccourts.org/gen/webfront.nsf/wp/8F154DF81B1C0F508525752100667C15/$FILE/Temporary%20Rules%20of%20Sup.%20as%20published%20(FINAL).pdf.

95. *Ohio Deskbook*, *supra* note 48.

96. *Id.* at 1-3.

97. "An additional downside of court-mandated ADR is that psychological experiments reveal that Americans prefer to use adversarial adjudicatory methods as opposed to court-mandated ADR." *Moving from Mandatory*, *supra* note 82, at 498.

> A suggested reason is that litigation provides a greater opportunity for a party to present proof for its side, thus giving the party more control, in addition to giving it more voice, and hence, more satisfaction. Another reason is that there is a greater belief in fairness in the court system than in ADR.

purposes of this article, we will accept that one purpose of non-binding ADR is to provide greater control over the outcome. Mediation not only allows parties to have some control over the litigation costs and ultimate financial outcome, but also provides the parties with greater control over how they will be portrayed in the public eye because mediation "is a private and confidential process."[98] This later characteristic, of keeping dirty laundry a private matter, is shared in binding private arbitration as well.[99]

Another prominent feature of non-binding ADR is the flexibility it provides the parties in resolving their differences.[100] Solutions can be reached which could never be ordered by a court. Factors can be taken into account that might not be relevant to a legal determination of the outcome. For example, tax considerations can often impact settlement solutions but not be relevant to the legal decisions at issue.

By contrast, while binding arbitration shares the goals of saving resources, creating just outcomes, and reducing the strain on court systems, it also resolves disputes through the adversarial litigation process in a winner/loser decision-making process, not via settlement or facilitation.[101] Thus, we see the phenomenon of "ADR to ADR" in AAA Rule L-3(i), where the parties may wish to choose mediation before entering into full blown arbitration for the same reasons parties choose to mediate as an alternative to judicial litigation.[102] This is consistent with more recent questions as to arbitration's actual efficiency, timeliness, and lower costs compared to court based litigation.[103] Arbitration has morphed into something much more than the mini-trials with which they were once

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Id. at 498, n.118. This does not provide an empirical answer to the question of whether American litigants' objectively do have more control in effecting a favorable outcome for themselves through attempting to persuade a judge and jury during trial, even though they have no direct control over, or direct involvement in, the actual decision-making process.

98. Cook County Mediation Rules, *supra* note 85. "At the first mediation session, all participants sign a Confidentiality Agreement, stating that all discussions and disclosures in mediation remain confidential." *Id.*

99. JAY FOLBERG ET AL., RESOLVING DISPUTES: THEORY, PRACTICE, AND LAW 541 (2d ed. 2010).

100. *Id.*

101. *See, e.g.*, *ADR in Business Bankruptcy Cases*, *supra* note 49.

102. COMMERCIAL ARBITRATION & MEDIATION PROC. R. L-3(i), *available at* http://www.adr.org/sp.asp?id=22440#R3.

103. *See, e.g.*, Georgios I. Zekos, *Maritime Arbitration and the Rule of Law*, 39 J. MAR. L. & COM. 523, 542 (2008); Christopher R. Drahozal, *Arbitration Costs and Forum Accessibility: Empirical Evidence*, 41 U. MICH. J.L. REFORM 813, 816-22 (2008) (discussing arbitration forum fees and arbitrator costs in addition to lawyer fees and litigation costs). *See also supra* notes 14, 16, 22.

synonymous. The benefit of "limited discovery" is perceived by attorneys to have practically disappeared with necessary preparations increasingly mirroring those required for a full-fledged trial.

Unlike judicial litigation of business disputes, arbitration is aimed at confidential resolutions between the parties at hand. It is a form of private law rendering, and it does not have a goal of developing a body of case law, e.g., by applying the state's corporate code or common law of contract. It aims rather to provide an immediate benefit to the business litigants by letting them get on with business more quickly. However, when each individual private arbitration is viewed as merely one act in a drama repeated thousands of times each year, this case-by-case function can be understood as aiming at a greater, global, social benefit.

Some argue that even with the disposition of hundreds or thousands of cases, arbitration decisions erode development and predictability in the law, a vitally important business goal in establishing business courts.[104] However, the ability to resolve disputes confidentially may be important to business litigants who do not want to have their integrity or the quality of their services or products publicly impugned, especially where the claims lack merit.[105] Getting to yes in business cases is not just about splitting the

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> The trend of private adjudication and alternative dispute resolution popular in the 1990s contributed to a lack of coherent and consistent bodies of state law. Such alternatives to traditional state courts resolved disputes, but did so without setting precedent, without published decisions, and often without the advantage of appellate review. While private adjudication may have been an attractive short-term fix to the problems (costs and delays) of traditional state adjudication of business and commercial cases, it did not offer a long term solution because it eroded a stable, consistent, predictable body of law. "Since arbitration awards often are not published as reasoned decisions and some are expressly made confidential, the rules of law applied in these cases cannot be easily determined, scrutinized or applied to similarly situated litigations."

Making a Case for Business Courts, *supra* note 4, at 488-89. An interesting variant on this theme is the public availability of arbitration awards in securities arbitration, e.g., through FINRA. *See* FINRA Arbitration Awards Online, http://finraawardsonline.finra.org/ (last visited June 3, 2010). When the Supreme Court effectively authorized the enforcement of broker-customer arbitration clauses for the first time in *Shearson/American Express v. McMahon*, 482 U.S. 220, 243 (1987), it effectively privatized much of securities litigation. The result has been to limit the development of new precedent over the last two decades. Barbara Black & Jill I. Gross, *Making it Up as They Go Along: The Role of Law in Securities Arbitration*, 23 CARDOZO L. REV. 991, 992-93 (2002). However, self-regulatory organizations conducting the arbitration do publish the arbitrators' awards, but the decisions typically lack any legal reasoning of the kind that would be found in a judicial opinion. *Id.*

105. As set forth above, *see supra* note 104, many business courts publish their opinions on their own websites. If the claims do have merit, then the loss to the public welfare is not simply

baby or reaching an arbitrary decision; rather, it is about finding a solution that makes sense in terms of risk analysis, is sufficiently rooted in a business context, is efficient/timely, and minimizes bridge burning while preserving future opportunities.

As set forth above,[106] non-binding arbitration utilizes the same adversarial format, but serves an advisory function akin to neutral valuation.[107] Thus, a non-binding appealable arbitration award is often aimed at promoting a settlement between the parties without any form of final adjudication by third parties, and thus is ultimately facilitative in function. It likewise does not promote development of the law or public awareness of potential misconduct, an end result that is seen in facilitative ADR as well as adjudicative ADR.

C. Comparison of ADR and Specialized Business Courts.

While ADR and specialized business courts serve some similar goals, they are not the same. Thus, one may be preferred over the other by litigants or parties if forced to choose.[108] However, considering similarities and differences, we believe that the complementary use of ADR with specialized courts provides the better perspective.

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failure to develop the law, but failure to alert other businesses to these litigants' poor services or products, or bad business behavior, which may have broader negative social and business effects.

106. *See* J. Scott Vowell, *Creation of a Commercial Litigation Docket in the Birmingham Division Tenth Judicial District*, 71 ALA. LAW. 1, 56 (2010), *available at* http://www.alabar.org/publications/articles/Jan10/docket.pdf.

107. *See* COMM. DIV. GUIDE 2008, *supra* note 39.

108. *See* BLS STATUS REPORT, *supra* note 12, at 18. A Massachusetts' business litigator survey found that among those practicing in that region's business court (the Suffolk Superior Court Business Litigation Session),

> a majority (60%) . . . indicat[ed] they would be more likely to recommend that a client file suit in the Business Session rather than using a private mediation or arbitration process. Fifty-eight percent (58%) of respondents stated that their experience with the Business Session compared more favorably to their experiences with private alternative dispute resolution.

Id. at 16.

1. Similarities

a. Expertise

A key structural similarity between business courts and ADR is expertise and specialization in the decision maker or neutral, and the characteristics each must display within each context. The parties expect expertise in subject matter and process management from the judge, neutral, or arbitrator. Even if some would offer the proposition that, for businesses, bad justice is better than no justice, or a bad decision is better than a delayed decision, no judicial system or ADR system will long endure once a reputation for poor decision-making or incompetent facilitation becomes known. That the decision maker or neutral must be fair and impartial is a necessary predicate common to both.

b. Efficiency & Expediency

Specialized business courts and ADR also share the common goal of efficient and expedient resolution. Related to that commonality is reduced docket congestion and improving case flow in the court system for both business and general civil cases. A specialized business court achieves this end by accepting business and commercial cases (notoriously motion intensive with voluminous records that block the non-business civil docket), and assigning them to judges whose expertise and attention should permit them to resolve the cases more quickly than if they remained in the general docket fighting for judicial attention (including case management) among simpler, less complex, and cumbersome cases. In removing the complex business and commercial cases from the general docket, greater attention is available to be given to non-business cases, and to remove complex, voluminous record, motion-intensive cases that block the non-business civil docket.

Private ADR achieves a similar end by removing cases—often these same complex, difficult-to-manage and resolve cases congesting the general docket—from the civil docket, and resolving business cases with more expertise and expedition. However, reducing a court's docket congestion is likely not a primary objective for private ADR providers.[109]

109. It is more likely the result of a commercial or quasi-commercial enterprise finding an opportunity to provide services to address a problem in the court system, which has the ancillary effect of helping the court system's civil case flow.

2. Differences

The differences between specialized courts and ADR can be categorized in the following ways: (1) public/private nature of resolution, (2) development of a body of case law, (3) adversarial versus cooperative structure, (4) control over or choice of forum or decision maker, (5) costs, and (6) timing.

a. Public versus Private Resolution

A key difference between the two tools of specialized courts and ADR is the public nature of resolution in a specialized business court, which remains part of the public, taxpayer-financed, court system. This includes dockets and filings open to the public, sometimes with wide electronic access; trials open to the public and press; and published opinions, sometimes available online to the public as well as in traditional sources such as reporters in book form and electronic databases such as Lexis or Westlaw. This is not merely a happenstance, but part of a court's inherent role in developing a body of law for future guidance to all members of the community. Further, where parties choose to have disputes resolved in a public forum created through taxpayer dollars, those parties cannot expect a private judicial resolution or a jury decision closed to the world. By contrast, non-binding ADR or private commercial arbitration can remain unknown to the public and provide no precedent or guidance to the community at large regarding conduct that may avoid future litigation. ADR resolution of a business dispute serves privacy goals of individual litigants, but it erodes case law (and thus predictability) and the ability of courts to develop business law expertise.

b. Written Opinions

By contrast, issuing opinions serves two functions in advancing the law. One is to create a body of case law for guidance in that business court, which also may have the effect of opining on subjects otherwise not addressed by the state's appellate courts, thus providing guidance to litigants more generally and serving the predictability goal of business courts. The other function served by a public forum is to provide a platform for the development of appellate law. The business court opinion is merely the first stage in that vertical process. Such decisions can be appealed to intermediate appellate courts and, in some instances, to the state's highest

court; thus providing the opportunity for a state's appellate courts to address business and commercial substantive law and to create a sounder and clearer body of law for the public.[110] By contrast, non-binding ADR creates opinions generally not subject to appeal;[111] and arbitration awards, even if explained in detail, are rarely subject to meaningful challenge,[112] and do not advance the development of a public body of case law through either the vertical appellate process or the horizontal process of opinions giving guidance on the trial level. While the public nature of specialized business courts supports the goal of predictability, private resolution of commercial disputes does nothing to help inform the actions of others, accurately assess liability risks, or resolve ambiguities within the law.

c. Adversarial versus Cooperative Structures

At their foundations, business courts and non-arbitration ADR models of dispute resolution are based on fundamentally different principles. The adversarial litigation process, whether in a business court or a binding arbitration, is based upon a winner/loser paradigm where an unbiased third party decides which side has told the truth, has the law on its side, and merits victory. It can be, though not always, a winner-take-all process. It is a process that recollects combat,[113] sport and drama,[114] and may appeal more

110. Thus, while many describe Delaware's Court of Chancery, a trial court, as the most important business court in the country, an argument can certainly be made that it is Delaware's Supreme Court, with its final say on business law in Delaware, that is the preeminent business court.

111. AAA has adopted certain protocols allowing parties to appeal to an appellate arbitration panel. *See* Paul Bennett Marrow, *A Practical Approach to Affording Review of Commercial Arbitration Awards: Using an Appellate Arbitrator*, 60 J. DISPUTE RESOL. 10 (2005), *available at* http://www.adr.org/si.asp?id=2317.

112. *Business Courts and the Future of Arbitration*, *supra* note 33, at 500.

113. *See* CHARLES REMBAR, THE LAW OF THE LAND: THE EVOLUTION OF OUR LEGAL SYSTEM 110 (1980). "Trial by battle has its modern counterparts. Contemporary litigation, to a large extent, goes according to the skill and strength of the advocates who engage in it. And outside the courts, trial by battle continues in our conduct and our fantasy." *Id.* In addressing what is apparently the last case of "wager of battle" in England, in 1818, where the accuser would be forced to put his life at risk when the accused demanded to be tried by battle, one English justice stated: "One inconvenience attending this mode of proceeding is, that the party who institutes it must be willing, if required, to stake his life in support of his accusation." *Id.* at 34. In that case, a man who alleged his sister was murdered dropped the case when challenged to trial by battle. *Id.* at 18-19. Trial by battle was shortly thereafter banished permanently into history by Parliament, as there was no connection between truth and actual battle. *Id.* at 35. Apparently, the locals doubted this Norman import from the get-go. *Id.* at 182-83. Still, the idea of the modern trial as the day of reckoning, and the parties or their lawyers not knowing who will be the vanquisher and the vanquished, may still put the fear of metaphorical death into a party believing the truth of its case, and promote the idea of ADR.

to those parties whose motivations include the need for vindication, the desire to set a business precedent, or parties who perceive that they have an advantage in the adversarial process.[115]

By contrast, non-binding ADR is based on a facilitative model where the parties must agree to an outcome. It would be naïve to idealize the process as one of cooperation and friendship or to conclude there are no winners and losers in the process. Mediation and neutral valuation are non-binding, and they ultimately leave the decision in the hands of the parties as to whether and how to resolve their disputes, with the option to "walk away" at least theoretically always available. Presentations can be adversarial in style, and negotiations can be hard-nosed and confrontational, but (a) the decisions remain in the parties' hands; and (b) the ultimate resolution is not winner-take-all, but is some form of compromise.[116] There is the difference in having direct control in a decision-making process directly leading to the outcome in non-adjudicative ADR, rather than having indirect control by trying to persuade others (judge or jury) to provide a favorable outcome in a decision-making process in which the party and its counsel do not directly participate. Facilitation provides flexibility, an attribute the adversarial system often lacks.

d. Choice of Forum or Decision Maker

Another stated difference between ADR and business court litigation is that the parties can choose the neutrals, such as arbitrators, but cannot choose the judge.[117] This difference is not as great as it may appear. First, no single party can choose the arbitrator or other neutral; rather, the choice must be subject to mutual agreement by all sides. Moreover, if the parties cannot agree among themselves to the arbitrators or other neutrals (or if

114. The courtroom is a timeless source of inspiration for plays, books, television, and movies, but we are unlikely to see many stories about "The Young Mediators" or "L.A. Neutral Evaluation," though, *Boston Legal* has portrayed the drama in lawyer-to-lawyer settlement negotiations.

115. That the litigation process can also be used by a financially stronger party with a weak case to wear down a financially weaker opponent with a stronger factual or legal position can be another motive. *See generally* REMBAR, *supra* note 113.

116. The well-known belief that if both parties leave the mediation unhappy, then the result must be fair is the flip side of party satisfaction demonstrating a fair result. Of course, one side may be in such a weak or desperate position that its settlement at a mediation may amount to a defeat close to losing in court because there is no real alternative. *See generally* REMBAR, *supra* note 113.

117. *Business Courts and the Future of Arbitration*, *supra* note 33, at 498.

because they simply choose for any number of reasons not to make such a choice among themselves alone), in the private context, the parties will almost certainly involve a private ADR provider organization in the selection process; thus, this potentially makes their choice more circumscribed. Such an organization may provide its own list of expert neutrals from which the parties must prioritize and select in a process ultimately evaluated by the ADR organization. Even in court-annexed ADR, if the parties cannot agree to a listed neutral from the court's roster, then the court will select the neutral for the parties.

By comparison, a party contemplating initiating a civil action in a jurisdiction with a business court, which it knows will be assigned to the business court, also will know in advance that its case will be assigned to one of the specialized business court judges (a matter of public record). In effect, that party is choosing the business court judge, and if the other party has an avenue to take the case out of the business court, and does not, then both have chosen.[118] In essence, the choice presented with specialized courts is no more and no less than with any jurisdiction, venue, and forum questions presented in litigation.

No business court, other than Delaware's traditional equity court, excludes the jury option from cases where a jury could otherwise be had under state law. Thus, while decision-maker expertise and specialization exists in business courts for all non-jury trials, that expertise only exists up to the time of trial (final decision making) in a jury case. At that point, because of a potential lack of expertise and experience in the jury, the business court becomes no more predictable or reliable in reaching a reasoned and informed decision than any other court.[119] This significantly increases the risks for a business litigant because of the less predictable jury outcome, an especially disturbing risk for a party that may have an

118. Of course, if one side chooses to file its case in the business court, the other side has no means to transfer the case or remove it to federal court, and the plaintiff will not agree to ADR, then there is clearly an absence of choice in one party to the case. On the other hand, if litigation can only be brought in the business court and the defendant refuses ADR, then it can circumscribe the plaintiff's choice in the same way.

In litigation centering on a contractual relationship, business parties can choose their litigation forum or ADR method in advance via their contract. Thus, leaving the option to proceed with court-based litigation in the contract, even by silence, is a form of choice, just as choosing to insert an arbitration clause, mediation clause, or judicial venue provision would be. When a dispute arises, each side will inevitably consider which forum or dispute resolution method provides it with the greatest advantage. We are suggesting that the ability of one party to select the business court does not deny its opponent an otherwise unlimited or unfettered universe of neutrals to decide or facilitate the dispute.

119. An argument can be made that a specialist judge can provide a more informed context, and thus create circumstances where the jury is more likely to reach an informed result because of the judge's case management, jury instructions, pre-trial rulings, and rulings during trial.

objectively better case, but a risk that may be worth taking for the party with the objectively weaker case. Notably, this is the kind of risk that purportedly motivated parties to seek ADR over state trial court forums because the private commercial arbitrators were experienced, specialized, and stimulated the development of business courts.

e. Costs

ADR and specialized courts also can be distinguished on the basis of costs. Though there is a dispute about whether binding private arbitration ultimately saves time and litigation expenses,[120] the mediation process, if successful, is almost certain to achieve a speedier resolution and be less expensive than litigation in court or arbitration.[121] No matter how experienced the judge or arbitrators are in their litigation processes, the case is still going to take time, money, and effort, and the litigants will go through a bruising process before reaching its end. Thus, a difference between non-adjudicative ADR and litigation in specialized business courts is that non-adjudicative ADR offers a greater degree of expediency, unavailable in even the most streamlined courts. In choosing such, the parties may avoid the procedural stages of a trial (discovery, motion practice, pre-trial order, and other accoutrements of the litigation process).

f. Timing

In choosing any form of ADR, the parties also may avoid delays based on the timing and order of case docketing. Thus, in choosing ADR, the litigants can bypass the "queue" of cases that would otherwise have preference as first-filed.[122]

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120. *Business Courts and the Future of Arbitration*, *supra* note 33, at 498-99.

121.

> If set early in the case, mediation can reduce resolution costs. Earlier settlement translates into cost savings for both parties, according to their lawyers, as expensive discovery and motion practices are averted. Even when no settlement was reached, attorneys often report that mediation either saved or at least did not increase costs . . . .

Ohio Deskbook, *supra* note 48, at 1-3.

122. *Business Courts and the Future of Arbitration*, *supra* note 33, at 498.

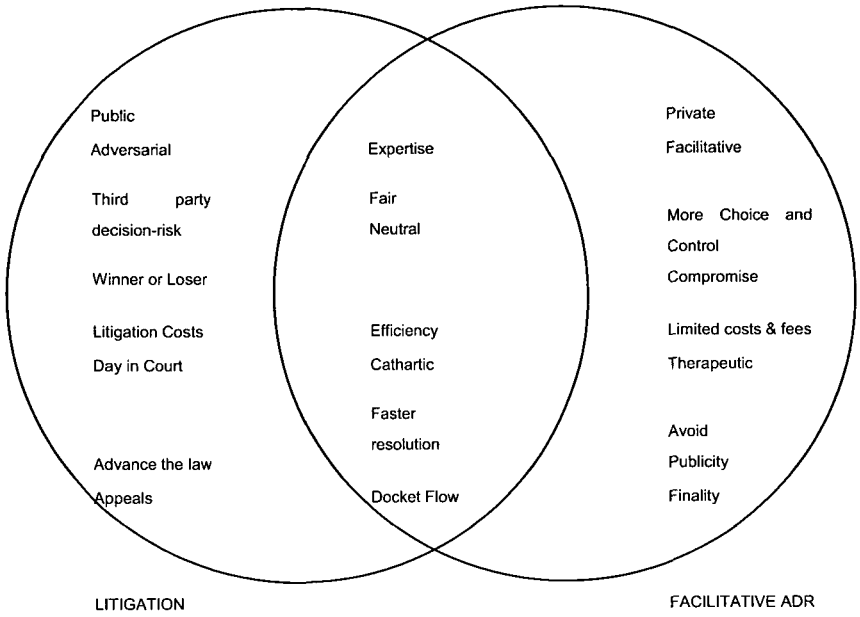

Diagram 1: Similarities and Differences between Goals of Business Court and Non-arbitration ADR.

E. The Unique Collaboration between ADR and Specialized Business Courts

As is evident from the discussions of the ADR rules cited above,[123] and the charts set out below, many business courts include some form of court-annexed ADR or the ability to refer cases to ADR. This comports with the reality that very few cases ever go to trial,[124] and that our state court systems are structurally unprepared to try every docketed case. Civil courts exist to resolve disputes, not to try all of them. The goals of ADR and specialized business courts are often complementary, and ADR has become an important tool of business court judges in advancing the goals of expeditious resolutions, privacy, maintaining relationships, or other goals undermined in an adversarial process. ADR is not simply another tool in the business court judge's business dispute resolution arsenal: it is one of her most powerful.

123. *See supra* notes 117, 120, and 122.
124. *See Decline of Trials*, *supra* note 2, at 1255.

Given the expert and expedited attention given to business court cases during the case management and motion practice phases of pre-trial, the parties should be adequately prepared to participate in ADR at an early stage.

Through repeated experience in business court cases, the business court judge may not only become an expert on business case litigation management and business and commercial substantive law, but she may come to understand when a case is ripe for some form of ADR, and even which specific neutral/mediator is well-suited for a case. Some business courts have lists of neutrals qualified to mediate or evaluate business court cases.[125] It is very likely that the sitting business court judges know, or will come to know, which of these neutrals/mediators have specific expertise in particular areas of substantive law, or which may have exceptional skills in handling complex disputes, disputes among family members in family businesses, cases with difficult counsel, or other unique personal factors among counsel or the parties.[126]

The role of the trial in resolving business cases remains unquestionably significant even though it is the final destination for a minority of cases. From the perspective of achieving settlement, most cases need a trial date. The reality of an impending trial is often a necessary predicate for non-binding ADR to be effective. There are many fears that may motivate a defendant to use ADR: economic loss; damage to personal reputation; damage to a reputation for providing quality goods and services; adverse publicity or humiliation; opening the door to future litigation; jury unpredictability; and getting nothing as a plaintiff.[127]

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125. This is the case in New York, North Carolina, and Philadelphia, among others.

126. One of the authors recently participated in a mediation/neutral valuation conducted by a former judge now in private litigation practice. The settlement conference was part of a court-annexed process for which the former judge was a volunteer neutral, appointed by a sitting business court judge. The dispute involved a subject on which this neutral was an expert, which was certainly known to the business court judge. The neutral's expertise in both procedure (how to conduct the mediation) and substance (knowledge of both the substantive law and the nature of the work at issue in the case) both expedited the process and made it more meaningful in terms of evaluating positions and claims. The likelihood of achieving any settlement would have been dramatically less had this neutral not had a real mastery of the practical and legal aspects of both the nature of the underlying work at issue and the law governing that work. Put in functional terms, this neutral was the right tool for the job. As set forth above, the business court judge's selection of the appropriate neutral for the case may even include non-lawyers. *See supra* notes 75, 76 and accompanying text.

127. Another factor may be the lawyer's fear of the client's response if the case goes to trial and the lawyer does not get a sufficiently favorable result in the client's eyes. This may be either a fear of disappointing the client or not having reached the level in one's practice where the lawyer is not

II. ADR RULES IN GENERAL AND SPECIALIZED BUSINESS COURTS

Set forth below is a table and discussion of court rules establishing and implementing ADR programs in general civil dockets as well as specific rules applicable only to the specialized business court or business cases within the jurisdiction.

Table 1:
A Comparison of the Structural Elements of Business Courts

State	General ADR Rules	Business Court Specific ADR Rules
ORIGINAL BUSINESS COURT		
Delaware Chancery Court Optional mediation for all cases with special rules for certain business and technology cases.	MEDIATION:[128] **How Ordered:** The Court may order mediation with the consent of the parties. **How Appointed:** Any sitting judge or master with the Court may be assigned to the mediation, or the parties may agree on a neutral third party. **Ground Rules:** Fee is $2500.[129] MEDIATION FOR BUSINESS & TECHNOLOGY CASES:[130] **How Ordered:** With the consent of the parties, the Court may order certain business and technology cases (only monetary claims exceeding $1 million in controversy with one party as a Delaware-formed business). **Ground Rules:** This is referred to as a mediation only docket and requires a filing fee of $10,000 plus an additional $2,500/day fee.	

afraid to "go to the mat" of trial if the settlement offer is not sufficient. Bryant G. Garth & Joyce Sterling, *Exploring Inequality in the Corporate Law Firm Apprenticeship: Doing the Time, Finding the Love*, 22 GEO. J. LEGAL ETHICS 1361, 1374-75 (2009); Stephen McG. Bundy, *The Policy in Favor of Settlement in an Adversary System*, 44 HASTINGS L.J. 1, 33 (1992) (stating that inexperienced "lawyers may fear trial unduly, either because it is an unknown or because they fear that their inadequacies will be exposed," though that author also observes that a lack of experience may drive some lawyers away from settlement because they will want to go to trial to get experience, or for fear of being "taken" while negotiating with a more seasoned adversary).

128. DEL. CH. R. 174, Voluntary Mediation in Court of Chancery, *available at* http://courts.state.de.us/Rules/#chancery (last visited June 2, 2010).

129. MEDIATION GUIDELINES PAMPHLET, VOLUNTARY MEDIATION IN THE COURT OF CHANCERY, *available at* http://courts.delaware.gov/forms/download.aspx?id=15478 (last visited June 2, 2010).

130. DEL. CH. R. 93-95, Voluntary Mediation in Court of Chancery, *available at* http://courts.state.de.us/Rules/#chancery (last visited June 2, 2010).

State	General ADR Rules	Business Court Specific ADR Rules
	ARBITRATION FOR BUSINESS DISPUTES:[131] **How ordered:** With consent of the parties in business cases with monetary claims exceeding $1 million in controversy, the Court may order arbitration. **How Appointed:** Upon receipt of a petition, the Chancellor will appoint an Arbitrator. **Ground Rules:** The parties must attend a preliminary conference and hearing before the actual arbitration hearing. Neither the petition for nor the arbitration proceedings themselves are public record. At any point, the parties may elect for mediation or settlement.	
Delaware Superior Court Mandatory mediation for all civil cases.	**MEDIATION:**[132] **How ordered:** Mandatory mediation, unless the parties agree to another form of ADR such as arbitration or neutral case assessment. **How Appointed:** Parties select a neutral.	**Complex Commercial Litigation Division, Superior Court,**[133] *Est. 2010* No separate ADR rules for business cases.
NON-DELAWARE BUSINESS COURTS		
Illinois Optional	**MEDIATION:** [134] Court-annexed mediation available for all Circuit Court cases.	**Cook County Circuit Court Commercial Calendar,**[135]

131. DEL. CH. R. 96-98, *available at* http://courts.delaware.gov/Rules/#chancery (last visited Jan. 5, 2010).

132. DEL. CH. R.16(b)(4), *available at* http://courts.state.de.us/forms/download.aspx?id=39348 (last visited June 2, 2010).

133. SUPERIOR COURT OF THE STATE OF DELAWARE, ADMINISTRATIVE DIRECTIVE OF THE PRESIDENT JUDGE OF THE SUPERIOR COURT OF THE STATE OF DELAWARE NO. 2010-3 (2010), *available at* http://www.lexisnexis.com/documents/237-20100428022711.pdf; Francis G.X. Pileggi, *Delaware Superior Court Establishes Special Business Court* (May 4, 2010), *available at* http://www.delawarelitigation.com/2010/05/articles/other-court-decisions/delaware-superior-court-establishes-special-business-court/.

134. *See* COOK COUNTY CIR. CT. R. 21, *available at* http://www.cookcountycourt.org/rules/rules/rulespart21.html; *see also* Illinois Court ADR Sourcebook, *available at* http://courtadr.org/sourcebook/rules.php?b1=proc (last visited June 2, 2010).

135. Circuit Court of Cook County, Commercial Calendar, http://www.cookcountycourt.org/divisions/index.html (follow "Law Division" hyperlink; follow "Commercial Calendar" hyperlink) (last visited Aug. 1, 2007); *see also Business Court History, supra* note 10, at 238-39.

State	General ADR Rules	Business Court Specific ADR Rules
mediation for all civil cases.	**How Ordered:** The court may order mediation *sua sponte*, pursuant to motion, or by stipulation of the parties. **How Appointed:** Parties have twenty-one days to agree on a mediator, failing which, the Court will appoint from a list or the Center for Conflict Resolution. **Ground Rules:** Mediation may end by settlement, certification of disagreement, or order of court. Communications are confidential with normal attorney exceptions.	*Est. 1993.* No separate ADR rules for business cases.
New York Optional mediation or other ADR for civil cases and optional mediation for business cases.	MEDIATION:[136] **How Ordered:** Each case is considered for suitability at outset, and channeled into ADR. Consent of parties is considered, but not required. **How Appointed**: Qualified mediators suggested and provided, but parties may choose their own mediator. **Ground Rules:** Proceedings are confidential, neutral mediator may not be subpoenaed. Compensation set by court rules at $300/hr.	**Commercial Division of the Supreme Court,** [137] *Est. 1993.* Located in Albany County, Eighth Judicial District, Kings County, Nassau County, New York County, Onondaga County, Queens County, Seventh Judicial District, Suffolk County, and Westchester County.

136. *See, e.g.*, SUPREME COURT OF THE STATE OF NEW YORK, COMMERCIAL DIVISION-COUNTY OF WESTCHESTER, RULES OF THE ALTERNATIVE DISPUTE RESOLUTION PROGRAM (2006), *available at* http://www.nycourts.gov/courts/comdiv/PDFs/9th-ADR-Rules.pdf.

137. N.Y. UNIF. R. 202.70, *available at* http://www.nycourts.gov/rules/trialcourts/202.shtml#70 (Rules of the Commercial Division of the Supreme Court); *see also* Administrative Order of the Chief Administrative Judge of the Court, AO 518 (2005), *available at* http://www.nysba.org/nysbainfo/committees/cplr/rules/CommDivRules06.pdf; COMMERCIAL DIV. OF THE SUPREME COURT OF THE STATE OF N.Y., REPORT OF THE OFFICE OF COURT ADMINISTRATION TO THE CHIEF JUDGE ON THE COMMERCIAL DIVISION FOCUS GROUPS 2–4 (2006), *available at* http://www.nycourts.gov/reports/ComDivFocusGroupReport.pdf; N.Y. Sup. Ct., Commercial Division, http://www.nycourts.gov/courts/comdiv/index.shtml (last visited Sept. 11, 2007); *see also Business Court History*, *supra* note 10, at 152-160.

State	General ADR Rules	Business Court Specific ADR Rules
		MEDIATION:[138] **How ordered:** At any stage in the matter, the court may direct or the parties may pursue mediation. **Ground Rules:** The mediator is to be "uncompensated." **New York County,**[139] **Nassau County**[140] **and Suffolk County**[141] **Commercial Division** **GENERAL ADR:** **How Ordered:** General ADR available to the parties upon request (including arbitration, neutral evaluation, or mediation), with mediation as the default form of ADR.

138. N.Y. UNIF. R. 202.70, *available at* http://www.nycourts.gov/rules/trialcourts/202.shtml#70 (last visited June 2, 2010).

139. *See generally* N.Y. COUNTY COMMERCIAL DIVISION, RULES OF THE ALTERNATIVE DISPUTE RESOLUTION PROGRAM, *available at* http://www.nycourts.gov/courts/comdiv/PDFs/NYCounty/Attachment1.pdf (last visited June 2, 2010).

140. NASSAU COUNTY COMMERCIAL DIVISION A.D.R. PROGRAM R. 2, *available at* http://www.nycourts.gov/courts/comdiv/nassau_ADR_Rules.shtml (last visited June 2, 2010).

141. *See generally* SUFFOLK COUNTY COMMERCIAL DIVISION MEDIATION PROGRAM, *available at* http://www.nycourts.gov/courts/comdiv/PDFs/Suffolk_ADR_Protocols.pdf (last visited June 2, 2010).

142. *See generally* WESTCHESTER COUNTY COMMERCIAL DIVISION RULES OF THE ALTERNATIVE DISPUTE RESOLUTION PROGRAM, *available at* http://www.nycourts.gov/courts/comdiv/PDFs/9th-ADR-Rules.pdf (last visited June 2, 2010).

State	General ADR Rules	Business Court Specific ADR Rules
		Ground Rules: In New York County, first four hour session at no charge in mediation and then $300/hour thereafter. Subject to prescribed ethical standards for mediators, arbitrators, and neutrals. In Nassau County, if neutral has satisfied annual pro bono requirement, can request reasonable compensation. Suffolk County, the first three hours of session are free, followed by a $300/hour fee. **Westchester County**[142] **Commercial Division** GENERAL ADR: Appears to be oriented to mediation. First four hours of session no charge, $300/hour thereafter unless agreed otherwise.
North Carolina	MEDIATION:[143] **How Ordered:** Mediation is mandatory in all cases. Parties may choose some other form of	**North Carolina Business Court,** [144] *Est. 1995*

143. RULES IMPLEMENTING STATEWIDE MEDIATED SETTLEMENT CONFERENCES IN SUPERIOR COURT CIVIL ACTIONS (1991) (*revised* March 1, 2010), *available at* http://www.nccourts.org/Courts/CRS/Councils/DRC/MSC/Rules.asp.

144. Order Adopting Amended Local Rules (July 31, 2006), *available at* http://www.ncbusinesscourt.net/New/localrules/Order%20Adopting%20Amended%20Local%20Rules.rtf [hereinafter N.C. Order]; General Rules of Practice and Procedure for the North Carolina Business Courts R. 9 (March 9, 2000) (*revised* July 31, 2006), http://www.ncbusinesscourt.net/New/localrules/ (last visited Aug. 1, 2007). *See also Business Court History*, *supra* note 10, at 169-70.

State	General ADR Rules	Business Court Specific ADR Rules
Mandatory mediation for civil and business court cases.	ADR if they stipulate. **How Appointed:** List of mediators provided. Parties may choose outside of list. If parties can't agree, Court appoints from list. **Ground Rules:** All settlement agreements must be in writing.	MEDIATION:[145] **How ordered:** Mediation is mandatory and shall comply with the Rules Implementing Statewide Mediated Settlement Conferences in Superior Court Civil Actions. **How Appointed:** The North Carolina Business Court maintains a list of approved mediators on its website, although the parties may pick their own. **Ground Rules:** The parties must discuss mediation and other forms of ADR prior to the thirty-day Case Management Conference.[146] The judge discusses ADR options with the parties and counsel at the Case Management Conference.
New Jersey Optional mediation for	MEDIATION:[147] **How Ordered:** Court may order any matter to mediation for up to two hours.	

145. N.C. Order, *supra* note 144, at R. 19; *see also* RULES IMPLEMENTING STATEWIDE MEDIATED SETTLEMENT CONFERENCES IN SUPERIOR COURT CIVIL ACTIONS, *available at* http://www.nccourts.org/Courts/CRS/Councils/DRC/MSC/Rules.asp (last visited June 2, 2010).

146. N.C. Order, *supra* note 144, at R. 17.

147. N.J. CT. R. 1:40, *available at* http://www.judiciary.state.nj.us/rules/r1-40.htm (last visited June 2, 2010).

148. *Id.*

State	General ADR Rules	Business Court Specific ADR Rules
all civil cases and mandatory arbitration in some cases.	**How Appointed:** Court appoints mediator from roster if parties don't designate. Parties have fourteen days from appointment to change mediators. **Ground rules:** Any part may withdraw after two hours. Before that time, good cause must be shown. Mediation may continue after withdrawal of a party if deemed useful. Mediator is required to report whether any action or severable claim has been settled. ARBITRATION:[148] **How Ordered:** Election by parties, but mandatory in certain non-business cases such as personal injury and automobile. **How Appointed:** Arbitration staff provided by Court. **Ground Rules:** Arbitration provided by the Court through its CDR program is non-binding.	**Complex Commercial Calendar,**[149] *Est. 1996.* Located in Essex and Bergen Counties. No separate ADR rules for business cases.

149. N.J. JUDICIARY, BERGEN COUNTY SUP. CT. CIVIL DIVISION, http://www.judiciary.state.nj.us/bergen/civil.htm (last visited Aug. 1, 2007); Memorandum from Richard J. Williams, Admin. Dir. of the Courts on Notice to the Bar Re: Pilot Program for Handling Complex Commercial Cases in General Equity (June 21, 2004), *available at* http://www.judiciary.state.nj.us/notices/n040624a.htm; Press Release, Office of Comme'ns, N.J. Judiciary, New Jersey Courts Develop Plans for Pilot Program for Complex Commercial Cases (June 24, 2004), *available at* http://www.judiciary.state.nj.us/pressrel/pr040624a.htm; *see also Business Court History, supra* note 10, at 170-76. The Civil Division of New Jersey Judiciary states:

> The Law Division processes cases filed in reference to automobile negligence, personal injury, medical malpractice, products liability, professional liability, contract, assault and battery, civil rights, tenancy, tort, real property, etc. These cases are placed in the applicable track, e.g., expedited, standard or complex, based upon complexity and the anticipated discovery requirements. All cases are processed through teams working in unison with judges' staffs.

N.J. JUDICIARY, BERGEN COUNTY SUP. CT., CIVIL DIVISION, http://www.judiciary.state.nj.us/bergen/civil.htm (last visited June 2, 2010).

State	General ADR Rules	Business Court Specific ADR Rules
Pennsylvania Philadelphia County Non-binding arbitration for cases less than $50,000 (not appealable to business court) and settlement conferences mandatory in Philadelphia Commerce Court with options for mediation or	ADR programs are specific to each judicial district, Philadelphia's program is listed below. NON-BINDING ARBITRATION PHILADELPHIA:[150] **How Ordered:** Mandatory in all civil cases alleging less than $50,000 in damages. **How Appointed:** Cases are referred to the Arbitration Center and assigned to a three-lawyer panel. **Ground Rules:** Ruling can be appealed de novo to the Court of Common Pleas. NON-BINDING ARBITRATION PITTSBURGH:[151]	**Philadelphia Commerce Program,**[152] *Est. 2000* SETTLEMENT CONFERENCES:[153] **How Ordered:** Mandatory unless another ADR procedure is utilized by the parties. **How Appointed:** Parties select five choices from a list of court-approved judges pro tem (experienced lawyers) and the court makes the final selection.

150. PA. R.C.P. §§ 1301-14 (2010); PHIL. CIV. R. 1301–05, 1308. COMPULSORY ARBITRATION CENTER CIVIL ADMINISTRATION AT A GLANCE 2005-2006, http://www.courts.phila.gov/pdf/manuals/civil-trial/compulsory-arbitration-center.pdf (last visited June 2, 2010); *see also* PHILADELPHIA COURT, FIRST JUDICIAL DISTRICT OF PENNSYLVANIA, COURT OF COMMON PLEAS, DISPUTE RESOLUTION CENTER, http://www.courts.phila.gov/common-pleas/trial/civil/ (last visited June 2, 2010). Allegheny County provides a similar program for all cases with damages claims less than $25,000. *See* Allegheny County Court of Common Pleas, Civil, Arbitration, http://www.alleghenycourts.us/civil/arbitration.asp (last visited June 2, 2010); *see also* ALLEGHENY COUNTY COURT OF COMMON PLEAS CIVIL PRACTICE MANUAL, (8th ed. 2007) http://www.alleghenycourts.us/downloads/civil/ACP09_10%20%20Arbitration.pdf (last visited June 2, 2010).

151. PA. R.C.P. §§ 1301-14; ALLEGHENY COUNTY CIV. CT. R. §§ 1301-06, 1308.

152. *Business Court History*, *supra* note 10, at 176-77; Jonathan K. Hollin, *Philadelphia Begins New Commerce Case Management System for "Business Litigation,"* FINDLAW.COM, (Dec. 1, 1999), http://library.findlaw.com/1999/Dec/1/129914.html; COMMERCE PROGRAM, CRITERIA FOR ASSIGNMENT OF CASES TO COMMERCE PROGRAM, http://fjd.phila.gov/pdf/cpcvcomprg/criteria.pdf (last visited Aug. 1, 2007); *see also* COURT CONSULTING SERV. DIV. NAT'L CENTER FOR STATE COURTS, CIVIL PROGRAMS IN THE PHILADELPHIA COURT OF COMMON PLEAS FINAL REPORT 69–73 (2004).

153. Draft Memorandum of Judge Pro Tem Subcommittee of the Philadelphia Bar Association Business Law Section's Business Litigation Committee 1 (on file with authors) [hereinafter Philadelphia ADR].

State	General ADR Rules	Business Court Specific ADR Rules
arbitration. **Allegheny County** Non-binding arbitration for all cases less than $25,000.		**Ground Rules:** First three hours are free; thereafter, the conference can continue with the consent of the parties at the rate of $300/hour. MEDIATION:[154] **How Ordered:** Voluntary. Parties must discuss at the Case Management Conference. Parties may be referred to nonbinding mediation at the discretion of the judge. **How Appointed:** Selected by the parties from the list of court-approved judges pro tem or a paid, private third party. BINDING ARBITRATION:[155] **How Ordered:** Agreement of the parties. **How Appointed:** An

154. *Id.* at 2.

155. *Id.*

156. In re Commerce/Complex Case Litigation Center in Allegheny County, Administrative Docket, No. 13 (Jan. 12, 2007), *available at* http://courts.phila.gov/pdf/cpcvcomprg/Protocols.pdf. The Commerce and Complex Litigation Center does not have formal ADR rules, and ADR is not mandated in practice. However, ADR is encouraged in appropriate cases, and if the parties request conciliations, i.e. judicial settlement conferences, the Commerce and Complex Litigation Center judges will schedule such conferences with the parties. *See* Email from the Honorable Christine Ward, Allegheny Court of Common Pleas, to Lee Applebaum, Esq., Fineman Krekstein & Harris, P.C., and Mitchell L. Bach, Esq., Eckert Seamans Cherin & Mellott, LLP (June 15, 2010 08:43 EST) (on file with the authors).

157. DESCRIPTION OF THE DOCKET AND PROCEDURES OF THE COMMERCE AND COMPLEX LITIGATION CENTERS, RESPONSIBILITY OF THE TRIAL JUDGE, http://www.alleghenycourts.us/civil/commerce_complex_litigation.asp (last visited June 2, 2010).

State	General ADR Rules	Business Court Specific ADR Rules
		arbitrator or panel of arbitrators will be selected by the parties. **Ground Rules:** Option available only after the three-judge panel decides all legal issues, leaving only questions of fact to remain for the arbitrator or under procedures agreed to by the parties. **Allegheny County (Pittsburgh) Court of Common Pleas Commerce and Complex Litigation Center,**[156] *Est. 2007* Judge actively manages case using management tools that will, for the particular case, provide efficient, cost effective, timely, and fair resolution of the case.[157]
Mass. No statewide	**ADR GENERALLY:**[158] **How Ordered:** Mandatory only in two cases: family court and experimental non-binding	**Business Litigation Session,**[159] *Est. 2000 (pilot program) Permanent*

158. *See generally* MASS. SUP. CT. UNIF. DISPUTE RESOLUTION R., *available at* http://www.mass.gov/courts/admin/legal/newadrbook.pdf (last visited September 26, 2010).

159. Administrative Directive No. 03-1, (Feb. 12, 2003) (Superior Court Business Litigation Session Extension and Expanded Venue), *available at* http://www.mass.gov/courts/courtsandjudges/courts/superiorcourt/03_01.pdf; Letter from Allan van Gestel, Presiding Justice, Suffolk Superior Court Bus. Litig. Section, Rules For Filing In Business Litigation Session (July 21, 2003), *available at* http://www.socialaw.com/article.htm?cid=14764; Mass. Court System, Superior Court Department, http://www.mass.gov/courts/courtsandjudges/courts/superiorcourt/index.html#comm (last visited June 2, 2010); *Business Court History, supra* note 10, at 180-81.

State	General ADR Rules	Business Court Specific ADR Rules
rules for ADR outside of family law matters.	mandatory programs that are county specific.	*2003* No separate ADR rules for business cases.
Nevada Mandatory settlement conference and mandatory arbitration for civil cases with less than $50,000 in damages.	SETTLEMENT CONFERENCE/NEUTRAL EVALUATION: **How Ordered:** Mandatory. ARBITRATION:[160] **How Ordered:** Mandatory for cases worth less than $50,000. Parties may file for an exemption. **How Appointed:** Roster provided, parties may stipulate to private arbitrator. **Ground Rules:** Parties pay for arbitrators. Very formal, organized arbitration process, similar to a court proceeding. Courts file a writ of execution within ten days if arbitrator is unpaid.	**Business Court,** [161] *Est. 2000* No separate ADR rules for business cases.
Rhode Island Optional arbitration or mediation for	ARBITRATION:[162] **How Ordered:** A justice may require submission to non-binding arbitration. All civil cases, including business cases, are eligible.	**Business Calendar,** [163] *Est. 2000* GENERAL ADR:[164] **How Ordered:** At the

160. NEVADA ARBITRATION R. 1, 6, http://www.clarkcountycourts.us/cjdc/courts-and-judges/adr/arbitration/ARBITRATION%20RULES.doc (last visited June 2, 2010).

161. *Business Court History, supra* note 10, at 184-85; WASHOE D. CT. R. 2.1, *available at* http://www.leg.state.nv.us/CourtRules/SecondDCR.html; NEV. CIR. CT. R. 1.61, *available at* http://www.leg.state.nv.us/courtrules/EighthDCR.html (last visited June 2, 2010).

162. RHODE ISLAND DISTRICT COURT, ALTERNATIVE DISPUTE RESOLUTION PLAN (March 6, 2006), *available at* http://www.rid.uscourts.gov/menu/generalinformation/adr/ADRPlan-030106.pdf.

163. R.I. Superior Court, Message from the Presiding Justice, http://www.courts.state.ri.us/superior/ message.htm (last visited Aug. 1, 2007); Administrative Order No. 2001-9 (April 17, 2001), *available at* http://courts.state.ri.us/superior/pdfadministrativeorders/2001-9.pdf (establishing a "Business Calendar"); *Business Court History, supra* note 10, at 188-90.

164. *Business Court History, supra* note 10, at 189.

State	General ADR Rules	Business Court Specific ADR Rules
all civil cases, and additional ADR options are available for business cases.	**How Appointed:** The Court usually appoints a magistrate judge to serve as arbitrator, who is not compensated by the parties. **Ground Rules:** Informal procedures to resolve conflicts may be established. Communications are confidential. Parties may stipulate to mediation instead.	discretion of the judge. The parties must identify previous ADR attempts on initial case questionnaires and discuss ADR as a part of case management. Court uses lawyer and non-lawyer neutrals. NON-BINDING ARBITRATION:[165] **How Ordered:** The Court may order the parties to attend non-binding arbitration.
Maryland Optional mediation or other forms of ADR for civil cases and optional ADR procedures for business and technology cases.	MEDIATION & GENERAL ADR:[166] **How Ordered:** Recommended that all cases assigned be referred to mediation or other ADR. This may include non-binding arbitration or neutral case evaluation. Court has no power to compel ADR without consent of both parties. Court may compel a settlement conference.	**Business & Technology Case Management Program,** [167] *Est. 2003* GENERAL ADR: **How Ordered:** The Business and Technology Case Management Program must include ADR proceedings including "settlement conferences, neutral case evaluation, neutral fact-finding,

165. *Id.* ("In line with the goal of expeditious treatment of cases, the Business Calendar Justice can require that the parties utilize non-binding mediation.").

166. MD. R. CIV. P. tit. 17, ch. 100, http://www.courts.state.md.us/title17.html (last visited June 2, 2010).

167. MD. BUS. & TECH. TASK FORCE, REPORT (2000), http://www.courts.state.md.us/finalb&treport.pdf; MARYLAND BUSINESS & TECHNOLOGY CASE MANAGEMENT PROGRAM, http://www.courts.state.md.us/businesstech/index.html (last visited June 2, 2010); *see also Business Court History*, *supra* note 10, at 190-94.

State	General ADR Rules	Business Court Specific ADR Rules
		arbitration, mediation, and other non-judicial procedures . . . ."[168] BTCMP mediators must have special training beyond that required of mediators generally.[169] **How Appointed:** Selected by the parties from a list of certified professionals registered with the court.[170]
Florida Mandatory mediation for civil cases and district specific ADR rules for business cases.	MEDIATION:[171] **How Ordered:** Mediation may be ordered by a judge, but is not generally mandatory. **How Appointed:** Parties are generally given a court-appointed neutral. **Ground Rules:** Mediators are often very inexpensive or free, particularly for indigents. The level of mediation assigned is based on the amount in controversy.	**Business Court Subdivision,** *Est. 2004* Located in Orlando (9th), Tampa (13th), and Miami (11th) judicial districts, and a hybrid commercial/complex litigation subdivision in Ft. Lauderdale (17th Judicial District).

168. MARYLAND BUSINESS & TECHNOLOGY CASE MANAGEMENT PROGRAM, R. 16.205(b)(4), (Jan. 1, 2003), *available at* http://michie.lexisnexis.com/maryland/lpExt.dll?f=templates&cMail=Y&fn=main-h.htm&cp=mdrules/8/ec7/f17/f2c.

169. MD. R. CIV. P. 17-104(c).

170. MD. R. CIV. P. 17-104-07; *see also* BUSINESS & TECHNOLOGY CASE MANAGEMENT PROGRAM, MEDIATION AND ADR, http://www.baltocts.state.md.us/civil/BTCMP/mediation_adr.htm (last visited June 2, 2010).

171. Alternative Dispute Resolution, typically in the form of mediation, is provided at the judicial circuit level and is not uniformly supervised by the state. *See, e.g.*, FIFTEENTH JUDICIAL DISTRICT ALTERNATIVE DISPUTE RESOLUTION, *available at* http://15thcircuit.co.palm-beach.fl.us/web/guest/courtprograms/adr (last visited June 2, 2010); FOURTEENTH JUDICIAL DISTRICT ALTERNATIVE DISPUTE RESOLUTION PROGRAM, *available at* http://www.jud14.flcourts.org/CountyPrograms/ADRMediation/AdrMed.htm (last visited June 2, 2010).

State	General ADR Rules	Business Court Specific ADR Rules
		ORLANDO 9TH DISTRICT MEDIATION: [172] **How Ordered:** Mandatory in all cases. **How Appointed:** Court assigned or agreed upon by the parties. **Ground Rules:** Only the mediator may declare an impasse. Mediator may be paid, in part, out of the earnings of the prevailing party. Sanctions if parties with "[f]ull authority to

172. Orange County, Florida Amended Order Governing Complex Business Litigation Court and Procedures, Administrative Order No. 2003-17-04 (9th Cir. Ct.) (Dec. 20, 2006), *available at* http://www.ninthcircuit.org/research/orders/downloads/2003-17-04.pdf; Ninth Judicial Circuit Court of Fla., Complex Business Litigation Court, http://www.ninja9.org/Courts/Business/Index-BC.htm (select "Court Information" and "Rules" to access the Business Court Procedures) (last visited Sept. 9, 2007); *see also Business Court History*, *supra* note 10, at 231-37; ORANGE COUNTY. FLA. BUS. CT. P. R. 8.1-8.3, *available at* http://www.ninthcircuit.org/research/orders/downloads/Business%20Court%20Procedures.pdf (last visited June 2, 2010); *see also* Michael P. Bruyere & Meghan D. Marino, *Making Arbitration Truly Mandatory,* TR. & EST. MAG. (July 2008), *available at* http://www.lockelord.com/files/News/d5835345-5acd-4b94-b0e4-715531692aa9/Presentation/NewsAttachment/582c3e27-a67b-477e-9d1d-73f7c05e2644/2008-07_MakingArbitration_BruyereMarino_Entire.pdf.

173. MIAMI-DADE COUNTY, FLA. COMPLEX BUS. LIT. P. R. 8.1-8.3, *available at* http://www.jud11.flcourts.org/programs_and_services/CBLCourtProcedure01-17-2007%20_2_.pdf (last visited June 3, 2010).

174. Hillsborough County, Florida Complex Business Litigation Division, Administrative Order No. 5-2008-105 (13th Cir. Ct.) (July 30, 2008), *superseding* Administrative Order 5-2007-004, *available at* http://www.fljud13.org/dotnetnuke/portals/0/AO/DOCS/2008-105.pdf.

175. Administrative Order Amending the Establishment of the Complex Litigation Unit, Order No. 2008-9-Civ., Rules 8.1-8.4 (Jan. 9, 2009), *available at* http://www.jud11.flcourts.org/programs_and_services/CBLCourtProcedure01-17-2007%20_2_.pdf. Note the special ADR provisions are applicable to complex litigation cases, not just commercial cases, assuming that there is substantial overlap between the two categories within the same subdivision of the Ft. Lauderdale court.

State	General ADR Rules	Business Court Specific ADR Rules
		settle" do not attend. Parties must submit case summaries in advance of mediation. **MIAMI 11TH DISTRICT**[173] **MEDIATION/NON-BINDING ARBITRATION:** **How Ordered:** The Court shall assign one form of ADR in the case management order. The parties may request one form or another. **How Appointed:** Court or party-selection. **Ground Rules:** Attendance requirements and mandatory exchange of case information with a mediator. **TAMPA 13TH DISTRICT COMPLEX BUSINESS LITIGATION DIVISION:**[174] The Division has authority to establish specific case management procedures for business cases. **FT. LAUDERDALE 17TH DISTRICT** [175] **COMPLEX COMMERCIAL AND TORT SUBDIVISIONS GENERAL ADR:** **How Ordered:** ADR must be discussed during an initial case management conference. The court may order ADR procedures

State	General ADR Rules	Business Court Specific ADR Rules
		including mediation, non-binding arbitration, or an advisory jury trial.
Georgia Optional ADR procedures for civil cases and court-specific rules for business cases.	ADR is generally encouraged in civil litigation; however, programs are county specific throughout the state, but often mirror the ADR programs offered in Fulton and Gwinnett Counties respectively.[176] FULTON COUNTY GENERAL ADR:[177] Arbitration, mediation, early neutral evaluation, and judicially hosted settlement conference services available for most civil cases and mandatory for certain non-business cases such as family and landlord-tenant matters. **How Ordered:** At the request of the parties or an order of the Court. **How appointed:** All ADR providers must be registered with the Georgia Commission on Dispute Resolution.[178] GWINNETT COUNTY GENERAL ADR:[179]	

176. GEORGIA SUPREME COURT ALTERNATIVE DISPUTE RESOLUTION RULES, *available at* http://www.godr.org/files/CURRENT%20ADR%20RULES%20COMPLETE%201-19-2010.pdf.

177. Fulton County Superior Court, Alternative Dispute Resolution - Mediation, http://www.fultoncourt.org/sca200807/offices/adr-mediation.html (last visited June 2, 2010).

178. Georgia Commission on Dispute Resolution, http://www.ganet.org/gadr (last visited June 2, 2010).

179. Gwinnett Courts, Alternative Dispute Resolution Program, http://www.gwinnettcourts.com/#courtprograms_alternativedisputeresolution/ (last visited June 2, 2010); *see also* Gwinnett Judicial Circuit State of Georgia, Alternative Dispute Resolution Program,

State	General ADR Rules	Business Court Specific ADR Rules
	Mediation, neutral case evaluation, and arbitration services are available for most civil cases. **How Ordered:** At the request of the parties or an order of the Court. **How appointed:** All ADR providers must be registered with the Georgia Commission on Dispute Resolution.[180] **Special Masters:** Rule 46 of the Uniform Rules of Georgia's Superior Court sets out the broad range of possible uses the parties and court may make of a special master.[181]	**Fulton County Superior Court Business Case Division,**[182] *Est. 2005* & **Gwinnett County Superior Court Business Case Division,**[183] *Est. 2008* GENERAL ADR:[184] **How Ordered:** ADR must be discussed during the case management conference and included in the case schedule at the request of the parties or the direction of the court.
Oregon Mandatory mediation in	MEDIATION:[185] **How Ordered:** Mandatory for certain family matters.	

Internal Operating Procedure (Feb. 2002), http://www.gwinnettcourts.com/documents/adr/IOPADR2002.pdf.

180. Georgia Commission on Dispute Resolution, http://www.ganet.org/gadr (last visited June 2, 2010).

181. GA. UNIF. SUPER. CT. R. 46, *available at* http://www.georgiacourts.gov/files/UNIFORM+SUPERIOR+COURT+RULES+08_10.pdf (last visited June 3, 2010).

182. Superior Court of Fulton County Business Court, Project Overview, http://www.fultoncourt.org/superiorcourt/business_po.php (last visited June 2, 2010); ATLANTA, GA. CIR. CT. R. 1004.

183. Gwinnett Courts, Superior Court, Business Court, http://www.gwinnettcourts.com/#courtsjudges_superior_businesscourt/ (last visited June 2, 2010); *see also* Joel Furfari, *Verdicts Come Swiftly, Experimenting with Business Courts*, WIKI GUIDE TO GWINNET, Feb. 6, 2008, *available at* http://www.wikigwinnett.com/content.cfm?Action=wiki&WikiID=5710.

184. ATLANTA JUDICIAL CIR. R. 1004 (amended 2010), *available at* http://www.fultoncourt.org/sca200807/documents-and-forms/doc_view/6-business-court-rules.raw?tmpl=component.

185. LANE COUNTY, OR. CIR. CT. SUPPLEMENTARY R.12.001-004, effective Feb.1, 2009, *available at* http://courts.oregon.gov/Lane/docs/Lane_SLR_2009.pdf.

State	General ADR Rules	Business Court Specific ADR Rules
family matters and arbitration for civil cases with less than $50,000. No specific ADR rules for business cases.	ARBITRATION:[186] **How ordered:** Mandatory for all cases dealing with less than $50,000; optional for all other cases. **How Appointed:** Each party selects one arbitrator. Those two arbitrators then select however many more arbitrators will be required. **Ground rules:** Arbitrators may rule on all matters of own jurisdiction, up to and including validity of arbitration clause. Arbitrator has extensive powers, including calling his own experts.	**Lane County Circuit Court Commercial Court Program,**[187] *Est. 2006* No separate ADR rules for business cases.
Colorado General ADR may be ordered in all civil cases, with an emphasis on	GENERAL ADR:[188] **How Ordered:** A court may refer any dispute to ADR, although parties have five days to object with compelling reasons. Available forms of ADR include: arbitration, early neutral evaluation, med-arb, mini-trial, settlement conference, special masters, and summary jury trials.	**Commercial Litigation Docket,**[189] *Est. 2006* 4th Judicial District (El Paso & Teller Counties) No specific ADR rules, however the parties are

186. Chapter 36—Mediation and Arbitration, *available at* http://www.leg.state.or.us/ors/036.html (last visited June 2, 2010); *see also* LANE COUNTY, OR. CIR. CT. SUPPLEMENTARY R. 13.041, 13.121, effective Feb.1, 2009, *available at* http://courts.oregon.gov/Lane/docs/Lane_SLR_2009.pdf.

187. OPERATING STATEMENT, COMMERCIAL COURT PROGRAM, SECOND JUDICIAL DISTRICT, LANE COUNTY CIRCUIT COURT (2006), *available at* http://courts.oregon.gov/Lane/docs/commercialcourtoperatingstatementseptember262006.pdf; *see also* State of Oregon, Guide to Oregon Court, http://www.courtreference.com/Oregon-Courts.htm (last visited June 2, 2010); LANE COUNTY, OR. CIR. CT. SUPPLEMENTARY R. 7.031, effective Feb.1, 2009, *available at*
http://courts.oregon.gov/Lane/docs/Lane_SLR_2009.pdf.

188. Colorado Dispute Resolution Act, §13-22-301 (1988); *see also* Colorado Fourth Judicial District Office of Dispute Resolution, http://www.gofourth.org/disp-rez-directory.htm (last visited June 2, 2010).

189. Memorandum from Gilbert A. Martinez, Chief Judge, on Commercial Docket, Nov. 21, 2006, http://www.gofourth.org/CJD%20Comm%20docketfourth_judicial_district.htm.

State	General ADR Rules	Business Court Specific ADR Rules
identifying ADR procedures for commercial cases at the outset of the case.	**How Appointed:** Parties may choose from any ADR organization, or request a selection from the Office of Dispute Resolution. **Ground Rules:** Parties are responsible for costs and confidentiality provisions apply.	required to address ADR options in the initial case management conference including timing, method, and scope of potential dispute resolution techniques.[190]
Maine General ADR techniques available for most civil commercial cases.	GENERAL ADR:[191] Available in most civil cases including arbitration, mediation, and early neutral case evaluation. Mediation is mandatory for all small claims and contested family matters. **How Appointed:** Parties select a neutral from a court-approved "roster" or by agreement of the parties. **Ground Rules:** Court-referred ADR is overseen by CADRES (Court ADR Services), an organization which facilitates ADR, administers the neutral rosters, and collects nominal administrative fees.	**Maine Business & Consumer Court,**[192] *Est. 2007* GENERAL ADR:[193] **How Ordered:** Mandatory for most civil, commercial cases and includes techniques such as mediation, non-binding arbitration, or early neutral evaluation. **How Appointed:** Parties select from a court-approved registry of professionals. **Ground Rules:** ADR should be sought early in the case, typically within the first 60-

190. Memorandum from Commercial Docket Implementation Committee on Commercial Docket Practices Standards, Feb. 25, 2007, http://www.gofourth.org/m_c_m_o_r_a_n_d_u_m.htm.

191. ME. R. CIV. P. 92, *available at* http://www.courts.state.me.us/court_info/adr/adr_rules.html (last visited June 2, 2010); *see also* State of Maine Judicial Branch, ADR Rules and Policies, *available at* http://www.courts.state.me.us/court_info/adr/adr_rules.html (last visited June 2, 2010).

192. Establishment of the Business and Consumer Docket, Order No. JB-07-01 (June 1, 2007), *available at* http://www.courts.state.me.us/maine_courts/specialized/business/index.shtml.

193. ME. R. CIV. P., R. 16B, *available at* http://www.courts.state.me.us/rules_forms_fees/rules/MRCivPAmend2-27.htm (establishing a statewide Alternative Dispute Resolution (ADR) program for the Maine Superior Court); *see also*, State of Maine Judicial Branch, ADR Availability, http://www.courts.state.me.us/court_info/adr/adrcases.html (last visited June 2, 2010).

State	General ADR Rules	Business Court Specific ADR Rules
		120 days after commencement of the suit.
South Carolina Mediation available for most civil cases if selected.	MEDIATION:[194] **How Ordered**: For almost all claims, parties may be ordered to attend mediation unless they elect to arbitrate. Exceptions include prisoner and child services cases. The Supreme Court has ordered mandatory ADR in fourteen counties. **How Appointed:** Court or parties may appoint. Court appoints from a roster. **Ground Rules:** Normal confidentiality applies, except that all mediators must report statistical data for analysis and planning. Medical malpractice cases are put on the fast track to mediation.	**South Carolina Business Court,**[195] *Est. 2007* No separate ADR rules for business cases.
Ohio	MEDIATION:[196] **How Ordered:** Mediation is not mandatory,	**Ohio Commercial Docket,**[197] *Est. 2007*

194. *See* South Carolina State Court Register, http://www.judicial.state.sc.us/courtReg/indexADR.cfm (last visited June 2, 2010).

195. Business Court Pilot Program, Administrative Order No. 2007-09-07-01 (Amended by Order No. 2007-11-30-01) (Sept. 7, 2007), *available at* http://www.sccourts.org/busCourt/index.cfm.

196. OHIO SUPERINTENDENCE CT. R. 16, *available at* http://www.supremecourt.ohio.gov/LegalResources/Rules/superintendence/Superintendence.pdf (last visited June 2, 2010).

197. TEMPORARY R. OF SUPERINTENDENCE (effective July 1, 2008 through July 1, 2012) (amending OHIO SUPERINTENDENCE CT. R.), *available at* http://www.fccourts.org/gen/webfront.nsf/wp/8F154DF81B1C0F50852575210066 7C15/$FILE/Temporary%20Rules%20of%20Sup.%20as%20published%20(FINAL).pdf; Dan Crawford, *Ohio Bar Considers Push for Separate Business Court*, BUS. FIRST OF COLUMBUS, Jan. 3, 1997, *available at* http://columbus.bizjournals.com/columbus/stories/1997/01/06/story2.html; Thomas J. Moyer, Address at the Ohio State Bar Association Annual Meeting (May 17, 2007), *available at* http://www.supremecourtofohio.gov/PIO/Speeches/2007/OSBA_051707.asp; *see also Business Court History*, *supra* note 10, at 274; Hamilton County Law Library Blog, *Ohio "Commercial Docket" Rules of Superintendence/ Criminal & Civil Procedure* (posted July 11, 2008), *available at* http://cincinnatilaw.blogspot.com/2008/07/ohio-commercial-docket-rules-of.html (providing a link to Amendments to the Rules of Superintendence for the Courts of Ohio, Temp. Sup. R. 1.01—1.11).

State	General ADR Rules	Business Court Specific ADR Rules
Mediation available for most civil cases if requested. General ADR and special masters contemplated for business cases.	but counties have discretion in creating their own mediation programs. The state is considering unifying settlement rules. **How Appointed:** State sets qualifications; mediators in abuse cases are held to a higher standard. **Ground Rules:** Mediation communications are privileged under the Ohio UMA.	GENERAL ADR:[198] Mediation and other forms of ADR are contemplated in the sample case management order. SPECIAL MASTERS:[199] **How Ordered:** With the consent of the parties, the Court may appoint a special master to address substantive issues within the case. **How Appointed:** The Court appoints the special master, which can be suggested by the parties but which can have no underlying relationship with the parties.
New Hampshire General ADR available for most civil	GENERAL DISPUTE RESOLUTION:[200] Includes mediation, arbitration, and neutral case evaluation. **How Ordered:** On request of the parties or order of the Court.	

198. TEMPORARY R. OF SUPERINTENDENCE (effective July 1, 2008 through July 1, 2012) (amending OHIO SUPERINTENDENCE CT. R.), *available at* http://www.fccourts.org/gen/webfront.nsf/wp/8F154DF81B1C0F508525752100667C15/$FILE/Temporary%20Rules%20of%20Sup.%20as%20published%20(FINAL).pdf.

199. Sample Case Management Order, *available at* http://www.sconet.state.oh.us/boards/commDockets/docs/CaseMgmtOrder.pdf (last visited June 2, 2010).

200. N.H. SUPER. CT. R. 170, *available at* http://www.courts.state.nh.us/rules/sror/sror-h3-170.htm (last visited June 2, 2010); *see also* New Hampshire Judicial Branch, Office of Mediation & Arbitration, http://www.courts.state.nh.us/adrp/index.htm (last visited June 2, 2010) (describing alternative dispute resolution options and guidelines in the state); New Hampshire Judicial Branch, Office of Mediation & Arbitration, Superior Court Mediation Forms, *available at* http://www.courts.state.nh.us/adrp/forms/forms.htm#superior (last visited June 2, 2010); N.H. SUPER. CT. R. 173, *available at* http://www.courts.state.nh.us/rules/sror/sror-h3-171.htm (last visited June 2, 2010).

201. N.H. SUPER. CT. R. 170.B, *available at* http://www.courts.state.nh.us/rules/sror/sror-h3-170-b.htm (last visited June 2, 2010).

State	General ADR Rules	Business Court Specific ADR Rules
cases upon request and judicially-hosted settlement conferences available for complex cases if requested.	**How Appointed:** Parties stipulate to the selection of the neutral from a roster maintained by the Court/Office of Mediation & Arbitration. **Ground Rules:** Parties can select a volunteer or a paid mediator, but cases with claims over $50,000 are encouraged to select a paid mediator. **Judicially Hosted Settlement Conferences:**[201] **How Ordered:** By agreement of the parties, the Court may assign a complex case (those involving $250,000 or more in claims and requiring a trial of five or more days) to judicially hosted settlement conferences. **How Appointed:** An active or retired judge is assigned to the case, but the parties may appeal the selection within ten days.	**Business and Commercial Dispute Docket,**[202] *Est. 2008* No separate ADR rules for business cases.
Alabama Optional mediation available for most civil cases but is	**MEDIATION:**[203] A central state office oversees ADR, but each district court may create their own ADR or mediation program. **How Ordered:** By the Court or request of the parties in a civil case. **How Appointed:** By order of the Court and	**Commercial Litigation Docket,**[204] *Est. 2009* No separate ADR rules for business cases.

202. N.H. SUPER. CT. R. 214, http://www.courts.state.nh.us/rules/sror/sror-h3-214.htm (last visited June 2, 2010); *see also* Business and Commercial Dispute Docket Established in N.H. Superior Court, http://rattelaw.com/2009/10/23/business-and-commercial-dispute-docket-established-in-nh-superior-court/ (October 23, 2009) ("Enacted in 2008, SB-378 creates a separate Business and Commercial Dispute Docket within the Superior Court.").

203. ALABAMA CENTER FOR DISPUTE RESOLUTION, CIVIL COURT MEDIATION RULES 1-3 (May 1, 2003), http://alabamaadr.net/index2.php?option=com_content&do_pdf=1&id=32.

204. Administrative Order No.2009-23, Dec. 18, 2009 (10th Cir. Ct.) (establishing the Birmingham Division, Commercial Litigation Docket), *available at* http://10jc.alacourt.gov/AdminOrder2009_23_BusCt.pdf; *see also* J. Scott Vowell, *Creation of Commercial Litigation Docket in the Birmingham Division, Tenth Judicial District*, 71 ALA. LAW. 56, 56-57 (2010), *available at* www.alabar.org/publications/articles/Jan10/docket.pdf.

State	General ADR Rules	Business Court Specific ADR Rules
county specific.	agreement of the parties selecting a qualified mediator from a state-maintained roster of neutrals.	
SPECIALIZED COMPLEX CIVIL COURTS		
California General ADR is available for civil cases and programs are court-specific for complex courts.	**General ADR:**[205] No uniform rules with regard to ADR.[206] (Example of county-specific rules) **How Ordered:** Plaintiff must serve a copy of an ADR packet to defendant along with other papers. Almost all cases are referred to mediation, arbitration, or early settlement. If both parties agree, they may elect binding arbitration. **How Appointed:** Volunteer judges act as neutrals. Parties may also appoint or choose from a roster. **Ground Rules:** Cost ranges from 100 to 800 dollars an hour.	**Complex Litigation Program,**[207] *Est. 2000* **GENERAL ADR:** Each complex litigation program appears able to make its own ADR rules. The rules for the program in San Mateo County, for example, state the expectation that the parties will participate in some form of mediation or ADR and must discuss their plan at the initial case management conference.

205. SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN FRANCISCO, ALTERNATIVES TO TRIAL, ALTERNATIVE DISPUTE RESOLUTION INFORMATION PACKET (Sept. 2008), http://www.sfsuperiorcourt.org/Modules/ShowDocument.aspx?documentid=2222.

206. There are no special rules regarding alternative dispute resolution techniques. Information regarding the program, however, states that complex case departments are typically staffed with one or more clerks and one or more research attorneys with each judge, where the research attorneys "encourage and coordinate mediation hearings" among other case management responsibilities. JUDICIAL COUNCIL, CIVIL AND SMALL CLAIMS ADVISORY COMMITTEE, COMPLEX CIVIL LITIGATION PILOT PROGRAM, www.courtinfo.ca.gov/reference/documents/factsheets/comlit.pdf (last visited June 2, 2010); *see also* CAL. COURTS, ALTERNATIVE DISPUTE RESOLUTION (ADR) FOR CIVIL CASES: COURT ADR PROGRAMS, http://www.courtinfo.ca.gov/programs/adr/tcadr.htm (providing a general list of rules for each county).

207. ADMIN. OFFICE OF THE COURTS, CAL. COURTS, COMPLEX CIVIL LITIGATION PROGRAM FACT SHEET (2007), *available at* http://www.courtinfo.ca.gov/reference/documents/factsheets/comlit.pdf; CAL. COURTS, COMPLEX CIVIL LITIGATION PILOT PROGRAM, *available at* http://www.courtinfo.ca.gov/programs/innovations/documents/SI_Brief_ComplexCivLit.pdf.

State	General ADR Rules	Business Court Specific ADR Rules
Arizona General ADR available and strongly encouraged for civil cases.	GENERAL ADR:[208] **How Ordered:** After consultation, a judge or either party may direct the case to ADR. Parties are given an affirmative duty to consider ADR, including the promise of a meeting or telephone conversation within thirty days of the first appearance of defendant. **How Appointed:** Judicial roster or parties may appoint. **Ground Rules:** Parties may elect instead of ADR to have a one-day trial, in which each side gets two hours to present a case to four jurors. If a party to a non-binding arbitration elects to go to trial after the result, he must pay all fees if the result is not at least 10% more favorable than the initial verdict.	**Complex Litigation Court,**[209] *Est. 2002* No separate ADR rules for complex cases.

208. ARIZ. R. CIV. P. 16(g), *available at* http://www.superiorcourt.maricopa.gov/SuperiorCourt/AlternativeDisputeResolution/docs/16gorder.pdf (last visited June 2, 2010). The rules also provide for a mandatory case management conference where parties will discuss, among other topics, the scheduling of settlement conferences. Authorizing a Complex Civil Litigation Pilot Program Applicable in Maricopa County, Administrative Order No. 2002-107 (Nov. 22, 2002), http://www.supreme.state.az.us/orders/admorder/Orders02/2002-107.pdf (see Rule 16.3 entitled "Initial Case Management conference in Cases Assigned to the Complex Civil Litigation Program").

209. Authorizing a Complex Civil Litigation Pilot Program Applicable in Maricopa County, *supra* note 208; Extension of Authorization for the Complex Civil Litigation Pilot Program Applicable in Maricopa County, Administrative Order No. 2006-123 (Dec. 20, 2006), *available at* http://supreme.state.az.us/orders/admorder/Orders06/2006-123.pdf; *see also Business Court History*, *supra* note 10, at 213-15.

State	General ADR Rules	Business Court Specific ADR Rules
Connecticut Optional general ADR available for civil cases.	GENERAL ADR:[210] Including mediation, arbitration, attorney trial referee, special masters, court-annexed mediation, early neutral evaluation, and fact-finding mediators. **How Ordered:** Upon agreement of the parties, or it can be ordered by the Court in automobile and family cases. **How Appointed:** Parties select a neutral from a directory of privately-paid neutrals.	**Complex Litigation Docket,**[211] *Est. 2003* No separate ADR rules for complex cases.

In examining the availability and prevalence of alternative dispute resolution programs in specialized courts, it is also important to understand how ADR options within specialized courts are influenced by the existing trial court rules of the same jurisdiction. Therefore, this article looks at both the general trial court ADR rules as well as those applicable only to the specialized business or complex litigation court.

The procedural rules in all twenty-two state courts that also operate in specialized business or complex litigation courts address the issue of ADR. Of the specialized business courts, nine have specific ADR rules that apply only to the business cases, in addition to California, which provides specific ADR rules for the cases in its complex litigation program.[212] Therefore,

210. STATE OF CONNECTICUT JUDICIAL BRANCH, MEDIATION PROGRAMS/ALTERNATIVE DISPUTE RESOLUTION (ADR), *available at* http://www.jud.ct.gov/external/super/altdisp.htm (last visited June 2, 2010); STATE OF CONNECTICUT JUDICIAL BRANCH, SPECIAL SESSIONS, COMPLEX LITIGATION DOCKET, *available at* http://www.jud.ct.gov/external/super/spsess.htm#ComplexLitigationDocket (last visited June 2, 2010).

211. STATE OF CONNECTICUT JUDICIAL BRANCH, COMPLEX LITIGATION DOCKET, http://www.jud.state.ct.us/ external/super/spsess.htm#ComplexLitigationDocket (last visited Aug. 1, 2007); Memorandum from Joseph H. Pellegrino, Chief Court Adm'r Judge, Conn. Judicial Branch, Notice to Attorneys re Complex Litigation Docket, Superior Court, Civil Division (effective June 3, 2002), *available at* http://www.jud.state.ct.us/external/super/ComplexLitigationNotice.pdf; *see also Business Court History*, *supra* note 10, at 211-13.

212. California, Florida, Georgia, Maine, Maryland, Nevada, New York, North Carolina, Ohio, Oregon, Pennsylvania, and Rhode Island all provide additional ADR rules for their specialized court cases. *See supra* notes 136, 143, 150, 160, 162, 166, 171, 176, 185, 191, 196, 207 and accompanying text.

nearly half of the jurisdictions supplemented general trial ADR rules with additional procedures for business cases in specialized dockets.

Ten of the twenty-two state trial courts surveyed provided for optional mediation,[213] with three states making mediation mandatory in general civil cases.[214] Mediation appears to be favored in general trial court rules as opposed to arbitration, with thirteen jurisdictions providing for either optional or mandatory mediation and six jurisdictions providing for optional or mandatory arbitration.[215] The rules of six specialized business courts and two complex litigation courts also provide for "general ADR" allowing the court or the parties to determine the most appropriate form of ADR for the case, the parties, and the issues involved.[216] In addition to these traditional approaches to ADR, Nevada makes settlement conferences mandatory,[217] and New Hampshire provides specific rules related to judicially hosted settlement conferences for cases with damages claims exceeding $250,000.[218]

In specialized business and complex litigation courts, the jurisdictions are roughly split in preference between optional mediation (3), mandatory mediation (3), arbitration (2), and general ADR rules (4). In addition to these traditional categories, Pennsylvania makes participation in settlement conferences mandatory for business court cases,[219] and Ohio's business court rules provide for the appointment of special masters to decide substantive matters in quasi-ADR proceedings.[220] General ADR is also promoted within specialized business courts through aggressive case management orders entered in the initial phase of the case that specifically addresses and encourages the parties to consider and make a plan for ADR.

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213. This includes states such as Alabama, Florida, Maryland, Ohio, and South Carolina. *See supra* notes 166, 171, 194, 203 and accompanying text.

214. These three are Delaware (Superior Court), North Carolina (general trial court and business court), and Florida. Several jurisdictions require mediation of certain claims such as family matters or cases involving low dollar damages amounts. *See, e.g.*, LANE COUNTY, OR. CIR. CT. SUPPLEMENTARY R.12.001-004, effective Feb. 1, 2009, *available at* http://courts.oregon.gov/Lane/docs/Lane_SLR_2009.pdf; ME. R. CIV. P., 16B.

215. *See supra* notes 128, 147, 150, 160, 162, and 175. The trial court rules of the following states provide for arbitration: Delaware (Chancery Court), Nevada, New Jersey, Oregon, Pennsylvania, and Rhode Island.

216. The states where these courts reside are Arizona, California, Connecticut, Georgia, Maine, Massachusetts, and New Hampshire.

217. NEVADA ARBITRATION R. 3(c).

218. N.H. SUPER. CT. R. 170.

219. Hollin, *supra* note 152.

220. Sample Case Management Order, *supra* note 199.

The strength or weakness of the general trial court ADR rules provides no indication of the existence or strength of the ADR rules for the corresponding specialized court. For example, both North Carolina and Florida have robust ADR procedures for both the trial court and the business court. In contrast, Delaware Superior Court has mandatory mediation for civil cases, but no specific business court ADR procedures.[221] Similarly, Nevada had mandatory settlement conferences in civil cases and mandatory arbitration for low-damages claims, but no specific ADR rules for the specialized business court.[222] On the other hand, Massachusetts had relatively weak ADR rules at the general trial court level and no specific ADR rules for the business court.[223]

III. TESTING THE WATERS: SURVEY METHODOLOGY & RESULTS

A. Survey Methodology

The authors researched alternative dispute resolution rules in various jurisdictions with business courts, consulted with current business court judges, and constructed a survey tool to elicit responses regarding ADR techniques employed in specialized business courts. The survey was sent electronically to one hundred judges who have attended prior meetings of the American College of Business Court Judges or who sit on specialized business courts.[224] Recipients of the survey were sent reminder emails prior to the completion of the data collection period. Additionally, the authors sent individual emails to business court judges in states that were not yet represented in the survey results requesting their responses.

Twenty-eight respondents returned completed surveys, representing a twenty-eight percent response rate. One response was discarded from the results, however, because it was from a specialized tax court and is therefore outside of the scope of this article. Of the utilized responses, fourteen of the nineteen specialized business courts were represented, including California, which operates a specialized court for complex civil litigation. Therefore, the responses represent specialized courts in fourteen different states. Responses from multiple courts were received from the following

221. DEL. CH. R.16(b); Pileggi, *supra* note 133. Also, note that the Delaware Superior Court Business Court was just formed on May 1, 2010, so it may not have had time to formulate and enact specific ADR procedures at the time that this article was being researched and written.

222. NEVADA ARBITRATION R. 3(C).

223. MASS. SUP. CT. UNIF. DISPUTE RESOLUTION R. 1-9.

224. The survey was sent to an email address provided by a judge when registering for the 2009 annual meeting of the American College of Business Court Judges. Surveys were sent to 109 email addresses, of which nine were inaccurate and unable to receive messages.

jurisdictions: California, Florida, Georgia, Illinois, Maryland, Nevada, and Pennsylvania. The results are discussed in terms of respondents or jurisdictions (i.e., each operating business court); however, at several points throughout the discussion, the results are broken down into states, thus disregarding multiple responses received from different business courts (i.e., jurisdictions) within a single state.

B. Analysis of ADR in Specialized Business Courts Survey

Mediation is the most popular form of court-annexed alternative dispute resolution services according to survey respondents, with seventeen jurisdictions reporting court-annexed programs. Mediation[225] is reported as mandatory in only seven courts representing five states: Delaware, Florida, Maryland, North Carolina, and Pennsylvania. Such programs are commonly staffed with volunteer mediators (11) or privately paid mediators (15), that the parties can select from a list of court-approved[226] mediators (13), or by agreement on their own without assistance from the court (11). Nineteen respondents indicated that mediation typically took place at any time during the process, with twelve respondents indicating a preference that mediation take place while discovery is in its early stages or ongoing with pending motions for summary judgment.[227]

The prevalence of self-reported mediation programs in specialized courts comports with the above rules analysis where twelve states' rules authorize optional or mandatory mediation programs for civil cases, and roughly half of the jurisdictions have specialized mediation rules for business cases.

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225. Mediation here includes neutral evaluation to capture the affirmative response from Pennsylvania and to comport with the local rules requiring settlement conferences, which have structural similarities with mediation.

226. *See, e.g.*, SUPREME COURT OF THE STATE OF NEW YORK, COMMERCIAL DIVISION-COUNTY OF WESTCHESTER, RULES OF THE ALTERNATIVE DISPUTE RESOLUTION PROGRAM (2006), *available at* http://www.nycourts.gov/courts/comdiv/PDFs/9th-ADR-Rules.pdf.

227. Ten respondents indicated that the parties "typically" mediated prior to the completion of discovery and before summary judgment motions are filed, prior to the completion of discovery and after summary judgment motions are pending, and prior to completion of discovery and after summary judgment motions are decided.

Table 2: Mediation Programs in Specialized Business Courts		
	Jurisdictions	States
Court-Annexed Mediation	17	11
Mandatory Mediation	7	5

The inclusion of an ADR discussion as a component of case management is the strong commonality among all of the responding jurisdictions. Twenty-three jurisdictions[228] reported that the court discussed ADR with the parties during case management conferences with nineteen jurisdictions indicating that they do so early in the case at the initial conference or within a certain period of time after the case is initiated or assigned to the specialized court.

The use of special masters in business cases is another strong commonality among the responding jurisdictions, with twenty-six indicating that they utilize special masters. Responses indicate that special masters are rarely full-time employees of the court, are likely to be paid attorneys or retired judges, and are likely to be appointed by special authority of the assigned judge.[229] The majority of respondents (18) self-reported their use of special masters as "seldom." When utilized, special masters are more likely to be employed on discovery issues (20) versus substantive issues (10) or settlement efforts (8).

228. The following jurisdictions indicated no response with regards to the discussion of ADR techniques with the parties: Baltimore Circuit Court, Massachusetts Superior Court Business Litigation Section, the 6th District of Pennsylvania, and the Lucas County Common Pleas Pilot Business Court.

229. Five respondents indicated that their court programs provided full-time special masters for business cases: Delaware, Nevada, and South Carolina. Eighteen respondents indicated that the special masters utilized by their courts were paid attorneys or retired judges. Eighteen respondents also indicated that their use of special masters was "seldom" as opposed to the four jurisdictions (Alameda County Superior Court, Florida's 13th Judicial District Complex Business Litigation Court, New York Supreme Court, and Nevada's Eighth Judicial District) that reported their use of special masters as "frequent."

Table 3: Use of Special Masters in Business Court Cases	
	Jurisdictions
Special Masters Authorized by Rules	26
Special Masters used seldom	18
Special Masters used frequently	4
Special Masters used to resolve discovery issues	20
Special Masters used to resolve substantive issues	10
Special Masters used to reach settlement	8

Jurisdictions are roughly split between having court-annexed arbitration programs (13 responded in the affirmative) and not (15 responded in the negative). A strong majority (22) indicated that they have had cases where the parties converted litigation into arbitration after the suit was filed.[230]

Court-annexed neutral evaluation is offered in ten business courts located in five different states.[231] A majority of business courts do not offer such ADR services in a court-annexed setting. No business courts require neutral evaluation as a mandatory litigation process, though Philadelphia's Commerce Court requires settlement conferences in each case, which may have significant aspects of neutral evaluation. Of the jurisdictions offering a court-annexed program, all ten indicated that neutral evaluation was utilized at any time during the litigation process and was dependent upon the needs of the case and the parties.

Court-annexed mini trials are provided in seven business courts operating in four different states.[232] A majority of business court jurisdictions (20) do not offer court-annexed mini-trials. Of those jurisdictions offering mini-trails, a sitting judge not assigned to the case is

230. Reasons for such conversion include the following: a term of an agreement between the parties, financial and time efficiency, early resolution, technical expertise, and often at the request of a defendant wishing to avoid the uncertainty of a trial.

231. States offering court-annexed neutral evaluation include: California, Georgia, Maryland, New Hampshire, and Pennsylvania. *See also supra* notes 136-142.

232. The following jurisdictions reported court-annexed mini-trials: Tenth Judicial Circuit of Alabama, Santa Ana Superior Court (CA), Orange County Superior Court (CA), Florida's 13th District Complex Business Litigation Court, and Pittsburgh's Court of Common Pleas (PA).

most likely to serve as the neutral in the matter.[233] Like other forms of ADR, jurisdictions that offer such court-annexed services provide them at any time in the trial as determined by the needs of the case and the parties.

Only three business courts operating in two different states provide judicial panels to hear cases,[234] with the strong majority (23) indicating that judicial panels are not offered to business litigants.

Table 4: ADR Programs in Specialized Business Courts

	Yes	No	No Response
Ct. Annexed Med.	17	10	0
Ct. Annexed Arbitration	12	14	0
Ct. Annexed Neutral Eval.	10	16	1
Mini-Trials	7	20	0
Panels	3	23	1
ADR Discussed in Case Mgmt. Conf.	23	0	4

Table 1 and the rules discussion following it demonstrate that the rules for specialized courts demonstrate a preference for mediation programs (six total: three optional and three mandatory). This preference also is suggested in the survey responses that indicated a higher prevalence of mediation programs in specialized courts. Additionally, the rules discussion indicates that two jurisdictions had specific rules creating arbitration programs, and four jurisdictions had rules for "general ADR" programs. The judicial survey responses indicate a higher incidence of court-annexed arbitration in practice than was evident from the rules review. That there is a greater incidence of self-reported ADR techniques employed in specialized courts than is apparent from a facial review of the rules shows that ADR programs are often court, and even program, (i.e., business court versus family court) specific.[235] It also suggests fluidity in the construction and application of

233. Three jurisdictions reported that a sitting judge not assigned to the case served as the neutral in a mini-trial.

234. The Philadelphia Commerce Court Program, the Maryland Business Circuit Court, and the Baltimore Circuit Court offer judicial panels. Note, however, that five respondents indicated that their rules allowed for such panels. The rules in the 13th Judicial District of Florida and the 6th District of Pennsylvania authorize such panels; however, respondents indicated that they were not utilized. *See* Hollin, *supra* note 152.

235. The discrepancy between reported and rules-authorized programs may be due in part to general reporting errors, jurisdictions whose rules authorized "general ADR," and confusion over the meaning of "court-annexed arbitration."

ADR techniques to specialized court programs. For example, the business court operating in Fulton County (Atlanta), Georgia, does not have a specific rule authorizing, requiring, or creating an ADR program. However, the court self-reported that it is operating a court-annexed mediation program because the court has developed a list of referral business mediators, offers judicially-hosted settlement conferences, and manages cases on the assumption that mediation is de facto mandatory unless good cause is shown.[236]

Respondents were asked to share suggestions for the use of ADR in business court cases. These open-ended responses indicate a strong preference among business court judges for the increased use of ADR in business court cases, although the opinions differed as to the most appropriate form of ADR (arbitration, judicially-hosted settlement conference, mediation, or neutral case evaluation).[237] Between litigation and arbitration, however, there was disagreement among the respondents as to trends of usage (increase or decrease in favor among litigants) and efficacy. One respondent indicated that arbitration should be a full option in lieu of litigation following the Delaware Chancery Court model. Another participant responded that "[i]n our circuit litigation is much preferred over arbitration." Another participant echoed the same declining trend of arbitration with the response: "Overall, the manager of our court-annexed arbitration program has seen a sharp decline in the use of arbitration." He reported that "the parties do not like it any longer" and therefore do not seek it. "The Business Case Division has not had any cases refer out to arbitration, but many cases have settled through privately held mediation or judicially hosted settlement conferences." Representing perhaps a middle road approach is the following response, "[A]rbitration . . . makes sense in cases involving highly technical issues where it is possible to get a panel of experts. In other cases, it is in my experience generally not particularly cost-effective, as compared to litigation."[238]

In comparing the rules analysis and the judicial survey responses, we see that ADR, especially in the context of specialized courts, is a rapidly evolving and emerging component of resolving business disputes. The

236. Interview with Noelle Laguoux-Alvarez, Program Director & Staff Attorney for the Fulton County Superior Court, Business Court, (May 13, 2010) (on file with author).

237. This strong preference is evident in thirteen of the seventeen open responses to Question 8: "Do you have any suggestions or ideas for using arbitration in the business or complex litigation context? If you answered affirmatively, please describe your suggestions."

238. For a full review of comments and suggestions from respondents, please see Appendix B.

formal rules (both for general cases and business court-specific rules) reviewed in Table 1 indicate firm categories of ADR and a structured approach to creating and implementing such programs. As self-reported in the survey, the responsiveness and tailoring of specialized courts to the needs of business cases have likely contributed to a more fluid approach to implementing ADR techniques in these programs. The ADR programs in any specialized court must be able to serve business court goals including responsiveness, timely resolution, and specialization.

IV. CONCLUSIONS

A. Business Courts and Non-Arbitration ADR

Business courts are uniquely situated to implement non-arbitration ADR procedures and programs for a number of reasons. Business courts around the country have been used as testing laboratories to try new technologies and new rules and procedures.[239] They are an ideal arena in which to experiment with ADR options. Most significantly, the hands-on case management provided by business court judges with control of the litigation from the outset permits the judges to identify the ADR processes which will be most useful in a particular case. It also enables the judge to identify the right time to implement ADR procedures. Additionally, it affords judges the opportunity to discuss the benefits of ADR with the parties in the context of cost-efficient case management.

Perhaps the primary reason business courts can provide the effective, flexible, and creative use of ADR procedures is the nature of the parties appearing before these courts and their counsel. These are business-to-business cases. The businesspersons who are the decision makers with respect to conduct of the litigation are (1) more familiar with the legal system, (2) focused on bottom line cost considerations, (3) accustomed to analyzing and evaluating risks, and (4) comfortable with negotiating. They do, or should, exert more control over their counsel. Frequently, the outcome of a particular case can have ramifications beyond the specific outcome of the case at issue, thus providing them with incentive to find a solution rather than a judicial resolution. Every legal problem is a component of a larger business problem. Business managers are, by nature, more adept at the skills needed in facilitative procedures. As the tables above indicate, business court judges are taking advantage of those skills

239. *See, e.g.*, REPORT OF THE OFFICE OF COURT ADMINISTRATION TO THE CHIEF JUDGE ON THE COMMERCIAL DIVISION FOCUS GROUPS 3 (July 2006), *available at* http://www.nycourts.gov/reports/ComDivFocusGroupReport.pdf.

and the courts' management control to promote solutions to business problems short of trial. The court system benefits from the early resolution and the parties reach a more flexible and creative solution to their business issues.

B. Business Courts and Arbitration

When they have the option, business managers and their lawyers will make rational choices between binding arbitration and business courts. There may well be valid business reasons for parties to opt for arbitration of their disputes. Confidentiality of trade secrets and the desire to keep the issues or their resolution out of the public eye are legitimate business concerns. On the other hand, judicial validation of a specific practice or policy may be important to a business, or the manager may simply be more comfortable with an outcome reached through the judicial process. Perceived cost savings may also dictate the choice. Professor Stipanowich has addressed the numerous cost issues arising in the context of evolving arbitration practices that are moving arbitration in the direction of traditional court-based litigation.[240]

The most significant consideration affecting costs and the choice between litigation and arbitration is the explosion of electronically stored information (ESI) and its impact on the expense of discovery. Litigators are trained to obtain all the information that could possibly be relevant to their case. As more litigators become involved in arbitration, they bring with them their need for discovery. That emphasis on discovery is at odds with the historical approach in arbitration that either eliminated or strictly restricted discovery, thus promoting the cost effectiveness of arbitration. The nature and abundance of ESI has driven the costs of discovery to astronomical proportions. The costs of producing ESI are driven even higher by the need for and time involved in review by counsel. As arbitration comes to resemble litigation in terms of the costs associated with e-discovery, arbitration loses its cost advantage over litigation. Perhaps more significantly, the absence of any public record or rules governing e-discovery in arbitration makes its use more problematic since the costs cannot be adequately evaluated.[241] Here, business courts have an advantage

240. *The New Litigation*, *supra* note 3.

241. As Professor Stipanowich observed about the management of e-discovery in arbitration:

because there are public decisions and rules providing guidance on what the judges may do or what policies they will follow.[242] The courts offer more certainty in an already ambiguous world. Business court judges are more likely to develop expertise in dealing with e-discovery issues that will come up in virtually every business case, and they will create a public track record which will guide counsel.[243] How the courts and the arbitration profession

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> The challenge for arbitrators and arbitration processes is addressing these concerns effectively in the context of a highly discretionary system (without uniform rules or precedents) that is conventionally aimed at efficiency and expediency in conflict resolution. Issues include the scope or limits of e-discovery and its corresponding burdens and benefits; handling of the costs of retrieval; and the duty to preserve electronic information, spoliation issues, and related sanctions. Will it be possible for arbitrators to effectively meet the challenges of e-discovery in an efficient and relatively economical manner? The answer depends on the effectiveness of choices made by counselors and drafters.

Taking Charge, *supra* note 54, at 421. Professor Stipanowich offers suggestions for managing e-discovery in arbitration. *Id.* at 421-22. The common ground in making e-discovery manageable in arbitration is party cooperation on both procedure and exchange. Thus, the parties must understand, negotiate and choose their protocols, and then inform the arbitrators of the ground rules that the arbitrators are to manage or enforce. While court-based litigation does expect party cooperation in ESI management, for example FED. R. CIV. P. 26(f)(3)(C) ("A discovery plan must state the parties' views and proposals on . . . any issues about disclosure or discovery of electronically stored information, including the form or forms in which it should be produced."); General Rule of Practice and Procedure for the North Carolina Business Court states:

> Prior to filing motions and objections relating to discovery of information stored electronically, the parties shall discuss the possibility of shifting costs for electronic discovery, the use of Rule 30(b)(6) depositions of information technology personnel, and informal means of resolving disputes regarding technology and electronically stored information. The certificate required by Rule 18.6(a) shall address efforts to resolve the dispute through these and any other means related to discovery of information stored electronically.

N.C. BUS. CT. R. 18.6(b), *available at* http://www.ncbusinesscourt.net/New/localrules/NCBC%20Amended%20Local%20Rules%20-%202006.doc. It is ultimately a judge that will guide and control electronic discovery based on rules and judicial decisions. *Id.*

242. *See, e.g.*, Analog Devices, Inc. v. Michalski, 2006 NCBC 14 (N.C. Super. Ct. 2006), *available at* http://www.ncbusinesscourt.net/opinions/2006%20NCBC%2014.htm; Bank of America Corp. v. SR Int'l Business Ins. Co., 2006 NCBC 15 (N.C. Super. Ct. 2006), *available at* http://www.ncbusinesscourt.net/opinions/2006%20NCBC%2015.pdf.

243. Analog Devices, Inc. v. Michalski, 2006 NCBC 14 (N.C. Super. Ct. 2006), *available at* http://www.ncbusinesscourt.net/opinions/2006%20NCBC%2014.htm; Bank of America Corp. v. SR Int'l Business Ins. Co., 2006 NCBC 15 (N.C. Super. Ct. 2006), *available at* http://www.ncbusinesscourt.net/opinions/2006%20NCBC%2015.pdf. *See also* COMMERCIAL DIVISION, NASSAU COUNTY [NEW YORK], GUIDELINES FOR DISCOVERY OF ELECTRONICALLY STORED INFORMATION , *available at* http://www.nycourts.gov/courts/comdiv/PDFs/Nassau-E-Filing_Guidelines.pdf (last visited June 2, 2010); PROPOSED ELECTRONIC DISCOVERY GUIDELINES

handle e-discovery will have an outcome-determinative effect on the choices businesses and their counsel make with respect to forum selection.

Since arbitration and litigation both have their respective benefits and drawbacks, it should be expected that hybrids combining the best features of the two will develop over time. It is not difficult to envision business court judges sitting as the lead arbitrator on a three-arbitrator panel where the court rules governing e-discovery control the discovery process. Delaware has taken the first step in this direction by permitting its members of the Court of Chancery to sit as arbitrators.[244]

It is not a large step to expand the panel to include either party selected arbitrators or experts in highly technical areas. Such customized panels could provide the speed, cost effectiveness, and expertise desired by the business community while preserving the confidentiality that is important in many cases. New rules will have to be adopted to facilitate such creative solutions. Those rules would not be difficult to fashion, and binding arbitration provisions that incorporated the use of business court judges could provide the customization needed by particular businesses or industries.

FOR THE MARYLAND BUSINESS AND TECHNOLOGY CASE MANAGEMENT PROGRAM JUDGES, *available at* http://www.baltocts.state.md.us/civil/BTCMP/proposed_electronic_data_discovery_guidelines.pdf (last visited June 2, 2010).

244. *See* DEL. CODE ANN. tit. 10 §§ 349-50 (2010). This includes the Chancellor, Vice-Chancellor, or Masters in Chancery, as made clear by Chancery Rule 96(d)(2). Moreover, Delaware adopted a complementary statute, passed at the same time, providing that the "[t]he parties in any matter may stipulate that the decision of the Court of Chancery, or a Master of the Court of Chancery if they so choose, shall be final and binding and not subject to appeal." DEL. CODE ANN. tit. 10 § 351. While this dispute resolution format remains one of judicial litigation, it looks to provide the same kind of finality as arbitration; but here it is based on the parties' trust in the judges', or masters', recognized expertise in both procedural and substantive law, as well as the desire for the noted efficiency of Chancery and finality.

Sections 349, 350, and 351 were part of a single bill "intended to preserve Delaware's pre-eminence in offering cost-effective options for resolving disputes, particularly those involving commercial, corporate, and technology matters." *See* An Act to Amend Title 10 of the Delaware Code Relating to the Resolution of Disputes in the Court of Chancery, H.R. 49, 145th Cong. (2009), *available at* http://legis.delaware.gov/LIS/lis145.nsf/vwLegislation/HB+49/$file/legis.html?open. The voluntary arbitration statute (section 349) includes "business-to-business disputes about major contracts, joint ventures, or technology." It excludes consumer disputes. The jurisdiction is identical to that found in the voluntary mediation statute. *See* DEL. CODE. ANN. tit. 10 § 347 (2003). Both statutes mark significant evolutionary changes to Chancery's traditional equity jurisdiction by permitting the Chancellor, Vice-Chancellors, or Masters in Chancery to hear solely monetary disputes, though only in excess of $1 million.

One business court program now offers a hybrid of judicial and binding arbitration functions: the Philadelphia Commerce Court's Abramson Protocols.[245] "The [Abramson Protocols] procedure combines a three [business court] judge panel[246] ruling on the questions of law that will control the case, with [private commercial] arbitrators then making the final determinations based upon the three judge panel's opinion."[247] It is a process chosen by the parties, subject to the assigned business court judge's approval.[248] The parties agree to the key procedural terms by stipulation, which is then reviewed by the court that ultimately issues an order on procedures. "The parties then jointly submit a complete and exclusive list of all of the legal issues to be presented and decided by a panel of three Commerce Program Judges."[249] They brief and argue those issues to the panel, which then issues an opinion solely on the legal issues.[250] Before going to the arbitrators with this legal guidance in hand, however, the originally assigned business court judge holds a settlement conference. If the case does not settle, it then goes to party-selected arbitrators for factual hearings and final determination. By agreement, the arbitrators' award must be "subject to the guidance and instruction found in the panel opinion."[251]

The Abramson Protocols not only provide for the business court judges' combined expertise on the law,[252] but they,

> address the situation where parties may have a general desire to pursue the matter to resolution in arbitration, with its promise of finality [and privacy]; but are unwilling to arbitrate because there is no clear statement of the law to guide the arbitrators in how to interpret determinations of fact.[253]

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245. The protocols and associated forms can be found on the Philadelphia Court of Common Pleas Commerce Case Management Program website, http://www.courts.phila.gov/common-pleas/trial/civil/units/commerce-program.asp?keepThis=true&TB_iframe=true&height=350&width=520 (last visited June 2, 2010).

246. Philadelphia's business court has three designated judges. *See Business Court History, supra* note 10, at 177.

247. ABA LITIGATION DEVELOPMENTS, *supra* note 2, at 165-66.

248. *Id.*

249. *Id.*

250. *Id.*

251. *Id.* Further, the parties must agree that the panel's opinion is final and non-appealable. *Id.*

252. The three judge opinion not only serves the parties, but it then provides written precedent for others on the issues. *See, e.g.*, Independence Blue Cross v. Air Liquide Am., L.P., No. 2158 2007 LEXIS 294 (C.P. Phila.2007), *available at* http://fjd.phila.gov/pdf/cpcvcomprg/051100761.pdf. This is a significant difference from the confidentiality found in private commercial arbitration.

253. Lee Applebaum, *Commerce Court ADR Procedure Suited to Business Court*, LEGAL INTELLIGENCER, Feb. 7, 2006. "Parties who would otherwise want to use arbitration, but forego it because of concern about the lack of guidance and transparency on dispositive legal issues, should be freed from those concerns by the strength of a three judge opinion." ABA LITIGATION DEVELOPMENTS, *supra* note 2.

In this format, which is not designed for every case, the judge plays the traditional role of judge in adding discipline to the arbitration process to avoid the "splitting the baby" phenomenon, but also steps in as a settlement master or mediator at a time ripe for case disposition.

The role of non-arbitration ADR in business courts will continue to expand and become even more creative as the need and opportunity arises. The costs of litigation will drive the need. Business courts and arbitration panels will evolve to operate in many similar ways. Hybrids will be created that take advantage of the best of both procedures. As we develop a more global economy, the need for workable cost-effective dispute resolution will become more critical. Both the business courts and arbitration providers will have to develop new procedures that work in that environment and deal effectively with access to electronically stored information and other features unique to business-to-business disputes.

APPENDIX A: RESULTS

SURVEY OF ALTERNATIVE DISPUTE RESOLUTION TECHNIQUES UTILIZED IN BUSINESS COURTS

All questions are directed to specialized business court or complex litigation court programs, dockets, or the like. These questions are not directed to other parts of your court systems' dockets, or to other parts of your own dockets that do not include business or complex litigation specialization. Please review the informed consent attached to the original email.

Name of Court:_____

1. Arbitration

A. Does your Court have court-annexed arbitration procedures, i.e., where the arbitrators are provided by the Court itself?

Yes	13	No	14

B. If yes, do you and/or your judges ever act as arbitrators in connection with those procedures?

Yes	3	No	15

C. As a judge, have you experienced parties converting litigation to arbitration after a suit was filed?

Yes	22	No	5

D. If so, what were the motivations? (You may describe using single words or short phrases in lieu of a narrative.)

See Appendix B

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2. Mediation

A. Does your Court have court-annexed mediation, i.e., where the mediators are provided by the Court itself?

Yes	17	No	10

B. If so, please provide the following information (mark all applicable answers):

The Court uses volunteer mediators	11
The Court uses senior judges	7
The Court uses paid mediators	15
The Court uses other sitting judges	6
The Court uses persons other than lawyers or judges	2

C. Are the persons identified above:

Selected by the parties from a list of Court-approved mediators?	13
Selected by the parties from a list of Court-suggested mediators?	4
Selected by the parties without Court assistance?	11

D. At what point in the litigation process do the parties typically mediate (mark all applicable answers)?

Prior to completion of discovery and before summary judgment motions are decided	12
Prior to completion of discovery and after summary judgment motions are pending	11
Prior to completion of discovery and after summary judgment motions are decided	10
On the eve of trial	8
During trial	6

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Depends on the case, and the parties may mediate at any time during the process	19

E. Is mediation mandatory in each case?

Yes	7	No	16

F. If yes, does your Court require using court-annexed mediation, as defined above, or may the parties select private mediation?

The parties must use court-annexed mediation	1
The parties may use court-annexed mediation (if available) or private mediation	9

3. Neutral Valuation

A. Does your Court have a court-annexed neutral valuation program, i.e., where the neutrals are provided by the Court itself?

Yes	10	No	16

B. If so, please provide the following information (mark all applicable answers):

The Court uses volunteer neutrals	6
The Court uses senior judges	4
The Court uses paid neutrals	6
The Court uses other sitting judges	1
The Court uses persons other than lawyers or judges	0

C. Are the persons identified above:

Selected by the parties from a list of Court-approved neutrals?	9
Selected by the parties from a list of Court-suggested neutrals?	0
Selected by the parties without Court assistance?	5

D. At what point in the litigation process do the parties typically go to neutral valuation (mark all applicable answers)?

Prior to completion of discovery and before summary judgment motions are decided	2
Prior to completion of discovery and after summary judgment motions are pending	2
Prior to completion of discovery and after summary judgment motions are decided	2
On the eve of trial	1
During trial	1
Depends on the case, and the parties may go to neutral valuation at any time during the litigation process	10

E. Is neutral valuation mandatory in each case?

Yes	0	No	15

F. If so, does your Court require using court-annexed neutral valuation, as defined above, or may the parties select private neutrals?

The parties must use court-annexed neutral valuation	1
The parties may use court-annexed neutral valuation (if available) or private neutral valuation	4

4. Mini-trials

A. Does your Court use mini-trials?

Yes	7	No	20

B. If so, please provide the following information (mark all applicable answers):

The Court uses sitting judges	1
The Court uses volunteer lawyers or volunteer retired judges	0
The Court uses senior judges	1
The Court uses paid lawyers or paid retired judges	1
The Court uses sitting judges other than the assigned judge	4
The Court uses persons other than lawyers or judges	1

C. Are the persons identified above:

Selected by the parties from a Court-approved list?	0
Selected by the parties from a Court-suggested list?	0
Selected by the parties without Court assistance?	2

D. At what point in the litigation process do the parties typically use mini-trials?

Prior to completion of discovery and before summary judgment motions are decided	1
Prior to completion of discovery and after summary judgment motions are pending	0
Prior to completion of discovery and after summary judgment motions are decided	0
On the eve of trial	0
During trial	0

Depends on the case, and the parties may conduct mini-trials at any time during the litigation process	6

E. Are mini-trials ever mandatory?

Yes	0	No	9

5. Panels

A. Do the judges of your Court ever sit in panels to hear cases?

Yes	3	No	23

B. Do your rules provide that opportunity?

Yes	5	No	14

C. If yes, how often does your Court use panels?

Never	3
Infrequently	3
Sometimes	0
Often	0
Always	0

6. Case Management

A. Do you communicate with parties/lawyers about ADR as part of case management?

Yes	23	No	0

B. If so, how, and at what stage?
See Appendix B

7. Special Masters

A. Do your Courts provide for or permit the use of special masters?

Yes	26	No	1

B. If so, does your Court have special masters employed by the court full time?

Yes	5	No	20

C. If so, and your Court does not have special masters employed by the court full time, do you have the authority to appoint a special master?

Yes	19	No	0

D. If you have the authority to appoint a special master, are the persons appointed (mark all applicable answers)?

Other judges	1
Senior judges	4
Volunteer attorneys	4
Paid attorneys or paid retired judges	18
Persons other than attorneys or judges	3

E. How would you describe your use of special masters?

Seldom	18	Frequent	14

F. For what purposes do you utilize special masters? (check all that apply)

Discovery	20
Substantive issues	10
Settlement	8

8. Additional Information (Optional)

A. Do you have any suggestions or ideas for using arbitration in the business or complex litigation context?

Yes 13	No 13

If you answered affirmatively, please describe your suggestions:
See Appendix B

B. Does your Court have written arbitration procedures or guidelines?

Yes 9	No 16

If you answered affirmatively, may we contact you to obtain a copy of the procedures?

Yes 11	No 1

Name:_____
Address:_____
_____
Email address: _____

Would you like more information on court-annexed arbitration? If so, please provide your contact information below:

Name:_____
Address:_____
_____
Email address: _____

Thank you for your participation.
Please return this completed survey to anees@gsu.edu or via postal mail to:

Anne Tucker Nees,
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Georgia State University College of Law
P.O. Box 4037
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[Vol. 11: 35, 2010]

APPENDIX B:

Open Ended Survey Responses

Survey #	1.D	6.B	8.A.	Notes
1.	Privacy. Finality. Less Discovery. Save Money.	Case Management Conference three months after filing	See attached "Abramson Protocols" (will summarize)	
2.	NR	NR	Mandatory and have parties pay	
3.	NR	Throughout the case	10 Del. C. §349, parties may agree to arbitration before a Chancery judge.	For 7 F. (Advancement/ Indemnification details re specific fees and expenses)
4.	Protecting confidential information	At case management conference	Having client representatives at case management meetings and telling them to weigh litigation costs v. ADR costs	
5.	It is essentially a rent a judge situation- we will use a "senior" judge.	Beginning of case	"Just to make it available as an alternative"	
6.	Efficiency, cost prompt resolution	NR	NR	
7.	Early resolution, technical expertise, special background	Case management conference	NR	
8.	Motion to enforce arbitration clause	Initial conference and each status conference	NR	

Survey #	1.D	6.B	8.A.	Notes
9.	Time and Money	Agenda of each CML	NR	
10.	Economic, tactical, more time efficient	Pre-trial conference and initial scheduling conferences	Arbitration as full option in lieu of litigation. Follow Delaware Chancery Court model.	
11.	"The parties' motivations are unknown"	Within 120 days of case filing	Non-binding arbitration for cases where one side has an unrealistic assessment of its case's strength.	
12.	Wrote no "unless a contract provision exists".	Almost every status conference	"We should have ability to (illegible) arbitr (illegible)"	
13.	NR	NR	NR	
14.	NR	Initial case management conference, occasionally brought up by the judge in later status conferences	"Overall, the manager of our court-annexed arbitration program has seen a sharp decline in the use of arbitration. He reports that 'the parties do not like it any longer' and therefore do not seek it. The Business Case Division has not had any cases refer out to arbitration, but many cases have settled through privately	

Survey #	1.D	6.B	8.A.	Notes
			held mediation or judicially hosted settlement conferences"	
15. ***[Response excluded from results discussion]***	NR	At case management conference	NR	
16.	Arbitration clause and tactical advantage to arbitration	Discussed at initial case management conference. Mediation deadline set.	"In our circuit litigation is much preferred over arbitration"	
17.		At Rule 16 hearing	ADR should be mandatory in every case. Parties should select the form.	No court annexed mediation, but ADR is required in every civil case. The parties may elect mediation, arbitration, or neutral case assessment. If they cannot agree, the default is mediation. The rules allow the parties to select the means and timing of ADR subject to approval by the Court. The

Survey #	1.D	6.B	8.A.	Notes
				Court will incorporate the agreed upon ADR in its case scheduling orders."
18.	Mandatory	Pre-trial before and after discovery	NR	
19.	"To extricate their case from a rapidly approaching trial date" (Delay?)	At case management conference and resolution of motions for summary judgment	Encourage ADR in complex litigation	
20.	Privacy, reliable dates, reduced costs	Rule 16 conference and whenever possible	"I promote the idea, for all the reasons business people general[ly] choose it— speed, cost, confidentiality"	
21.	100% by defense trying to avoid a jury trial.	It is set out in the scheduling order just after the case is assigned a track.		
22.	They use arbitration if there is a contract calling for it and a party— typically defendant— moves to compel arbitration.	"Early and often. It's simple self-preservation. We can't possibly try every case on our calendars."	"Arbitration—as opposed to mediation—makes sense in cases involving highly technical issues where it is possible to get a panel of experts. In other cases, it is in my experience generally not particularly cost-effective, as	They have court-annexed arb. But not in business cases. "We can direct parties to try mediation and, if they can't agree on a mediator, appoint one from a previously-

Survey #	1.D	6.B	8.A.	Notes
			compared to litigation."	approved list maintained by the court. We do not, however, provide or supply mediators." No written guidelines or procedures for arbitration in the business court—but such guidelines do exist for other types of cases.
23.	Money	Any stage	NR	
24.	NR	Frequently urges parties towards mediation	Mediation is always appropriate after discovery is complete, and is most valuable at that time.	
25.	limit discovery procedures and shorten the trial	Following the answer, initial appear[ance]s, the parties and counsel meet with the court to determine what information is needed for a settlement conference to be productive. A settlement		

Survey #	1.D	6.B	8.A.	Notes
		conference is scheduled with another Business Court Judge and the time frame agreed to by counsel.		
26.	NR	NR	NR	
27.	Faster, easier, cheaper process	At the very first case management conference	Arbitration and, specifically, judicial settlement conferences seem to be very helpful in lowering the cost, time and risk to litigate	Court has judicially hosted settlement conferences utilizing active judges, senior judges and other non-lawyer/judges
28.	My experience has been the opposite, I have seen cases where parties are litigating the enforceability of arbitration clauses.	NR	NR	Notes that mediation is not mandatory, but is strongly encouraged.