

**ALTERNATIVE DISPUTE RESOLUTION:  
AN OVERVIEW**

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**M. Elizabeth Medaglia, Esq.  
Jackson & Campbell, P.C.  
1120 20<sup>th</sup> Street, N.W., South Tower  
Washington, D.C. 20036 USA  
Tel: 202-457-1612  
Fax: 202-457-1678  
Email: [LMedaglia@JacksCamp.com](mailto:LMedaglia@JacksCamp.com)  
[www.JacksCamp.com](http://www.JacksCamp.com)**

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# ***ALTERNATIVE DISPUTE RESOLUTION: AN OVERVIEW***

M. Elizabeth Medaglia\*

## **A. Introduction and Purpose of ADR**

As long as humans have interacted with one another, there has been a need to resolve the conflicts that arise in everyday life. In our modern litigious society, the average individual or business person faced with a conflict may instinctively turn to the legal system to remedy his or her perceived wrong. However, upon closer examination, numerous choices are available to disputants who wish to settle their differences in another, arguably more civilized, manner.

Historically, resort to the courts to solve disputes was discouraged. In colonial times, litigation was perceived as contrary to the well being and religious principles of the community. The early merchant community, in order to preserve business relations, regularly turned to arbitration – a process whereby opposing parties authorized a neutral individual to make a binding decision to resolve a dispute. As courts became more congested in the late nineteenth and early twentieth centuries people looked to forms of dispute resolution that avoided costly delays. These historical goals of preserving relations and avoiding inefficient formal legal processes have driven the development of Alternative Dispute Resolution in recent times.

Alternative Dispute Resolution (“ADR”) is a general term encompassing a wide range of methods to resolve conflicts outside formal court litigation system.<sup>1</sup> While arbitration is one of the oldest, and arguably best known of the mechanisms, there are numerous others available,

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\* M. Elizabeth Medaglia is a Senior Director in the law firm of Jackson & Campbell, P.C., in Washington, D.C. The views expressed in this article are the authors’ own and are not intended to reflect those of her firm or its clients.

<sup>1</sup> See generally Linda R. Singer, *Settling Disputes: Conflict Resolution in Business, Families*

such as mediation, summary jury trials, mini-trials, and private judging. Some of these techniques have been developed in the last 30 years, and new refinements continue to be developed on an ongoing basis.

Approaches to ADR may be categorized as court-related or private. The distinction is necessarily somewhat inexact since the judicial system has traditionally sought ways to facilitate settlement between disputants. For example, to encourage negotiations, in most jurisdictions settlement offers are not admissible into evidence to prove liability. However, it is important to recognize that a distinction exists: sometimes disputants choose ADR to avoid the court system, while at other times; they are forced by the court to use it as part of that jurisdiction's civil procedure and irrespective of their views on its value.

There is no single purpose for the use of ADR. Therefore, in deciding whether to avail oneself of ADR, it is important to understand what goals one is pursuing. The following are some of the most commonly cited purposes for using ADR:

1. to create efficiencies (*i.e.*, to save time and money);
2. to preserve party relationships;
3. to promote active party participation;
4. to achieve better or more effective results, due to the expertise of neutral parties;
5. to assist people in obtaining resolution of disputes, by reducing costs of dispute resolution.

As Stephen Goldberg, *et al*, note in their treatise, *Dispute Resolution*, these goals may overlap and conflict.<sup>2</sup> Therefore, it is essential to analyze thoroughly one's needs and reasons for pursuing an alternative to the court system, and the probable effect on the disputants of selecting one alternative rather than another.

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*and the Legal System* (1994); Stephen Goldberg et al., *Dispute Resolution* (2002).

<sup>2</sup> Goldberg, *supra* note 1, at 5.

## B. ADR Develops

The early American colonists in New England were a religious people. The church played a dominant role in the lives of these early settlers, and one of its functions was to serve as a court for a broad spectrum of disputes, ranging from religious differences to commercial and property controversies. Lawyers and civil lawsuits were shunned, as they were perceived as destructive to community harmony.<sup>3</sup>

Even cosmopolitan Boston shared this prejudice against lawyers, and a 1635 town meeting “ordered that no inhabitant ‘shall sue one another at law’ until an arbitration panel had heard the dispute.” Quaker settlers followed a defined procedure of dispute resolution that relied on negotiation and arbitration. Similarly, Dutch colonists in New York relied on a “Board of Nine Men” to resolve controversies by means of conciliation, mediation and arbitration.<sup>4</sup>

Commercial arbitration gained widespread acceptance by the merchant communities in the New York and Philadelphia regions during the mid-eighteenth century. In 1786, the New York Chamber of Commerce established the first private tribunal in America for the settlement of commercial disputes.<sup>5</sup> Merchants commonly included arbitration clauses in a wide variety of contracts. A subsidiary of the CIGNA corporation inserted arbitration clauses in its insurance policies as far back as 1793.<sup>6</sup> Businessmen preferred the speedy and low-cost alternative to formal legal proceedings, and viewed lawyers with suspicion, fearing that they would place their own interests above those of the commercial community. Commercial arbitration is the longest

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<sup>3</sup> Jerold S. Auerbach, *Justice Without Law?* at 23-25 (1985).

<sup>4</sup> *Id.* at 31.

<sup>5</sup> *Id.* at 33.

<sup>6</sup> Robert L. Robinson, *ADR in the Insurance Industry: One Company’s Perspective*, *Arb. J.*, Sept. 1990, at 24.

continuing form of alternative dispute resolution in American society.<sup>7</sup>

The Civil War, a watershed in our nation's history, also marked a turning point in the history of ADR. The Freedmen's Bureau, created by the federal government to facilitate the transition of former slaves into society, faced a tremendous volume of civil disputes between former masters and slaves. General O. O. Howard, Commissioner of the Freedmen's Bureau, developed a system of three-man arbitration tribunals for labor-contract disputes involving amounts of less than \$200. Although consistently favoring the interests of the planter class, these tribunals provided an expeditious means of settling thousands of cases which threatened to swamp the southern courts.<sup>8</sup> One author has noted the importance of the shifting focus of dispute resolution in the aftermath of the war: "Until the Civil War, alternative dispute settlement expressed an ideology of community justice. Thereafter ... it collapsed into an argument for judicial efficiency."<sup>9</sup>

The conflict between labor and management in the late 1800's invited interest in arbitration as a means to avoid violence and encourage settlement. Although states created arbitration tribunals to deal with labor disputes, the disparity of power between labor and management tended to favor the interests of the latter. It was not until the 1930's, when strong unions emerged along with a legal basis for collective bargaining, that the arbitration process became a satisfactory method of resolving labor disputes.<sup>10</sup> During World War II the National War Labor Board was created to mediate disputes between management and labor. The Taft-Hartley Act of 1947 established the Federal Mediation and Conciliation Service as an

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<sup>7</sup> Auerbach, *supra* note 3, at 43.

<sup>8</sup> *Id.* at 58-59.

<sup>9</sup> *Id.* at 57.

<sup>10</sup> *Id.* at 66.

independent agency offering assistance to management and labor in settling disputes.<sup>11</sup>

Commercial arbitration gained new prominence in the early twentieth century. While it had become an important aspect of trade associations (such as the New York Stock Exchange and Chicago Board of Trade) which sought to preserve business relations through internal resolution of disputes, commercial arbitration emerged after World War I as an attractive alternative to an increasingly clogged court system. In the progressive era of social legislation in the early 1900's, courts faced a great increase in the volume of cases involving such issues as labor-management relations and workplace conditions for women and children. The attraction of arbitration increased with the passage in 1920 of a New York statute which provided that agreements to arbitrate future disputes were irrevocable and enforceable. In 1926 the American Arbitration Association was formed to facilitate the resolution of commercial disputes through arbitration.<sup>12</sup>

The 1960's and 1970's witnessed a dramatic increase in litigation that has continued largely unabated to this day. A variety of factors combined to produce this condition. Among them was the diminishing role of the family, community and church, which have historically operated as mediating institutions. At the same time that these organizations lost a degree of their significance, both federal and state governments created numerous new causes of action to respond to social problems – ranging from the Civil Rights Act of 1964, to state laws prohibiting discrimination on various grounds, to environmental legislation.<sup>13</sup> Accompanying the dramatic increase in litigation has been the significant expansion of the discovery process – with its

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<sup>11</sup> U.S. Department of Labor, *Brief History of the American Labor Movement* 32 (1976).

<sup>12</sup> Auerbach, *supra* note 3, at 103-6.

<sup>13</sup> Goldberg, *supra* note 1, at 3-4.

attendant increases in costs, disputes, and abuses.<sup>14</sup>

Partly in response to these factors, the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice (the “Pound Conference”) convened in 1976 to generate a national discussion of the current status of the American judicial system. Sponsored by the American Bar Association, Conference of Chief Justices, and the Judicial Conference of the United States, the Pound Conference was designed “to take a hard look at how our system of justice is working,” to “ask whether it can cope with the demands of the future,” and to “begin a process of inquiry into needed change.”<sup>15</sup>

The Pound Conference triggered a significant national discussion concerning ADR. Professor Frank E. A. Sander presented a paper at the conference entitled “Varieties of Dispute Processing,” in which he advocated a “flexible and diverse panoply of dispute resolution processes,” which would provide for more effective conflict resolution than habitual recourse to the court system.<sup>16</sup> The ABA created a Special Committee on Dispute Resolution, (now established as the Standing Committee on Dispute Resolution) and also formed a Pound Conference Follow-Up Task Force which in 1976 and 1977 submitted recommendations for improving the delivery of justice.<sup>17</sup>

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<sup>14</sup> Daniel Segal, *Survey of the Literature on Discovery from 1970 to the Present: Expressed Dissatisfactions and Proposed Reforms* (1978); Section of Litigation, American Bar Association, *Report of the Special Committee for the Study of Discovery Abuse* (1977).

<sup>15</sup> Warren E. Burger, *Agenda for 2000 A.D. – A Need for Systematic Anticipation*, in *Addresses Delivered at the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice*, 70 F.R.D. 79, 83 (1976).

<sup>16</sup> *Id.* at 130-131.

<sup>17</sup> American Bar Association, *Report of Pound Conference Follow-Up Task Force*, 74 F.R.D. 159 (1976).

### C. ADR Matured

ADR, as an alternative to full-blown litigation, is now an established part of our dispute-resolution systems. As suggested above, disputants' involvement with ADR may be required by judicial authority, or it may be private and voluntary.

In court-related ADR, the parties are ordered by the court to participate in a particular method of ADR. In some jurisdictions the court orders arbitration for disputes involving amounts than a certain dollar value.<sup>18</sup> In other jurisdictions the court orders the parties to select a mutually agreeable ADR technique.<sup>19</sup> In still other courts, an officer screens newly docketed cases for appropriate ones to be sent to mandatory mediation sessions.<sup>20</sup>

Modern court-related alternatives include, among others, the summary jury trial, "private judging," and the "multi-door" court concept. Federal District Judge Thomas D. Lambros, of the Northern District of Ohio, Eastern Division, invented the summary jury trial in 1980. Conceived as a final alternative before a full trial begins, the summary jury trial seeks to induce settlement by offering a prediction of what an actual jury would find in a particular case. The first summary jury trial involved a products liability claim of a defective football helmet.<sup>21</sup> Since its origin, the process has been used in federal courts in at least Colorado, the District of Columbia, Florida, Massachusetts, Michigan, Montana, Oklahoma, and Pennsylvania. In 1984, the Judicial Conference of the United States endorsed the experimental use of summary jury trials "as a

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<sup>18</sup> See, e.g. N.Y. Civ. Prac. L. & R. § 3405 (2003).

<sup>19</sup> See, e.g., S.D. Tex. R. 16.4.

<sup>20</sup> See, e.g., Bureau of National Affairs, *Circuit Executive for District of Columbia Circuit Describes Design, Goal, and Promise of ADR Program*, 3 Alternative Disp. Resol. Rep. 326 (1989).

<sup>21</sup> Thomas D. Lambros, *The Summary Jury Trial and Other Alternative Methods of Dispute Resolution*, 103 F.R.D. 461, 463 (1984).

means of promoting fair and equitable settlement of potentially lengthy civil jury cases.”<sup>22</sup>

The practice of “private judging,” or “trial by referee,” dates from the middle 1800’s, but has recently gained in popularity in those states where the procedure is available. Since 1872, the California code has provided for the reference to a referee for the determination of certain civil issues.<sup>23</sup> Traditionally, the procedure was used to determine specific issues or questions of fact in a case. However, in 1976, some Los Angeles County attorneys, with the consent of all parties, moved to have their entire case referred to a retired judge for trial. Following the successful resolution of that case, the use of “private judging” has increased in frequency. The parties pay for the appointed judge’s services, and then agree among themselves how to divide this cost (usually the parties pay equal shares).<sup>24</sup> New York has a similar process, referred to as “trial by referee.”<sup>25</sup>

Professor Sander’s idea of channeling disputes into different “doors” of a courthouse – including, but not limited to litigation, conciliation, mediation, arbitration, and social services – has been adopted by several jurisdictions across the country. For example, the Superior Court of the District of Columbia institutionalized the Multi-Door program as a full operating Division of that court in 1989.<sup>26</sup> At the federal level, both the U.S. Court of Appeals for the District of

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<sup>22</sup> Thomas D. Lambros, *The Judge’s Role in Fostering Voluntary Settlements*, 29 Vill. L. Rev. 1363, 1377-78 (1984); see also Lucille M. Ponte, *Putting Mandatory Summary Jury Trial Back on the Docket: Recommendations on the Exercise of Judicial Authority*, 63 Fordham L. Rev. 1069, 1071 n.14 (1995).

<sup>23</sup> Cal. Civ. Proc. Code §§ 638-45 (2004).

<sup>24</sup> Barlow F. Christensen, *Private Justice: California’s General Reference Procedure*, 1982 Am. B. Found. J. 79, 79-81; see also *Alternative Dispute Resolution in Commercial Intellectual Property Disputes*, Scott H. Blackmand, 47 Am. U.L. Rev. 1709, 1715 (1998).

<sup>25</sup> N.Y. Civ. Prac. L. & R. §§ 4301-4321 (2003). See also David J. Shapiro, *Private Judging in the State of New York: A Critical Introduction*, 23 Colum. J.L. & Soc. Probs. 275 (1990).

<sup>26</sup> Superior Court of the District of Columbia, *The Multi-Door Dispute Resolution Division of the Superior Court of the District of Columbia* (undated pamphlet).

Columbia Circuit and the U.S. District Court for the District of Columbia have established court-adjunct ADR programs which offer litigants opportunities to use various conflict resolution techniques.<sup>27</sup>

Modern private methods of dispute resolution have proliferated in the last 25 years. These private techniques, as the name implies, are utilized without the supervision of a court. They may be used without ever filing suit, or they might be resorted to after a suit has been commenced. In the latter case, the parties may need to obtain a stay from the court - although in some jurisdictions the docket may be so congested that no stay would be necessary.

Arbitration and mediation have existed as alternatives for certain types of disputes for at least the last century. However, the contemporary era of ADR has witnessed a far greater quantity and variety of cases being resolved using ADR (not simply commercial or labor issues). Also, various for-profit companies have emerged to provide dispute resolution services. In addition to arbitration and mediation, mechanisms which have found favor include early neutral evaluation, fact finding procedures, hybrid arbitration/mediation procedures and minitrials.

Among the newer dispute resolution procedures, the minitrial has gained considerable attention. The first minitrial was held in 1977 to resolve a patent infringement dispute between two large corporations in California. In addition to this technically complex case, minitrials have been used in product liability, contract, construction, toxic tort, and trade secret disputes. While most cases have involved two business entities, others have involved disputes among multiple parties, or disputes between individuals and business entities.<sup>28</sup>

Whereas the American Arbitration Association operates on a non-profit basis, other

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<sup>27</sup> Bureau of National Affairs, *supra* note 20, at 326.

<sup>28</sup> Eric D. Green *et al.*, *Settling Large Case Litigation: An Alternative Approach*, 11 Loy. L.A. L. Rev. 493 (1978); *see also* Catherine Cronin-Harris, *Symposium on Business Dispute*

entities offer dispute resolution services for a profit. These private companies actively recruit both retired and sitting federal and state court judges to serve as mediators or neutral decisionmakers. The Center for Public Resources propounds a policy statement and maintains a file on law firms and corporations which pledge to investigate the use of ADR procedures before pursuing full-scale litigation.<sup>29</sup>

#### **D. A Brief Description of Common ADR Methods**

This overview would not be completed without briefly describing the most typical ADR mechanisms in use today.

##### **1. *Direct Negotiation:***

Probably the most cost-effective and efficient manner of resolving claims is through early settlement negotiations directly between the parties. If the parties are able to make an early and sufficiently accurate assessment of the merits of their respective cases and can negotiate a reasonable settlement, substantial litigation costs can be avoided.

##### **2. *Mediation***

Mediation is a technique in which parties are brought together to discuss settlement with a neutral third party. The mediator may, but does not necessarily, have substantive subject area expertise. The mediator meets with the parties, separately and together, and attempts to help them reach an agreement. There are nearly as many styles of mediation as there are mediators. For example, some mediators are willing to put a value on a case, and others are not. The mediator has no power, however, to make decisions for the parties. An effective mediator will attempt to gain the confidence of the parties so that they will disclose their priorities, options,

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*Resolution*, 59 Alb. L. Rev. 847 (1996).

<sup>29</sup> CPR Legal Program, The Center for Public Resources, *CPR Law Firm Policy Statement on Alternatives to Litigation* (1991); CPR Legal Program, the Center for Public Resources, *CPR*

and alternatives for agreement – critical information that they do not wish to share with the other side. In this way the mediator may discover areas of agreement or compromise when the parties' lack of trust in one another or fear of appearing weak or excessively eager to settle may prevent them from revealing their true interests or "bottom lines" to one another. The mediator's distance from the litigation, plus his or her creativity, may achieve a breakthrough towards resolution when direct negotiations would not succeed. Mediation, like negotiation, is most effective when the parties have been able to make a thorough evaluation of the merits of their respective cases and enter the process with a willingness to compromise.

### **3. *Arbitration***

Arbitration is a binding procedure which frequently provides litigants with a fast and cost-effective means of resolving disputes. It is conducted before one or several neutral fact finders usually agreed upon by the parties and generally possessing expertise in the particular subject area. The arbitrator may not be required to provide reasons for the decision reached. Since this is a binding procedure with limited if any right to appeal, parties may be hesitant to utilize this ADR technique in situations involving significant sums of money or novel and complex issues.

### **4. *Summary Jury Trials/Mini-Trials:***

The terms summary jury trial and mini-trials are sometimes used synonymously, but they are actually very different and distinct ADR mechanisms.

The summary jury trial, a court-annexed method of ADR conceived by Judge Thomas Lambros, is usually a half-day proceeding in which attorneys for opposing parties are each given about one hour to summarize their cases before a six-member jury, selected through the federal

jury pool. Introduction of evidence is limited, and witnesses are excluded from the proceeding. After the evidence has been presented and the judge provides a short explanation of the law, the jury retires and either presents a consensus verdict, or, if no consensus can be reached, reveals anonymous individual juror views. The jury's verdict is purely advisory, unless the parties agree to be bound thereby.<sup>30</sup>

According to Judge Lambros, the purpose of the proceeding is to give the parties an insight into the way a jury would view a case, while saving the time and expense of a full trial. As conceived, the summary jury trial presupposes that the parties have completed full discovery and have adequately prepared their cases so that there can be some comfort level that the verdict which the advisory jury renders will resemble what could be expected if the matter proceeding through a full trial.

By contrast, the mini-trial is a private form of ADR which is actually more akin to mediation than to a trial. This technique is fairly flexible, and can be tailored to the needs of the parties. Discovery may be accelerated and/or limited by agreement of the disputants. The procedure, which is usually non-binding, is presented to a neutral rather than a judge; and company officials with settlement authority sit in place of a jury.<sup>31</sup> Over a one or two day period, the attorneys present their best case and the party representatives meet following the presentation to attempt to reach a settlement.

The mini-trial may consider all issues in the case, but more frequently it focuses on one or a few issues at the crux of the dispute, and on which some movement is imperative if a

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<sup>30</sup> Thomas D. Lambros & Thomas H. Shunk, *The Summary Jury Trial*, 29 Clev. St. L. Rev., 43 (1980).

<sup>31</sup> The close involvement of company representatives is a hallmark of the mini-trial.

resolution is to be negotiated. If a settlement is not reached, the neutral may render an advisory opinion as to how the judge may rule.<sup>32</sup>

#### **E. Conclusion**

Alternative dispute resolution is not a complete substitute for the judicial process. Certain cases remain best resolved by the court system. Sometimes ADR efforts fail. The task of assessing whether a dispute may benefit from ADR and, if so, choosing the most appropriate mechanism, involves the evaluation of a variety of factors, including the characteristics of the case, the nature of the parties, and situational considerations.<sup>33</sup>

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<sup>32</sup> Eric D. Green, *et al.*, *supra* note 28, at 503.

<sup>33</sup> Goldberg, *supra* note 1, at 545-48.