ADR: A NEW NAME FOR AN OLD GAME

by Ronald M. Sturtz

The purpose of this article is to explain the application of some well known methods of resolving disputes which may be familiar, but probably are less understood than expected. Most of you are acquainted with or perhaps have been involved in traditional litigation in the federal or state court systems. You are also undoubtedly aware that most disputes do not ever reach an actual trial before a judge or jury. Those concluded short of trial are helped by various alternatives to be discussed here, such as early neutral evaluation, mediation, negotiation, private judging, mini-trial, summary jury trial and arbitration. These alternative means of aiding dispute resolution have received the acronym "ADR". Some of these methods are well known and understood. Some are innovative. As we explore this recent explosion of interest in ADR, consider where you fit into the picture: as a party, an expert, a party-appointed arbitrator or neutral.

The year 2000 is rapidly approaching. In recent years much of accepted business methodologies, and for that matter social procedure, have been changing at warp speed. If any one thing could be singled out as the impetus, it would be computerization and the resultant realization of developments in daily living almost as fast as the events happen. The electronic age has made most business leaders and the consuming public come to expect prompt, efficient and complete conclusions to every problem or concern as soon as their attention focuses on the issues. The legal profession and business of dispute resolution have been infected with the same virus.

Continuing the trend of societal modernization, dispute resolution has reached new heights and dimensions in speed and efficacy. No longer are parties to a dispute constrained to exhaust time and money pursuing litigation. Today, disputants are increasingly availing themselves of ADR techniques.

The primary need to resolve the dispute, quickly, efficiently and most importantly, qualitatively, has replaced courtroom adjudication. Parties who choose ADR as a means of resolving disputes find they reach as satisfactory a result as with pursuing litigation, but without unnecessary temporal and fiscal expenditures.The most frequently asked questions by clients are "Who is the judge?," and "When will this case come to trial and be concluded?" With resort to ADR, the answers to such questions are in the parties' control.

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What's Wrong With Traditional Litigation

Several centuries ago Shakespeare wrote, "The first thing we do, let's kill all the lawyers." (*Henry VI*, Part III.) Some would assert that things have not changed, and the impetus to this misused statement is as appropriate now as it was alleged to be in the 16th century. But, in fact, society has changed. Indeed, life has grown infinitely more complex since Elizabethan times, and the legal profession has responded.

Perhaps one of the most common form of dispute resolution, the filing of a complaint in a state or federal court, has grown painfully complex not to mention exhaustive-both physically and fiscally. Learned Hand, former Chief Judge of the Court of Appeals for the Second Circuit during the early and middle parts of this century, once quipped, "[a]s a litigant, I should dread a lawsuit beyond anything else short of sickness and death."

There is no question that in most parts of this country we are presented with an overburdened federal judiciary and its growing inability to process and adjudicate cases in a timely efficient fashion. In the federal system, there are over 280,000 civil and criminal cases filed each year, and the number continues to grow. The federal experience is mirrored in the states to a great degree, but the numbers are more dramatic.

Adding to the judiciary's incapacity to cope with the immense number of civil case filings, litigation delays are exacerbated by extensive and sometimes extraordinary pretrial activity. Parties will typically file many motions which seek rulings on issues well before the actual trial begins. In addition, the present discovery process can be drawn out consuming inordinate amounts of time and money. Studies show that up to 60% of litigation costs are attributed to this activity. ADR reduces and in many cases eliminates this pretrial activity, but in any event certainly brings focus to the process thereby reducing temporal and monetary expenditures arriving at the dispute resolution stage earlier.

In response to the challenge, the legal profession, in the federal and state systems has been actively promoting ways to deal with the problem. Since so many cases are settling without going to trial, reaching the settlement stage more quickly, efficiently and gracefully became the goal. Client demands over the past 30 years have prodded the legal profession to revisit alternative methods of resolving disputes. ADR is more practical, less expensive and obtains results vastly quicker than litigation. Disputants can pick and choose the nature of their forum, choose their decision-maker and achieve a resolution expending a fraction of the time and resources that litigation would consume. ADR provides parties with viable, efficient alternatives to litigation and methods to settle disputes.

ADR: A National Movement

National policy favors ADR. Congress and most states have enacted statutes which can be classified as involving ADR. The American Bar Association (ABA), notably its Section of Litigation, is a strong and vibrant supporter of ADR. At the August 1993 American Bar Association meeting, a new Dispute Resolution Section was authorized and is now being organized. By ABA House of Delegates resolution, non-lawyer associate members are welcome to join.

Two major national not-for-profit organizations and many private ADR providers actively promote and facilitate the use of ADR. The American Arbitration Association (AAA) is a public service, non-profit national membership organization. It was founded in 1926 shortly after the adoption of the first of a number of arbitration laws patterned after a model act which was adopted in different versions around the nation. The organization's primary function is to encourage and facilitate the use of arbitration and other voluntary techniques of dispute resolution. This is done through education, training, and research for all forms of out-of-court settlement methods. The AAA actively assists business in designing custom-tailored dispute settlement systems. In addition, nationally the AAA is instrumental in its role of compiling and providing lists of arbitrators, including non-lawyers, who are available to private parties for use in resolving their own disputes.

The Center for Public Resources (CPR), a New York-based national public policy organization, is another organization actively involved in the promotion of ADR. The CPR Legal Program was founded in 1979, and it consists of several hundred general counsel of major corporations, law firm practitioners and legal scholars. Recently, the CPR was nationally recognized for developing and implementing among its corporate members a written pledge committing a signatory to explore ADR methods before proceeding with or in lieu of litigation. Over 600 of the nation's largest corporations have signed and abide by the pledge. In addition, the CPR developed a similar national initiative among law firms, whereby the CPR's law firm members drafted and 1,425 law firms signed the *CPR Law Firm Policy Statement*.

How ADR Works And Different Types Of ADR

The decision to submit a dispute to arbitration, or another form of ADR, is usually manifested by a contractual provision between the parties. The contract clause defines the scope and limits of ADR for the parties who select the type of ADR, establish the procedure by which a neutral is selected and determine whether and to what extent the process and decisions are final and binding. The parties are free to specify parameters delineating their ADR according to their own individual needs. For example, the parties may specify that only certain, as opposed to all, issues arising from the contract or transaction are subject to ADR. Importantly, the parties may bind the neutral to base his decision on state law, federal law or even generally accepted commercial standards as defined by the parties. The ADR clause can be as limiting or broad, as specific or vague as the parties' desire. The shape ADR takes is limited only by the parties' imagination.

Arbitration Clause

A very simplistic (and *not* recommended) standard arbitration/ADR clause to be inserted in contract could be:

> Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be settled by arbitration [parties can specify any form of ADR] and judgment upon the award rendered by the Arbitrator(s) may be entered in any Court having jurisdiction thereof.

What is missing from this provision is minimal references to a chosen state or federal arbitration law, designated rules and substantive law, whether the arbitration is to be administered and perhaps most importantly, designation of the arbitrator(s) or the method of selection.

If the parties fail to include an arbitration clause in their contract or where the dispute does not involve a prior contract, the parties may still submit their dispute to arbitration by entering into an appropriate agreement signifying the specific dispute to be resolved. Submitting a matter to ADR may invoke the operation of an ADR statute.

Award

The contract clauses generally provide for a judgment upon the award to be entered by a court having jurisdiction of the parties. There is no difference between a judgment procured through litigation and one obtained following an ADR proceeding. Accordingly, such a judgment is enforceable like any other court-won judgment.

Some state statutes authorize courts to review ADR awards, whether or not judicial review is provided in the ADR clause. Generally, awards will be vacated only upon grounds of corruption, fraud, partiality of the neutral, or other similar wrongdoing. The New Jersey arbitration statute, for example, provides that the award will be confirmed unless "the award is vacated, modified or corrected"[1] for any of the following reasons:

1. Where the award was procured by corruption, fraud or undue means;
2. Where there was either evident partiality or corruption in the arbitrators or any thereof;
3. Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause being shown therefore, or in refusing to hear evidence, pertinent and material to the controversy, or of any other misbehavior prejudicial to the rights of any party;
4. Where the arbitrators exceeded or so imperfectly executed their powers that a mutual, final and definite award upon the subject matter submitted was not made.

Even where an award is vacated, spending the time and expense going through ADR is *not* wasted. Having engaged in the ADR process, the parties accomplish several things which should assist and expedite the litigation. Much of the work necessary for trial will have been done in preparation for ADR. Some discovery will probably be done, issues will have been focused and sharpened, perhaps many of the elements of the underlying dispute will have been settled or at the very least, progress toward settlement will have been made. In any event, ADR serves the parties' needs by reducing time and expense associated with going to court.

Different Types Of ADR

One of ADR's most attractive elements is its flexibility. The shape and format of any alternative proceedings are limited only by the party's imagination. While there are more standard or recognizable forms of ADR, each with distinct characteristics adaptable to a variety of circumstances, the parties are free to fashion a framework which suits their particular needs. This is typically done in an ADR clause either in the underlying contract or through a post dispute agreement.

The standard forms of ADR are recognized as negotiation, early neutral evaluation, mediation, private judging, summary jury trial, mini-trial, and arbitration. Arbitration can be court-ordered, (presumptively mandatory and typically non-binding) often with minimally coercive features to give the parties incentive to allow the result to become final. With the adoption of the Civil Justice Reform Act of 1990, (CJRA) virtually all United States District Courts around the nation adopted local rules which mandate or at least provide for participation in one of the ADR methodologies, although no litigant can be forced to accept a result or settlement proposal. The statistics seem to prove that since 96% of all court filed cases settle before trial, the effort to introduce dispute resolution discussions into the process at the earliest time will lead to more expeditious and less costly litigation - perhaps even a higher percentage of consensual dispositions. The effect of an agreed upon result or mandated award is usually the same, a final disposition of the dispute or case, similar in respect to the finality of a court-ordered judgment which can be enforced as one fully tried to an imposed determination.

Since ADR is the product of an agreement among parties, the bounds are defined only by legality and public policy. Fortunately, neither constraint significantly encroaches upon the parties' rights to fashion a dispute resolution process. There are the classical or traditional forms already discussed but the parties may mix and match, (with some care and planning) or even dispose of them altogether and define a completely unique process. The parties are virtually unfettered in their ability to selectively implement elements from one type in concert with one or more elements of another type or develop something entirely new and unique. The name ascribed to the process by the parties is practically meaningless. The ultimate concern centers upon the definitions and powers prescribed. The ADR process will follow whatever rules are established by the parties, unless the named process adopts a statutorily prescribed format.

Negotiation
The term negotiation derives from a Latin word which means "carrying on business." Negotiation has been employed in everyone's daily living. Society, increasingly disenchanted with the cost and adversarial nature of litigation, is turning to the negotiation alternative. The parties usually attempt negotiation prior to the pursuit of any other form of dispute resolution. However, it can be attempted in tandem with other dispute resolution processes as well. In fact, the parties can engage in negotiation settlements at any stage of the litigation process.

While the negotiation process is varied, there are phases which most negotiation proceedings follow. During this first orientation phase, the parties establish initial contact, set the tone for their future interaction and form impressions as to the style, integrity and expertise of the other party. In this phase, the parties also decide upon procedural matters.

The second phase consists of the information exchange or argument where the parties concentrate on substantive issues. The length of this stage depends on the relationship of the parties and on the complexity of the issues.

The third phase of the process is triggered by the crisis point which can be an approaching deadline, a trial date or the running of the statute of limitations. Many negotiations produce settlements immediately prior to the crisis point.

The final phase of the negotiation process is the settlement or, conversely, the breakdown of the negotiation proceedings. If the negotiation process has failed, the parties must pursue another form of dispute resolution.

There is no third party in the negotiation process. As a result, resolving procedural problems can prove difficult. The parties involved in the dispute or their representatives must be able to communicate, work together and compromise. If the parties reach an agreement, it is binding and final. Since the parties themselves have crafted the settlement, there is no danger of an appeal. If one of the parties breaches the contract or fails to perform, the parties may either return to negotiation or seek relief through the courts. In addition, legislation has been enacted which encourages finality in the decision. Rule 68 of the Federal Rules of Civil Procedure allows one party to offer a settlement to the other side. If the offer is not accepted, and the rejecting party receives less at trial than the amount offered, then that party must pay the costs incurred by the offeror from the date of the offer.

Like mediation, negotiation which is also completely private, does not produce predictable results. It also requires nondisclosure and a tailoring of the process to that particular dispute. Thus, any subsequent dispute must proceed through a separate dispute resolution process. A party in the negotiation process could not depend on the outcome to prevent subsequent litigation of similar disputes. As with other settlement efforts, statements made during negotiation are not admissible in subsequent court proceedings. However, the facts learned are not secret or confidential (unless otherwise carefully and properly provided in an explicit agreement). This enables parties who want to avoid unnecessary public review or criticism to iron out their differences in a confidential manner. This is particularly attractive to disputants involved in a patent or trademark infringement. Negotiation saves money. The parties conduct the proceedings themselves, so there are no third-party neutral fees. In addition, attorneys' fees are greatly reduced. Negotiation also saves the costs inevitably committed to continued litigation.

Mediation
In a successful mediation, everyone comes away a winner. Mediation is not a procedural alternative to litigation, it is a settlement device. Unlike adjudication which focuses on the past, mediation looks to the future and is used now in virtually any kind of dispute. Most of the federal district court plans filed pursuant to the CJRA have mediation as a significant component. It is the least threatening ADR method and often gets the parties talking for the first time.

The parties decide the format of the proceeding. They may decide to submit written materials or a brief statement of the case. The mediator, the parties and their attorneys usually meet prior to the mediation to exchange facts and to summarize their positions. This meeting provides the parties with the full picture in an efficient and relaxed manner. Witnesses are permitted, indeed encouraged to attend and to elaborate upon their positions in complete confidence without the constraints of any evidentiary rules.

After the fact exchange, the mediator continues to meet separately with each party. Their discussions are completely private unless the disclosing party permits the mediator to relate any part. The mediator offers advice and insight to each party in turn. An attempt is made to bring each side to accept compromise of its position(s), but the key ingredient is the skill of the mediator to understand how the parties can be brought to a position where they agree with the adverse party's needs. This process is repeated until settlement is reached or until the parties decide to pursue other means of resolving the dispute. If a settlement is reached, or a joint session appears to be appropriate, the parties are brought together to hear the views of the other side and eventually if successful, to formally agree to terms and signing an agreement. The end product is similar in nature and effect to a consent decree obtained in court. Unlike arbitration, there is no judgment or award in mediation.

Except in court mandated ADR programs, the parties choose the mediator. They may locate a mediator in a variety of ways including public advertisement, referrals from lawyers, counselors or clergy, from academia, governmental agencies, state mediation and conciliation services and the AAA. In the real estate world, mediation can be extremely

useful in arriving at settlement of valuation issues and perhaps in disputes regarding the efficient producing cause of a sale. Mediators generally participate actively in the negotiations, make suggestions, offer alternatives and help the parties resolve their dispute and reach settlement. However, some situations dictate that the mediator merely act as a conciliator, providing a forum for the parties to come together, and allowing the parties to shape the result.

The mediator's initial task is to inform the parties how the process works and to establish the ground rules. After the ground rules have been laid, the mediator will assist the parties in identifying the facts and issues in their dispute. It is eye-opening to see how often the parties have never had a prior dialogue, as mentioned above.

The success of mediation is usually dependent on the selection of the mediator. Parties generally pick a mediator with a relevant business background or legal expertise. In addition to actual experience, the mediator should be organized and able to efficiently streamline the facts and issues presented. He should also be objective and unbiased, patient, professional, trustworthy and independent. Finally, the mediator should be perceptive and able to recognize the parties' priorities and problems and help them structure an appropriate settlement. An independent real estate counselor with knowledge of the relevant issues can be a valuable resource as a mediator.

Mediation obviously does not produce predictable results. First, it depends on nondisclosure: even the parties to the dispute are unaware of all the statements made and the facts produced. Second, the ultimate agreement is based on the needs and goals of the parties rather than on an identifiable legal standard. Thus, a party participating in the mediation could not bind an unrelated party to that agreement in subsequent litigation even if the facts were identical. Since the mediation process is private, the discussions and the substance of the sessions are protected from public scrutiny. Documents produced during mediation and the substance of information disclosed in the mediation, can be discoverable in subsequent litigation. However, the content of mediation proceedings are afforded much greater protection from discovery than are evidentiary and fact documents. To avoid any confidentiality problems, the parties simply sign an agreement that any and all discussions made during the proceeding as part of settlement negotiations will be inadmissible in any future litigation under well understood federal and state evidence rules.

Mediation saves money. It is attractive for smaller cases in which the amount litigated is quickly consumed by expended executive time as well as attorneys' fees and costs. Mediation is also attractive for larger cases which involve a long discovery period and spiraling legal fees. The mediator's hourly fee is comparable to that of a good attorney. Usually, it is divided equally among the parties. However, if one party favors mediation more than the others, it may choose to bear a larger portion of the cost.

Arbitration

Arbitration is the submission of a controversy to a nonjudicial, neutral decision maker sometimes comprised of three persons, but often only one. The process and problems to be described here are well rooted in many societies as a way of resolving disputes. Arbitration is particularly common in business and labor disputes, professional sports, union grievances, international commercial disputes and consumer disputes. It is gaining favor in banking matters, and there is no reason why it should not continue to gain extensive acceptance in all manner of real property related agreements. The money and time saved through arbitration make it particularly well suited to the modern business world. The proceedings are not usually public and, if properly administered by an organization or the arbitrator(s), speedy. The *key ingredient* is in the drafting of the arbitration clause when each party to the agreement is free to insist upon appropriate safeguards and procedures to assure these goals are attained. Contrary to often heard criticism, recent studies show it does not frequently result in compromise dividing the pot awards. Again, the arbitration agreement will control the result.

A party seeking relief initiates the proceeding by a written demand for arbitration which resembles the complaint filed in normal litigation. It does not need to state any formal cause of action. Instead, the short demand form streamlines the proceeding from the outset. After the claim has been filed with the administering authority or the adversary and the matter is agreed or determined to be arbitrable, both parties begin the process of choosing arbitrators. An agreed upon restricted discovery period may thereafter commence, assuming the contract or selected rules provide for such discovery, or the arbitrator(s) concur.

The arbitration hearing is conducted privately usually by legal counsel. Although considerably shorter and less formal, the format of the arbitration proceeding resembles a trial. Usually, both sides are allowed to make opening statements, present their cases and cross-examine the other party's witnesses. Since facts can be presented by affidavit this may not always be possible.

An arbitrator(s) presides over the process. They may be selected by the parties—each party chooses one arbitrator (i.e. "party arbitrators") who then select a third. The third appointed to the tribunal is often referred to as the umpire. This does not mean that the umpire has the task of choosing between the other two arbitrators' decisions; any award must be made by at least a majority of the arbitrators.

Arbitrators may also be appointed under the rules of an arbitration entity such as AAA when that organization has been designated to administer the arbitration. Under AAA's commercial arbitration guidelines, a roster of arbitrators, often experts in

their field, is maintained by AAA. Similarly, the CPR has compiled a number of national and regional panels of distinguished neutrals, some specialized in various fields, available for such service.

Depending on the jurisdiction, the party arbitrators may and in fact are expected to confer with the party who selected them; they may be biased but not corrupt. Great care should be taken to consider the role of the arbitrators, their qualifications and their ethics. Generally speaking, independence of all members of a panel is preferred, but not mandatory unless the contract or applicable arbitration statute permits or otherwise applies. It must be emphasized that, since arbitration is the product of contract (except for court-mandated programs which are essentially non-binding), the parties are free to fashion their own rules and criteria. Whenever a method to select arbitrators has failed in identifying the person(s) to act, applicable federal and state statutes provide for designation by a judge in a summary expedited procedure.

Arbitrators are given great control over the arbitration proceeding except to the extent the contract otherwise provides. They determine when to schedule the arbitration hearings, establish procedural rules, grant postponements and issue subpoenas which can be enforced by court orders with the power of contempt. The arbitrators can also admit any evidence the parties wish to present through either witnesses or documents. In addition, if the arbitrators are dissatisfied with the evidence offered, they may solicit additional evidence by questioning a witness themselves. Alternatively, they may request that a party's attorney produces evidence which they consider necessary for resolution of the dispute.

The arbitrator's ability, expertise and fairness is the foundation of the success or failure of the process. A conscientious and knowledgeable arbitrator can move the dispute quickly and satisfactorily, conduct the proceedings with integrity, render a just award and facilitate the continuation and improvement of a productive business relationship. Arbitration cannot guarantee predictability. Because arbitrators usually do not provide written explanations of their awards, it is difficult for a party to ascertain what factors went into the result and to order its behavior accordingly.[2] Likewise, a party is unable to rely on that decision as precedent and is unable to avoid similar litigation. This outcome can easily be avoided, however, by requiring the arbitrators to document the reasons for their decision and thus determine what behavior to avoid in the future.

The arbitration proceeding ensures confidentiality. It allows the parties to avoid unwanted and counterproductive publicity absent a confidentiality agreement to the contrary. This usually facilitates the continuation of that business relationship and also protects the reputation of the parties. Another advantage is the informality which characterizes the arbitration proceeding. Unlike the courtroom which demands compliance with numerous rules, the arbitration proceeding allows the parties to resolve their dispute in a somewhat less formal, relaxed though adversarial atmosphere. Again, the parties are free to design, modify and agree upon these rules in their arbitration contract or clause prior to the commencement of the proceeding.

Arbitration can be a more cost efficient and less expensive process than traditional court adjudication provided the parties and counsel understand the process. In addition to potential savings for executive or client time diverted from business, legal fees, the financial consequences of the lost business relationship, should also be considered. The additional costs incurred in arbitration are the payment of the initial fee for commencing the arbitration paid to the administering organization (if any), the cost of producing witnesses, and the cost for the stenographic record, if one is made.

Private Judging

The private judge process, dubbed "rent-a-judge", is analogous to arbitration, yet retains many of the characteristics of a traditional judicial proceeding. It is flexible and efficient and has proven especially helpful in complex commercial real estate cases where particularly contentious parties seem to abound.

Many states have enacted statutes allowing parties to choose the private judge process. In New Jersey, a procedure fashioned after prevalent California practice, the Alternative Procedure for Dispute Resolution Act[3], provides for resolution of controversies by means of private judges called umpires. The act was intended to provide parties with a quicker, less costly but more predictable process for dispute resolution than traditional civil litigation and to provide the parties' rights not usually available to them through arbitration.

The key elements of the law provide that the result must be arrived at in accordance with applicable principles of law, and the determination must be in writing with findings of fact and law readily reviewable. It reduces the possibility that an umpire will apply his own notions of justice and render an award bearing no resemblance to that which results in a judicial resolution of the matter. In this way, private judging differs greatly from an arbitration proceeding in which the arbitrator is free to fashion the award even in a manner inconsistent with applicable substantive law.[4] Unlike traditional litigation however, there is only one appeal to a trial level judge. Thus the process can be swift, predictable and inexpensive since extensive discovery is not contemplated.

The proceeding is initiated upon filing of a demand which must set forth the claim, any defenses and the amount of damages sought. The party demanding resolution must also initiate the process of umpire selection. Once the umpire has been selected or appointed, each party submits to the umpire and to the adversary, statements of factual and legal positions which govern the issues to be determined. The umpire may allow modification if such changes

do not unduly prejudice the opposing parties. Unlike arbitration which does not expressly authorize discovery, the private judge process anticipates some discovery to be completed within 60 days following the receipt of the demand, unless the umpire or the parties otherwise provide. Such discovery may be through oral depositions, inspection of documents and interrogatories (when so authorized by the umpire). At the hearing, the parties are entitled to be heard, to present evidence relevant to the controversy and to cross examine any witnesses appearing.

The private judging proceeding is conducted by a single umpire unless the parties have agreed otherwise. If an agreement designates an umpire, then that person conducts the proceeding. If an agreement describes a method by which the umpire is to be selected, this method is followed as well. However, if a method is not provided, or if a method proves unworkable, then, as with traditional arbitration, the Superior Court (New Jersey's trial level court) will appoint an umpire in a summary action.

The umpire has full jurisdiction to provide all relief and to determine all claims and disputes arising under the contract. The umpire is not competent to testify in any subsequent court action related to the private judging proceeding. The umpire also has the authority to allow the parties to have discovery through interrogatories and to shorten or lengthen the 60 day period allotted for discovery. The umpire may require the testimony of any witness or the production of any evidence, and the umpire may direct that such evidence be obtained. The umpire fixes the time and place for the hearing (unless the parties have otherwise agreed) and may adjourn the hearing from time-to-time.

The parties may choose the third-party neutral. This makes the rent-a-judge process an attractive alternative to normal adjudication in which the neutral (i.e. a judge or a jury) is assigned through a luck-of-the-draw. The disputants should select a third party with business or technical expertise who can recognize and understand the complexities of the dispute. If a dispute turns solely on a legal issue, then a retired judge might be the best qualified, although a real estate professional might well perform such duties in the right circumstances.

As in arbitration, the umpire must comply with a code of ethics. The umpire is required to disclose any interest or relationship which would bias his evaluation of the case. The rent-a-judge process differs from a normal court proceeding in that it is private. While many other formalities of the courtroom are present, the parties are assured that their disputes will be free of public review and scrutiny. The private judging process is less expensive than a normal court trial, however the parties must still prepare the case as if proceeding to a normal trial, though the limits placed on discovery greatly reduces cost.

An umpire's compensation is similar to that of an arbitrator. The umpire's expenses and fees and all other expenses including the cost of the facilities, the deposition and hearing transcripts, and expert witness fees are paid as provided in the award. In addition, the *parties may* allow the umpire to award attorneys' fees.

While the New Jersey ADR statute is applicable only in that state, there is nothing to prevent contracting parties from adopting by reference the substance of the law. Care should be taken to review the law with local counsel, but there is no policy reason which would prevent enforcement of this ADR technique in any other jurisdiction.

Early Neutral Evaluation

The paramount objective of the early neutral evaluation process is to reduce the cost and time spent in prolonged litigation. The process was developed in 1982 by the Federal District Court for the Northern District of California and it has grown steadily in popularity. It is now a cornerstone of court administration in many states and other federal districts. Early neutral evaluation recognizes that the most money can be saved in the early stages of litigation. The patterns and expectations for the litigation process are set in this early stage. Therefore, direct communication, cooperation and common sense have the most beneficial effect in the earliest stages as well.

The early neutral evaluation process forces parties to analyze the strengths and weaknesses of their arguments, to focus on the critical issues and to confront the concerns of their opponents. It has been used most successfully in cases involving civil rights, contract disputes, insurance coverage disputes, labor disputes, personal injury and patent infringements.

Early neutral evaluation takes place at the outset of the litigation process, usually within four months after a complaint has been filed in court. In some cases, the session may even be held before the first judicial pre-trial status conference. In other cases, the court allows a very abbreviated period of discovery prior to the evaluation session.

At the start of the session, the evaluator (usually very experienced lawyers in the field of the dispute, or a special judge assigned for this task) briefly discusses the goals and establishes the tone which is to control the proceedings. The parties mutually select the third-party neutral to conduct the evaluation. In addition, the court, under its power to appoint a special master, can also appoint the third-party neutral, who most often serves pro bono. The neutral is referred to as the evaluator. The parties then make a 15 to 30 minute presentation explaining their views of the facts and describing the evidence upon which they rely. Documents may be used where appropriate. After hearing each party's position and evaluating the evidence presented, the neutral offers an assessment of the case.

The third party plays a very critical role in the early neutral evaluation proceeding as an evaluator as well as a counselor, mediator and advisor. The evaluator helps the parties narrow the scope of the

dispute by identifying areas of consensus and by isolating areas critical to resolving the dispute. The evaluator also assesses the strengths and weaknesses of the arguments and offers an assessment of the likely outcome. In addition, without imposing or relaying his analysis, the evaluator attempts to facilitate a settlement. If the parties seem interested, the evaluator can host a settlement discussion. Finally, if the parties seem disinterested in a settlement, or if the settlement fails, then the evaluator can help the parties devise a strategy for sharing information and conducting discovery in contemplation of a future settlement discussion.

As in arbitration, it is most effective if the evaluator is familiar with the nature of the dispute. Thus, the evaluator should be an individual with business experience or technological expertise who can identify the parties' concerns and priorities. Equally important, the evaluator should be creative and perceptive so he can introduce issues or contentions. The early evaluation process also requires an individual who is a problem solver and a solution-oriented person, able to recognize the goals of the parties and steer the conversation accordingly. If the evaluator has the requisite credibility, the views expressed can be very persuasive.

The evaluator should ordinarily have legal knowledge. This enables the evaluator to distinguish between the information necessary for settlement negotiations and the information necessary for a full trial. Often, private attorneys are better suited than judges to serve as evaluators. The attorneys have more time to devote to the process. In addition, there is some concern about having a judge assigned to the case to formulate his opinion from the outset.

The early neutral evaluation is a private proceeding. There is no formal testimony, and oral communications during the session are privileged as part of settlement discussions. The evaluators are prohibited from discussing with the court, or anyone else, anything which took place in the session.

The early neutral evaluation process is very flexible and informal. Based on the schedules of the parties, the evaluator picks the time and place for the sessions to be conducted. The environment of the session should be as casual and informal as possible with no procedural or evidentiary rules.

The early neutral evaluation is a cost-effective device in which litigants can learn about their opponents' cases. It reduces the length of the litigation process and the resulting expenses. It focuses the parties on the critical issues and prevents the parties from wasting money on unnecessary and unproductive discovery.

Mini-trial

The first case to ever use the mini-trial was *Tele-Credit, Inc. v. TRW, Inc.* which involved a legally and technically complex patent infringement dispute. After nearly three years of litigation, and very substantial legal fees, a trial date had not been set. The parties agreed to give the mini-trial a chance. Two days after the mini-trial began, the parties had reached a settlement.

The mini-trial is especially attractive for business people, because it gets them involved in the process from the outset. It forces them to recognize the strengths and weaknesses of their arguments and to be reasonable in their demands and concessions. The mini-trial is a sophisticated process which requires the presence and commitment of high-level business persons. It is best suited for larger disputes in areas such as antitrust, patents, construction, breach of contract, complex technical issues, unfair competition and employee grievances. Recent studies demonstrate that mini-trials result in prompt settlement in more than 95% of the instances it is used. A recent very well written article describing this technique can be found in *Litigation*, the Journal of Section of Litigation.[5] The following is a distilled analysis of this ADR method:

1. A mini-trial usually does, and should, directly involve the principals. Those individuals who are and will be most affected by the outcome of the underlying dispute should be present (and not simply available by telephone).
2. A mini-trial is an early intervention technique; ideally it should occur well before the actual trial of the case.
3. A mini-trial should save the parties litigation costs or at least offer a real prospect of such savings if it results in a settlement.
4. A mini-trial should give the parties a taste of litigation for the psychological benefits and cathartic effects this can provide.
5. A mini-trial is a voluntary, consensual undertaking.
6. A mini-trial, though more structured than pure mediation, can be as formal or informal as the parties wish, with the tilt toward informality tending to dampen the antagonism real litigation often promotes.
7. A mini-trial is nonbinding, leaving the parties free to return to the supervision and enforcement power of the courts.
8. A mini-trial is flexible, reflecting the consensus of the parties on how to structure the event or events to best serve their needs.
9. It is important to emphasize that, as with other forms of consensual ADR methods, a mini-trial can be confidential, freeing the parties from the prying eyes of a public or press intent on reviewing dockets, pleadings, deposition transcripts, and the trial itself.

When should you consider a mini-trial? Only certain cases are suited for the technique. It depends, on the size of the matter. A mini-trial requires significant effort and carries no guarantee of success, no certainty that the dispute will be resolved. The parties also must agree on how the mini-trial itself will be conducted. All these points may be subject to negotiation:

- The amount of time to be allotted to each party.
- The availability of rebuttal time.

- Whether the presentations will be made solely through counsel or whether testimony (or less formal oral presentations) from key witnesses will be allowed.
- The extent to which normal evidentiary rules should apply.
- Whether experts will be used.
- The extent to which streamlining procedures will be used.

The role of the neutral should also be defined in the mini-trial agreement. Will the neutral supervise and monitor, or even enforce, the discovery process? What will the neutral do at the mini-trial itself? The neutral could act like a judge and supervise the presentations or act as a go-between in facilitating the negotiations. The neutral could issue an advisory opinion of his view of the case at the close of the presentations or after a predetermined period of negotiation.

None of this is preordained. The neutral is available to serve the parties to the extent they mutually agree and are willing to pay. The only essential point is that the neutral's role must be defined so that each party's expectations are clear. Once the agreement is signed, the parties must quickly move into action and continue the momentum toward the hoped for resolution. This observation should apply equally to all ADR methods. The important thing in preparing for a mini-trial is that it is not a final adjudication, yet if well done it will help to shape the eventual outcome of the dispute. If nothing else it will affect the psyche of all of the participants, clients and lawyers alike.

If it is consistent with the agreement, counsel should not hesitate to enlist the aid of the neutral in facilitating discovery and ensuring (to the extent possible) that discovery obligations are being honored. A critical issue for the parties is whether and when they will have the neutral share his evaluation of the presentations. This can be a delicate question. The neutral's evaluation can have a sobering effect, dashing the unrealistic view of at least one of the parties. It also carries the risk (one that successful neutrals avoid by building trust and confidence) that the neutral will no longer be perceived as disinterested.

Thus, the mini-trial is a hybrid which merges characteristics of adjudication, arbitration, mediation and negotiation into a unique creation. The parties to the dispute set forth the framework in the mini-trial agreement. They determine procedural rules, rules governing acceptable behavior and what role the neutral should play. At the mini-trial hearing, attorneys and experts for both sides usually make summary presentations of their cases to the neutral and to the panel, comprised of one representative for each disputing party, explaining why their side should win. Documents and other evidence can be submitted, and witnesses may also testify. Each side's presentation is followed by rebuttal and questions by the opposing side. After the weaknesses of both sides have been exposed, the business persons on the panel analyze, negotiate and possibly resolve their dispute. If the business persons fail to reach an agreement, the neutral may be called on to assist. Generally, the court action is stayed while the mini-trial process is proceeding. The mini-trial does make the outcome of the instant dispute predictable. Generally, the neutral's opinion of that probable outcome of litigation is consistent with the ultimate verdict rendered by the court. Thus, the mini-trial encourages the parties to settle rather than continue costly and counterproductive litigation.

Summary Jury Trial

The summary jury trial (SJT) is a short, inexpensive form of trial which allows the parties to look into the future. Conceived in 1980 by a federal judge, its use has grown markedly throughout the country. A summary jury trial, unlike all other forms of ADR, provides the parties with an opportunity to present their cases before empaneled jurors who are not told their deliberations aren't real. The jurors have no special qualifications or expertise. Rather, they are lay people usually taken from the otherwise empaneled pool of jurors who are viewing this case and the legal issues presented for the first time. The purpose of a summary jury trial is to find out what an average jury thinks about the dispute. The summary jury trial is an effective means of ascertaining the probability of a result. The uncertainty of an outcome can interfere with the settlement of a dispute. This situation arises most often in the context of liability, but as mentioned above, most often involves damages. The mock jury serves as the third-party neutral. Since the jury is selected from the general population, it's role is exactly the same as in a normal adjudication. It listens to summaries of the case, followed by instructions of the court, and decides accordingly. The summary jury trial educates the parties on how a jury will comprehend, analyze and react to the numerous issues of law and fact and what a jury thinks without being bound by its decision. It informs the parties what they risk in taking the case to full trial in accordance with complete procedural safeguards.

The summary jury trial is presided over by a judge or a magistrate upon assignment from the court. In order to be indicative, the case should be in a posture suitable for a full trial. This means that the summary jury trial should follow completion of discovery. However, when discovery has not yet been completed, parties can conduct fast-track discovery which focuses the parties on the most critical issues, resulting in a considerable savings of time and money.

The summary jury trial itself consists of a *voir dire* (opening statements) presentation of summary evidence (although nothing would prevent the parties from having minimal live testimony), rebuttal and closing statements. Each presentation is subject to a time limit, and the entire trial usually takes no longer than a day. All evidence, including the testimony of witnesses, is usually presented by counsel in narrative form. Once the parties have completed

their presentations, the jury is charged and instructed by the court in the same manner as a normal trial.

Post-SJT conferencing begins after the SJT concludes. The parties, their counsel and the judge are present. The parties, now better informed of the strength of their cases, negotiate with one another. If after the SJT the parties have not been able to settle within a time fixed by the court or the parties, the court usually sets the case for a full trial.

Summary jury trials have proven helpful in cases involving negligence, product liability, personal injury, mass toxic tort, contract disputes, age, gender, race discrimination and anti-trust, but there is no limit to its use where a jury trial has been duly demanded. The process is utilized most often in complex cases where the parties are anxious to have a dry run on the issue of damages. The exercise has been found useful in helping the parties move to discuss settlement.

Summary jury trial provides insight into how a jury perceives the strengths and weaknesses of each side. Studies conducted demonstrate that cases which proceeded to trial resulted in verdicts remarkably consistent with those reached in the summary jury trial. Liability findings and damage awards were almost identical. The only difference was the additional time and money devoted to reaching that verdict.

The summary jury trial proceeding is not usually open to the public, nor is it recorded unless specifically ordered by the court. However with agreement, counsel may arrange for a court reporter to be in attendance. Flexibility is essential to the effectiveness and efficiency of a summary jury trial. Nonetheless, a summary jury trial should resemble a real trial as much as possible. The presence of a judicial officer and a jury helps create this aura. In addition, while the summary jury trial does not require procedural and evidentiary rules as strict as those in a normal trial, it does adhere to similar standards. Evidence inadmissible or unavailable at trial may not be used.

Whether or not the summary jury trial results in a settlement, it can save the parties money. If the case settles, all adjudication costs are avoided. Studies have shown that upwards of 40% of litigation costs result from the trial. Thus, the parties get all they would in a full trial at a fraction of the cost. If the case proceeds, the parties have lost nothing. They still would have had to conduct discovery and all other pretrial preparation. The parties have simply engaged in a low-cost dress rehearsal which has made them better informed and more prepared.

Conclusion

The foregoing presentation illustrated the flexibility of the many varieties of ADR. One common theme that pervades each form of ADR is that it achieves settlement or resolution quicker and more efficiently than litigation. None of these methods approach the formality of traditional adjudication, but with effort the parties can be very impressed with the process with much less cost. ADR places primacy on satisfying the needs of the disputants—achieving a legitimate resolution to their dispute in a timely and cost-effective manner. The legal profession has from time immemorial had the duty to conclude litigation in the most efficient way possible.[6] The stress placed upon utilization of ADR methods in the federal and state court systems is the natural outgrowth of increased court backlogs, rising litigation costs and a recognition by clients that litigation takes a toll on their business and professional lives. Often all of this transcends measurable out-of-pocket costs to the attorneys and expert advisors. Discussion of settlement and methods to reach that goal are no longer a sign of weakness; rather it has become a regular and anticipated event in the course of dispute resolution. Indeed, consideration of carefully drawn dispute resolution contract provisions is a must no longer relegated to boiler plate language added to the bargain as an after-thought.

Real estate professionals engaged in the process which often gives rise to the deal, have the opportunity to urge their clients to *insist* upon attention to such matters. *Indeed you will be well served if you demand such attention in your own affairs as none of us are immune from the litigation virus.* By pursuing ADR, parties are not journeying down an unknown path. Widespread use of ADR may be new, but ADR itself certainly is not. As indicated at the outset, ADR has been widely used in many areas of the law to avoid the pitfalls of litigation. Real estate counselors can do their clients great service by educating them on the availability, uses and benefits of ADR as a means to resolve disputes.

NOTES

1. See N.J.S.A. 2A:24-7. New Jersey has also adopted an ADR statute, N.J.S.A. 2A:23A-1 et. seq. with a similar provision.
2. The standard for review of an arbitral award differs among federal and many state jurisdictions. In California, the highest court ruled in 1992 "an error of law apparent on the face of the award that causes substantial injustice *does not* provide grounds for judicial review." *Monchharsh v. Heily & Blase*, 3 Cal.4th 733 (1992) (emphasis added). Within the same week, the New Jersey Supreme Court in *Perini Corp. v. Greate Bay Hotel & Casino* (the Sands Hotel) 129 N.J. 479 (1992) by a split vote determined that a court can invalidate an arbitration award that was based upon gross, unmistakable error of law. Other courts have rules which would only interfere if the award were irrational, or a "manifest disregard of the law", but what seems to be clear is that all courts would follow whatever standard the parties choose.
3. N.J.S.A. 2A:23A-1 et. seq.
4. See discussion set forth in end note 3.
5. The following outline has been adopted and taken with permission from an article on Mini-Trial authored by Lawrence J. Fox, a partner in Drinker Biddle & Reath, Philadelphia, Pa. which appeared in "Litigation", Vol.19, Number 4, Summer 1993, *The Journal of the Section of Litigation*, American Bar Association. Mr. Fox is vice chair of the section.
6. Former Chief Justice Warren E. Burger made this point in his 1986 speech before the American Law Institute where he observed: "The true function of our profession should be to gain an acceptable result in the shortest possible time with the least amount of stress and at the lowest possible cost to the client. To accomplish that is the true role of the advocate."