

**Massachusetts Continuing Legal Education
Superior Court Civil Practice Manual**

Chapter 10 -- Alternatives to Litigation

By David A. Hoffman, Esq.

Chapter Outline

I. Introduction

II. Terminology

A. Methods in which party control of the outcome is highest.

1. Negotiation
2. Mediation

B. Methods in which the third party is given a more substantial role in shaping the outcome.

1. Case evaluation
2. Minitrials
3. Summary jury trials
4. Non-binding arbitration

C. Methods in which there is no party control of the outcome.

1. Arbitration
2. Master's proceedings

D. Hybrid methods which combine elements of other methods.

1. Med/arb
2. Arb/med

III. Court-Connected ADR vs. Private ADR

A. Private ADR.

B. Court-Connected ADR.

IV. Is the Case Suitable for ADR?

A. Cases Suited for ADR.

1. Privacy concerns.
2. Need for quick resolution.

3. Cost concerns.
4. Desire to preserve on-going relationships.
5. Concerns about compliance with outcome.
6. Ability to choose decisionmaker.
7. Client's need to be heard.

B. Cases Not Suited for ADR.

1. Issues of principle.
2. Reputational interests.
3. Power or information imbalance.
4. "Repeat players."
5. "One-trip ticket" evidence.
6. Unique powers or remedies of the court.

V. Structuring the ADR Process

A. Choosing an ADR Process.

B. Selecting the ADR Provider.

C. Other Logistical Issues.

1. Administration.
2. Rules.
3. Scope of Dispute Covered by Agreement.
4. Cost.
5. Date, Location and Attendees.
6. Information Exchange.
7. Confidentiality.
8. Discovery.
9. Bifurcation and Dispositive Motions.
10. Governing Law.
11. Form of Award or Decision.
12. Limitation of Remedies.

VI. Participating in the ADR Process

A. Procedural Aspects of ADR

1. Tolling Agreements.
2. Motions to Stay.

3. Motion to Appoint Master.
 4. Motion to Compel Arbitration.
 5. Motion to Confirm, Modify or Vacate Arbitration Award.
- B. Advocacy in ADR Processes.

I. Introduction

The purpose of this chapter is to introduce various dispute resolution alternatives which are often used instead of litigation. An understanding of these alternatives and the ability to use them effectively are quickly becoming essential tools in the litigator's toolbox.

In fact, some jurisdictions have adopted ethical rules *requiring* attorneys to discuss dispute resolution alternatives with their clients; such a rule is currently under consideration by the Massachusetts Supreme Judicial Court, based on a recommendation from the SJC Standing Committee on Dispute Resolution. If adopted, Rule 1.4(c) would state:

In appropriate situations, attorneys should discuss with clients the advantages and disadvantages of available dispute resolution options.

(Under the Local Rules of the federal District Court for the District of Massachusetts, counsel must submit a statement to the Court, in connection with an early scheduling conference, that such a consultation with the client has occurred. See Local Rule 16.1(D)(3).)

II. Terminology

Alternative dispute resolution (“ADR”) is a term used to describe a wide array of dispute resolution processes, including negotiation, mediation, conciliation, case evaluation, and arbitration, among others. Although many of these processes have common features, there are significant differences. For example, the terms mediation and arbitration are often confused, but they have entirely different meanings. Thus, a useful starting point for discussion is a definition of the basic terms.

One useful way to think of the spectrum of alternatives is to arrange them on a scale from those in which the parties are most in control of the outcome (e.g., negotiation and mediation) to those in which the parties voluntarily relinquish control to a third party (e.g., arbitration and masters proceedings). Somewhere in the middle of that spectrum lie those methods in which a third party is given a substantial role in shaping the outcome but the ultimate resolution of the case remains in the hands of the parties (e.g., case evaluation, mini-trials, summary jury trials, and non-binding arbitration). Also lying somewhere in the middle are such hybrid methods as med/arb (mediation preceded by arbitration) and arb/med (arbitration preceded by mediation, with the decision withheld from the parties while mediation is attempted). The following are the most commonly used ADR methods, arranged in the above-described order.

A. Methods in which party control of the outcome is highest.

1. *Negotiation* in legal matters involves a discussion directly between the parties and/or their counsel, with the goal of reaching a settlement of the matter in dispute.
2. *Mediation* is a voluntary process in which a trained neutral assists the parties in reaching a negotiated settlement. The parties are free to walk away from

the table at any time, but once they reach an agreement, it is as enforceable as any contract. The mediator does not impose a solution but instead explores the barriers to settlement and the parties' underlying interests.

B. Methods in which the third party is given a more substantial role in shaping the outcome.

1. *Case evaluation* involves the use of a third party, who listens to a summary of each party's case and renders a non-binding opinion as to the likely outcome if the case were to go to trial.
2. *Minitrials* are neither trials nor are they always brief. In a minitrial, counsel for each side makes a presentation of its evidence in summary form to a panel composed of a neutral facilitator/mediator and the president or CEO of each of the parties involved in the dispute. The facilitator/mediator presides, but all of the panel members may ask questions. After the presentations, the CEOs attempt to negotiate a resolution of the dispute, either on their own or with the help of the facilitator/mediator, who is sometimes asked for an assessment of the likely outcome of the case if it is not settled. Minitrials are used primarily for complex business disputes.
3. *Summary jury trials* involve brief presentations of the evidence in a case (usually summarized by counsel) to a group of six jurors, whose opinion is purely advisory. The goal of the process is to encourage parties who are at an impasse in their negotiations to reassess their settlement positions.
4. *Non-binding arbitration* is rarely used in Massachusetts but is common in other states. It is identical to ordinary arbitration except the result is not final -- either party may ignore the results and proceed to trial. Most jurisdictions impose costs on a party who rejects the arbitral decision and fails to obtain a better result at trial. (The Massachusetts Commission Against Discrimination has recently adopted an ADR program that includes non-binding arbitration.)

C. Methods in which there is no party control of the outcome.

1. *Arbitration* is a form of private adjudication, in which a disinterested third-party (or in some cases a panel of three) listens to presentations of evidence and then decides the case. The process is not unlike a trial, except that it is more informal (arbitrations are ordinarily conducted in a conference room) and the rules of evidence usually do not apply. Arbitration is ordinarily a creature of contract -- that is, the parties have agreed, either in a contract executed before the dispute arose, or in a submission agreement after the

dispute arose, to submit their differences to a binding decision on the basis of an arbitration hearing. Once the dispute is submitted, the decision of the arbitrator (or panel of three arbitrators) is virtually unchallengeable -- i.e., there are few legal grounds for overturning an arbitrator's decision. (See G.L. c. 251.)

2. *Master's proceedings* are hearings before a court-appointed master, who is appointed by the court for the purpose of hearing evidence and reaching a decision on the facts or, in some cases, both the law and facts of a case. Ordinarily, a master's decision is final with respect to factual issues but may be reviewed for errors of law. (See Mass. R. Civ. P. 53; Superior Court Rule 49.)

D. Hybrid methods which combine elements of other methods.

1. In *Med/arb* (mediation/arbitration) the parties participate in a mediation, but they agree in advance that if the case is not resolved there, they will submit the matter to arbitration for a final and binding decision.
2. *Arb/med* is the same as med/arb, but the order of the two steps is reversed. The purpose of reversing the steps is to allow the parties to use the same individual for both phases of the proceeding without fear that (a) private caucuses between the mediator and the individual parties may impair the fairness of the process, and (b) the neutral's role as the ultimate decisionmaker will discourage the parties from being candid about the weaknesses of their case.

III. Court-Connected ADR vs. Private ADR

Since all of the above-described ADR methods except negotiation require the assistance of a third party, it is important for litigators to understand the institutional settings in which ADR is available.

A. Private ADR.

In Massachusetts (and around the country) private ADR services are provided by individuals, non-profit organizations and for-profit firms. The non-profits include (a)

community mediation programs, in which services are provided by volunteers and there is an emphasis on serving low and moderate income individuals (typically in cases in which lawyers are not involved); (b) the American Arbitration Association, the nation's oldest and largest dispute resolution organization, in which mediation and arbitration services are provided on a fee-for-service basis by individuals serving on large panels selected by AAA on the basis of experience in particular fields (such as construction, employment, and insurance matters); and (c) local non-profit, fee-for-service firms (such as The Mediation Group), in which the panels are smaller.

The growing interest in ADR has resulted in rapid growth of the availability of for-profit ADR services. In Massachusetts, there are several hundred individuals and firms that offer ADR services on an hourly or per diem basis. Among the largest of these providers are JAMS/Endispute and United States Arbitration & Mediation, which are national firms. Listings of the local individuals and firms providing such services can be found in the Martindale-Hubbel Dispute Resolution Directory and the Boston Bar Association Directory of Massachusetts ADR Providers.

B. Court-Connected ADR.

In some courts, mediation and dispute intervention services are provided by court personnel. In the District Courts, clerk-magistrates often serve as mediators; in Housing Court, mediation services are provided by housing specialists; and in the Probate and Family Court, family service officers provide dispute intervention services which are

similar to mediation except that the substance of the proceedings may be reported to the court.

For many years, Massachusetts courts have also used the services of volunteers (often members of the bar or retired judges) to provide conciliation services, primarily in the Superior Court. Community mediation programs have also provided mediation services in the District Courts.

In recent years, new programs in the Superior Court (such as the Middlesex Multi-Door Courthouse, Worcester Multi-Door Courthouse, and the services offered by the Massachusetts Office of Dispute Resolution) and the Federal District Court (in which three senior status judges provide mediation services) have expanded the options available to litigants through the courts. In the Superior Court programs, there is typically a charge for the services of the neutral (i.e., the mediator, arbitrator or case evaluator), as well as an administrative fee; the panelists are selected by the programs based on their training and experience, and the parties can discuss with the program's case screener the selection of a suitable mediator, arbitrator, or case evaluator.

In 1993 the Massachusetts Supreme Judicial Court issued a policy statement setting broad goals for the creation of court-connected ADR programs. The policy statement calls for the promulgation of standards for the referral of cases to such programs. As this book went to press, the SJC Standing Committee on Dispute Resolution issued a report with recommendations for such standards, including a proposed set of uniform rules. It is unlikely that the adoption of these rules will

dramatically affect the provision of services by existing court-connected programs (such as the Superior Court programs in Suffolk, Middlesex, Norfolk, and Worcester Counties). However, adoption of the proposed rules might increase the availability of such services in counties where they are not currently in place.

IV. Is the Case Suitable for ADR?

The key advantage to using ADR methods is that they enable the parties to design a process that makes sense for the particular circumstances of the dispute and the parties' resources. However, not every case is appropriate for ADR. In many cases it will not be needed. After all, lawyers have resolved cases for their clients for many years without ADR methods, primarily through direct negotiations. Most studies show that 95% of cases filed in court are settled without a trial. With those statistics, why bother using third parties? The short answer is that ADR methods are not needed when negotiation works. It is when negotiations break down, and the only alternative is litigation, that mediation, arbitration, and other ADR methods should be considered.

A. Cases Suited for ADR.

The following are the primary indications that a case might be suitable for ADR.

- 1. Privacy concerns.** For many clients, the primary advantage of ADR is that it permits private resolution of the dispute. In many employment, personal injury, divorce, and other cases involving highly personal issues, both parties will prefer to resolve their differences in a non-public forum. Virtually all ADR processes are conducted in private. With the exception of arbitrations and master's proceedings, there is no record of the

proceedings. At the conclusion of a settlement-oriented ADR process, the parties may file a stipulation of dismissal or an agreement for judgment in order to bring a litigation matter to a close; Superior Court judges ordinarily will not require the parties to file the settlement agreement itself, although the parties are free to do so. (In arbitrations and master's hearings, there is usually a transcript of the proceedings only if the parties request one, and that record is ordinarily not filed in court unless the parties are seeking to contest the outcome on the limited grounds available for such challenges. See Hoffman & Matz, Massachusetts ADR, chs. 10, 12.) In arbitrations and master's proceedings, the final resolution of the matter will ordinarily become a matter of public record only if one of the parties seeks intervention by the court to enforce, modify, or vacate the decision of the master or arbitrator.

2. Need for quick resolution. Because of the delays caused by docket congestion and the unpredictable nature of discovery and motion practice, it is difficult if not impossible to predict how much time will be required to resolve any litigation matter. In Superior Court and federal District Court, it is not unusual to see three to five years elapse before a case is reached for trial, and appeals can add additional years to the process. In mediation and other settlement-oriented methods of ADR, cases can be resolved very quickly, although a certain amount of discovery or voluntary exchange of information may be needed before the parties will feel that they are ready to consider settlement options. In arbitration and master's proceedings, the final resolution of a case can be determined by the parties with some certainty because they can specify by

agreement the dates for the hearing and the decision by the arbitrator or master. (In cases submitted to the American Arbitration Association pursuant to an arbitration clause, AAA statistics for commercial arbitration show that the average time from filing of a demand to issuance of an award is 152 days.)

3. Cost concerns. Just as it is virtually impossible to predict how long litigation will last, it is equally difficult to predict its cost. Settlement-oriented ADR processes eliminate the cost of a trial and appeals; in most cases, the parties realize savings by eliminating or streamlining pretrial discovery and motion practice. In arbitrations and master's proceedings, where the parties have agreed to try the case but in an alternative forum, the cost savings arise primarily from (a) eliminating the costly process of preparing for trial only to have the case rescheduled by the court, (b) narrowing the grounds for appeal, and (c) in some cases, agreeing to limit the overall time that each party will have for presentation of its case. In both of these forms of ADR, there are likely to be significant savings, not only in attorney's fees but also due to a reduction in the disruption of the client's life or business.

4. Desire to preserve on-going relationships. In litigation involving parties with an on-going relationship, the abrasive quality of the litigation process tends to erode whatever goodwill might otherwise have survived the resolution of the dispute. Mediation is a particularly useful form of ADR where the parties wish to (or must) maintain a relationship, such as in employment, construction, landlord-tenant, divorce (particularly where children are involved) and cases involving long-term contracts. In

such cases there are often settlement possibilities that will enable the parties to achieve joint gains -- for example, by establishing mutually advantageous terms for future dealings. (Mediators refer to this strategy for settlement as “creating value” or “expanding the pie.”)

5. Concerns about compliance with outcome. Several empirical studies have suggested that mediated settlements result in higher levels of satisfaction by the parties and higher levels of compliance with the agreement (as compared with compliance with the terms of a court-imposed judgment). See Hoffman & Matz, Massachusetts ADR § 4.10 (1996). The parties’ control of the outcome makes these results readily understandable.

6. Ability to choose decisionmaker. For some clients the most important advantage of ADR is the ability to participate in the choice of the neutral or decisionmaker. This is especially important in adjudicative forms of ADR such as arbitration and master’s proceedings. In highly technical cases (such as complex construction cases or patent disputes), the parties may feel that they can get a more informed decision from an expert than from a lay jury or a generalist judge.

7. Client’s need to be heard. Some clients find it difficult to consider settlement until they have had their “day in court” -- i.e., an opportunity to tell their story to a disinterested person who (they hope) will see things their way. Unfortunately, litigation does not always provide an opportunity to be heard. Even in the small percentage of cases that are tried, the rules of evidence and procedure sometimes frustrate

the impulse to “tell it like it is.” The informality of mediation permits such venting, as does arbitration (because the rules of evidence are ordinarily not strictly applied).

B. Cases Not Suited for ADR.

The following are the primary indications that a case might not be suitable for ADR.

1. Issues of principle. For many clients, the idea of settling a matter in which they believe they are indisputably right is so vexing that they would prefer the cost, delay, and intrusiveness of litigation rather than feel that they have acquiesced.

Adjudicative forms of ADR might be appropriate in such cases, unless the client believes that public vindication is needed, but settlement-oriented forms of ADR may be inappropriate. (In some cases of this kind, however, attorneys have found that the reality testing available in mediation and case evaluation can be a useful experience for a client who does not believe that he or she could possibly lose at trial.) For some client, private adjudication is undesirable because their case involves an issue of public importance and they wish to establish a legal precedent (such as a matter involving civil rights or civil liberties), which can only be done by a court. See Owen Fiss, *Against Settlement*, 23 Yale L.J. 1073 (1984).

2. Reputational interests. In some cases, the parties have reputational interests that they want to vindicate. This sometimes occurs in defamation cases or cases in which a highly visible employee has been dismissed. Unless the parties have agreed in advance

that a settlement or arbitration award can be made public, using ADR may prevent the party seeking vindication from obtaining it.

3. Power or information imbalance. In some cases, the cost and delays associated with litigation provides one party (typically the more affluent party) with advantages that he or she does not wish to sacrifice. Litigation may also be desirable for the less powerful party -- for example, if an imbalance in access to information makes extensive discovery necessary. (Of course, it is possible to structure discovery into ADR processes by agreement, just as it is possible to employ ADR methods after court-supervised discovery has been completed.) A severe power imbalance that impairs one party's ability to participate in a mediation or other ADR process may dictate caution in using ADR.

4. "Repeat players." For some clients, the costs savings associated with the settlement of a case may be illusory because settlement will spawn further litigation. This may be the case in the defense of employment termination, product liability, and other cases where the defendant is likely to face similar claims. Although settlement-oriented forms of ADR usually result in agreements that include confidentiality provisions, many defendants have concerns about whether information about settlements or arbitration decisions will fall into the wrong hands. In addition, some "repeat players" may need a decision from a court with respect to an issue of law or fact that could otherwise be relitigated many times (such as the validity of a patent or lien).

5. **“One-trip ticket” evidence.** Mediation may be unproductive when one or more parties have powerful (or seemingly dispositive) evidence which has not been disclosed to, or discovered by, the opposing party. Professor Eric Green has accurately referred to such information as “one-trip ticket” evidence because once the other side has seen it, they will develop an explanation for it that can be used at trial -- i.e., the element of surprise is essential to its usefulness. In such cases, settlement-oriented forms of ADR may be ineffective because the parties have assessed their likelihood of success at trial based on different information. Of course, adjudicative forms of ADR may be perfectly suitable for such cases, since the element of surprise can be preserved.

6. **Unique powers or remedies of the court.** In some cases, the scope of relief that the parties seek cannot be secured by agreement or private adjudication. For example, receivership or bankruptcy proceedings are based on the ability of a court to bind non-parties. In some cases, on-going judicial oversight of a public or private institution is needed -- e.g., school desegregation or cases involving conditions in prisons. (There is no reason, however, why mediation or arbitration could not be used in such cases, so long as the parties were in agreement that the final result would be converted into a consent decree or other judicially enforceable order.) ADR methods are also unlikely to be practical where large numbers of claimants need to be joined as parties, such as in a class action. ADR may be appropriate, however, in certain phases of a case which was initiated as a litigation matter. For example, injunctive relief might be sought

to freeze the status quo so that mediation can begin, or arbitration might be used to assess individual damages claims in the wake of a class action judgment establishing liability.

V. Structuring the ADR Process

Structuring an ADR process for the resolution of a case permits litigators to use their creativity to write the ground rules that will shape the outcome of the case -- an extraordinary opportunity. Professor Arthur Miller has told his civil procedure students: “I’ll give you the facts, you let me write the procedural rules, and I will beat you every time.” In some case, the ground rules may already be written (e.g., the parties may be bound by an arbitration provision in their contract), but there is still room to customize the process.

The discussion that follows relates primarily to those situations in which the parties can freely choose whether to use ADR and, if so, in what manner. Under those circumstances; the parties should execute a “submission agreement,” in which they submit the matter to mediation, arbitration, or some other ADR process, and specify the details of the process (many of which are discussed in this section). (Sample submission agreements are contained in Forms ___ of this book.) In cases where the parties are already required to submit their dispute to an ADR process because of a “pre-dispute” arbitration or mediation clause in an agreement, the parties can still negotiate a submission agreement that provides more specifics or varies the terms of their original agreement -- e.g., by agreeing to mediate a case prior to arbitration, or tolling the statute of limitations during a mediation, or tailoring an arbitration with a high/low agreement.

Many of the issues discussed below should be considered in deciding whether a process to which the client is already bound can be customized to achieve a better fit of the forum to the dispute.

The two most important decisions to be made in structuring an ADR process are (a) choosing which ADR process to use; and (b) selecting the mediator, arbitrator, or other ADR provider.

A. Choosing an ADR Process.

The choice of process turns primarily on the objectives of the parties. (For an excellent discussion of this issue, see Goldberg & Sander, “Fitting the Forum to the Fuss: A User Friendly Guide to Selecting an ADR Procedure,” 10 *Negotiation J.* 49 (1994).) Are they looking for a quick and final answer from a third party? If so, arbitration may be the best solution. Are there opportunities for joint gains and an ongoing relationship between the parties if negotiations succeed? In that case, mediation might be preferable.

There are several important principles to bear in mind in choosing an ADR process.

First, the decision is not necessarily “either/or.” For example, one issue in a case might be suitable for binding or non-binding arbitration or trial before a master, because a determination of that issue will enable the parties to settle the rest of the case by negotiation. (The author has had one such experience in a case involving a technical issue -- namely, whether a particular roofing product had failed to meet industry performance standards. Once that issue was resolved by a special master on the basis of

a full evidentiary hearing with expert witnesses and numerous exhibits, the parties were able to resolve the other issues in the case.)

Second, timing may be a factor in the choice of process. For example, case evaluation is unlikely to be a good choice at the outset of the case unless each side already has all the information they need to inform the case evaluator.

Third, the hallmark of ADR is its flexibility; there is no reason to limit the choice to an “off-the-shelf” process. For example, arbitrations can be tailored, by agreement, with a “floor” and a “ceiling” -- known as a “bracketed” or “high/low” arbitration, where the arbitrator’s authority to award damages is limited by the floor and the ceiling. Another version is “baseball” or “last offer” arbitration, in which the arbitrator may give as an award either the amount last offered by the defendant or the amount last demanded by the plaintiff, but no other amount. (The parties can also agree to withhold from the arbitrator any information about these limitations, in which case the processes described above would be called “blind bracketed arbitration” and “night baseball.”) In other words, taking full advantage of the potential of ADR requires a willingness to put as much thought and creativity into the design of the process as into the advocacy employed in the process.

Finally, consultation with an ADR provider -- for example, someone the parties are considering using as a mediator or arbitrator -- may be a useful step in designing the process. There is nothing improper about having exploratory discussions with an ADR provider, although it may be wise to conduct such discussions jointly with counsel for the

opposing party, so as to avoid a situation where one of the parties believes that the neutral's impartiality has been compromised by ex parte communications.

B. Selecting the ADR Provider.

The choice of the neutral is, in many cases, the most critical decision of all. For the uninitiated, however, the decision may seem daunting. Throughout the United States there are more than 50,000 individuals and firms providing ADR services -- approximately 2,500 in Massachusetts alone. In court-connected programs, there are usually case screeners who can assist in the selection process. Private ADR providers also perform that service -- i.e., assisting the parties in matching the case with an appropriate neutral. However, when operating without that kind of guidance (and, in some cases, even with it), several considerations should guide the decision.

First, does the neutral have the necessary qualifications? For example, the confidentiality statute governing mediation requires 30 hours of training for the mediator, among other things. See G.L. ch. 233, § 23C. There is currently no mechanism for "certifying" mediators and arbitrators, but qualifications standards for court-connected ADR are under review by the SJC Standing Committee on Dispute Resolution.

Second, does the neutral have the necessary process skills? Mediators must be good communicators and, above all, good listeners. They must have the ability, among other things, (a) to manage a negotiation, especially in cases where there is a high degree of emotionality; (b) to win the parties' trust and persuade them of his or her impartiality; (c) to help the parties assess the alternatives to settlement; and (d) to maintain the

confidentiality of the process. Arbitrators must also be good listeners and good managers of an adversarial process. In some cases, an arbitrator must make rulings on complex evidentiary or procedural issues; a high degree of familiarity with the kinds of issues may be essential.

Third, in some cases, specialized knowledge in a certain area may be useful. For example, in a neighborhood dispute involving parties who speak only Cambodian, a neutral who speaks that language is likely to be more effective than someone who must rely on an interpreter. Another example: the parties in a complex construction case may prefer to use as a mediator or arbitrator someone who already knows how to read architectural plans and other construction documents.

Finally, how much experience has the neutral had in similar cases? Past experience is not always an accurate predictor of future success, but it is certainly useful information. Word of mouth is one of the methods of getting data. Another is asking the neutral for references -- this is a completely proper inquiry, so long as the neutral gives out only the names of the attorneys involved in the prior litigation, and not the names of the parties. (In order to make the references as useful as possible, it may be a good idea to constrain the neutral's selection of references -- for example, by asking for only the names of attorneys in cases the neutral handled in the last six months, or in cases with a similar subject matter.)

In some case, the parties cannot agree on an ADR provider. There are several methods for breaking such an impasse:

- The parties can each select neutrals, who make an independent selection of a neutral. One variation of this approach -- most commonly used in arbitration -- involves using a three neutral panel; in a two-party case, each party selects one neutral, and they in turn select the neutral panelist.
- The decision can be committed to the discretion of an agency or organization (such as the American Arbitration Association), which may be administering the process, or to a third party (such as the president of a state or local bar association). The parties can limit that discretion by specifying that only someone with a particular background can be selected (e.g., ten years on experience in the computer software field).
- The parties can request that an administering agency propose a list containing an odd number of qualified neutrals; the parties then take turns striking one person from the list, until only one name remains.

C. Other Logistical Issues.

Once the parties have reached agreement on whether to use ADR, what form of ADR to use, and the neutral who will perform the services, the remaining issues are less difficult.

1. Administration. ADR proceedings can be handled on an administered or non-administered basis. In an administered case, an organization (e.g., the AAA), court program (e.g., Middlesex Multidoor Courthouse), or firm (e.g., JAMS/Endispute) handles scheduling and payment arrangements, provides a meeting place, and maintains the records for each case. In a non-administered case, the parties and the ADR provider handle those matters themselves. Administered cases are often more expensive because the parties are usually required to pay an administrative fee; however, those fees are usually rather small. The added cost may be worthwhile in cases where tensions between the parties or their lawyers are high, because a case administrator can handle contentious procedural matters that otherwise might derail the process.

2. **Rules.** In arbitrations, the parties often agree that a particular set of rules shall govern the procedural aspects of the case. This is usually a worthwhile precaution. The rules of the American Arbitration Association, JAMS/Endispute, and the CPR Institute for Dispute Resolution can be used even if the parties do not use those organizations to administer the case. Rules are needed less in mediation and other settlement-oriented forms of ADR, but the AAA, JAMS/Endispute, and CPR have promulgated rules for mediations and Minitrials.

3. **Scope of Dispute Covered by Agreement.** In order to bring a dispute to a conclusion and establish appropriate limits for ADR proceedings, the parties should agree on the scope of the dispute to be addressed. In an arbitration, this issue may be significant for *res judicata* purposes, after the conclusion of the arbitration. In mediation and other non-adjudicative processes, the parties are more likely to be able to settle a case if they come to the table with a clear view of what the salient issues are.

4. **Cost.** In court connected programs, fees are fixed by the court. In private programs, however, the parties should execute an agreement to mediate, a med/arb agreement, an arbitration submission agreement, or another appropriate form of agreement in which the neutral's fees and any administrative fees are determined. The agreement should specify the manner in which the fees will be divided, as well as any refund or cancellation policies.

5. **Date, Location and Attendees.** The parties should specify not only the date, time, and location, but also how long the session will last and who will attend. In an

arbitration or master's proceeding, it may be helpful to specify when certain witnesses will be needed and whether they will be sequestered.

6. Information Exchange. If full discovery has not been completed, the parties may need to provide for an orderly exchange of documents or answers to specific questions. Occasionally, agreements will specify that certain depositions will be conducted. It is usually a good idea to arrange for an exchange of briefs before the ADR session, in part to inform the neutral but also to give each side a summary of the issues to be addressed. Some mediators prefer to receive confidential memoranda from each side - - i.e, briefs that are not exchanged and thus are intended to give a more candid view of the case. (The author's experience as a mediator in programs where confidential memoranda are used is that the parties seldom reveal anything confidential in them, and therefore an exchange of memos is generally more productive.) In either event, it is important for each side to have a clear understanding of the applicable ground rules.

7. Confidentiality. The parties may wish to provide that everything that happens in the ADR session shall be confidential, including the fact that the session is occurring. If so, their agreement should say so. Although there is some measure of statutory protection for confidentiality in mediation (G.L. c. 233, § 23C), there are no similar statutes governing arbitration and other ADR processes.

8. Discovery. Arbitration and mediation have been viewed as streamlined where processes in which the parties dispense with costly, time-consuming discovery. In recent years, however, many attorneys have found that ascertain amount of discovery makes

mediation more effective (because each side is better able to evaluate the strengths and weaknesses of their case) and makes arbitration a fairer process (because the element of surprise is reduced). Submission agreements can specify the type of discovery and set parameters, such as the number of depositions, their duration, etc.

9. Bifurcation and Dispositive Motions. Ordinarily an arbitrator would not entertain a motion for summary judgment or bifurcate the proceedings (e.g., ruling on liability issues before hearing evidence on damages), because federal and state arbitration statutes provide that an arbitral decision can be overturned where the arbitrator did not hear all the relevant evidence. There is a growing trend, however, in the direction of permitting arbitrators to rule on dispositive motions, on the theory that, if the motion were allowed, some of the proffered evidence in the case would no longer be relevant. (The AAA has issued new construction and employment arbitration rules which permit such motions.)

10. Governing Law. Before submitting a matter for decision by an arbitrator, master, or other private adjudicator, it may be useful in some cases for the parties to specify not only the substantive law but also the law governing the adjudication itself. The primary issue here is whether the federal arbitration act or the state arbitration act will govern. (For a discussion of the differences, see Hoffman & Matz, Massachusetts ADR § 10.4 (1996).)

11. Form of Award or Decision. One of the hallmarks of arbitration has been that the arbitrator does not explain his or her decision, but instead issues a “bare” award. (Labor arbitrations are an exceptions; there, a body of published decisions has created a “common law” of the unionized workplace.) However, the parties are entitled to specify that the arbitrator shall issue an opinion setting forth the reasons for the award. The parties may feel that the outcome is more satisfying if they understand the reasons for it. On the other hand, the reasoning may motivate an appeal that would not otherwise have been filed, and the cost of the time involved in writing an opinion is likely to come from the pockets of the parties. Where the damages issues are complicated, however, the parties may find it useful to give the arbitrator a “form of award,” something like a jury verdict questionnaire, to guide the arbitrator’s discretion.

12. Limitation of Remedies. One of the most contentious issues in arbitrations has been the authority of the arbitrator to award interest, punitive damages, attorney’s fees, costs, and other relief. Because one of the objectives of arbitration is to avoid the cost of going to court, specifying the scope of the arbitrator’s powers in a submission agreement will (hopefully) eliminate later disagreement on that subject.

VI. Participating in the ADR Process

A. Procedural Aspects of ADR

The purpose of this section is to outline some of the procedural steps that should be taken in order to steer a case from the litigation path to the ADR path, while at the same time protecting the interests of clients.

1. Tolling Agreements. Most mediations last no longer than a day or two, but some require weeks or even months to complete. During that time, if no suit has been filed, statutes of limitations may run. If the parties wish to maintain the status quo, a tolling agreement is needed. (See Form ___ for a sample tolling agreement.)

2. Motions to Stay. Time standards and tracking orders force litigants to complete discovery and motions for summary judgment on a schedule which may interfere with the use of ADR. After all, if the parties have agreed to mediate their dispute, they may wish to avoid the expense of depositions and motion practice. Yet they may wish to preserve their right to take those steps if the mediation fails. (See Form ___ for a sample motion to stay litigation.) A motion to stay may also be useful where the parties anticipate returning to court after arbitrating some but not all of the issues in a case.

3. Motion to Appoint Master. Although courts have the authority to appoint masters in appropriate cases, they are now used primarily where the parties have requested such an appointment. Thus, motions to appoint a master are often joint motions which specify the person to be appointed, the scope of the issues to be determined, payment arrangements, and the time frame for the hearing and the issuance of a report. (See Form ___ for a sample motion to appoint master. This form can also be used for appointment of a mediator or arbitrator, although such arrangements are usually made by agreement, without the entry of an order by the Court.)

4. Motion to Compel Arbitration. In some cases, a party to an arbitration agreement will resist a demand for arbitration. This can happen when the party demanding arbitration has failed to make timely demand and the opposing party claims that the right to insist on arbitration has been waived. (For a discussion of the waiver issue, see Hoffman & Matz, Massachusetts ADR § 10.09 (1996).) (See Form ___ for a sample motion to compel.) In some cases, it may be necessary for a party to seek a stay of arbitration -- for example, where that party has asked a court to award interim injunctive relief to preserve the status quo so that the arbitration can proceed in an orderly manner after litigation over the injunctive relief issue has concluded.

5. Motion to Confirm, Modify or Vacate Arbitration Award. Once an arbitration award has been issued by an arbitrator or panel of arbitrators, the next step is obtaining compliance. Since an arbitrator cannot issue a judgment or execution, a party seeking compliance with an arbitration award against another party who is refusing to comply with the award must obtain a judgment by means of a motion to confirm. (See Form ___ for a sample motion.) Likewise, a party seeking to modify or vacate an arbitration award must ask the Court to do so. (See Forms ___ for examples of such motions.)

B. Advocacy in ADR Processes.

A discussion of the principles of advocacy in mediation, arbitration, and other ADR processes lies beyond the scope of this chapter. Suffice it to say, for present purposes, however, that the skills needed for effective advocacy in arbitration, master's

proceedings, and other adjudicative ADR processes are not significantly different from those that are needed in court. In mediation and other settlement-oriented forms of ADR, the skills needed by the advocate *are* different -- primarily negotiation skills, but also the ability to persuade. For an excellent discussion of this subject, see E. Galton, Representing Clients in Mediation (1994).

[David A. Hoffman is a mediator, arbitrator, and attorney at the Boston Law Collaborative, LLC. He can be reached at DHoffman@BostonLawCollaborative.com. Mr. Hoffman is a graduate of Harvard Law School, where he was an editor of the Harvard Law Review. He is a former member of the Massachusetts Supreme Judicial Court Standing Committee on Dispute Resolution. Mr. Hoffman serves as an arbitrator and mediator for the American Arbitration Association, the Center for Public Resources Institute for Dispute Resolution, the Massachusetts Office of Dispute Resolution, Middlesex and Worcester Multi-Door Courthouse programs, and the Community Dispute Settlement Center. Mr. Hoffman is the co-author (with Prof. David E. Matz) of Massachusetts Alternative Dispute Resolution (2 vols., Michie 1996).]

Copyright 1995 - David A. Hoffman