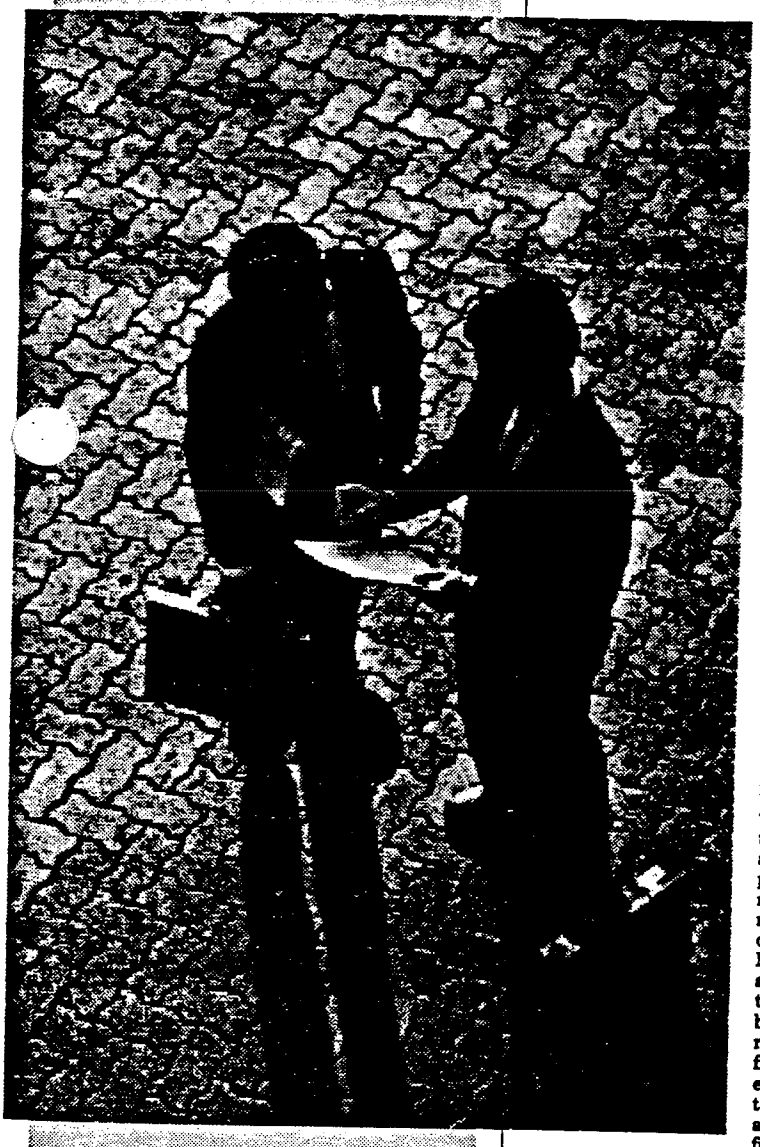
The ABCs Of ADR:
A Glossary Of Dispute Resolution Methods

By David A. Hoffman

Alternative dispute resolution is a term used to describe the entire array of dispute resolution methods other than litigation in the courts. Some commentators have suggested that ADR should stand for appropriate dispute resolution, since a principal advantage of ADR is its inherent flexibility, giving lawyers the ability to tailor the dispute resolution process to the circumstances of the case and the needs and preferences of the disputing parties.



Although some of the terminology used in the field of ADR is familiar (e.g., arbitration, mediation), much of it is relatively new. Moreover, even the well-known terms such as arbitration and mediation are often used interchangeably (and thus incorrectly) by people not familiar with ADR procedures. The following is a glossary of terms used by ADR practitioners, in alphabetical order:

Adjudication. Adjudication is a generic term for the rendering of a decision on a disputed matter by a neutral party or panel. Although the term is most often associated with decision-making by a court or governmental agency, the rendering of a binding decision after the presentation of evidence and arguments in a private, non-governmental setting (such as an arbitration) is also an "adjudication."

Arbitration. Arbitration is a form of adjudication which is generally private and less formal than litigation in court. The decision-maker is usually an individual or panel of three individuals selected by the parties or a neutral agency; in some cases involving three arbitrators, each party selects an arbitrator and those two arbitrators select the third. In most arbitrations, the rules of evidence are relaxed and there is little pre-hearing discovery. The ruling of the arbitrator(s) is rendered in most cases without an opinion. Under both Massachusetts and federal statutes governing arbitration, arbitration awards can be appealed only on a narrow range of grounds (such as fraud or the refusal to hear evidence material to the controversy),[1] and therefore awards are generally more final than a trial court decision, which can be appealed for errors of law or fact. There are many varieties of arbitration, including court-annexed, non-binding and structured arbitrations in which the range of possible awards is limited by agreement of the parties (e.g., "baseball' or last-offer arbitration, or bracketed arbitration).

Case Evaluation. Case evaluation is a process in which the parties or their attorneys present a summary of their case to a neutral third party for an opinion as to the likely outcome if the case is adjudicated. When this process occurs in the early stages of the dispute, it is often referred to as Early Neutral Evaluation (ENE). The opinion of the evaluator is not binding on the parties. Its value is to encourage settlement by indicating the likely determination of a court. The process can be part of a court-annexed program (e.g., a "multidoor courthouse" program) or a private ADR service. Generally the neutral is someone with experience in the field of the dispute — often an experienced attorney or a retired judge. In some instances, case evaluation services will be used by only one party in order to get a "second opinion" about the value of a case.

Civil Appeals Management Plan (CAMP). A Civil Appeals Management Plan has been established in the United States Court of Appeals for the First Circuit and several other circuits in order to reduce appellate caseloads by encouraging settlement of pending appeals. The CAMP program has been implemented by appointing a "settlement counsel" who reviews each case that is docketed and, in appropriate cases, confers with the parties' counsel to discuss settlement.[2]

Community Mediation. Community mediation programs involve the use of volunteer mediators, usually drawn from the local community, to resolve cases pending in the district courts (such as small claims matters, landlord-tenant cases and commercial disputes) and local disputes involving schools, neighborhoods and, in some cases, domestic relations matters. In some instances, minor criminal matters may be referred for mediation.[3]

Conciliation. In several counties, the Superior Court schedules cases for conciliation conferences conducted by retired judges and/or members of the bar in order to assist the parties in settling the case or resolving any discovery or procedural matters that need to be addressed to ready the case for trial. The parties are often required to prepare for a conciliation session by submitting a summary of factual and legal issues in dispute, a list of witnesses and exhibits, and an estimate of the time needed for trial. Conciliation sessions differ from mediation in that exploring the possibility of settlement is only part of the conciliator's agenda; the conciliator must also explore what steps, if any, remain to be taken so that the case is ready to be tried.[4]

Confidential Listening. If the parties to a dispute want to determine whether settlement is possible, they can retain a third party or "confidential listener" to whom the parties communicate their settlement positions. The third party does not disclose the opposing party's settlement position, but reports to both parties in accordance with pre-arranged instructions, whether the parties' positions overlap or are within a specified range of each other. (The parties may agree that if their positions overlap, they will settle at a figure that splits the difference.) This procedure can be combined with mediation if the parties request the third party to assist them in bridging the gap in their settlement positions.[5]

Court-Annexed ADR. Many courts have adopted ADR procedures for pending cases on either a mandatory or voluntary basis. Court-annexed ADR procedures may be staffed by court-supervised personnel or independent agencies. For example, mediation programs in the Suffolk and Norfolk Superior Courts are staffed by non-court

See page 6

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Glossary Of Dispute Resolution Methods

Continued from page 1

of Dispute Resolution. (See also "Multidoor Courthouse" below.) Some programs, such as the CAMP program, involve solely court personnel. Many courts outside Massachusetts use court-annexed arbitration to reduce docket congestion.[6]

Dispute Review Board (DRB). A dispute review board is a dispute prevention technique that is used in the construction industry but which could be adapted to other fields. The DRB is created in the contract between, say, a contractor and developer. The parties to the agreement select the individuals who will serve on the DRB for the duration of the contract. When disputes arise, they are presented to the DRB, which is generally composed of experts who have been following the progress of the project. The DRB's findings are non-binding, but if they are not accepted, they may be used as evidence in any subsequent arbitration. DRB's have been used in a number of major construction projects; for example, a DRB procedure has been established for the Boston Central Artery/Tunnel Project.[7]

Divorce Mediation. The purpose of divorce mediation is to assist the parties in reaching agreement on matters such as custody, visitation, alimony and distribution of assets. The mediator does not seek to reunite the parties or restore their marriage.[8] (See discussion of "mediation" below.)

Early Neutral Evaluation (ENE). ENE is a variant of case evaluation (see above). It is conducted shortly after a law suit is filed — generally before the parties have embarked on discovery. The discussion is confidential and conducted by volunteer attorneys with some expertise on the subject of the dispute or with substantial trial experience. The neutral generally discusses the possibility of settlement with the parties. If settlement is not achieved, the neutral may assist the parties in agreeing on sequencing discovery and the filing of dispositive motions.[9]

Facilitation. Facilitation is a process in which a third party neutral assists several parties to reach consensus. The facilitator does not involve himself or herself in the substantive aspects of the matter under discussion but instead focuses on the process of bringing the parties together toward a decision.[10]

Fact Finding. When the resolution of a dispute turns entirely or in part on a disagreement about a factual issue (e.g., a technical or scientific question), the parties can retain a third-party neutral to determine that particular issue, either by investigation or by reviewing evidence presented by the parties to the dispute. Fact-finding is often used in public sector collective bargaining situations. Fed. R. Evid. 706 also enables the federal courts to appoint a neutral expert.[11]

Master. Both federal and state courts have the power to refer all or part of a case to a master, a neutral decision-maker who conducts a trial-like hearing in which the parties can present witnesses and exhibits and submit briefs. See Fed. R. Civ. P. 53; Mass. R. Civ. P. 53; Superior Courts Rule 49. The master's decision with respect to factual issues is generally considered final, but his or her decision may be reviewed for errors of law.

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Mediation. Mediation is a voluntary process in which a neutral third party assists the parties in resolving their dispute. The mediator has no authority to impose a settlement and the parties are under no obligation to reach an agreement. Any settlement achieved in a mediation is therefore voluntary. The mediator may, but need not, suggest settlement terms. Mediation proceedings are generally private and confidential, and the substance of the discussions in a mediation are generally privileged under G.L.c. 233, §23C.

Med/Arb. Med/arb is a combination of mediation and arbitration, in which the parties agree in advance that if the dispute is not resolved through mediation, they will proceed with a binding arbitration. (In some cases, the mediation may resolve some, but not all, of the issues in dispute and thus will narrow the focus of the arbitration.) The parties generally determine in advance whether the same individual will serve as arbitrator if the dispute is not entirely resolved through mediation. Although the use of the same individual will usually be more efficient, some mediators are reluctant to arbitrate a case in which they have conducted ex parte caucuses with the disputants.[12]

Michigan Mediation. Michigan Mediation is a term used to describe a non-binding arbitration (i.e., it is not mediation at all). A panel of three neutrals is chosen to hear a summary of each party's case and review briefs and documents submitted by each party. The parties are free to reject the panel's decision and proceed with litigation. However, if one party accepts the findings and the other party does not, the party who rejected the findings is liable for the other party's attorney's fees and costs if the judgment is within a certain range of the panel's findings. For example, if the prescribed range is 10 percent and the panel concludes the plaintiff's claim is worth $100,000, the plaintiff may reject the panel's decision and proceed with litigation, but any judgment less than $90,000 would result in the plaintiff paying the defendant's costs.[13]

Mini-Trial. A mini-trial is not an adjudication of a dispute; it is a two-step proceeding designed to facilitate settlement. The first step consists of presentations by the parties' attorneys summarizing the evidence and arguments they expect to offer at trial if the matter is not resolved by settlement. These presentations are made to a panel composed of a neutral third party and the CEOs (or other officials with decision-making authority) of each party to the dispute. The neutral third party presides over the proceeding, while the party representatives are there primarily to observe and assess the strength of the cases being presented to them. During the course of these presentations, the panel members can ask questions in order to clarify the arguments made by counsel. The second step consists of a meeting at the conclusion of the presentations, involving the principals (with or without the neutral) to discuss settlement. The neutral may be asked for his or her assessment of the case. Although mini-trials are generally conducted without involvement of the courts, several courts (including the Federal District Court for the District of Massachusetts) have incorporated mini-trials as an option for litigants in cases where a lengthy trial is anticipated.[14] The term mini-trial is sometimes confused with "summary jury trial." (See discussion of "summary jury trial" below.)

If the parties to a dispute want to determine whether settlement is possible, they can retain a third party or "confidential listener" to whom the parties communicate their settlement positions.

Multidoor Courthouse. In a multidoor courthouse, cases are screened by an intake office, which makes a determination, in consultation with the parties, as to which of several dispute resolution mechanisms should be used. Typically, the options available in a multidoor courthouse program include, at a minimum, early neutral evaluation, mediation, arbitration and adjudication. The concept of the multidoor courthouse began with Professor Frank Sander's 1976 article entitled "Varieties of Dispute Processing," 70 F.R.D. 79 (1976), in which he suggested that the courts should take a role in matching cases with appropriate dispute resolution processes. Multidoor courthouse programs have been established in several states; currently the only such program in Massachusetts is the Middlesex Multidoor Courthouse program, which handles approximately 15 percent of the cases filed in the Superior Court there.[15]

Negotiation. Negotiation, without the assistance of a mediator or facilitator, is the method most attorneys use to resolve cases out of court. Negotiation is also involved in every non-adjudicative ADR process, such as mediation. In some contracts, negotiation between the parties (or, in some instances, between particular officials — such as CEOs — of the parties to the dispute) is a mandatory step in a multi-tiered ADR process. Negotiation involves a joint search for an area of agreement, usually with each party testing the other to find the settlement area. Creative negotiation involves a search for solutions that can give all parties the most satisfaction possible.

Neutral Expert. Neutral experts, retained jointly by the parties to a dispute, are used in some cases to resolve technical issues on a binding or non-binding basis. While this method is generally used outside the scope of court proceedings, a neutral expert can be appointed by the court in which a case has been filed. See, e.g., Fed. R. Evid. 706.

Ombudsperson. An ombudsperson assists in the resolution of disputes within a company, agency or other entity, or of complaints by consumers against such an entity or organization. For example, some large companies have established an ombudsperson to field complaints from employees about personnel matters. Many newspapers have established an ombudsperson to review complaints about editorial decisions. Manufacturers often have an ombudsperson to assist consumers with problems and complaints. Some government agencies have established an ombudsperson to assist with constituents' grievances.[16]

Partnering. Partnering is a dispute avoidance technique used in the construction industry, but which could be used in other industries as well. A partnering arrangement includes (a) meetings between the parties at the outset of contract negotiations to discuss long-term goals; (b) incentives built into the parties' contract to align the parties' interest in the swift completion of the project and (c) agreement on the manner in which disputes will be handled if they arise (e.g., by discussions between senior management, then by reference to a standing dispute resolution board, etc.).[17]

Private Judging. California and certain other states (but not Massachusetts at this point) have statutes under which cases may be referred to private judges who exercise the same authority over the referred case as a trial judge. Unlike arbitration, the decision of the private judge can be appealed in the same manner as any trial court decision. In California (where private judging is sometimes referred to as "rent-a-

A Glossary Of Dispute Resolution Methods

judge"), 20,000 of the 650,000 cases filed in one year were handled by private judges.[10]

Regulatory Negotiation. Regulatory negotiation (sometimes referred to as reg/neg) is a process for administrative rule-making in which affected parties, agencies and citizens groups send representatives to discuss a proposed rule. The negotiation is facilitated by an individual who has no interest in the outcome of the negotiation. The goal is to achieve a consensus broad enough that no party has the incentive to block (e.g., through litigation) implementation of the proposed rule.[11]

Rent-A-Judge. (See "private judging" above.)

Screening Panel. Massachusetts, along with more than 20 other states, has adopted the use of screening panels to review medical malpractice cases before they can be filed or go to trial.[12] Under Massachusetts' program (established by G.L.c. 231, §60B), the parties' attorneys present a summary of the case and copies of relevant documents to a three-member panel consisting of an attorney, physician and Superior Court judge. If the panel decides against the plaintiff, he or she may pursue litigation only after posting a $6,000 bond to secure the payment of the defendant's costs and attorney's fees in the event the defendant prevails at trial.

Settlement Conference. Settlement conferences, which are an increasingly common feature of civil litigation in both state and federal courts, are generally conducted by a judge in the court where the case will be tried. Under the new local rules for the Massachusetts Federal District Court, the court must inquire about the parties' efforts to settle the case at every case conference. Local Rule 16.3. Judges frequently decline to involve themselves in the parties' settlement discussions if the case will be tried without a jury. (Under the new local rules, federal district courts in Massachusetts can refer a case to another judicial officer for settlement discussions. Id.) If a case involves a jury trial, however, some judges will become actively involved as an intermediary in an attempt to settle the case.[13]

Settlement Week. Some courts (though none yet in Massachusetts) set aside a period during which no trials are held and schedule a series of settlement conferences in a large number of cases. The goal is to clear as many cases as possible from the court's docket. The courts often enlist help from bar groups and volunteer lawyers to serve as mediators for the settlement discussions generated by these conferences. In some jurisdictions, settlement weeks or settlement days are scheduled on a regular basis.[14]

Special Master. In cases where the dispute involves a highly technical issue requiring special expertise, courts will often appoint a special master whose experience uniquely qualifies him or her as a decision-maker. Courts also appoint special masters — sometimes referred to as "settlement masters" — to handle large, complex cases requiring a substantial commitment of time and effort because of the need for elaborate case management. (For example, in the Agent Orange, Dalkon Shield and several other toxic tort cases, special masters were involved in both case management and settlement discussions, which led to resolution of those cases.)[15]

Standing Neutral. A standing neutral is a person or panel that has been given authority under the terms of a contract to review disputes arising under that contract. Examples of standing neutrals are dispute resolution boards (discussed above) or an umpire or referee, appointed at the inception of the contract. The contract will specify whether the neutral's decision will be deemed binding or advisory, and, if the decision is non-binding, whether it will be admissible as evidence in any subsequent litigation. Standing neutrals have been used in a variety of construction projects.[16]

Summary Jury Trial (SJT). A summary jury trial is non-binding adjudication administered by the court in which the action is pending. The purpose of the proceeding is to give the parties and their attorneys an assessment of the likely outcome of the case if it goes to trial. Thus, an essential feature is that the parties, or representatives with settlement authority, must attend the SJT. The attorneys present a summary of the evidence and arguments they expect to offer at trial to a jury generally composed of six people chosen from the court's jury list. The jury then deliberates and returns a decision on the issues in dispute. Summary jury trials are generally used only for cases in which a lengthy trial is anticipated. The term summary jury trial is sometimes confused with the term mini-trial, which is discussed above.[17]

Even the well-known terms such as arbitration and mediation are often used interchangeably - and thus incorrectly - by people not familiar with ADR procedures.

Tailored Arbitration. In some cases, parties to a dispute wish to arbitrate (or may be contractually bound to arbitrate) but want to specify the manner in which the arbitration will be conducted. Under the terms of a submission agreement, the parties can "tailor" the arbitration to fit the circumstances of the case by specifying, for example, the issues to be decided, the method of selecting the arbitrator(s), discovery limitations, time limitations for the presentation of evidence and the relief to be awarded if liability is found.[18]

Under both Massachusetts and federal statutes, arbitration awards can be appealed only on a narrow range of grounds. Awards, therefore, are generally more final than a trial court decision.

Endnotes

[1] See 9 U.S.C. §10(a); G.L.c. 251, §12.

[2] See United States Court of Appeals for the First Circuit Local Rule 47.5; American Bar Association, Standing Committee on Dispute Resolution, "Alternative Dispute Resolution: A Handbook for Judges" at 77-86 (P. Harter, ed. 1991); E. Plapinger & M. Shaw, "Court ADR: Elements of Program Design," 141 (1992).

[3] See A. Davis, "Community Mediation in Massachusetts," (1986); American Bar Association, Standing Committee on Dispute Resolution, "Alternative Dispute Resolution: A Handbook for Judges" at 119 (P. Harter, ed. 1991).

[4] See Governor's Alternative Dispute Resolution Working Group, "Dispute Resolution in Massachusetts," 52-56 (1986); "Boston Bar Association Directory of ADR Providers," 14-31 (1992).

[5] See CPR Legal Program, "Containing Legal Costs: ADR Strategies for Corporations, Law Firms and Government," 9 (E. Fine ed. 1988).

[6] See American College of Trial Lawyers, "Handbook on Alternatives for Dispute Resolution," 13-17 (1991); Hennsler, "Court-Annexed ADR," in "Donovan Leisure Newton & Irvine ADR Handbook," 350-72 (J. Wilkinson, ed. 1990); ABA Section of Litigation, "Report of the Task Force on the Civil Justice Reform Act," (1992).

[7] See Endispute, Inc., "Mediation and ADR to Resolve Public Construction Contract Disputes," 16-17 (1992).

[8] See American Bar Association, Standing Committee on Dispute Resolution, "Alternative Dispute Resolution: A Handbook for Judges" at 32-33 (P. Harter, ed. 1991); ABA Family Law Section, "Divorce Mediation: Readings" (L. Riskin ed. 1985).

[9] See "Donovan Leisure Newton & Irvine ADR Handbook," 354-56 (J. Wilkinson, ed. 1990); American Bar Association, Standing Committee on Dispute Resolution, "Alternative Dispute Resolution: A Handbook for Judges" at 99-106 (P. Harter, ed. 1991); E. Plapinger & M. Shaw, "Court ADR: Elements of Program Design," 130-31 (1992); American College of Trial Lawyers, "Handbook on Alternatives for Dispute Resolution," 7 (1991).

[10] See Administrative Conference of the United States, Sourcebook: Federal Agency Use of Alternative Means of Dispute Resolution," 45 (M. Milhauser & C. Pou, Jr., eds. 1987).

[11] See CPR Legal Program, "Containing Legal Costs: ADR Strategies for Corporations, Law Firms and Government," 10-11 (E. Fine ed. 1988); Administrative Conference of the United States, "Sourcebook: Federal Agency Use of Alternative Means of Dispute Resolution," 45 (M. Milhauser & C. Pou, Jr., eds. 1987).

[12] See Endispute, Inc., "Mediation and ADR to Resolve Public Construction Contract Disputes," 32-35 (1992); American Arbitration Association, "Drafting Dispute Resolution Clauses: A Practical Guide," 9 (1992).

[13] See "Donovan Leisure Newton & Irvine ADR Handbook," 354 n.3 (J. Wilkinson, ed. 1990); American Bar Association, Standing Committee on Dispute Resolution, "Alternative Dispute Resolution: A Handbook for Judges" at 87-98 (P. Harter, ed. 1991); E. Plapinger & M. Shaw, "Court ADR: Elements of Program Design," 134-35 (1992).

[14] See E. Plapinger & M. Shaw, "Court ADR: Elements of Program Design," 136-37 (1992).

[15] See E. Plapinger & M. Shaw, "Court ADR: Elements of Program Design," 141 (1992); National Center for State Courts, "Middlesex Multidoor Courthouse Evaluation Project," (1992).

[16] See American Bar Association, Standing Committee on Dispute Resolution, "Alternative Dispute Resolution: A Handbook for Judges" at 115 (P. Harter, ed. 1991).

[17] See Endispute, Inc., "Mediation and ADR to Resolve Public Construction Contract Disputes," 4-5 (1992); American Arbitration Association, "White Paper on the Avoidance and Resolution of Construction Disputes," 16 "The Punchlist," 1 (March 1993).

[18] See American Bar Association, Standing Committee on Dispute Resolution, "Alternative Dispute Resolution: A Handbook for Judges" at 130-35 (P. Harter, ed. 1991); E. Plapinger & M. Shaw, "Court ADR: Elements of Program Design," 139-40 (1992); American College of Trial Lawyers, "Handbook on Alternatives for Dispute Resolution," 8 (1991).

[19] See American Bar Association, Standing Committee on Dispute Resolution, "Alternative Dispute Resolution: A Handbook for Judges" at 143-48 (P. Harter, ed. 1991).

[20] See J. Nolan & L. Sartorio, Tort Law, 37 M.P.S. §277 (2d ed. 1989); "Donovan Leisure Newton & Irvine ADR Handbook," 360-61 (J. Wilkinson, ed. 1990).

[21] See American Bar Association, Standing Committee on Dispute Resolution, "Alternative Dispute Resolution: A Handbook for Judges" at 11-21 (P. Harter, ed. 1991); E. Plapinger & M. Shaw, "Court ADR: Elements of Program Design," 131-32 (1992).

[22] See E. Plapinger & M. Shaw, "Court ADR: Elements of Program Design," 137-38 (1992); American College of Trial Lawyers, "Handbook on Alternatives for Dispute Resolution," 7 (1991).

[23] See American Bar Association, Standing Committee on Dispute Resolution, "Alternative Dispute Resolution: A Handbook for Judges" at 24 (P. Harter, ed. 1991); Governor's Alternative Dispute Resolution Working Group, "Dispute Resolution in Massachusetts," 5 (executive summary) (1986).

[24] See C. Sapers, "Avoiding and Resolving Disputes," in "Legal Cases and Materials for the Construction Professional," 832-35 (unpublished 1992).

[25] See "Donovan Leisure Newton & Irvine ADR Handbook," 356-57 (J. Wilkinson, ed. 1990); American Bar Association, Standing Committee on Dispute Resolution, "Alternative Dispute Resolution: A Handbook for Judges" at 7-10 (P. Harter, ed. 1991); American College of Trial Lawyers, "Handbook on Alternatives for Dispute Resolution," 8-12 (1991).

[26] See Endispute, Inc., "Mediation and ADR to Resolve Public Construction Contract Disputes," 29-31 (1992).