

Alternative Dispute Resolution—An Introduction for Legal Assistance Attorneys

Major Sherry R. Wetsch
Legal Assistance Policy Division
Office of The Judge Advocate General

Alternative dispute resolution (ADR) mechanisms—mediation and arbitration—often offer a quicker, less expensive, and more conciliatory way to settle a dispute than litigation. Potential litigants are using these alternatives more, particularly to resolve family law, consumer law, personal injury, and employment law disputes. Many state¹ and federal² laws and policies now promote or even mandate ADR.³

Resorting to arbitration or mediation is faster and costs less than traditional litigation methods. In addition, litigation is public, while ADR mechanisms generally enable the parties to preserve their privacy. Although it usually helps to have a lawyer present during arbitration or mediation, it is not uncommon for parties to represent themselves, because the procedures are much more informal and flexible than those used in a court hearing. Alternative dispute resolution can produce better and more creative results for the parties, and possibly even preserve an amicable relationship between them. On low dollar and simple cases, the parties may consider a telephone hearing.

Legal assistance attorneys are finding that mandatory mediation or arbitration provisions are often embedded in many contracts, including standard consumer purchase agreements, credit card contracts, insurance contracts, leases, utility contracts, and contracts involving securities. These clauses are

also commonly included in employment contracts.⁴ Many contractual arbitration clauses specify binding arbitration as the only means to resolve any future disputes arising out of the contracts. Almost any kind of dispute⁵ may be suitable for ADR, and legal assistance practitioners may find it advantageous for their clients to affirmatively seek out ADR services, particularly in divorce, child custody, or other family disputes.⁶

This article offers a practical introduction to mediation and arbitration and identifies several web resources. In addition, it includes some useful observations and insights into ADR from an experienced neutral.

Mediation and Arbitration Distinguished

Mediation and arbitration are the two most common types of ADR. They differ significantly. In mediation, a third-party neutral or mediator assists the parties—they meet, explore options, and negotiate a mutual settlement to resolve their dispute. Mediators do not decide who is right or wrong. Instead, they help the parties reach a solution on their own that works for them. The parties are not required to reach an agreement, and sometimes they do not. Generally, there is no record of the mediation session, and the only document produced is the

1. For example, Texas Government Code, Chapter 2008, provides “It is now the policy of the State of Texas that disputes before state agencies be resolved as fairly and expeditiously as possible and that each state agency support this policy by developing and using alternative dispute resolution procedures in appropriate aspects of the agency’s operations and programs.” TEX. GOV’T CODE ANN. ch. 2008 (West 2000).

2. Examples of federal provisions include: The Federal Arbitration Act, 9 U.S.C.S. §§ 1-307 (LEXIS 2000) (making arbitration agreements that involve or affect interstate commerce enforceable); 28 U.S.C.S. § 471 (LEXIS 2000) (mandating that all U.S. district courts adopt plans to reduce the delay and expense of litigation); “Evidence suggests that an effective litigation management and cost and delay reduction program should incorporate several interrelated principles, including . . . utilization of alternative dispute resolution programs in appropriate cases . . .” Congressional Statement of Findings to Judicial Improvements Act of 1990, § 102, Pub. L. 101-650, 104 Stat. 5089 (1990); Exec. Order No. 12,979, 60 Fed. Reg. 55,171 (1995) (encouraging the use of ADR to resolve agency procurement protests).

3. See American Arbitration Association (AAA) (visited May 10, 2000) <<http://www.adr.org>> (containing links to federal and state laws). In 1998 alone, the AAA administered over 95,000 cases using mediation or arbitration. *Id.*

4. Many Department of the Army civilian employees may use mediation through the Army when they file an EEO complaint. See Captain Drew A. Swank, *Mediation and the Equal Employment Opportunity Complaint Process*, ARMY LAW., Sept. 1998, at 46. Legal assistance attorneys seldom find themselves advising on employment matters because of *Army Regulation 27-3, The Army Legal Assistance Program’s* exclusion of most employment disputes from the scope of the legal assistance program. U.S. DEP’T OF ARMY, REG. 27-3, THE ARMY LEGAL ASSISTANCE PROGRAM, para. 3-8 (21 Feb. 1996) [hereinafter AR 27-3].

5. See “What Kinds of Cases Can be Mediated?” (visited May 5, 2000) <<http://www.nolo.com/encyclopedia/articles/cm/cm36.html>> (discussing the types of cases appropriate for mediation). Many non-criminal disputes may be mediated successfully, including those involving contracts, leases, small business ownership, employment and divorce. For example, a divorcing couple might work out a mutually agreeable child custody agreement. On occasion, criminal disputes may also be mediated successfully, even including felony cases such as manslaughter and burglary. In these cases, the mediation sessions have replaced the traditional plea bargaining between the prosecutor and defense counsel. In many cases, the victims (or victim’s survivor) have participated. In some of these, the settlement has included jail time and upon conclusion of the mediation, the parties convene before a judge who imposes the mediation-agreed upon sentence. See Jerry Sandel & Sherry R. Wetsch, *Mediation of Criminal Disputes in the 278th Judicial District*, 25 IN CHAMBERS 3 (1998).

6. See Divorceinfo.com (last modified Mar. 4, 2000) <<http://www.divorceinfo.com/>> (offering many helpful, informative pages on such topics as surviving the divorce experience, life after divorce, taxes, bankruptcy, and parenting). In addition, the site has a page entitled “*Divorce Mediation*” that should help clients understand the benefits of mediation in divorce. *Id.*

actual settlement agreement. Agreements are generally enforceable in the same manner as any other written contract. Mediation preparation is often limited, as there is no formal discovery. It offers the parties a chance to communicate and to vent in a neutral, confidential setting in the presence of a “neutral” third party.

Arbitration is a significantly more formal proceeding that provides the parties a hearing before a neutral decision-maker, the arbitrator. Parties may conduct discovery before the hearing. During the hearing, the parties may make opening statements, introduce documents, and examine witnesses under oath. The rules of evidence are relaxed (for example, hearsay is often considered). The arbitrator or a panel of arbitrators listens to both sides, weighs the evidence presented, then decides the case and issues an order (sometimes called an award). Depending upon the contract clause or other agreement that brought the parties to arbitration, the neutral’s order can be binding or non-binding. If the order is binding, the parties have limited rights of appeal. If the decision is non-binding, the parties may still go to court.

Mediation

Many clients may benefit from mediation. It works as well for one issue, two-party disputes, as it does for multi-issue, multi-party disputes. Sometimes even parties who have had a protracted dispute settle the case fairly quickly after beginning mediation. What is it about mediation that works? A skilled mediator facilitates communication, encourages an exchange of ideas and information, tests the reality of the parties’ perceptions, advises, encourages, suggests, persuades, and translates what is said into a form that detoxifies the emotional baggage of the message. Allowing the parties to vent in a neutral and professional environment can be useful, as many disputes involve egos and feelings, not just legal rights.

Sometimes a mediator will make recommendations to assist the parties in reaching their own agreement. The recommenda-

tions are often creative, collaborative solutions to problems that go beyond the mere exchange of money. Hence, mediated settlement agreements can afford the parties more complete relief than a court decree or an arbitration award. During mediation, the parties may expand discussions to issues that are beyond the matters originally cited in the petition or complaint. Experienced mediators may be able to assist the parties to identify concessions that are of little value to one party, but of great value to the other. They can create a “win-win” situation that is extremely important when the parties have an ongoing relationship, as do parents in a child custody dispute.⁷

There are cases that are not appropriate for mediation. The practitioner should think twice before recommending mediation where one party is truly a victim. For example, mediation may not be appropriate in a family law case where there has been serious spouse abuse.⁸ Obviously an attorney should not use mediation if one of the client’s goals is to establish a legal precedent, given that mediations themselves and the results of mediations are usually confidential.

Policy Guidance

Army Regulation 27-3 recognizes that mediation is an appropriate method of dispute resolution.⁹ *AR 27-3* also specifies that legal assistance attorneys are encouraged to share innovative measures with other legal assistance providers.¹⁰ The regulation outlines the services legal assistance attorneys may provide, including mediation.¹¹ While legal assistance attorneys may serve as mediators, they may not ethically do so after forming an attorney-client relationship with a party to the mediation as they will necessarily have lost their neutrality.¹² In addition, attorneys who serve as mediators or arbitrators must comply with the ethical standards of *Army Regulation 27-26, Rules of Professional Conduct for Lawyers*.¹³ Consider this comment to Rule 2.2 when deciding whether you as a legal assistance attorney should serve as a mediator:

7. Annette Galik, *Mediating Child Support Contempt Cases*, 62 TEX. B. J. 543 (1999).

8. Texas Family Code § 6.602 allows the court on its own motion to order parties to mediation. However, a party in a dissolution of marriage proceeding who has been a victim of spouse abuse may file objections to mediation with the court on the basis that family violence has been committed against the objecting party by the other party. After an objection is filed, the suit may not be referred to mediation unless, on the request of the other party, a hearing is held and the court finds that a preponderance of the evidence does not support the objection. If the suit is referred to mediation, the court shall order that appropriate measures be taken to ensure the physical and emotional safety of the party who filed the objection. The order shall provide that the parties not be required to have face-to-face contact and that the parties be placed in separate rooms during mediation. Sometimes, while not rising to the level of a victim-offender scenario, the parties nonetheless have power imbalances between themselves that are so extreme that the case is extraordinarily difficult to mediate. TEX. FAM. CODE ANN. § 6.602 (West 2000).

9. AR 27-3, *supra* note 4, para. 3-7j.

10. *Id.* para. 3-4a(5).

11. *Id.* para. 3-7.

12. See U.S. DEP’T OF ARMY, REG. 27-26, RULES OF PROFESSIONAL CONDUCT FOR LAWYERS, app. B, Rule 2.2 (1 May 1992). For example, a lawyer who has represented one of the individuals for a long period and in a variety of matters might have difficulty being impartial between the individual and one to whom the lawyer has only recently been introduced.

Should a legal assistance officer see both the dependent-seller and a soldier-buyer of a used car, the individuals would have potentially conflicting interests and the legal assistance officer would be acting as a mediator in such a situation. Because confusion can arise as to the lawyer's role where each individual is not separately represented, it is important that the lawyer make clear the relationship. A lawyer acts as a mediator in seeking to establish or adjust a relationship between individuals on an amicable and mutually advantageous basis; for example, arranging a property distribution in settlement of an estate or mediating a dispute between individuals. The lawyer seeks to resolve potentially conflicting interests by developing the individuals' mutual interests. The alternative can be that each individual may have to obtain separate representation, with the possibility in some situations of incurring additional cost, complication or even litigation. Given these and other relevant factors, all the individuals may prefer that the lawyer act as mediator. In considering whether to act as a mediator between individuals, a lawyer should be mindful that if the mediation fails the result can be additional cost, embarrassment and recrimination. In some situations the risk of failure is so great that mediation is plainly impossible. For example, a lawyer cannot undertake mediation among individuals when contentious litigation is imminent or who contemplate contentious negotiations. More generally, if the relationship

between the individuals has already assumed definite antagonism, the possibility that the individuals' interests can be adjusted by mediation ordinarily is not very good.¹⁴

In most cases, if an Army attorney is going to mediate, it will be an attorney serving in another section of the Office of the Staff Judge Advocate (such as Administrative Law).¹⁵

How Does a Client Get to Mediation?

How does a client get to mediation? When you think mediation would benefit your client, one way is to ask the other party to mediate. If your client desires mediation, you as the attorney can forward the request. Another way to get there may be by contract. Many contracts contain pre-dispute ADR provisions. Check to see if the contract contains a mandatory mediation provision.

If your client is already in litigation, the court may on its own motion order the parties to mediate.¹⁶ In such cases, a party is required to participate in good faith¹⁷ and to follow the applicable rules of mediation, but is not required to reach an agreement. Any settlement is always purely voluntary.

How Can You Help Your Client Avoid Mediation?

If a court has ordered your client to mediation but you or your client do not think that the case is either ripe or appropriate for mediation, what should you do? In many instances, the client is allowed a brief period to file objections.¹⁸ There may be a statute that exempts your client from forced mediation. In Texas, for example, courts are barred from ordering victim-

13. *Id.* Rule 2.2 provides:

(a) A lawyer may act as a mediator between individuals if:

(1) the lawyer consults with each individual concerning the implications of the mediation, including the advantages and risks involved, and the effect on the lawyer-client confidentiality, and obtains each individual's consent to the mediation;

(2) the lawyer reasonably believes that the matter can be resolved on terms compatible with the individuals' best interests, that each individual will be able to make adequately informed decisions in the matter, and that there is little risk of material prejudice to the interests of any of the individuals if the contemplated resolution is unsuccessful; and

(3) the lawyer reasonably believes that the mediation can be undertaken impartially and without improper effect on other responsibilities the lawyer has to any of the individuals.

(b) While acting as a mediator, the lawyer shall consult with each individual concerning the decisions to be made and the considerations relevant in making them, so that individual can make adequately informed decisions.

(c) A lawyer shall withdraw as a mediator if any of the individuals so requests, or if any of the conditions stated in paragraph (a) is no longer satisfied. Upon withdrawal, the lawyer shall not represent any of the individuals in the matter that was the subject of the mediation unless each individual consents.

14. *Id.* This comment also provides sound guidance for legal assistance attorneys serving as mediators on confidentiality and attorney-client privilege.

15. *See infra* note 39 and accompanying text. While lawyers may serve as mediators, there is no requirement that a mediator must be a lawyer.

16. For example, section 154.002 of the Texas Civil Practice and Remedies Code provides that it is the policy in the state to encourage the use of ADR to resolve disputes. Some district courts in Texas automatically refer cases involving children to mediation unless domestic violence is an issue. TEX. CIV. PRAC. & REM. CODE ANN. § 154.002 (West 2000).

17. As a practical matter it is difficult to enforce the requirement of "good faith."

offender mediation or other ADR in a criminal prosecution arising from family violence.¹⁹

As a practical matter, however, there is rarely a reason to avoid mediation. The economic cost of participating is usually low, as is the time commitment. Many mediations can be completed in a single session ranging between two and four hours. There is little or no risk involved, as your client is not giving up any right to proceed to arbitration or litigation. At the very least, you and your client will have an opportunity to hear the other side's view of their case. Additionally, if you have a difficult client, the mediator may support some of the positions you have previously articulated to your client.

Agreements to Mediate

Before beginning mediation, the parties need to establish and know the ground rules. They do so in an "agreement to mediate." When ordered to mediate, a court order will often contain or refer to the "rules of mediation." Some courts have standard rules that are part of an order to mediate. If the court does not have established rules, the mediator can provide a set that is applicable for the dispute.

If the parties are already in litigation when they sign an agreement to mediate, legal assistance attorneys should consider whether the agreement constitutes an agreement that should be filed with the court pursuant to the applicable state rules of civil procedure.²⁰

An agreement to mediate forces the parties to acknowledge that they understand the rules of the mediation. Perhaps the most important rule is the requirement for confidentiality.²¹ It is paramount to a successful mediation. Both an agreement to mediate and the rules for mediation should include a provision that the parties agree and understand that the mediator will not be subpoenaed for any matter arising out of the dispute. Additionally, state law may require that the third-party neutral maintain confidentiality,²² and may even set out circumstances under which the impartial third party may be precluded from testify-

ing in proceedings relating to or arising out of any matter in dispute.²³ If confidentiality is not the law in your jurisdiction, consider asking the mediator to incorporate a confidentiality provision into the agreement to mediate, as well as into any settlement agreement.

The confidentiality requirement encourages open communication. If you (or your client) are concerned about discovery abuse,²⁴ seek a private caucus with the mediator and let the mediator guide the mediation without disclosing certain information to other parties. If witnesses or family members attend the mediation, the mediator should ensure that they too understand and agree to the rules.

The Mediation Process

Every mediator has his own way of conducting a mediation, and every mediation differs. The process is flexible and informal. Some mediators require the parties to submit information regarding issues before the first mediation session, while others prefer to wait until the first meeting of the parties.

The mediation often starts with a "general caucus" where the parties and the mediator gather in the same room. The mediator covers the rules of mediation and ensures that any needed agreements to mediate are signed. The parties introduce themselves, and the mediator explains the mediation process. The parties or their representative then make opening statements to identify issues and clarify perceptions.

Many mediators will encourage the parties to begin a dialogue during general caucus. Venting is a legitimate and important part of the mediation process, and can take place at any point in the process. Frequently the emotional needs of the parties need to be addressed prior to any other issues.

After opening statements, the mediator may ask whether there are any offers for settlement, and may ask other questions designed for issue clarification. These questions can encourage

18. In Texas, if a court refers your case to an alternative dispute resolution procedure, you have ten days from receipt of notice to file your objections. TEX. CIV. PRAC. & REM. CODE ANN. § 154.022.

19. S. 1124, 76th Leg., 1999 Tex. Sess., available at <<http://www.capitol.state.tx.us/tlo/billnbr.htm>>.

20. For example, pursuant to Rule 11 of the Texas Rules of Civil Procedure, no agreement between attorneys or parties touching any pending suit will be enforced unless it is in writing, signed, and filed with the papers as part of the record, or unless it is made in open court and entered of record. TEX. R. CIV. P. 11.

21. In Texas, a requirement for confidentiality and impartiality has been legislated. See TEX. CIV. PRAC. & REM. CODE ANN., ch. 154. For a discussion of confidentiality in arbitration, see Edward Dolido, *Confidentiality during and after Arbitration* (visited May 8, 2000) <<http://www.adr.org/publications/currents/cur1299-2.html>> (concluding that confidentiality ultimately depends on the parties).

22. See TEXAS CIV. PRAC. & REM. CODE ANN., ch. 154.

23. See TEXAS GOV'T CODE ANN. § 2008.054 (West 2000).

24. On occasion, attorneys have expressed the concern that the only reason the other party appeared for the mediation was to learn more about the case rather than participating for the purpose of negotiating a settlement.

the parties to focus on the essential issues of the case rather than on emotional matters.

If the parties are hostile or too emotional, the mediator will separate the parties and shuttle back and forth between them in “private caucuses.” A private caucus is a conference between the mediator and one party, without the other party being present. The mediator passes offers and demands between the parties. Conversations between a party and the mediator during private caucus are confidential unless a party authorizes the mediator to disclose information to the other side.

The mediator may do some “reality checking” with the parties in private caucuses. Particularly when parties remain steadfast in their positions, the mediator may probe regarding risks, worst-case, and best-case scenarios. The mediator will try to identify a party’s wants, needs, and hidden agendas. The mediator may use general and private caucuses alternatively to help the parties reach agreement.

Some cases require more than one mediation session. Sometimes parties need time to gather additional information or to evaluate the proposal before them. Sometimes the parties just run out of time and need another session to finalize matters.

Whether the case settles or reaches an impasse, the mediator probably will meet with the parties together at the end of the session to thank everyone for participating and then close the mediation. If the case has neither settled nor reached an impasse, the mediator will probably encourage the parties to attend another mediation session. Sometimes the work during a mediation session leads to a future settlement even without another mediation meeting. A telephone conference may be all that is needed to wrap things up. If the case does settle, the mediator will urge the parties to sign a settlement before ending the final mediation session to memorialize the agreement.

Settlement Agreements

Unless the parties sign an agreement to resolve their dispute before leaving the mediation, a party may change his mind and not sign later. A hand written agreement can suffice; the parties can execute a more formal agreement later.

A written settlement agreement is a contract between the parties. If the matter was already in litigation or arbitration when the agreement was reached, the practitioner needs to determine whether asking the judge or arbitrator to incorporate the mediated settlement agreement into an order (or award) is

desirable or maybe even required. Such requirements may be found in state rules of civil procedure.²⁵

Authority to Settle

Since one of the key goals of mediation is a signed agreement before the parties leave the mediation, the individuals with “authority to settle” need to participate in the process. If the other party is a corporation such as an insurance company, ask the corporate representative during opening session if they have the authority to settle the case. If a representative discloses limits on his or her authority, ask whether the actual person who has authority can at least be reached by telephone. Sometimes attorneys appear at the mediation on behalf of clients (corporate or non-corporate). As long as the attorney has the authority to settle or can obtain authority to settle based on their participation, this should be acceptable. It is not uncommon for the attorney or other person representing a party to make a telephone call to obtain authority to make or to accept particular offers. Having someone present who can settle the case by signing and binding that party to a settlement agreement is the key.

Types and Styles of Mediation

There are different styles of mediation. Two common styles are the directive style and the transformative style.

Most lawyers are familiar with the problem-solving or directive approach to mediation. The mediator using this approach actively participates in moving the parties toward settlement. The mediator asks direct questions, offers ideas, and makes suggestions. The goal of this type of style is to assist the parties in resolving the issues at dispute.

Another approach to mediation is the “transformative” style.²⁶ Mediators using the transformative approach do not focus on problem-solving or settlement. Rather, the focus is on the parties themselves. The transformative practitioner focuses on changing people and not situations. The mediation is an opportunity for empowerment and recognition for the parties. It is more facilitative than directive.²⁷ The United States Postal Service currently uses the transformative approach to mediate certain employment disputes, hoping that the parties will gain skills that will assist them in future situations. One goal is to improve work relationships.

A mediator may also use a hybrid approach, particularly in cases such as child custody disputes, where the relationship of

25. *E.g.*, TEX. R. CIV. P. 11; *see supra* note 20. Such requirements may also be found within domestic relations code sections. Section 6.602 of the Texas Family Code provides that mediated settlement agreements are binding on the parties if the agreement (1) provides in a prominently displayed statement that is in boldfaced type or capital letters or underlined that the agreement is not subject to revocation; (2) is signed by each party to the agreement; and (3) is signed by the party’s attorney, if any, who is present at the time the agreement is signed. TEX. FAM. CODE ANN. § 6.602 (West 2000).

26. R.A.B. BUSH & J.P. FOLGER, *THE PROMISE OF MEDIATION* (1994).

the parties and the legal issues need to be addressed. If you believe that your client's case would benefit from a certain style of mediation, then look for a neutral that practices the style you need. Do not hesitate to ask the mediator what his or her approach is. State your preference. Good mediators will adjust their styles to meet the needs of the parties.

Arbitration

Many arbitrations arise out of a "future disputes" clause embedded in a contract; these clauses often provide for binding arbitration.²⁸ The bottom line in these cases is that the parties have contracted away their right to seek redress in court. They may have also contracted away their rights to certain types of relief, such as punitive damages and attorneys' fees. When the parties have agreed to binding arbitration, either party can usually request it when a dispute arises. If a party refuses to participate, the movant can request a court to issue an order to compel arbitration under either the Federal Arbitration Act or a state's arbitration act.

Although there are some benefits to using arbitration versus litigating, one issue for a legal assistance practitioner to consider is that if your client agrees to settle all disputes arising out of a contract with binding arbitration, your client may be precluded from participating in a related class action. In small dollar cases, this could be most unfortunate for a consumer. Given that there are some expenses involved in arbitration, it may not be feasible for individual clients to pursue low dollar disputes.

Unbeknownst to many consumers, many credit card companies have amended credit card agreements to insert arbitration provisions. As AR 27-3 provides that legal assistance will be provided to debtors who require help on credit card claims, the legal assistance practitioner may need to advise clients on arbitration procedures.²⁹

Credit card companies are not the only ones inserting arbitration provisions in the fine print of their agreements with consumers. Banks, retailers such as Circuit City and Gateway, and long distance companies have done the same. Courts have been upholding the binding arbitration agreements that can be found in many pre-dispute provisions.³⁰

When advising a client regarding a consumer dispute or arbitration, be sure to cover these questions:

- (1) Is there an agreement to arbitrate?
- (2) Which statute governs the arbitration rights and procedures in this case?³¹
- (3) Is the dispute within the scope of the arbitration agreement?
- (4) Is there any choice possible in the selection of arbitrators?
- (5) Has the client waived his or her right to litigate?
- (6) Has the client waived his or her right to certain types of damages?
- (7) Can the arbitrator's award be changed or overturned?

27. According to the United States Postal Service, a mediator with a transformative orientation believes that conflict presents opportunities for individuals to change (transform) their interactions with others, if they choose. People can take advantage of these opportunities by exercising their capabilities for both decision-making and perspective-taking. Conversely, a mediator with a directive orientation believes that conflict represents only a problem to be solved or a dispute to be settled. A mediator with a directive orientation assumes ownership of the parties' problem and its solution, and directly or subtly engages in activities that drive, determine, or impose both the definition of the problem and its solution. Houston District Redress Program of the United States Postal Service, 1999 Advance Mediation Skills Training (on file with author).

28. The following is a sample arbitration provision:

Arbitration: Any claim, dispute or controversy by either you or us against the employees, agents or assignee of the other, arising from or relating in any way to this Agreement or your Account, including Claims regarding the applicability of this arbitration clause or the validity of the entire Agreement, shall be resolved by binding arbitration by the National Arbitration Forum, under the Code of Procedure in effect at the time the Claim is filed. Rules and forms of the National Arbitration Forum may be obtained and Claims may be filed at any National Arbitration Forum office, www.arb-forum.com or P.O. Box 50191, Minneapolis, MN 55405, telephone 1-800-474-2371. Any arbitration hearing at which you appear will take place at the location within the federal judicial district that includes your billing address at the time the Claim is filed. This arbitration agreement is made pursuant to a transaction involving interstate commerce, and shall be governed by the Federal Arbitration Act, 9 U.S.C. Sections 1-16. Judgment upon any arbitration award may be entered in any court having jurisdiction.

This agreement applies to all Claims now in existence or that may arise in the future except for: (1) claims that you or we have individually filed in a court before the effective date of the amendment of the Agreement adding this arbitration agreement; (2) claims advanced in any judicial class actions that have been finally certified as class actions and where notice membership has been as directed by the court before the effective date of the amendment of the Agreement adding this arbitration agreement; and (3) claims made by or against any affiliated third party to whom ownership of your Account may be assigned after default (unless other Party elects to arbitrate). Nothing in this Agreement shall be construed to prevent any party's use of (or advancement of) any Claims, defenses, or offsets in bankruptcy or repossession, replevin, judicial foreclosure or any debts now or hereafter owned by either party to the other under this agreement.

In the absence of this arbitration agreement you or we may otherwise have a right or opportunity to litigate claims through a court, or to participate or be represented in litigation filed in court by others, but except as otherwise provided above, all claims must now be resolved through arbitration.

29. AR 27-3, *supra* note 4, para. 3-6e.

(8) What costs will the client be responsible for?

Choosing a Neutral

Once the client decides to use ADR, finding a “neutral” becomes paramount. Where should you (or your client) look?

Legal assistance attorneys working with a low-dollar value case or a client with limited financial resources have more than one practical alternative. Many counties have community-based or court-annexed mediation centers. If you do not know whether such a center operates locally, contact a local court or the Council of Better Business Bureaus (BBB). Many court-annexed dispute resolution centers are partially funded by the public through means such as a portion of filing fees. Some of these centers charge a reduced fee for low-income parties or low-dollar cases. The BBB may provide free or low-cost arbitration and mediation services for certain types of consumer disputes.³² Mediation centers, as well as many BBB programs, often use volunteers as neutrals. While this keeps the cost of the service down, realize that your client may be assigned an unseasoned neutral trying to gain experience.

If the ADR is court-ordered, the court may have already appointed a neutral. If not, determine if there is a statutory or contractual designation of a particular panel of neutrals that must be used. Some statutes and contracts will also designate required procedures.

Both lawyers and non-lawyers serve as neutrals. The fees charged vary from neutral to neutral and from case to case. Fees may be charged on an hourly basis or by the day or half-day. Qualifications vary and should be evaluated as early as possible, but no later than when deciding if conflicts of interest exist. In addition to looking for experience as a neutral, see if the neutral has any expertise in the area of the dispute. For example, if you are dealing with a real estate dispute, it should

be possible to find an experienced neutral that has prior experience either in real estate law or as a real estate agent.³³

If your client’s dispute is already in litigation and there is not a contractual or statutory directive controlling the selection of a neutral, the client may petition the court to appoint one. The court is likely to appoint an experienced neutral with whom it is familiar. It is also possible that the court may have a fund to provide for payment of fees for the neutral.

Even if your client is not in litigation, see if your local courts maintain lists of experienced, qualified neutrals that are willing to serve. The going rate for these private practitioners varies. Most attorneys charge their normal hourly rate. Some neutrals charge a flat day or half-day rate. For example, a mediator whose normal billing rate is \$250 per hour might charge \$500 per party for a half day. If your client cannot afford the quoted fee of a neutral, you can always ask the neutral if he or she could reduce the rate. Sometimes, if one party has a “deeper pocket” than the other, such as an insurance company and an insured, the “deep pocket” will agree to pay a greater portion of the fee.

If there is a governmental agency that regulates the activity that is the subject of the dispute, contact that agency. Some agencies have regulations that provide for the services of a neutral. For example, the Texas Department of Transportation, which regulates shipping companies, contracts with private practitioners to serve as neutrals on disputes between consumers and moving and storage companies. The service is provided at no cost to the consumer.

There also may be a non-governmental agency that polices the activity that is the subject of the dispute. The National Association of Security Dealers (NASD) has panels of arbitrators and mediators for disputes concerning securities. Other organizations, such as the American Arbitration Association (AAA)³⁴ and the National Arbitration Forum,³⁵ provide neutrals, are involved in the administration of their services, and may have established policies and procedures. Parties are

30. Gateway’s arbitration agreement includes the following:

Any dispute, controversy, or claim against Gateway, Gateway 2000, Inc. or its affiliates arising out of or relating to this Agreement, its interpretation, or the breach, termination or validity thereof, or any related purchase shall be resolved exclusively and finally by arbitration administered by the American Arbitration Association (AAA) under its rules. You may file for arbitration at any AAA location in the United States upon payment of \$100 or any applicable filing fee. The arbitration will be conducted before a single arbitrator, and will be limited solely to the dispute or controversy between you and Gateway. The arbitration shall be held in any mutually agreed upon location in person, by telephone, or online. Any decision rendered in such arbitration proceedings will be final and binding on each of the parties, and judgment may be entered thereon in a court of competent jurisdiction. The arbitrator shall not award either party special, exemplary, consequential, punitive, incidental or indirect damages, or attorneys’ fees and each party irrevocably waives any such right to recover such damages. The parties shall share the costs of the arbitration (including arbitrator’s fees, if any) in the proportion that the final award bears to the amount of the initial claim.

See *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147 (7th Cir. 1997).

31. Attorneys should determine if the Federal Arbitration Act (9 U.S.C.S. §§ 1-307 (LEXIS 2000)) or a state statute applies.

32. For more information on available services in your area, call the Council of Better Business Bureaus (BBB) at 1-800-955-5100 or visit the BBB’s web site at <<http://www.bbb.org>>.

33. See Mediation Information and Resource Center, *What Qualifications Does a Mediator Need?* (visited May 8, 2000) <<http://www.mediate.com/about/index.cfm#selectam>>.

charged a fee for services. Sometimes the fee is based on the amount in dispute. Yet another source of mediators is The National Association for Community Mediation (NAFCM).³⁶ This membership organization is comprised primarily of community mediation centers. Its web site contains a by-state directory of community mediation centers.³⁷ An additional source is the Professional Mediation Association.³⁸ Last, but certainly not least, contact the state and local bar association for information on ADR providers and other ADR-related information.

A staff judge advocate (SJA) in a community without available low-cost ADR may establish an installation or community panel of neutrals in cooperation with Army Community Service volunteers. If the installation is large enough, the SJA may have enough qualified attorneys who can serve. Of course, a disputing party who is not a service member or a business who routinely serves the military community may be uncomfortable using a "military" neutral because there could be a perception of favoritism toward the service member. However, if the service is free, and all parties sign a disclosure and waiver, this could be an option when the parties cannot afford to pay for the services of a neutral. An example is the arbitration program for landlord and tenant disputes, which was established by The III Corps and Fort Hood Staff Judge Advocate.³⁹ An SJA could

also coordinate with local reserve judge advocates that are willing to serve as a neutral to earn retirement points.⁴⁰

Preparing Your Client for Mediation

Depending on your available time, other clients, and resources, you may help your client prepare for mediation. Preparing for mediation is substantially similar to preparing for trial. Unless you are accompanying your client to the mediation, you should advise the client how to present the case very similarly to presenting a case in small claims court. Several web sites offer helpful checklists, pamphlets or articles.⁴¹

In addition, the Federal Trade Commission offers *Resolving Consumer Disputes: Mediation and Arbitration* which may help clients understand mediation and arbitration generally.⁴² Several other web sites contain useful information.⁴³

Conclusion

Mediation and arbitration can help your clients resolve their disputes faster, cheaper, and more privately than litigation. The next time you find yourself advising a client facing what appears to be an irreconcilable dispute, consider mediation or arbitration as an alternative to litigation. Managed wisely, ADR may be in the client's best course of action.⁴⁴

34. The AAA, the largest and one of the oldest ADR organizations active in the United States, has an interest in all areas of ADR. See American Arbitration Association (visited May 10, 2000) <<http://www.adr.org>> (offering extensive information about the AAA's services, including copies of many of the more important sets of dispute resolution rules and procedures, ethical standards, descriptions of the services available through the Eastman Library, the roster of neutrals, and publications). Particularly useful are the resources on arbitration law which allow one to obtain the text of federal, state, and uniform laws relating to arbitration and to some extent other areas of dispute resolution. *Id.*

35. See National Arbitration Forum (visited May 10, 2000) <<http://www.arb-forum.com/index.htm>>. The Forum is a nationwide network of professional arbitrators, who are retired judges, litigators, and law professors. It administers arbitrations, provides the rules that govern the arbitrations, and schedules the arbitrators who ultimately decide disputes. It is a neutral arbitration company and is not affiliated with any party. Its web site includes a library and some sample clauses. *Id.*

36. The National Association for Community Mediation's mission is "to support the maintenance and growth of community-based mediation programs and processes, to present a compelling voice in appropriate policy-making, legislative, professional, and other arenas, and to encourage the development and sharing of resources for these efforts." See The National Association for Community Mediation (visited May 9, 2000) <<http://www.nafcm.org>>.

37. *Id.*

38. The Professional Mediation Association was established to promote mediation. It has a free mediator referral service for persons, organizations, or companies, and will provide all necessary contact information. See The Professional Mediation Association (visited May 10, 2000) <<http://www.promediation.com/>>.

39. See Lieutenant Colonel Gene Silverblatt & Robert Sullivan, *Arbitration of Landlord-Tenant Disputes at Fort Hood*, ARMY LAW., June 2000, at 32. In this program, landlord-tenant disputes among military personnel are arbitrated under the provisions of the Texas General Arbitration Act. The procedures established apply to disputes of at least \$100, and only those cases not involving the United States government. The program does not apply to criminal or disciplinary matters, or matters of official business. The Chief, Administrative & Civil Law, III Corps and the Fort Hood Staff Judge Advocate's office, supervises the arbitration program. The arbitrator who hears the cases is usually a civilian employee and not a lawyer.

40. See AR 27-3, *supra* note 4, para. 2-2b (containing general information on reserve judge advocates earning retirement points).

41. See ADR Resources (visited May 10, 2000) <<http://www.adrr.com/>> (containing informative sections entitled *Preparing for Mediation*, *Mediation Checklist*, *Using the Mediation Checklist*); Divorceinfo.com (last modified May 22, 1999) <<http://www.divorceinfo.com/preparingformediation.htm>> (offering information on preparing for mediation); Nolo.com, Self-help Law Center (visited May 10, 2000) <http://www.nolo.com/encyclopedia/cm_ency.html?t=001A0000011011999#Subtopic77> (including general information on mediation); FreeAdvice.com (visited May 10, 2000) <<http://www.freeadvice.com/law/559us.htm>> (offering general information about mediation).

42. See Federal Trade Commission (visited May 10, 2000) <<http://www.ftc.gov/bcp/online/pubs/general/dispute.htm>>.

43. See The Office of the Executive Secretary, Virginia Department of Dispute Resolution Services (last modified Mar. 7, 2000) <<http://www.courts.state.va.us/cons/consumer.htm>> (offering several publications: *Mediation: A Consumer Guide*; *Mediation—Resolving Disputes in a Different Way*; *Guidelines for the Training and Certification of Court Referred Mediators*; *Standards of Ethics and Professional Responsibility for Certified Mediators*; *What Every Lawyer’s Client Should Know About Mediation*; *Visitation: Factors to Consider*; and links to a coalition of community mediation centers); Georgetown University, E.B. Williams Library (last modified Dec. 20, 1999) <<http://www.ll.georgetown.edu/lr/rs/adr.html>> (including ADR primary legal materials including Title 9, Arbitration, United States Code (official text through House of Representatives) and links to state statutes on dispute resolution). The Office of Personnel Management, *Alternative Dispute Resolution: A Resource Guide* (last modified Aug. 3, 1999) <<http://www.opm.gov/er/adrguide/adrhome.html-ssi>> provides an excellent seven-chapter comprehensive manual describing the ways in which various government agencies resolve disputes. Chapter 1, organized alphabetically by agency name, describes ADR techniques and practices for twenty-eight different federal agencies. Other sections include “Shared Neutrals Program,” “Administrative Appeals Agencies,” “ADR Training and Assistance Sources” (which lists both federal and non-federal sources for ADR training), a link to other ADR web sites, and an annotated bibliography. The Appendix contains ADR documents including the ADR Act of 1996, the Presidential Memorandum of 1998, and Executive Order 12,871. See also Mediate.com (visited May 10, 2000) <<http://www.mediate.com>> (consisting of a “Mediation Information and Resource Center, where mediators, mediation organizations, and the public meet.” offering extensive, searchable, and clickable lists of mediators and dispute resolution organizations, a useful collection of articles on ADR topics, lists of training programs, professional meetings, newsletters, and other dispute resolution activities); The Academy of Family Mediators (visited May 10, 2000) <<http://www.mediators.org>> (describing the Academy, its history, its role in developing important standards for training and mediator ethics, and publishing *Mediation Quarterly*); The American Bar Association Section on Dispute Resolution (visited May 10, 2000) <<http://www.abanet.org/dispute>>.

44. For examples of agreements to mediate, rules of mediation, and sample short-form pre-dispute clauses, see the June 2000, *The Army Lawyer* (“Miscellaneous Administrative Information”) at <<http://www.jagnet.army.mil>>.

Attachment A

Agreement to Mediate

This case has been referred to mediation [pursuant to an Order of the Court] [by agreement of the Parties hereto] designating _____ as the mediator.

Accordingly, it is AGREED as follows:

_____ has been designated to mediate this case and is authorized to conduct the mediation of this case.

In all respects the mediation shall be governed by and conducted in accordance with this Agreement, [any applicable state law], and the "Rules for Mediation," a copy of which is attached hereto.

All mediation sessions shall be private, confidential, and privileged from discovery. The Mediator shall not be required to disclose any information revealed to him/her, unless authorized by the Parties or as otherwise required by law. Each participant agrees not to make any effort to compel any testimony whatsoever of the Mediator regarding any communications, written or oral, made in connection with the mediation. Likewise, each person agrees not to make any effort to compel the Mediator to produce any information or documents provided to him/her by any Party to the mediation.

1. The Parties acknowledge that the Mediator shall be serving as a neutral intermediary only and will not act as an attorney or advocate for any party.

Each participant is advised that if an agreement is reached as a result of this mediation and the Mediator assists in the preparation of a written settlement agreement, then each Party should have the settlement agreement independently reviewed by their own attorney before executing the agreement.

The Mediator is expressly permitted to meet privately with any of the Parties and have such ex parte communications with any party before, during, or after the mediation as the Mediator determines are necessary and proper.

The Mediator has the discretion to terminate the mediation at any time if he/she believes that an impasse has been reached, or that the mediation should not continue for any other reason.

The Court will be advised by the Mediator only as to whether the case settled or not, or whether the mediation was recessed or was reset.

If any Party to this Agreement makes any effort to involve the Mediator in litigation relating to this mediation, or attempts to compel his/her testimony, or attempts to have the Mediator

divulge any information or produce any documents relating to the mediation, such Party agrees to pay all fees and expenses of the Mediator in resisting such efforts, including reasonable attorneys' fees.

AGREED, this ____ day of _____, 20__.

Attachment B

Rules of Mediation

Definition of Mediation. Mediation is a process in which an impartial third person, the Mediator, facilitates communication between the Parties to promote reconciliation, settlement, or understanding. The Mediator may suggest ways of resolving the dispute(s), but may not impose his or her judgment on the issues of the Parties.

Agreement of Parties. Whenever the Parties have agreed to mediation, they are deemed to have made these rules, as amended and as in effect as of the date of the submission of the dispute, a part of their agreement to mediate.

Consent to Mediator. The Parties consent to the appointment of the individual named as Mediator in their case. The Mediator shall act as an advocate for resolution and shall use his or her best efforts to assist the Parties in reaching a mutually acceptable settlement.

Conditions Precedent to Serving as Mediator. The Mediator shall not serve in any dispute in which he or she has a financial or personal interest in the result of the mediation. Prior to accepting an appointment, the Mediator shall disclose any circumstances likely to create a presumption of bias or to prevent a prompt meeting with the Parties. In the event that the Parties disagree as to whether the Mediator shall serve, the Mediator shall not serve.

Authority of Mediator. The Mediator does not have the authority to decide any issue for the Parties, but will attempt to facilitate the voluntary resolution of the dispute by the Parties. The Mediator is authorized to conduct joint and separate meetings with the Parties and to offer suggestions to assist the Parties to achieve settlement. If necessary, the Mediator may also obtain expert advice concerning technical aspects of the dispute, provided that the Parties agree and assume the expenses of obtaining such advice. Arrangements for obtaining such advice shall be made by the Mediator or the Parties, as the Mediator shall determine.

Commitment to Mediate in Good Faith. While no one is asked to commit to settle a case in advance of the mediation, all Parties commit to participate in the proceedings in good faith with the intention to settle, if at all possible.

Parties Responsible for Negotiating Own Settlement. The Parties understand that the Mediator will not and can not impose a settlement in their case and agree that they are responsible for negotiating a settlement. The Mediator, as an advocate for settlement, will use every effort to facilitate the negotiations of the Parties. The Mediator does not warrant or represent that settlement will result from the mediation process.

Authority of Representatives. Party representatives must have authority to settle and all persons necessary to the decision to settle shall be present. The names of such persons will be communicated in writing to the Mediator prior to the mediation.¹

Time and Place of Mediation. The Mediator shall fix the time and place of each session of the Mediation. The Mediation shall be held at the office of the Mediator or any other convenient location agreeable to the Mediator and the Parties, as the Mediator determines.

Identification of Matters in Dispute. Prior to the first scheduled mediation session, each Party shall provide the Mediator with confidential information in the form requested by the Mediator setting forth its position with regard to the issues to be resolved. At or before the first session, the Parties will be expected to produce all information reasonably required for the Mediator to understand the issues presented. The Mediator may require any Party to supplement such information.

Privacy. Mediation sessions are private. The Parties and their representatives may attend the mediation sessions. Other persons may attend only with the permission of the Parties and with the consent of the Mediator.

Confidentiality. The Mediator shall not divulge confidential information disclosed to a Mediator by the Parties or by witnesses.² All records, reports, or other documents received by a Mediator while serving in that capacity shall be confidential. The Mediator shall not be compelled to divulge such records or to testify in regards to the mediation in any adversary proceeding or judicial forum. Any Party who violates this agreement shall pay all fees and expenses of the Mediator and of other Parties, including reasonable attorneys' fees, incurred in opposing efforts to compel testimony by the Mediator.

Stenographic Record. There shall be no stenographic record made of the mediation.

No Service of Process At or Near Site of Mediation. No subpoenas, summons, complaints, citations, writs, or other process may be served at or near the site of any mediation session upon any person entering, attending, or leaving the session.

Termination of Mediation. The mediation shall be terminated: (a) by execution of a negotiated settlement agreement by the Parties; (b) by declaration of the Mediator to the effect that further efforts at mediation are no longer worthwhile; (c) after the completion of one full

¹ Depending on the circumstances, this Mediator has allowed parties to be "present" through telephone availability.

² Attorneys should determine if the Agreement to Mediate, Order to Mediate, or state law creates an exception to the rule on confidentiality. For example, mediators may have an obligation to report occurrences of child abuse discovered during mediation. The confidentiality requirement may not preclude a party from thereafter using the information if acquired through another source.

mediation session by a written declaration of a Party or Parties to the effect that the mediation proceedings are terminated.

Exclusion of Liability. The Mediator is not a necessary or proper party in judicial proceedings relating to the mediation. The Mediator shall not be liable to any party for any act or omission in connection with any mediation conducted under these rules.

Interpretation and Application of Rules. The Mediator shall interpret and apply these rules.

Fees. Each Party is responsible for payment of $\frac{1}{2}$ of the Mediator's fees. Payment of fees is to be made prior to the start of the first mediation session.³

³ This rule would not be applicable to parties using mediation services provided by an agency or organization free of charge.

Attachment C

Sample Short Form Pre-Dispute Clauses

Sample Short-Form Pre-Dispute Mediation Clause

If a dispute arises out of or relates to this contract, or the breach thereof, and if said dispute cannot be settled through negotiation, the parties agree first to try in good faith to settle the dispute by mediation under the Commercial Mediation Rules of the American Arbitration Association before resorting to arbitration, litigation, or some other dispute resolution procedure.

Sample Short-Form Pre-Dispute Arbitration Clause

Upon the demand of any party, whether made before or after the institution of any judicial proceeding, any controversy or claim whatsoever arising out of or relating to this contract, or the breach thereof, shall be settled by binding arbitration in accordance with the Commercial Arbitration Rules of the American Arbitration Association, and judgment upon the award rendered by the arbitrator may be entered in any court having jurisdiction thereof.

Sample Combined Pre-Dispute Mediation and Arbitration Clause

Dispute resolution procedures. The parties desire an expeditious means to resolve any disputes that may arise between them regarding this settlement agreement. Therefore, the parties agree to mediation and arbitration as forth below.

a. Mediation. If a dispute arises out of this Agreement, and if said dispute cannot be settled through negotiation, then the parties agree first to try in good faith to settle the dispute by mediation. If a mediation has not been conducted and the matter resolved within 20 days from request by either party for mediation, the parties may then resolve the dispute by binding arbitration as set forth below.

b. Arbitration. Upon demand of either party, whether before or after the filing of any suit, any controversy or claim whatsoever arising out of or related to this Agreement

shall be settled by binding arbitration in accordance with the Federal Arbitration Act, and judgment upon the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof.

If using a provision such as one of the above, note that it does not automatically obligate your client to using the American Arbitration Association, but rather just their rules.

When reviewing or drafting a contract for your client that you want to insert an ADR provision in, consider inserting a mediation and arbitration provision, rather than just one or the other. It is possible to state that all disputes under the contract will first go through mediation, and then if not resolved through mediation, the parties will arbitrate. Inserting a mandatory mediation provision costs your client nothing in terms of giving up of rights. However, the insertion of a mandatory arbitration may preclude your cl client from going to court.