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## ALTERNATIVE DISPUTE RESOLUTION:

### An Overview

\* Gregory A. Ross

*"Discourage Litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often the real loser - in fees, expenses, and waste of time."*

*-Abraham Lincoln-*

The words of Mr. Lincoln, attorney, are especially true today. The costs associated with litigation have risen dramatically due to such factors as expanded discovery and increasing legal fees. A recent Harris Poll found that at least 90 percent of the judges who responded said excessive litigation costs resulted from, among other things, attorneys' abuse of discovery<sup>1</sup>. This, and high legal fees, sometimes as much as \$300 an hour, made legal assistance out of the reach of most companies<sup>2</sup>.

Add to this the fact that the nation's court dockets are hopelessly overburdened, and you have the modern legal system - expensive and time consuming. For example, since 1970, the annual filing of civil cases has more than tripled. Between 1975 and 1985, annual filings of the so-called big civil cases - those involving thousands of documents - more than quadrupled<sup>3</sup>.

The result is that significant civil litigations are typically taking eight years or more to get to trial, and U.S. corporations are paying more than \$20 billion a year to their litigation attorneys<sup>4</sup>.

Despite the large number of lawsuits started, more than 95 percent of the cases are settled, without a trial, after years of litigation<sup>5</sup>. In light of this, more and more executives are asking why they should pay millions of dollars to lawyers, over many years, as a prelude to a virtually inevitable settlement that might well have been achieved at the outset.

Responding to these concerns parties to disputes have tried new, innovative techniques to resolve their disputes short of litigation. These approaches, commonly referred to as Alternative Dispute Resolution (ADR), are all designed to get disputes expeditiously resolved outside the normal court system. ADR includes such techniques as negotiation, mediation, and arbitration, as well as the hybrid processes of med-arb, mini-trial, summary jury trial, and moderated settlement conferences. This article examines the first three basic techniques, their advantages and applications, and provides sources for further information on the subject.

### NEGOTIATION

Negotiation is perhaps the technique that businessmen are most familiar with. It is a voluntary, usually informal, unstructured process used by disputants to reach a mutually acceptable agreement. At the option of the participants the dispute may be kept private. There is no third-party facilitator; disputants may appoint lawyers to represent them. No limits are placed on the presentation of evidence, arguments, or interests.

*(Continued on next page)*

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# ALTERNATIVE DISPUTE RESOLUTION: An Overview, by Gregory A. Ross

(Continued from front page)

Negotiation is probably the first step a person should take when problems arise. It gets the parties together to discover exactly what the dispute is about. It sets up a dialogue between the parties. Since negotiations are more a "win-win" situation than the "win-lose" situation associated with lawsuits, the agreement is more easily enforced and should not require the use of further legal action to enforce.

This technique can be used in any situation when problems arise. A common example is a dispute as to the terms of a contract. However, many times the parties become so heated in their debates and their positions become so entrenched that negotiations break down. It is then that mediation becomes the best option.

## MEDIATION

When the parties cannot reach an agreement on their own, a mediator is often brought in. The mediator's role is to facilitate analysis of the case and to foster an atmosphere that allows the parties and their counsel to reach a settlement. The mediator has no authority to force an agreement or render a binding decision. Mediation is voluntary, non-binding, and confidential. Like negotiation, mediation creates a "win-win" situation instead of the "win-lose" mode of traditional litigation.

The advantages of mediation over litigation are numerous. Problems are handled quickly, cheaply, and are kept from expanding to include additional "marginal" issues. Communications between the parties are improved and unreasonable claims or expectations are addressed. Mediation also helps facilitate negotiations between multiple parties or issues. Compliance is greater since parties are more likely to fully comply with a resolution that they agree to. Additionally, most mediation contracts take the form of legal and binding settlement contracts.

Mediation is used in many areas such as claims involving insurance companies, landlord/tenant disputes, family disputes including divorce, and credit problems. Mediation is applicable in any situation where a negotiated settlement is preferable to litigation but the parties are having trouble reaching an agreement.

Unfortunately, sometimes even the mediator's attempt to conciliation is not sufficient. The nature of the dispute will be such that the parties want a final, binding decision but wish to avoid the cost and delay of actual litigation. In these cases, arbitration is called for.

## ARBITRATION

Arbitration, the settlement of a dispute by an impartial person who renders a final and binding decision based on the facts and evidence, is increasing as a result of hundreds of contracts which contain arbitration clauses. Business people like to have their disputes resolved by other business people. An individual who is an expert in the particular area of dispute will more easily comprehend and analyze the problem before them. For example, in a construction dispute, a panel of arbitrators might consist of a contractor, engineer, architect, or an attorney who practices construction law.

Also, the informality of an arbitration hearing allows it to progress promptly and helps the participants feel more at ease. Generally, the formal rules of evidence do not apply and the arbitrators allow whatever significance they feel is appropriate to the evidence being presented. Furthermore, parties can schedule the hearings at their convenience and will receive prompt decisions.

Virtually any type of civil matter may be submitted to arbitration. The construction industry uses arbitration in many cases. Arbitration is also used in cases involving contracts of sales, landlord/tenant disputes, oil and gas, warranties, and consumer/merchant disputes to name but a few. Many international contracts provide for arbitration to avoid the formalities, complexities and uncertainties of foreign court proceedings.

### PRIMARY ADVANTAGES (6)

<u>Advantage</u>	<u>% of Total Mentions</u>
Saves time and money	59.18
Confidentiality	10.20
Expertise of panel	10.20
Salvages business relationships	8.16
Expeditious result	8.16
Conserves management time	2.00
Results better accepted by those in business	2.00

### ADVANTAGES

Some of the foregoing advantages of ADR are self-evident, while others are more subtle. The most obvious benefit is that ADR saves time and money while averting business disruptions caused by litigation.

Another advantage is that ADR preserves business relationships. Often a company will embark on years of litigation and even if ultimately "successful" will have lost millions of dollars of potential business from the opposing party.

This rarely occurs in an ADR setting. Indeed, the early involvement of people in the business community can often lead to a "win-win" result where both sides gain.

The expertise of the panel is one of the more notable advantages of ADR. All too often, a jury - or even a judge - fails fully to comprehend the complex issues in a case. The expertise of an ADR panel eliminates such a possibility. Additionally, it enables the attorneys to take shortcuts that do not detract from, and most often enhance, the effectiveness of their presentations.

### USE OF ADR IN CASES(6)

Type of Dispute	% of Total ADR Use
Breach of contract	30.51
Employee disputes	15.25
Complex/multiparty cases	11.87
Products liability	8.47
Policyholder disputes	5.08
Commercial cases	5.08
Patent	5.08
Construction	3.39
Trademark/copyright	3.39
Technology disputes	1.69
Supplier cases	1.69
Medical malpractice	1.69
Real estate/document interpretation	1.69
Breach of warranty	1.69
Check fee cases	1.69
Accounting	1.69

Confidentiality is another advantage of ADR proceedings. This element of privacy avoids much corporate embarrassment and finger-pointing; more important, it averts the need to air trade secrets in public.

### INCREASING ROLE

ADR has taken an increasing role in the business community. The Fortune 1,000 corporations have recently increased their use of ADR over 75 percent in the last five years. Of the companies that resolve at least some of their litigation through the use of ADR, 6.8 percent of their cases are now being resolved by ADR - up from 2.2 percent five years ago. This represents a 209 percent increase in the use of ADR.

When viewed in terms of dollar exposure, the results are even more dramatic. In 1984, these corporations were resolving 4.3 percent of their litigation in terms of dollar exposure through the use of ADR; that number has grown to 20 percent - an increase of 365 percent during the past five years<sup>6</sup>.

### CONCLUSION

Disputes between parties inevitably arise. When they do, some technique must be used to resolve them. Too often, the parties resort to litigation without exploring other approaches better suited to the situation. ADR is an attempt to move away from the disadvantages of litigation towards the advantages achievable through non-traditional dispute resolution procedures. To save time, money, and the relationship between the parties, each side should explore ADR when disputes arise.

### SELECTED LISTING OF NON-PROFIT ADR INFORMATION SOURCES

American Bar Association  
Standing Committee on Dispute Resolution  
1800 M St., N.W., Suite 200-S  
Washington, D.C. 20036  
(202) 331-2258

Better Business Bureau of North Central Texas  
1106 Brook St.  
Wichita Falls, Texas 76301  
(817) 723-5526

Community Relations Services  
U.S. Department of Justice  
Room 2534, Federal Building  
515 Rusk  
Houston, Texas 77002  
(713) 229-2861

Federal Mediation and Reconciliation Services  
2100 K St., N.W.  
Washington D.C. 20427  
(202) 653-5290

National Institute for Dispute Resolution  
1901 L St., N.W., Suite 600  
Washington, D.C. 20026  
(202) 466-4764

Texas Education Agency  
Department of Special Education  
201 East Eleventh St.  
Austin, Texas 78701  
(512) 463-9362

### SELECTED READING LIST

*Alternative Dispute Resolution*, L. Kanowitz (1985).

*Dispute Resolution Program Directory - 2nd ed.*, ABA (1983).

*Getting to Yes - Negotiating Agreements Without Giving In*, R. Fisher & W. Ury (1981).

*Handbook of Alternative Dispute Resolution, New Horizons to the Texas Justice Systems*, prepared by the State Bar of Texas and the Texas Young Lawyers Association (1983).

### -NOTES-

\* Mr. Gregory Ross is a second year law student at the Texas Tech School of Law, and is currently a research assistant at the Bureau of Business and Government Research, Midwestern State University.

1. Results of a poll conducted by L. Harris & Assoc. Inc. as reported in NLJ, April 25, 1988. p. 16.
2. Cook, "Hourly Billing: a Thing of the Past?" - NLJ, Nov. 23, 1987. p. S-1.
3. Wilkinson, "Mediation Law: ADR is increasingly Effective, Averts Litigation in Many Cases," NLJ, April 4, 1988. p. 22.
4. McLaughlin, "Resolving Disputes in the Financial Community: Alternatives to Litigation," 41 Arb. J. 19 (1986).
5. Results of a survey of Fortune 1,000 Corporations taken by Mr. Wilkinson on behalf of his firm, Donovan Leisure Newton & Irvine and used in his article "Mediation Law," NLJ, April 4, 1988. p. 22-23.
6. Tables taken from Wilkinson, "Mediation Law: ADR is increasingly Effective, Averts Litigation in Many Cases," NLJ, April 4, 1988. p. 22-23.

**SELECTED BUSINESS STATISTICS**  
Wichita Falls, Texas

	<u>1982</u>	<u>1983</u>	<u>1984</u>	<u>1985</u>	<u>1986</u>	<u>1987</u>	<u>1988</u>	<u>1989</u>	
								I	April
<b>Building Permits Issued</b> <sup>1</sup>									
Grand Total									
Number	1,567	1,635	1,587	1,577	1,466	1,657	9,697	1,253	514
Valuation (000)	45,375	73,236	45,959	68,942	40,951	31,105	48,377	7,127	1,658
<b>New Residences</b>									
Number	363	539	428	341	141	111	63	24	4
Valuation (000)	10,451	15,223	14,914	18,589	9,995	7,296	4,368	2,194	255
<b>Help Wanted Ads (Inches)</b> <sup>2</sup>	37,800	31,331	45,088	35,858	29,179	32,085	44,948	10,925	5,098
<b>City Sales Tax Allocated</b> <sup>3</sup>									
(Thousand Dollars)	6,078	5,918	6,448	6,950	6,483	6,023	5,105	782 <sup>4</sup>	NA
<b>Employment (Avg.)</b> <sup>5</sup>									
Civilian Labor Force	57,379	57,178	57,294	56,796	56,545	57,235	57,568	56,675	NA
Unemployment	4,246	4,251	2,298	3,406	4,668	4,475	3,602	3,608	NA
Unemployment Rate	7.4	7.4	5.1	6.0	8.3	7.8	6.3	6.3	NA
<b>Natural Gas Consumed</b> <sup>6</sup>									
(Billions of cubic feet)									
Residential	2,547	2,437	2,515	2,346	2,105	2,199	1,803	369	NA
Commercial	1,300	1,282	1,303	1,173	1,108	1,120	920	172	NA
Industrial	4,496	4,742	5,091	5,372	5,824	8,242	7,821	932	NA
<b>Natural Gas Customers (Avg.)</b> <sup>7</sup>									
Residential	31,781	31,265	30,966	30,661	30,348	29,743	29,717	29,494	NA
Commercial	2,974	2,977	2,968	3,015	3,116	3,127	3,083	3,138	NA
Industrial	52	45	43	43	41	40	37	37	NA
<b>Water Consumed</b> <sup>8</sup>									
(Millions of Gallons)	6,569	7,302	8,158	7,090	6,999	7,570	7,147	1,481	NA

<sup>1</sup> Building Permits issued figures are from the City of Wichita Falls.  
<sup>2</sup> Help Wanted Ads information furnished by Wichita Falls Times & Record News.  
<sup>3</sup> City Sales Tax Allocated figures are reported by the State Comptroller's Office.  
<sup>4</sup> For the months of January and February only.  
<sup>5</sup> Employment-related figures are for Wichita Falls MSA, (Wichita County) from Texas Employment Commission.  
<sup>6 & 7</sup> Natural Gas Consumed and Natural Gas Customers figures are inclusive of Wichita County, from Lone Star Gas Co.  
<sup>8</sup> Figures for Water Consumption are for the City of Wichita Falls only.  
 NA Not Available at Printing Time.



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