

1999

Giving Meaning to the Second Generation of ADR Education: Attorneys' Duty to Learn about ADR and What They Must Learn

Suzanne J. Schmitz

Follow this and additional works at: <https://scholarship.law.missouri.edu/jdr>



Part of the [Dispute Resolution and Arbitration Commons](#)

Recommended Citation

Suzanne J. Schmitz, *Giving Meaning to the Second Generation of ADR Education: Attorneys' Duty to Learn about ADR and What They Must Learn*, 1999 J. Disp. Resol. (1999)

Available at: <https://scholarship.law.missouri.edu/jdr/vol1999/iss1/5>

This Article is brought to you for free and open access by the Law Journals at University of Missouri School of Law Scholarship Repository. It has been accepted for inclusion in Journal of Dispute Resolution by an authorized editor of University of Missouri School of Law Scholarship Repository. For more information, please contact bassettcw@missouri.edu.

Schmitz, Suzanne J. Giving Meaning to the Second Generation of ADR Education

Generation of ADR Education: Attorneys' Duty to Learn about ADR and What They Must Learn

Suzanne J. Schmitz*

I. INTRODUCTION

Alternative dispute resolution (ADR)¹ has become a permanent part of the legal landscape. Courts and administrative bodies assume that attorneys understand ADR.² Clients expect that attorneys will use ADR,³ because clients want inexpensive and timely resolution of their disputes.⁴ To meet the expectations of courts, legislatures, and clients, lawyers must be educated about ADR.

ADR scholar Carrie Menkel-Meadow reports that education about ADR is moving into its second generation -- the education of the attorney who serves as advocate or representative of the client in connection with some ADR process.⁵ The first generation of ADR education, in contrast, focused on the role of the neutral, the mediator or arbitrator.⁶ Because all attorneys must be familiar with ADR⁷ and

* Assistant Clinical Professor of Law, Southern Illinois University, Carbondale, IL. The author thanks Theresa M. Cameron, J.D. '99, for research and editorial assistance and numerous colleagues for their comments on earlier drafts.

1. When used in this article, the term "ADR" refers to the range of processes institutionally available to resolve civil disputes, including negotiation, mediation, early neutral evaluation, mini-trials, summary jury trials, judicial settlement conferences, and arbitration as well as litigation. There are other processes included under the ADR umbrella, but this article focuses on these as the ones most often used in the United States. See *infra* Section IV.

2. ELIZABETH PLAPINGER & DONNA STIENSTRA, ADR AND SETTLEMENT IN THE FEDERAL DISTRICT COURTS: A SOURCEBOOK FOR JUDGES & LAWYERS 3, 8 (1996); see discussion *infra* Section IIA.

3. In regard to corporate clients, a study of 528 large U.S. corporations reported that 88% had used at least one type of ADR. PRICE WATERHOUSE LLP, THE USE OF ADR IN U.S. CORPORATIONS: EXECUTIVE SUMMARY (1997). More than 800 corporations and their 3200 subsidiaries have signed the CPR Corporate Policy Statement on Alternatives to Litigation, agreeing to try ADR before pursuing litigation against another signee. CPR Corporate Policy Statement on Alternatives to Litigation (last modified April 8, 1999) <<http://www.cpradr.org>>.

4. Warren E. Burger, *Isn't There A Better Way?*, 68 A.B.A. J. 274, 274 (1982); David Plimpton, *Mediation Of Disputes: The Role Of The Lawyer And How Best To Serve The Client's Interest*, ME. BAR J., Jan. 1993, at 38. Chief Justice Burger also suggests that the legal system has contributed to an overly complicated system for resolving minor disputes. See generally Warren E. Burger, *Our Vicious Legal Spiral*, JUDGES J., Fall 1977, at 23.

5. Carrie Menkel-Meadow, *Ethics In Alternative Dispute Resolution: New Issues, No Answers From The Adversary Conception Of Lawyers' Responsibilities*, 38 S. TEX. L. REV. 407, 427 n.91 (1997).

6. *Id.*

7. See discussion *infra* Part II.

because more attorneys will serve as advocates in an ADR process than will serve as neutrals, this second generation of education will reach most attorneys.⁸

Despite the institutionalization of ADR, lawyers are poorly informed about it.⁹ A practicing attorney explained this phenomenon this way:

[t]he private practitioner who has not been exposed to ADR fears such unknowns as: (1) giving up the relative security of the judicial system for the uncertainty of dealing with an unknown third-party "neutral"; (2) the potential adverse impact on fee generation . . . ; (3) the impact on the attorney-client relationship that results from a third party evaluating and, possibly, critiquing a client's litigation position¹⁰

Those evaluating ADR programs also report that attorneys are not well-informed about ADR.¹¹ The lack of knowledge on the part of attorneys should not be surprising. Most lawyers who graduated from law school prior to the last decade learned little about ADR while in law school.¹² Yet, attorneys report that it is experience with dispute resolution processes that most prepares them for ADR.

This article explores the need for attorneys to learn about ADR and sets out a basic primer for the second generation of ADR education. Part II of this article details why attorneys have a duty to be educated about ADR. Part III discusses what attorneys need to know about ADR. Part IV sets out an ADR primer, with recommended readings, for litigation and transactional attorneys who desire to meet the expectations of the courts and of their clients.

8. Nancy Welsh & Barbara McAadoo, *The ABCs of ADR: Making ADR Work in Your Court System*, JUDGES J., Winter 1998, at 11, 12-13.

9. Leonard L. Riskin, *Mediation and Lawyers*, 43 OHIO ST. L.J. 29, 43 (1982).

10. Mark A. Buckstein, *An Introductory Primer on Pre-Litigation ADR Counseling for the Outside Lawyer*, DISP. RESOL. J., Jan. 1997, at 35; see also Stephen B. Goldberg et al., *ADR Problems and Prospects: Looking to the Future*, 69 JUDICATURE 291 (1986). Goldberg, et al., suggest that lawyers are uninformed about ADR, concerned about the lack of institutionalization of ADR, uncomfortable about its use, fearful of the economic consequences of using ADR, and fearful of the message sent to opposing counsel when ADR is suggested. *Id.*

11. BOBBI MCADOO, A REPORT TO THE MINNESOTA SUPREME COURT: THE IMPACT OF RULE 114 ON CIVIL LITIGATION PRACTICE IN MINNESOTA 25 (Dec. 1997); Joshua D. Rosenberg & H. Jay Folberg, *Alternative Dispute Resolution: An Empirical Analysis*, 46 STAN. L. REV. 1487, 1504, 1520 (1994). John Lande, *How Will Lawyering And Mediation Practices Transform Each Other*, 24 FLA. ST. U. L. REV. 839, 897 (1997). A few empirical studies have concluded that attorneys are informed about ADR. See Thomas D. Cavanagh, *A Quantitative Analysis of the Use and Avoidance of Mediation by the Cook County, Illinois, Legal Community*, MEDIATION Q., Summer 1997, at 353, 361; Morris L. Medley & James A. Schellenbeth, *Attitudes of Attorneys Toward Mediation*, MEDIATION Q., Winter 1994, at 185, 195. Both of these studies used questionnaires sent to attorneys in which the attorneys reported that they were informed. Other studies, including those in which ADR neutrals are interviewed, report that attorneys are not well informed. See sources cited *supra* note 10.

II. LAWYERS HAVE AN OBLIGATION TO LEARN ABOUT ALTERNATIVE DISPUTE RESOLUTION

A review of state and federal legislation, court rules, ethical codes and actual practice should underscore the fact that ADR is a permanent part of the legal landscape.

A. *Courts and Legislatures Expect Attorneys to be Informed about ADR and to Counsel Their Clients about ADR*

Every federal district court in the nation will soon be required to offer one or more ADR options to litigants.¹³ This requirement will only add to the current expectation of federal courts that attorneys be familiar with and able to use ADR options. The federal district courts "expect attorneys to be knowledgeable about ADR in general and about the court's ADR programs in particular."¹⁴ Almost every federal district court requires attorneys to counsel their clients about ADR, confer with their opponent concerning ADR, address ADR in the case management plan filed with the court, or discuss ADR options with the court at the time of the case management conference.¹⁵ Several district courts presently impose a duty on attorneys to discuss ADR with their clients and report in writing to the court that they have done so.¹⁶ To assist counsel, courts have prepared brochures, guidelines, and other handouts explaining ADR.¹⁷

Many federal district courts have instituted plans to offer ADR as a means of expediting litigation in accord with the Civil Justice Reform Act of 1990.¹⁸

13. Alternative Dispute Resolution Act of 1998, Pub. L. No. 105-315, § 3, 112 Stat. 2993, 2994 (1998).

14. PLAPINGER & STIENSTRA, *supra* note 2, at 8.

15. *Id.* at 14-19; FED. R. CIV. P. 16(c)(9).

16. PLAPINGER & STIENSTRA, *supra* note 2, at 14-19. For example, when a civil case is filed, the attorneys for each party have an obligation to discuss the ADR program with their clients and to explore with them the possibility of resolving the dispute through arbitration or mediation rather than litigation. Each attorney is then required to complete and file with clerk of court a certificate signed by the attorney that ADR has been discussed with the client. UNITED STATES CTS. FOR THE DIST. OF UTAH, INFO. FROM THE CLERK OF COURT: ALTERNATIVE DISP. RESOL. PROGRAM 7-8 (rev. ed. 1997); N.D. Cal. L. R. 16-12; U.S. DIST. CT. FOR THE DIST. OF COLUMBIA, MEDIATION 3-4.

17. PLAPINGER & STIENSTRA, *supra* note 2, at 72-307. See, e.g., U.S. DIST. CT. FOR THE DIST. OF TENN., FED. MEDIATION PROGRAM (1997); U.S. DIST. CT. FOR THE W. DIST. OF OKLA., RESOLVING DISPS. IN FED. CT.: ALTERNATIVES AND OPTIONS FOR CIVIL CASES (1998); U.S. DIST. CT. FOR THE E. DIST. OF N.Y., DISP. RESOL. PROCS. IN THE E. DIST. OF N.Y. (1993); U.S. DIST. CT. FOR THE N. DIST. OF TEX., ALTERNATIVE DISP. RESOL. (1993); U.S. DIST. CT. FOR THE DIST. OF COLUMBIA, MEDIATION; U.S. DIST. CT. FOR THE DIST. OF UTAH, ALTERNATIVE DISP. RESOL. PROGRAM (rev. ed. 1997); U.S. DIST. CT. FOR THE N. DIST. OF CAL., DISP. RESOL. PROCS. IN THE N. DIST. OF CAL. (1997); U.S. DIST. CT. FOR THE E. DIST. OF MO., ALTERNATIVE DISP. RESOL. PROCS. MANUAL FOR THE E. DIST. OF MO. (1994); U.S. DIST. CT. FOR THE MIDDLE DIST. OF PA., PUBLIC GUIDE TO THE CIVIL CASEFLOW PROCESS (rev. ed. 1995).

18. 28 U.S.C. §§ 473-482 (1998); FED. R. CIV. P. 16(a)(1) and (2). As of 1994, fifty-one of the ninety-four federal court districts had in place a mediation program. Forty-eight used summary jury trials; twenty-two, arbitration; and fourteen, early neutral evaluation. The districts varied as to whether these programs were mandated or optional. See generally PLAPINGER & STIENSTRA, *supra* note 2, at Table 1. For an evaluation of the pilot districts authorized by the Civil Justice Reform Act, see JAMES S. KAKALIK ET AL., IMPLEMENTATION OF THE CIVIL JUSTICE REFORM ACT IN PILOT AND COMPARISON

Numerous federal courts operate or encourage mediation, early neutral evaluation or arbitration programs for civil cases.¹⁹ For example, a judge in the United States District Court for the District of Massachusetts may refer cases to mini-trials, summary jury trials, or mediation, using impartial third parties agreed to by the litigants.²⁰

Federal bankruptcy courts also employ ADR.²¹ The bankruptcy code permits arbitration when the parties agree to its use.²² Although no rule authorizes mediation in bankruptcy, at least twenty-eight districts have rules, orders, or guidelines regarding mediation in bankruptcy court.²³ ADR processes are expediting the resolution of appeals in the federal courts as well.²⁴ Thus, there is a clear expectation that attorneys practicing in federal trial and appellate courts will be familiar with ADR.

Likewise, state courts are adopting rules and state legislatures are enacting statutes requiring or permitting ADR. An overwhelming majority of states have in place some type of ADR program.²⁵ In Texas the policy is "to encourage the peaceable resolution of disputes with special consideration given to . . . the early settlement of pending litigation through voluntary settlement procedures."²⁶ Further,

DISTRICTS (1996).

19. The Western District of Missouri, Western District of Michigan, Northern District of Ohio, Northern District of California, and Northern District of West Virginia have served as demonstration districts for differentiated case management and ADR programs since passage of the Civil Justice Reform Act of 1990, Pub. L. No. 101-650, § 104, amended by Pub. L. No. 104-33, § 1, 109 Stat. 292 (1995); see Donna Stienstra, *Judicial Perceptions of DCM and ADR in Five Court Demonstration Programs Under the CJRA*, JUDGES J., Spring 1998, at 16. Earlier ten federal districts were authorized to implement mandatory arbitration and ten voluntary arbitration programs as pilot programs. 28 U.S.C. §§ 651-658 (repealed 1994). In 1994, the Northern District of Oklahoma referred 415 cases to mediation, the Middle District of Florida 300; the Western District of Missouri, 200; the Southern District of New York, 582; the Northern District of Texas, 580 cases; the Middle District of North Carolina, 292. PLAPINGER & STIENSTRA, *supra* note 2, at Table 4. During 1994 the Eastern District of Pennsylvania referred 1453 cases to arbitration; New Jersey, 1235; the Eastern District of New York, 527; the Middle District of Florida. *Id.* at Table 3. The Southern District of California referred 1410 cases to early neutral evaluation; the Northern District, 212; the Northern District of Ohio, 89; Nevada, 75. *Id.* at Table 5.

20. D. Ma. L. R. 16.4. See, e.g., UNITED STATES DIST. CT. E. DIST. OF MO. ALTERNATIVE DISP. RESOL. PROC. MANUAL 5 (1994).

21. See generally ROBERT J. NIEMIC, FEDERAL JUDICIAL CENTER, *MEDIATION IN BANKRUPTCY: THE FEDERAL JUDICIAL CENTER SURVEY OF MEDIATION PARTICIPANTS* (1998).

22. Bankruptcy Rule 9019(c); 11 U.S.C.A. (1999).

23. ROBERT J. NIEMIC, FEDERAL JUDICIAL CENTER, *MEDIATION IN BANKRUPTCY: THE FEDERAL JUDICIAL CENTER SURVEY OF MEDIATION PARTICIPANTS* (1998).

24. The Second, Fourth, Sixth, Seventh, Ninth, Tenth and District of Columbia Circuits are among those federal circuits that have enacted settlement conferences or mediation programs. See FED. R. APP. P. 33; UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, *GUIDELINES FOR THE CONDUCT OF PRE-ARGUMENT CONFERENCE UNDER THE CIVIL APPEALS MANAGEMENT PLAN*, 1996; 4th Cir. R. 33; 6th Cir. R. 81(c); UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT, *INTERNAL OPERATING PROCEDURE* Chapter 10, 9th Cir. R. 33-1; 10th Cir. R. 33.1; NANCY H. ROGERS & CRAIG A. MCEWEN, *MEDIATION: LAW, POLICY, PRACTICE* § 5.03 (1994).

25. Almost every state has some law governing mediation. See, e.g., ROGERS & MCEWEN, *supra* note 24, at Appendix C; Peter S. Chantilis, *Mediation U.S.A.*, 26 U. MEM. L. REV. 1031, 1033 (1996). Most states also have enacted an arbitration act. Thirty-five states and the District of Columbia have adopted some form of the Uniform Arbitration Act. UNIF. ARBITRATION ACT, 7 U.L.A. 1, U.L.A. Table of Jurisdictions Wherein Act Has Been Adopted (1997).

26. TEX. CIV. PRAC. & REM. CODE ANN. § 154.002 (West 1997).

“it is the responsibility of all trial and appellate courts to implement this policy and courts may refer matters to dispute resolution on their own or on motion of any party.”²⁷ ADR is being widely used in state courts in Texas, Florida, California, North Carolina and Virginia,²⁸ and similar legislation and court rules can be found in an increasing number of states.

Some states obligate attorneys to counsel clients about ADR. In Arkansas, “all attorneys . . . are encouraged to advise their clients about the dispute resolution process options available to them and to assist them in the selection of the technique or procedure, including litigation, deemed appropriate for dealing with the client’s dispute, case, or controversy.”²⁹ In Missouri, when an ADR program has been established, “counsel shall advise their clients of the availability of alternative dispute resolution programs.”³⁰ Minnesota assists attorneys by making ADR information available to attorneys while requiring attorneys to discuss the ADR options with their clients and opposing counsel.³¹ Other states, through their codes of professional responsibility for attorneys, impose an obligation to advise clients about ADR.³² Following the lead of Rule 16 of the Federal Rules of Civil Procedure, several states mandate or permit courts to convene pretrial conferences to discuss ADR.³³

In summary, a significant number of state and federal courts across the nation assume that attorneys will be educated about ADR. Attorneys must be able to counsel clients about ADR, discuss ADR options with the courts, and represent the client in various ADR processes.

B. Ethical Codes Impose an Obligation to Learn about ADR

The codes of professional responsibility that govern attorneys establish a duty to know and understand alternative dispute resolution. Some jurisdictions have made that duty explicit, but even where it is not explicit, the codes imply such a duty.

The lawyer owes the client the duty of competence. This duty encompasses the possession of legal skills and knowledge of court rules, such as those governing ADR.³⁴ The attorney is also obligated to “abide by a client’s decision concerning the objectives of representation, . . . and [to] consult with the client as to the means by

27. *Id.* §§ 154.003, 154.021.

28. Kimberlee K. Kovach, *Good Faith in Mediation-Requested, Recommended, or Required? A New Ethic*, 38 S. TEX. L. REV. 575, 580 (1997).

29. ARK. CODE ANN. § 16-7-204 (Michie 1997); *see also* COLO. REV. STAT. § 13-22-311 (1998).

30. MO. SUP. CT. R. 17.02(b) (emphasis added).

31. MINN. GEN. RULES OF PRAC. R. 114 (1997); Barbara McAdoo, *The Minnesota ADR Experience: Explanation to Institutionalization*, 12 HAMLIN J. PUB. L. & POL’Y 65, 83 (1991).

32. *See* discussion *infra* Part IIB.

33. IDAHO R. CIV. P. 16(c)(7); *see also* ILL. SUP. CT. R. 218(a)(6), (7) (“The participants at any conference under this rule may consider and take action with respect to . . . (7) the possibility of settlement or the use of extrajudicial procedures including alternative dispute resolution techniques to resolve the dispute.”).

34. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.1 (1997); A.B.A. ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT 4-5 (1996).

which they are to be pursued.”³⁵ The lawyer “should defer to the client regarding such questions as the expense to be incurred[. . .].”³⁶ Another of the attorney’s duties is to “make reasonable efforts to expedite litigation consistent with the interests of the client.”³⁷ The lawyer’s duty as a counselor requires the lawyer to “render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client’s situation.”³⁸

These ethical obligations, when read as a whole, make clear the lawyer’s duty to advise about, and thus to be informed about, ADR. Where local court rules adopt ADR programs or require counsel to report on the advisability of ADR, counsel must understand ADR processes in order to fulfill the ethical duty of competence. In order to address client concerns about cost-savings and speedy resolutions,³⁹ lawyers must advise about ADR. For example, in Colorado and Hawaii, in matters involving or expected to involve litigation, the lawyer “should advise a client of alternative forms of dispute resolution which might reasonably be pursued to attempt to resolve the legal dispute or to reach the legal objective sought.”⁴⁰ Georgia provides that “a lawyer as advisor has a duty to advise the client as to various forms of dispute resolution. When a matter is likely to involve litigation, a lawyer has a duty to inform the client of forms of dispute resolution which might constitute reasonable alternatives to litigation.”⁴¹

To ensure that lawyers meaningfully counsel the client, Georgia requires lawyers to complete course work in ADR.⁴² Many states offer programs in ADR as part of their continuing education programs or incorporate ADR processes into programs on related topics.⁴³ Further, lawyers are imposing on themselves a duty

35. A.B.A. ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2(a) (1996). Commentators debate whether alternative dispute resolution fits within “the objectives of representation” and constitutes a client decision or within the “means or tactics” of pursuing the objectives and constitutes a decision for the lawyer. *Id.* at Rule 1.2 cmt.1. The Comments acknowledge the interrelationship between objectives and means.

36. *Id.* at Rule 1.2(a) cmt. 1 (emphasis added). The lawyer has a duty to “explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.” *Id.* at 1.4(b). The client should be informed sufficiently “to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued, to the extent the client is willing and able to do so.” *Id.* at 1.2(a) cmt. 1.

37. *Id.* at Rule 4.1.

38. *Id.* at Rule 2.1.

39. Frank E. A. Sander & Stephen B. Goldberg, *Fitting the Forum to the Fuss: A User-Friendly Guide to Selecting an ADR Procedure*, 10 NEGOTIATION J. 49, 51 (1994).

40. HAW. RULES OF PROFESSIONAL CONDUCT Rule 2.1 (1998); see also COLO. RULES OF PROFESSIONAL CONDUCT Rule 2.1 (1998); Kan. Bar Assoc. Ethics/Advisory Comm., Op. 94-01 (April 15, 1994); Mich. Comm. On Ethics, Op. RI-255 (April 3, 1996); Pa. Comm. On Legal Ethics and Prof. Resp., Op. 90-125 (Jan. 1, 1991) (ethics opinions regarding the lawyer’s obligation to advise about offers to use ADR).

41. GA. CODE OF PROFESSIONAL RESPONSIBILITY Canon 7-5 (1996).

42. GA. ALTERNATIVE DISP. RESOL. Rules VIII (1996). This requirement may be met by a law school course in ADR, a Continuing Legal Education program in ADR, or the Bridge-the-Gap program that includes an introduction to ADR.

43. See LEONARD L. RISKIN & JAMES E. WESTBROOK, *DISPUTE RESOLUTION AND LAWYERS* 68 (2d ed. 1997); see also BOBBI MCADDOO, A REPORT TO THE MINNESOTA SUPREME COURT: THE IMPACT OF RULE 114 ON CIVIL LITIGATION PRACTICE IN MINNESOTA 25 (Dec. 1997); ELIZABETH PLAPINGER & MARGARET SHAW, *COURT ADR: ELEMENTS OF PROGRAM DESIGN* 122-24 (1992) (reporting on New

to counsel clients about ADR, and thus, to be informed about ADR. One example of such a duty appears in the Lawyer's Creed of Professionalism, which states that "in appropriate cases I will counsel my client with respect to mediation, arbitration and other alternative means of resolving disputes," and "I will endeavor to achieve my client's lawful objectives in business transactions and in litigation as expeditiously and economically as possible."⁴⁴

Many commentators support the argument that the attorney must advise the client about ADR.⁴⁵ The lawyer, like the physician, must inform the client of all the choices available so that the client may make an informed choice.⁴⁶

In summary, the code of professional responsibility clearly imposes a duty upon attorneys to inform themselves about ADR so that they can effectively advise their client; explain matters to the client so that the client can make informed decisions about the representation; abide by the client's decisions concerning the objectives of the representation; and expedite litigation.⁴⁷

C. Federal and State Governments, Statutes, and Custom and Practice Promote the Use of ADR

Government attorneys are expected to implement, and thus to understand, the ADR processes. President Clinton has directed that litigation counsel for the United States Government suggest and use ADR techniques in appropriate cases.⁴⁸ Likewise, state officials have also called on their attorneys to utilize ADR.⁴⁹ Federal and state administrative agencies also expect attorneys to take advantage of ADR. Congress has found that administrative proceedings could benefit from the ADR processes that "have yielded decisions that are faster, less expensive, and less

York, Illinois, Georgia, Colorado and California); Rosenberg & Folberg, *supra* note 11.

44. Lawyer's Creed Of Professionalism, 1988 A.B.A. SEC. TORT & INS. PRACS. ANN. MEETING A(2) and (3); *see also*, TEX. SUP. CT., TEX. LAWYER'S CREED II(2) and (11) (1989).

45. *See* ROBERT H. ARONSON & DONALD T. WECKSTEIN, PROFESSIONAL RESPONSIBILITY IN A NUTSHELL 451-54 (2d ed. 1991); Donald A. Burkhardt & Frederick K. Conover, II, *The Ethical Duty to Consider Alternatives to Litigation*, COLO. LAW., Feb. 1990, at 249; Robert F. Cochran Jr., *Must Lawyers Tell Clients About ADR?*, ARB. J., June 1993, at 8; Robert B. Moberly, *Ethical Standards for Court Appointed Mediators and Florida's Mandatory Mediation Experiment*, 21 FLA. ST. U. L. REV. 701, 723-26 (1994); Frank E. A. Sander, *Professional Responsibility: Should There Be a Duty to Advise of ADR Options? Yes: An Aid to Clients*, A.B.A. J., Nov. 1990, at 50; Carol VanAuken-Haight & Pamela Chapman Enslen, *Attorney Duty to Inform Clients of ADR?*, 72 MICH. B.J. 1038 (1993); Stuart M. Widman, *ADR and Lawyer Ethics*, 82 ILL. B.J. 150 (1994). *But see*, Michael L. Prigoff, *Professional Responsibility: Should There Be a Duty to Advise of ADR Options? No: An Unreasonable Burden*, A.B.A. J., Nov. 1990, at 51.

46. *See* Cochran, *supra* note 45, at 8; Sander, *supra* note 45, at 50; Widman, *supra* note 45, at 152.

47. MODEL RULES OF PROFESSIONAL CONDUCT Rules 1.1, 1.4, 2.1, 3.1 (1997).

48. *See* Exec. Order No. 12,988, 61 Fed. Reg. 4,729 (1996). *See generally* Exec. Order No. 12,788, 56 Fed. Reg. 55,195 (1991) (prior order of President Bush). Department of Justice attorneys are expected to use ADR. Because the Department handles more than 170,000 cases at any one time, the Department's use of ADR will have a major impact on the way cases in the federal courts are resolved. Lois J. Schiffer & Robin L. Juni, *Alternative Dispute Resolution in the Department of Justice*, 11 NAT. RESOURCES & ENV'T 11 (1996).

49. OR. REV. STAT. Tit.18, § 183.502 (1997); OR. REV. STAT. Tit.17, § 670 (1997).

contentious."⁵⁰ The Administrative Dispute Resolution Act authorizes federal agencies to implement dispute resolution processes.⁵¹ Some federal agencies have had a long and successful history of using ADR⁵² and state agencies have begun to use ADR.⁵³

Custom, as well as recently enacted statutes, promotes the use of ADR in many areas of the law. The labor, commercial, and construction fields have long employed arbitration and mediation.⁵⁴ Many other practice areas are beginning to appreciate the benefits of ADR, including health care, commerce, franchise, insurance, trademark, real estate, securities, and employment, to name a few.⁵⁵

Many states mandate or recommend mediation in family disputes.⁵⁶ Federal laws require or recommend ADR for matters involving products liability, transportation, environment, health care, financial institutions, and Native American rights.⁵⁷ States require or recommend mediation for special education matters, medical malpractice claims, housing disputes, and environmental disputes.⁵⁸ Mediation is also resolving issues related to agriculture, environment, business, small claims, selected criminal matters, especially those involving juveniles, and disputes concerning professional conduct.⁵⁹

50. 5 U.S.C. §§ 571-584 (1998); Administrative Dispute Resolution Act, Pub. L. No. 101-552 § 2(3); see also Jonathan D. Mester, *The Administrative Dispute Resolution Act of 1996: Will the New Era of ADR in Federal Administrative Agencies Occur at the Expense of Public Accountability*, 13 OHIO ST. J. ON DISP. RESOL. 167 (1997).

51. 5 U.S.C. § 572.

52. ADMINISTRATIVE CONF. OF THE U.S., TOWARD IMPROVED AGENCY DISPUTE RESOLUTION: IMPLEMENTING THE ADR ACT vii (Feb. 1995). Agencies using ADR include U.S. Departments of Justice, Labor, Housing and Urban Department, Federal Deposit Insurance Corporation, Environmental Protection Agency, U.S. Army Corps of Engineers, Internal Revenue Service, among others. *Id.* at 26.

53. OR. REV. STAT. Tit.18, § 183.502 (1997); see NANCY H. ROGERS & CRAIG A MCEWEN, MEDIATION: LAW, POLICY, PRACTICE §§ 5.03, 7.02 (2d ed. 1994).

54. See, e.g., ROGERS & MCEWEN, *supra* note 53, § 12.08 (1994); LINDA R. SINGER, SETTLING DISPUTES: CONFLICT RESOLUTION IN BUSINESS, FAMILIES, AND THE LEGAL SYSTEM 5-6 (2d ed. 1994); Barbara A. Phillips, *Mediation: Did We Get It Wrong?*, 33 WILLAMETTE L. REV. 649, 663 (1997); David Plimpton, *Mediation of Disputes: The Role of the Lawyer and How Best to Serve the Client's Interest*, 8 ME. B.J., 38, 39; Riskin, *supra* note 9, at 30 n.10.

55. See SINGER, *supra* note 54, at 5, 76, 77, 80-81, 84, 87-89, 94-96; ROGERS & MCEWEN, *supra* note 53, §§ 12.03, 12.04, 12.13. See generally *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991); *Shearson/American Bar Express, Inc. v. McMahon*, 482 U.S. 220 (1987); ADMINISTRATIVE CONF. OF THE U.S., TOWARD IMPROVED AGENCY DISPUTE RESOLUTION: IMPLEMENTING THE ADR ACT 22-25 (Feb. 1995); SUSAN D. HARTMAN, THE CENTER FOR SOCIAL GERONTOLOGY, ADULT GUARDIANSHIP MEDIATION MANUAL (1996); NAOMI KARP & ERICA F. WOOD, AMERICAN BAR ASSOCIATION, KEEP TALKING, KEEP LISTENING: MEDIATING NURSING HOME CARE CONFLICTS (1997); W. STEVE LEE, ABA COMMISSION ON LEGAL PROBLEMS OF THE ELDERLY, MEDIATING BIOETHICAL DISAGREEMENTS IN LONG-TERM CARE FACILITIES (June 1997); Robert J. Aalberts, *The Future of Mediation and in the Real Estate Industry*, 23 REAL EST. L.J. III-V (1995); Diane E. Hoffmann, *Mediating Life and Death Decisions*, 36 ARIZ. L. REV. 821 (1994).

56. MONT. CODE ANN. § 40-4-301 (1997); ROGERS & MCEWEN, *supra* note 53, §§ 12.01, 12.02.

57. See AMERICAN BAR ASSOCIATION, LEGISLATION ON DISPUTE RESOLUTION 212, 217, 226-28, 238 (1990); ROGERS & MCEWEN, *supra* note 53, § 12.14.

58. See ROGERS & MCEWEN, *supra* note 53, §§ 12.04 n.9, 12.05 n.2, 12.06 n.3, 12.07 n.9.

59. See AMERICAN BAR ASSOCIATION, LEGISLATION ON DISPUTE RESOLUTION 111 (1990); ROGERS & MCEWEN, *supra* note 53, § 12.05, at 15 n.2. Florida permits licensure boards to use mediation to resolve disputes over selected cases involving claims of professional malpractice. See ROGERS & MCEWEN, *supra* note 53, § 12.12, at 39 n.7. A number of jurisdictions offer optional arbitration for attorney fee disputes. See generally ILLINOIS STATE BAR ASSOC., FEE DISPUTES BETWEEN

III. WHAT IS IT THAT LAWYERS NEED TO KNOW ABOUT ADR

Stating that attorneys need to be informed about ADR is like saying that they need to know about litigation. The statement is too broad to be useful. Because there is an ethical obligation to know about ADR, the substance of that education must be explored. What is the basic knowledge about ADR that attorneys must possess in order to be competent at the turn of the century?

A. *What Roles Will Attorneys Play?*

A consideration of the roles attorneys are likely to play in regard to ADR is necessary to determine what education attorneys need. Before a dispute ever arises, counsel will help clients prevent the dispute; advise them on whether to use a pre-dispute resolution clause; educate them about the processes available; and draft such a clause. Once a dispute has arisen, attorneys will help clients determine which forum to use and persuade the adversary to use the desired ADR process, select the neutral, and determine the rules governing the chosen process. Counsel must prepare the client and the case for the chosen process, help the client develop a strategy for the chosen forum, and, in most cases, represent the client in the chosen forum.⁶⁰ If a resolution is reached, attorneys help the client evaluate the proposed resolution, draft the terms of the agreement, and implement and enforce the settlement. If no resolution is reached, the attorney must prepare the client for further negotiations or for some form of adjudication. Throughout these steps, counsel must research and interpret the applicable law. Some attorneys will also design and implement dispute resolution mechanisms.⁶¹

"Lawyer advocates,"⁶² "representational lawyers,"⁶³ "attorney participants," or "attorney representatives" are terms used to describe these roles of attorneys and to distinguish them from those of the attorney neutral.⁶⁴ No matter the role, the attorney must have a basic knowledge about ADR.

LAWYERS AND CLIENTS: THE ARBITRATION ALTERNATIVE (1992). More and more jurisdictions are using mediation for complaints involving lawyer misconduct. See ROGERS & MCEWEN, *supra* note 53, § 12.12.

60. In some jurisdictions, attorneys do not participate in community and family mediations. In other jurisdictions and in other types of mediations, the attorney will play a major role, as attorneys do in most other processes. See Plimpton, *supra* note 54, at 44.

61. See Riskin, *supra* note 9, at 53; JOHN S. MURRAY ET AL., PROCESSES OF DISPUTE RESOLUTION: THE ROLE OF LAWYERS 368 (2d ed. 1996); see also CATHY A. COSTANTINO & CHRISTINA S. MERCHANT, DESIGNING CONFLICT MANAGEMENT SYSTEMS: A GUIDE TO CREATING PRODUCTIVE AND HEALTHY ORGANIZATIONS (1996). Of course, attorneys may be the neutrals who resolve disputes as arbitrators, mediators, settlement judges or attorneys, evaluators, or other third parties. However, in examining what constitutes sufficient education about ADR, this model primer focuses on attorneys who counsel and advocate for their client.

62. Kovach, *supra* note 28, at 579; Carrie Menkel-Meadow, *Ethics in Alternative Dispute Resolution: New Issues, No Answers from the Adversary Conception Of Lawyers' Responsibilities*, 38 S. TEX. L. REV. 407, 422 (1997).

63. Jacqueline M. Nolan-Haley, *Lawyers, Clients, and Mediation*, 73 NOTRE DAME L. REV. 1369, 1377 (1998).

64. *Id.* at 1370 n.9.

B. What Does Society Expect Attorneys To Know

This second generation of ADR education, that of the attorney advocate, must reach most attorneys, whether they perform transactional or dispute resolution work. Thus, the education must be carefully designed. Several excellent guides for designing an ADR primer for lawyers include: the materials courts have issued to familiarize lawyers and their clients about ADR;⁶⁵ the educational materials offered by private ADR providers;⁶⁶ recommendations to inaugurate ADR programs;⁶⁷ and evaluations of ADR programs.⁶⁸ An examination of these materials leads to the designation of six major areas of study.⁶⁹

1. Attorneys must know what ADR is, what ADR processes are available, and the advantages and disadvantages of each process.

2. Attorneys must understand the authority for the ADR program in the applicable jurisdiction. Attorneys need to know whether it is voluntary or mandatory, the types of cases in the program, and whether the program is court-annexed or private.

3. Attorneys must know how each available ADR process operates. The attorney should understand how each process varies and how each will work.

4. Attorneys must know how to educate the client so that the client may choose whether to litigate or use ADR and can decide which ADR process to choose.⁷⁰

5. Attorneys must know what private services are available, what rules of procedure private services use, what ethical standards they endorse, and what costs are involved.

6. Attorneys must know how to obtain additional information about ADR.⁷¹

65. Some brochures address a number of forms of ADR while others focus only on the ADR method required or available in that district.

66. For more information about this topic, please contact the American Arbitration Association, U.S. Arbitration and Mediation Service, CPR, JAMS/ENDISPUTE. See appendix for the website addresses of these organizations.

67. See Welsh & McAdoo, *supra* note 8, at 13.

68. See generally MCADOO, *supra* note 43; Roselle L. Wissler, OHIO ATTORNEYS' EXPERIENCE WITH AND VIEWS OF ALTERNATIVE DISPUTE RESOLUTION PROCEDURES (March 1996); Rosenberg & Folberg, *supra* note 11, at 1520.

69. Additional useful sources of education for attorneys concerning ADR appear in bar journals, specialized practice journals, and dispute resolution journals. State bar journals frequently publish guides for practitioners when new programs are inaugurated. Professional organizations whose members frequently use some form of ADR often publish practice tips for attorneys. Private ADR providers and the American Bar Association Section on Dispute Resolution produce newsletters, magazines, and other materials filled with practice suggestions. See, e.g., AMERICAN BAR ASSOCIATION, LEGISLATION ON DISPUTE RESOLUTION (1990).

70. One brochure offers a chart for assessing which process meets such client goals as party satisfaction, party control and participation, improved case management, improved understanding of the case, and reduction of hostility. U.S. DIST. CT. FOR THE N. DIST. OF CAL., DISP. RESOL. PROCS. IN THE N. DIST. OF CAL. (1997); UNITED STATES CTS. FOR THE DIST. OF UTAH, INFORMATION FROM THE CLERK OF COURT: ALTERNATIVE DISPUTE RESOLUTION PROGRAM 6 (Rev. Ed. 1997).

71. It is also helpful for attorneys to understand the criticisms of ADR. See, e.g., Owen Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984); Harry T. Edwards, *Alternative Dispute Resolution: Panacea or Anathema*, 99 HARV. L. REV. 668 (1986); Edward Brunet, *Questioning the Quality of Alternative Dispute Resolution*, 62 TULANE L. REV. 1 (1987); Judith Resnik, *Many Doors? Closing Doors? Alternative Dispute Resolution and Adjudication*, 10 OHIO ST.J. ON DISP. RESOL. 211 (1995); Marc Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (and*

IV. A MODEL OF WHAT ATTORNEYS NEED TO KNOW

As a guide to defining what attorneys should know about ADR, a basic ADR primer must include education about all forms of ADR, the legal and ethical issues related to ADR, and skills and attitudes necessary to represent the client in the ADR processes. Skills and attitudes are critical to the successful ADR advocate, and are best learned through simulated or real experience.⁷² Those educating the ADR advocate must offer observation of ADR processes, or better, participation in simulated exercises designed to teach the skills necessary for competency in ADR advocacy.

The primer presented here, as a first step in developing the second generation of ADR education, focuses on the theoretical basis and legal issues related to the primary ADR processes. It includes suggested readings⁷³ for lawyers who wish to further their own education.⁷⁴ Those forms of ADR most frequently employed in the U.S. are the focus of this primer.⁷⁵

A. *The Basic ADR Primer*⁷⁶

1. *Introduction to ADR*

The term "alternative dispute resolution" refers to a range of methods of resolving civil disputes, beginning with negotiation and ending with litigation,⁷⁷ and

Think We Know) About Our Allegedly Contentious and Litigious Society, 31 UCLA L. REV. 4 (1983); Marc Galanter, *Justice in Many Rooms: Courts, Private Ordering, and Indigenous Law*, 19 J. PLURALISM & UNOFFICIAL L. 1 (1994).

72. Attorneys desiring to develop ADR advocacy skills should seek out continuing education programs that offer experiential learning. Indeed, those who evaluate ADR program report that it is experience in an ADR program that is the factor most likely to predict that attorneys will counsel a client to try an ADR process. See generally ROSELLE L. WISSLER, OHIO ATTORNEYS' EXPERIENCES WITH AND VIEWS ABOUT ALTERNATIVE DISPUTE RESOLUTION PROCEDURES 27 (March 1996); Jay Folberg et al., *Use of ADR in California Courts: Findings and Proposals*, 26 U.S.F. L. REV. 343, 370-71, 397-98; Rosenberg & Folberg, *supra* note 11.

73. The readings listed are not intended to be exclusive or exhaustive, but rather to introduce lawyers to ADR. An effort was made to select readings generally accessible to the practitioner. Readings have a value in providing a foundation for the experiential education so critical to lawyer's preparation for ADR.

74. This model is an overview of the topics most lawyers need to understand, not a complete curriculum. Those who specialize in such fields as labor or commerce where ADR is used extensively must be much better educated on these and other topics. Those lawyers with special assignments such as designing in-house dispute resolution programs for employees or customers or those drafting dispute resolution clauses for specialized fields will need more knowledge.

75. Private and court-annexed arbitration, mediation, early neutral evaluation, mini-trials and summary jury trials, and judicial settlement conferences are the ADR processes described here.

76. Whenever possible, references for the remainder of this article are drawn from the basic readings list. Some references are to original sources. Generally, however, references are to the sort of materials attorneys would easily access for an introduction to the topics discussed.

77. The field of ADR is still relatively young, and new programs are constantly developing. The law and ethics governing ADR process are evolving. Likewise, in some cases, the theory and practice of ADR are still being developed. Even ADR practitioners disagree about what terms to use and what processes are properly called. Leonard L. Riskin, *Understanding Mediators' Orientations, Strategies, and Techniques: A Grid For The Perplexed*, 1 HARV. NEGOTIATION L. REV. 7, 24 (1996). For another

encompasses processes quite different from each other in purpose and function. The ADR processes can be divided into two categories: 1.) negotiation and processes that assist in negotiation and 2.) processes that are adjudicatory.⁷⁸ Negotiation is the least formal of the processes and is usually conducted without third party assistance. Mediation, early neutral evaluation, mini-trials, summary jury trials, and judicial settlement conferences employ a third party to assist the parties in negotiating a resolution to the dispute.⁷⁹ These processes are often described as voluntary or non-binding, because the parties cannot be forced to reach a resolution. Thus, these processes cannot offer finality. Furthermore, there is no issue of judicial review because there is no decision unless the parties voluntarily reach one.

The adjudicatory methods are private arbitration,⁸⁰ administrative hearings, and litigation. Only arbitration is addressed in this article. Private arbitration involves the presentation of evidence to one or more neutrals who render a binding decision based on a standard the parties determine.⁸¹ Judicial review is extremely limited.⁸²

Critical to a basic ADR education is a knowledge of the statutes and rules of the applicable jurisdiction. If the local jurisdiction requires or recommends ADR, advocates need to be particularly well-informed about the processes being employed, the matters covered by the rule, and the procedures involved. Recent federal legislation requiring every federal district court to offer ADR specifically lists early neutral evaluation, mediation, mini-trial, and arbitration as processes that can be offered. Finally, advocates should know what private ADR services are available in the local community and includes being familiar with the local ADR vendors, their rosters and rules, and the customs and practices associated with those private services.

While ADR advocates will employ many familiar lawyering skills,⁸³ "the lawyer needs to have a mind set that does not look at every dispute as having only one appropriate course of action; namely, complaint, discovery, and trial by judge or jury."⁸⁴ In preparing for the adjudicatory processes, the lawyer can rely on the

discussion of mediation types, see James J. Alfani, *Trashing, Bashing and Hashing It Out: Is this the End of 'Good Mediation,'* 19 FLA. S. U. L. REV. 47-75 (1991).

78. SINGER, *supra* note 54, at 16.

79. See discussion *infra* Parts IV.A.4-7.

80. In discussing private arbitration, this article assumes that arbitration is binding. Non-binding arbitration produces an advisory opinion and is more like neutral evaluation. Private arbitration must be contrasted with court-annexed or court-sponsored arbitration. Court-annexed arbitration has the characteristics of a voluntary process because the decision can be rejected, and the characteristics of an adjudicatory process, because third party neutrals render a decision. See discussion *infra* Parts IV.A.8-9.

81. See discussion *infra* Part IV.A.8.

82. See discussion *infra* Part IV.A.8.

83. Lawyering skills used in ADR processes include negotiation, case preparation, client interviewing and counseling, organization, advocacy, problem-solving and drafting. Plimpton, *supra* note 54, at 44; see also Nolan-Haley, *supra* note 63, at 1376; Edward F. Sherman, *Reshaping the Lawyer's Skills for Court-Supervised ADR*, 51 TEX. BAR J. 47 (1988).

84. Plimpton, *supra* note 54, at 42. For an example of the value of the new mind set, see J. B. Ruhl, *Thinking of Mediation as a Complex Adaptive System*, 1997 B.Y.U. L. REV. 777, 796-97 (1997). Ruhl reports that in a case in which he served as an advocate in mediation, he learned of the adversary's underlying interests. This discovery permitted a settlement reached through a problem-solving method. Ruhl acknowledges that had he been thinking in his litigation mode, he may have missed the significance of this same information because his focus would have been on legal theories and the facts related to them. *Id.* In another example, Harrel relates that the family law advocate in litigation focuses

adversarial mind set and skills. In contrast, when using the ADR processes targeted toward resolution, the advocate needs to adopt a more conciliatory mind set and appropriate skills while effectively pursuing the client's interests.⁸⁵

2. How to Choose Whether to Use ADR

When determining whether a particular ADR method is appropriate the attorney must examine the goals, interests and needs of the client. Some characteristics of ADR processes are: time and cost-savings, confidentiality, and maintenance of the relationship between the parties.⁸⁶ Other factors favoring ADR include the desire for a remedy not available through the courts; need for on-going cooperation by the parties; need for party participation or control of the process; or preference for a decision based on expertise.⁸⁷ Parties also choose ADR to improve case management, reduce hostility, or gain a better understanding of the dispute, especially of underlying issues.⁸⁸

Most ADR processes offer time and cost savings, unless they are abused. However, not all forms of ADR offer the same benefits. Each form of ADR has advantages and disadvantages that must be weighed in the context of the dispute.⁸⁹ After inquiring into the client's goals, the attorney can assess which processes best meet the client's needs.⁹⁰ No one method of ADR is always best, although some

primarily on legal and settlement issues, while the family law advocate in mediation focuses "on the client's need for resolution, conciliation, and continued communication with the other party, especially where children are involved." Susan W. Harrell, *Why Attorneys Attend Mediation Sessions*, *MEDIATION Q.* at 369, 374 (1995). In regard to the new mind set, Nolan-Haley writes that ADR, and especially mediation, permits the legal system to employ a problem-solving process that respects human dignity and responsible decision-making, too often missing in the adversarial system. Nolan-Haley, *supra* note 63, at 1373. See generally *id.* at 1375-1390.

85. David Nuffer, *Adversarial or Conciliatory? What Litigators Should Know About Mediation*, *DISP. RESOL. J.*, Jan. 1996, at 24. The development of new skills and mind sets is best accomplished by participating in ADR experiences through observations, simulations, or actual experience. PLAPINGER & SHAW, *supra* note 43, at 124. Competence in ADR also requires knowledge of the moral and ethical issues confronting the representational lawyer or advocate. Nolan-Haley; *supra* note 63, at 1389.

86. Sander & Goldberg, *supra* note 39, at 53; Plimpton, *supra* note 54, at 42. See generally, EDWARD A. DAUER, *MANUAL OF DISPUTE RESOLUTION: ADR LAW AND PRACTICE* ch. 7 (1996); U.S. DIST. CT. FOR THE N. DIST. OF CAL., *supra* note 17, at 5 (1997).

87. SINGER, *supra* note 54, at 182.

88. Underlying issues are those interests such as the parties' needs and true feelings that may not be "presented" in the original definition of the issues of the dispute but that must be identified in order to reach resolution. See also U.S. DIST. CT. FOR THE N. DIST. OF CAL., *supra* note 17, at 5. See generally KIMBERLEE K. KOVACH, *MEDIATION: PRINCIPLES AND PRACTICE* 88, 107-14 (1994).

89. JOHN W. COOLEY & STEVEN LUBET, *ARBITRATION ADVOCACY* § 1.3 (1997); JOHN W. COOLEY, *MEDIATION ADVOCACY* § 1.3 (1996)

90. Sander & Goldberg, *supra* note 39, at 51-54. For example, a client desiring vindication or precedent will want litigation, while a client desiring privacy and maintenance of the relationship with the other party will choose mediation. The attorney should also assess the available ADR processes in terms of what process can best overcome the barriers that exist to resolution. For example, settlement barriers may be poor communication, emotions, differing perspectives of the facts or law, principles, constituent pressures, linkages to other issues, multiplicity or parties, conflicts in lawyer and client interests, desire to "win the jack pot," or complexity of the issues. See Lon Fuller, *The Forms and Limits of Adjudication*, 92 *HARV. L. REV.* 353, 364-71, 393-400, 403 (1978); Plimpton, *supra* note 54, at 41; Sander & Goldberg, *supra* note 39, at 55.

scholars and practitioners recommend mediation as the “default” choice.⁹¹ Finally, the advocate must consider which method the other disputant can be persuaded to try.⁹²

3. *Advisability and Drafting of ADR Clauses*

Many clients want to agree in advance on how they will resolve disputes that may arise later. Such pre-dispute ADR clauses use the time before the dispute arises to devise a conflict resolution plan. Thus, the parties may avoid having to decide about resolution when the dispute has given way to hostility between them.⁹³ Agreements to use ADR may also be drafted at the time the dispute has arisen; these are often called submission agreements.⁹⁴ Pre-dispute and submission agreements usually call for private forms of ADR.

Attorney representatives need to examine and interpret agreements clients have already made to determine if the agreement contains a pre-dispute ADR clause. They will determine if the clause is binding and enforceable under contract law.⁹⁵ Lawyers must also be able to advise clients on whether to include such clauses in agreements they write for their clients. Finally, lawyers need to know how to draft a pre-dispute or submission clause.⁹⁶ Drafters relying on private ADR providers must be familiar with the rules of the services they adopt.⁹⁷ Lawyers who choose not to adopt a private service must determine and draft the rules that govern the process.⁹⁸

91. Sander & Goldberg, *supra* note 39, at 59; Ruhl, *supra* note 84, at 800; U.S. DIST. CT. FOR THE N. DIST. OF CAL., *supra* note 17, at 22-23.

92. COOLEY, *supra* note 89, § 1.5.2; COOLEY & LUBET, *supra* note 89, § 1.5.2.

93. COOLEY & LUBET, *supra* note 89, § 2.3.

94. COOLEY & LUBET, *supra* note 89, § 2.3; *see also* BETTE J. ROTH ET AL., *THE ALTERNATIVE DISPUTE RESOLUTION PRACTICE GUIDE* §§ 4.1-4.3, 25.2 (1993).

95. To be enforceable, ADR must meet the requirements of contract law. Although few such clauses have been voided as adhesion contracts, agreements that are too one-sided are at risk of being challenged. *See generally* Brower v. Broemmer v. Abortion Servs. of Phoenix, Ltd., 840 P.2d 1013 (Ariz. 1992) (en banc); Patterson v. ITT Consumer Fin. Corp., 18 Cal. Rptr. 2d 563 (Cal. Ct. App. 1993); Gateway 2000, Inc., 676 N.Y.S.2d 569 (N.Y. App. Div. 1998). *But see* Hill v. Gateway 2000, Inc., 105 F.3d 1147 (7th Cir. 1997), *cert. denied* 118 S. Ct. 47 (1997). Attorneys should also examine state laws for rules affecting ADR clauses. Some jurisdictions require that these clause be printed on the front page, in bold print, in capital letters, or contain specific language. *See, e.g.*, MO. REV. STAT. § 435.460 (1994); CAL. CIV. PROC. CODE § 1295(b). However, such state laws are in danger of being voided because the Federal Arbitration Act preempts state laws that treat arbitration differently than they do other contracts. *See* Doctor’s Assoc., Inc. v. Casarotto, 517 U.S. 681 (1996). Additionally, ADR clauses that provide for arbitration must be in compliance with the Federal or the state Uniform Arbitration Act, that generally serves as a default if the parties have not agreed on arbitration rules. *See* ROTH, *supra* note 94, §§ 4.13, 25.8.

96. COOLEY & LUBET, *supra* note 89, § 2.3. *See generally* CORINNE COOPER & BRUCE E. MEYERSON, *A DRAFTER’S GUIDE TO ALTERNATIVE DISPUTE RESOLUTION* (1991); AMERICAN ARBITRATION ASSOCIATION, *DRAFTING DISPUTE RESOLUTION CLAUSES—A PRACTICAL GUIDE* (1997).

97. ADR services such as the American Arbitration Association, U.S. A&M, and JAMS/Endispute have rules governing various ADR processes. ROTH, *supra* note 94, §§ 4.6, 25.6.

98. The rules of private ADR providers cover procedures such as initiation of the ADR process, selection and qualification of the neutral, authority of the neutral, time lines, discovery, logistics, and fees, among other issues. Because arbitration is one of the longest used forms of ADR, a body of law governing arbitration has developed at the state and federal level. Lawyers need to know that law.

4. Mediation

The most common attorney error in regard to ADR is confusing mediation and arbitration.⁹⁹ Advocates must understand that mediation is a flexible, non-binding process in which a neutral facilitates settlement negotiations.¹⁰⁰ The mediator does not make a decision for the parties, but rather carefully listens to the parties' positions, and then by questioning, helps the parties negotiate, generate options, and resolve the dispute.¹⁰¹ The goal of mediation is a mutually satisfactory agreement resolving all or some part of the dispute by carefully exploring the facts, law, and parties' underlying needs, interests and priorities.¹⁰²

Prior to the mediation session, the advocate must counsel the client about mediation, especially explaining how it differs from adversarial processes.¹⁰³ Lawyers should ensure that the case has been investigated sufficiently.¹⁰⁴ The lawyer should educate the client about the potential value of the case and help the client develop a negotiation strategy that is directed toward the client's goals, needs and interests.¹⁰⁵

The advocate, along with opposing counsel, must carefully select the mediator whose style is likely to meet the needs of the parties.¹⁰⁶ In evaluative mediation, the mediator makes recommendations to the parties as to the merits and worth of the case, while in facilitative mediation the mediator focuses on improving communication between the parties and not making evaluations.¹⁰⁷ Some mediators meet primarily in joint sessions while others use primarily private sessions with disputants.¹⁰⁸ Some focus only on the issue originally presented while other mediators look for underlying issues.¹⁰⁹ In those cases in which the court appoints a mediator, the advocate must learn the background, experience, and style of the mediator, in order to be prepared for the mediation session.

Buckstein, *supra* note 10, at 35, 37. See generally ROTH, *supra* note 94, §§ 4, 25.

99. John W. Cooley, *Arbitration vs. Mediation -- Explaining the Differences*, 69 JUDICATURE 263 (1986). See generally McAdoo, *supra* note 43, at 65.

100. KOVACH, *supra* note 88, at 12; U.S. DIST. CT. FOR THE N. DIST. OF CAL., *supra* note 17, at 14. For criticisms of mediation, see Richard Delgado et al., *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WIS. L. REV. 1359; Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545 (1991). For other criticisms see sources cited *supra* note 71.

101. KOVACH, *supra* note 88, at 23, 28-29; U.S. DIST. CT. FOR THE N. DIST. OF TEX., *supra* note 17, at 2.

102. U.S. DIST. CT. FOR THE N. DIST. OF CAL., *supra* note 17, at 14.

103. Lee Goodman, *Preparing Your Client for Mediation*, 1994 CBA REC. 18, 21 (1994).

104. ERIC GALTON, REPRESENTING CLIENTS IN MEDIATION § 2.2 (1994); COOLEY, *supra* note 89, §§ 3.2, 4.1; see also KOVACH, *supra* note 88, at 65.

105. KOVACH, *supra* note 88, at 77-79.

106. *Id.* at 66-68; ALASKA JUDICIAL COUNCIL, A CONSUMER GUIDE TO SELECTING A MEDIATOR (1995).

107. Riskin, *supra* note 77, at 24; COOLEY, *supra* note 89, §§ 2.2, 4.3; GALTON, *supra* note 104, at chs. 1, 3.

108. Kovach, *supra* note 28, at 127; GALTON, *supra* note 104, at chs. 1, 3; COOLEY, *supra* note 89, § 5.4.

109. Riskin, *supra* note 77, at 24.

Local custom and practice further define how mediation is practiced, including whether attorneys attend.¹¹⁰ Clients with authority to settle are generally expected to attend. Furthermore, attorneys should prepare their clients to give an opening statement during a joint session.¹¹¹ Unlike opening statements in court, these statements are targeted to the adversary and should convey a willingness to consider settlement.¹¹² The advocate should prepare the client for private sessions in which the mediator may probe the strengths and weaknesses of the client's position and look for areas of possible resolution.¹¹³ The advocate must prepare the client to answer the mediator's questions, listen attentively to all parties, present the client's concerns, and consider the options that develop in mediation.¹¹⁴ The advocate should provide legal advice to the client before, during, and after the mediation session, and advise the client not to expect professional advice from the mediator.¹¹⁵

The advocate must master the rules governing the mediation process as determined by the ADR agreement or by the ADR service provider. When necessary, the attorneys for the disputants must negotiate the rules and logistics of the mediation session and draft an agreement to mediate with particular attention to confidentiality.¹¹⁶ In some cases, the mediator will expect a pre-mediation submission that the advocate prepares.¹¹⁷

Where lawyers do not attend the mediation session, they must take care that the parties know their legal rights and obligations, are prepared to present their version of the dispute, are able to assert their interests, and will negotiate for themselves.¹¹⁸ Even where lawyers attend the mediation session, the parties must be prepared to participate in the session.¹¹⁹

Agreements reached in mediation are enforceable as contracts.¹²⁰ Some jurisdictions regulate how these agreements are memorialized.¹²¹ Currently, there are few laws governing how mediations are conducted, but the attorney must check for any regulations. When a resolution is reached, the advocate must review the terms of settlement, draft the documents memorializing the agreement, and advise the client regarding enforcement and compliance.¹²²

Mediation, and possibly the other non-adjudicative forms of ADR, calls for the greatest change in attorney mind set and for lawyering skills other than those

110. KOVACH, *supra* note 88, at 77.

111. *Id.* at 86-88; COOLEY, *supra* note 89, §§ 4.4, 5.2.

112. Nuffer, *supra* note 85, at 26; Sherman, *supra* note 83, at 47-8. *But see* COOLEY, *supra* note 89, § 5.2; GALTON, *supra* note 104, at ch. 9.

113. KOVACH, *supra* note 88, at 91-92; COOLEY, *supra* note 89, § 5.4; GALTON, *supra* note 104, at ch. 7.

114. COOLEY, *supra* note 89, § 4; GALTON, *supra* note 104, at ch. 7.

115. COOLEY, *supra* note 89, § 4.5.

116. KOVACH, *supra* note 88, at 139-59; *see discussion infra* Part IV.A.10. *See generally* COOLEY, *supra* note 89, § 4.

117. *See generally* KOVACH, *supra* note 88, at 70-77; GALTON, *supra* note 104, at ch. 7; COOLEY, *supra* note 89, § 3.6.

118. COOLEY, *supra* note 89, §§ 3.6 - 3.7.

119. KOVACH *supra* note 88, at 87-88; COOLEY, *supra* note 89, § 4.

120. KOVACH, *supra* note 88, at 174-80; Kimberlee K. Kovach, *Overview* to ERIC GALTON, REPRESENTING CLIENTS IN MEDIATION, xxxviii (1994); COOLEY, *supra* note 89, § 6.

121. KOVACH, *supra* note 88, at 180-81; Kovach, *supra* note 120, at xxxvii.

122. COOLEY, *supra* note 89, §§ 6.2-6.3.

ordinarily employed in litigation. Unlike jury trials, the adversary, not the jury, is the most important person to the client. It is only the adversary who has the power to come to an agreement with the client. Thus, all of the behavior and strategy of the attorney and the client must be considered in the light of winning over the adversary. Attorneys and clients must learn to be assertive without being hostile.

Another major challenge for the attorney, especially in mediation, is the amount of control and participation the client has in the process. The attorney must adequately prepare the client for the amount of participation that will be expected of the client. The degree of client participation will vary with the mediator and local custom. Attorneys must realize that their role in mediation appears less dominating than the one experienced in litigation.

5. *Early neutral evaluation*

The advocate must know that early neutral evaluation (ENE), or neutral evaluation, is a process designed to bring together parties and their counsel to present case summaries before, and receive a non-binding assessment from, an experienced, neutral third party, called the evaluator.¹²³ Goals include enhancing direct communication between the parties, providing an assessment of the merits of the case by a neutral expert, providing a reality check for clients and lawyers, identifying and clarifying the issues in dispute, and facilitating settlement discussions.¹²⁴ In some jurisdictions, the process is also used to assist with case management.¹²⁵ ENE is most useful where the parties disagree on the value of the case or where there is some issue impeding settlement.

The advocate must carefully investigate and, with opposing counsel, select the evaluator, who must be accepted by all as credible.¹²⁶ Those evaluators with expertise and experience in the subject of the dispute are often viewed as more credible. If the court appoints the evaluator, the attorney should investigate the background, experience, and style of the evaluator.

Advocates must prepare the case sufficiently so that it is ready to present for evaluation.¹²⁷ They should counsel the client about the process and help the client assess the strengths and weaknesses of the case. Because some evaluators will offer to mediate before or after giving an evaluation, the advocate should prepare the

123. Adapted from U.S. DIST. CT. FOR THE E. DIST. OF MO., ALTERNATIVE DISP. RESOL. PROCS. MANUAL FOR THE E. DIST. OF MO. (1994); see also Wayne Brazil, *Early Neutral Evaluation: An Experimental Effort to Expedite Dispute Resolution*, 69 JUDICATURE 279 (1986). For evaluations of early neutral evaluation programs, see generally David I. Levine, *Early Neutral Evaluation: The Second Phase*, 1989 J. DISP. RES. 1 (1988) and Rosenberg & Folberg, *supra* note 11.

124. U.S. DIST. CT. FOR THE N. DIST. OF CAL., *supra* note 17.

125. See Rosenberg & Folberg, *supra* note 11, at 1491; U.S. DIST. CT. FOR THE N. DIST. OF CAL., *supra* note 17.

126. COOLEY & LUBET, *supra* note 89, § 7.9; Buckstein, *supra* note 10, at 35, 39.

127. In the Northern District of California, where ENE has been extensively used, attorneys are required to submit to the evaluator a statement identifying the session participants, major disputed issues, and discovery necessary prior to the settlement conference. Such a requirement encourages at least minimal preparation. Rosenberg & Folberg, *supra* note 11, at 1490. DAUER, *supra* note 86, § 13.12.

client for negotiations as described above.¹²⁸ Many of the lawyering tasks outlined for mediation are applicable for ENE as well.

Advocates should appreciate the value of the client's presence at the ENE sessions to hear both the presentations and the evaluator's opinion.¹²⁹ The advocate must explain the significance of the evaluator's opinion to the client.¹³⁰ Advocates should address such logistical matters as the form and timing of any required submissions and the time allotted for the evaluation session.¹³¹

6. Summary jury trials and mini-trials

Advocates in jurisdictions where courts offer summary jury trials or mini-trials should understand that these trials are another tool to help parties assess the worth of their case.¹³² Indeed, mini-trials are one of the forms of ADR specifically listed in the 1998 ADR Act.

Summary jury trials involve the presentation of evidence, in an abbreviated format, to a jury who renders an advisory, non-binding opinion.¹³³ Usually completed in a day or less, the goal of summary jury trials is to offer a typical jury's opinion of a case in the hope that this will influence the parties to settle the case.¹³⁴

In mini-trials, attorneys present their best arguments to the top decision-makers for the corporations or government agencies involved in the dispute.¹³⁵ A neutral moderator presides over the procedure.¹³⁶ After hearing the entity's best case and the best case of the opposing entity, the executives recess to negotiate settlement with or without the help of the moderator.¹³⁷ Mini-trials are private and non-binding.¹³⁸ Terms governing confidentiality are especially important.¹³⁹

128. Rosenberg & Folberg, *supra* note 11, at 1491; COOLEY & LUBET, *supra* note 89, § 7.9; Buckstein, *supra* note 10, at 39.

129. The Northern District of California's program is designed for the client to attend the ENE session and present the opening statement to the evaluator. Rosenberg & Folberg, *supra* note 11, at 1490.

130. DAUER, *supra* note 86, § 13.12.

131. See, for example, U.S. Dist. Ct. for the N. Dist. of Cal. Gen. Ord. No. 26, that provide for a pre-session submission and a two-hour session, consisting of an introduction by the evaluator, a 15-minute opening statement by each party, questions from the evaluator, recess for the evaluator to assess the case, joint session to learn of the evaluation or to work on settlement or develop a case management plan. See also COOLEY & LUBET, *supra* note 89, § 7.9; Buckstein, *supra* note 10, at 35, 39; DAUER, *supra* note 86, §§ 13.10-13.11.

132. COOLEY & LUBET, *supra* note 89, § 7.5.

133. *The Summary Jury Trial and Other Alternative Methods of Dispute Resolution: A Report to the Judicial Conference of the United States Committee on the Operation of the Jury System*, 103 FRD 461 (1984); Thomas D. Lambros, *The Summary Jury Trial -- An Alternative Method of Resolving Disputes*, 69 JUDICATURE 286 (1986); for a criticism of summary jury trials, see Thomas B. Metzloff, *Reconfiguring the Summary Jury Trial*, 41 DUKE L. J. 806 (1992).

134. Lambros, *supra* note 133, at 286. U.S. DIST. CT. FOR THE N. DIST. OF TEX., *supra* note 17.

135. Eric Green, *Corporate Alternative Dispute Resolution*, 1 J. DISP. RES. 203, 238 (1986); CPR INSTITUTE FOR DISPUTE RESOLUTION, MINITRIAL (1994); U.S. DIST. CT. FOR THE N. DIST. OF TEX., *supra* note 17; COOLEY & LUBET, *supra* note 89, § 7.6; ROTH, *supra* note 94, § 38.1.

136. Green, *supra* note 135, at 239; CPR INSTITUTE, *supra* note 136, at I-5.

137. Green, *supra* note 135, at 240-41; CPR INSTITUTE, *supra* note 136, at I-8; see also COOLEY & LUBET, *supra* note 89, § 7.6.

138. CPR INSTITUTE, *supra* note 135, at I-8, I-14; Green, *supra* note 135, at 238.

139. CPR INSTITUTE, *supra* note 135, at I-9; Green, *supra* note 135, at 238.

In both forums, the advocates must be skilled in making brief and persuasive presentations of the case.¹⁴⁰ In each case, attorneys must target their presentation to the audience -- a lay jury or government or business executives. Attorneys must complete enough investigation or discovery to make an effective presentation.¹⁴¹ They should counsel the client about the process, likely results, and risks. Lawyers must be familiar with the rules governing the process and, when necessary, must draft rules or terms.¹⁴² Because negotiation is likely to follow either of these sessions, advocates should help the client develop a negotiation strategy prior to the session and encourage the client to listen to the presentation of both cases with a view toward settlement.¹⁴³

7. *Judicial settlement conferences*

Advocates must know the rules and customs of local judicial settlement conferences. A judicial settlement conference is a court-sponsored meeting of the attorneys and the judicial officer, and possibly the clients.¹⁴⁴ Jurisdictions vary regarding whether the conferences are mandatory, the timing of conferences, the length of conferences, and the rules of confidentiality. Settlement judges vary in the methods and strategies they use, from those resembling a mediator or an evaluator, to those more like an arbitrator.¹⁴⁵ In some jurisdictions, the settlement judge is never the trial judge.¹⁴⁶ Advocates must know whether the rules require the attendance and good faith participation of the client, trial counsel, or others.¹⁴⁷ Lawyers may also need to prepare pre-conference submissions.¹⁴⁸ Of course, the advocate must prepare the client for negotiations during the conference, and determine the authority of the parties to settle.¹⁴⁹

8. *Private arbitration*

Attorney advocates undertaking private arbitration must understand that private arbitration is a process in which one or more neutrals render a binding decision after

140. Sherman, *supra* note 83, at 48; Lambros, *supra* note 133. Both Lambros and Sherman also discuss the ethical and strategic implications of summarizations. See also DAUER, *supra* note 86, § 13.25.

141. Lambros, *supra* note 133, at 287; Green, *supra* note 135, at 239.

142. See generally CPR INSTITUTE, *supra* note 135; local court rules on summary jury trial proceedings; see also DAUER, *supra* note 86, § 13.25; ROTH, *supra* note 94, §§ 38.8-38.16.

143. CPR INSTITUTE, *supra* note 135, at 1-8; Green, *supra* note 135, at 241; Lambros, *supra* note 133, at 290; see also COOLEY & LUBET, *supra* note 89, §§ 7.5-7.6.

144. Wayne Brazil, *Effective Lawyering in Judicially Hosted Settlement Conferences*, 1988 J. DISP. RES. 1, 4 (1988).

145. DAUER, *supra* note 86, § 13.02; see also U.S. DIST. CT. FOR THE N. DIST. OF CAL., *supra* note 17.

146. DAUER, *supra* note 86, § 13.04.

147. Brazil, *supra* note 144, at 10; DAUER, *supra* note 87, § 13.04.

148. DAUER, *supra* note 86, § 13.05.

149. *Id.*

reviewing evidence and arguments.¹⁵⁰ Arbitration is governed by the parties' agreement to arbitrate, made prior to or at the time the dispute arose or the rules of the ADR service provider selected.¹⁵¹ Attorneys should also realize that there is very limited judicial review of arbitration decisions.¹⁵² Because of the binding nature of arbitration and the limited review it entails, attorneys must approach arbitration carefully.¹⁵³ Its advantages lie in the ability of the parties to choose an arbitrator with expertise in the subject of the dispute and to control the process, including the remedies available.¹⁵⁴

In preparing for arbitration, advocates must know the rules of ADR service and the federal or state Arbitration Acts.¹⁵⁵ The ADR provider's rules may govern discovery, evidence, procedure, time lines, and the selection of the arbitrator.¹⁵⁶ Arbitration offers the possibility of selecting neutrals with expertise in the field of the dispute. Lawyers must carefully select the arbitrator or arbitrators and set the qualifications.¹⁵⁷ Typically, the service provides a procedure for choosing the arbitrator from a roster of those available.¹⁵⁸ If not using a service, attorneys must devise a method of selecting the arbitrators and determining whether to use one or

150. Arbitration can be binding or nonbinding. This article discusses only binding arbitration. See text accompanying *supra* note 81; MARTIN DOMKE, *DOMKE COMMERCIAL ARBITRATION* § 1.01 (rev. ed. 1984); COOLEY & LUBET, *supra* note 89, § 1.1; Buckstein, *supra* note 10, at 35, 38. Two excellent resources on commercial arbitration are DOMKE ON COMMERCIAL ARBITRATION and THOMAS H. OEHMKE, *COMMERCIAL ARBITRATION* (1995). An excellent resource on labor arbitration is FRANK ELKOURI & EDNA ELKOURI, *HOW ARBITRATION WORKS* (Marlin M. Nolz & Edward P. Goggin eds., 5th ed. 1997). Both labor and commercial arbitration are specialized fields and looseleaf services and other handbooks are available to assist the practitioner. References in this primer are made to Domke and Oehmke because the materials on commercial arbitration may present the best guide to the practitioner for a general overview of arbitration. Practitioners must consult the rules of the service being used or treatises in the substantive field for more particular advice.

151. DOMKE, *supra* note 150, § 1.01; OEHMKE, *supra* note 150, § 10.01; COOLEY & LUBET, *supra* note 89, § 2.3.

152. Grounds for vacating an arbitration decision under the Federal Arbitration Act are: the award was procured by corruption, fraud, or undue means; there was evident partiality or corruption in the arbitrators; the arbitrators were guilty of misconduct [in the conduct of the hearing]; the arbitrators exceeded their powers or a final, definite award was not made. 9 U.S.C. § 10 (1999); UNIF. ARBITRATION ACT § 12. Another ground is the violation of public policy where there has been an explicit, well-defined public policy. *W.R. Grace & Co. v. Rubber Workers*, 461 U.S. 757, 766 (1983); *Exxon Shipping Co. v. Exxon Seaman's Union*, 11 F. 3d 1189 (3d Cir. 1993). Errors in regard to law or facts are not grounds for vacating an arbitration decision. See *Steelworkers v. American Mfg. Co.*, 363 U.S. 564, 567-8 (1960); see also DOMKE, *supra* note 150, § 34.01; COOLEY & LUBET, *supra* note 89, § 6.5-6.6; ROTH, *supra* note 94, §§ 14.5-14.15.

153. DOMKE, *supra* note 150, § 1.01; OEHMKE, *supra* note 150, § 142.01.

154. COOLEY & LUBET, *supra* note 89, § 1.3.1.

155. 9 U.S.C. § 1-16; UNIF. ARBITRATION ACT §§ 1-25. The Federal Arbitration Act may preempt state law under certain circumstances so lawyers must be familiar with both acts. See *Southland Corp. v. Keating*, 485 U.S. 1 (1984); *Doctor's Assoc., Inc. v. Casarotto*, 517 U.S. 681 (1996). See, e.g., *AMERICAN ARBITRATION ASSOCIATION COMMERCIAL DISPUTE RESOLUTION PROCEDURES* (1999). The American Arbitration Association (AAA) also has rules for the arbitration of disputes related to construction, employment, and patent matters, to name a few. See generally OEHMKE, *supra* note 150, at ch. 9; see generally COOLEY & LUBET, *supra* note 89, §§ 2-5; ROTH, *supra* note 94, §§ 11-12.

156. See generally DOMKE, *supra* note 150, at ch. 20, § 21.01; OEHMKE, *supra* note 150, at chs. 33-34. See, e.g., AAA Commercial Arbitration Rules, R. 12-17, 22-28, 32-35.

157. COOLEY & LUBET, *supra* note 89, § 2.6; ROTH, *supra* note 94, § 10; Buckstein, *supra* note 10, at 37.

158. See, e.g., AAA Commercial Arbitration Rules, R. 12-17.

a panel of arbitrators; the panel may consist of all neutral arbitrators or arbitrators selected by each party with one neutral arbitrator chosen by the non-neutral arbitrators.¹⁵⁹

Attorneys must also carefully delineate the scope of the arbitrator's authority as to the issues to be decided and remedies available to the arbitrator.¹⁶⁰ Attorneys must determine the rules of evidence and procedure to be followed if the service does not have its own rules.¹⁶¹ They must decide whether the arbitrators are to decide the case based on law, industry practice, or some other standard; if the standard is the law, they can determine the choice of law to govern the matter.¹⁶² Working with the arbitrator and their clients, the advocates must decide such logistical matters as arbitrator fees and the location and timing of the hearing.¹⁶³ If confidentiality is desired, the advocates may need to draft appropriate protections.¹⁶⁴

Lawyers must be skilled in drafting the demand for arbitration, the response and counterclaims; investigating the case and conducting discovery; subpoenaing witnesses; procuring a court reporter and making a record; presenting evidence; and preparing pre- and post-hearing submissions.¹⁶⁵ They must also advise the client about the nature of the process and the likely results, or at least the risks.¹⁶⁶ Finally, they must prepare the client, as well as witnesses, for the arbitration hearing.¹⁶⁷ In short, attorneys appearing before arbitration panels need to possess the same trial skills, strategies, and master the same preparation as do litigators.

Once an award has been made, the attorneys must determine if any modification or correction is needed.¹⁶⁸ They must counsel the client as to whether to accept it or challenge it, knowing that challenges to an arbitration award are limited by statute.¹⁶⁹ They may need to seek judicial enforcement of the award.¹⁷⁰

9. *Mandatory or court-annexed arbitration*

159. DOMKE, *supra* note 150, § 20.03; OEHMKE, *supra* note 150, at ch. 35; COOLEY & LUBET, *supra* note 89, § 2.3.

160. One ground for vacating arbitration awards is that the arbitrators acted outside the scope of their authority. 9 U.S.C. § 10(4). Thus, it is important that their authority be delineated. DOMKE, *supra* note 150, at ch. 12, § 33.04; OEHMKE, *supra* note 150, §§ 100.01; 150.01-13; COOLEY & LUBET, *supra* note 89, § 2.3; ROTH, *supra* note 94, § 5; Buckstein, *supra* note 10, at 37.

161. DOMKE, *supra* note 150, at ch.2, § 24.02; OEHMKE, *supra* note 150, §§ 90.01, 90.03, 99.03, 100.01; COOLEY & LUBET, *supra* note 89, § 2.3.

162. COOLEY & LUBET, *supra* note 89, § 2.3.

163. *Id.*

164. Usually there is no record made of arbitration hearings, but parties may bring a court reporter if arranged in accord with the rules. See AAA Commercial Arbitration Rules, R. 28; DOMKE, *supra* note 150, at ch. 25; OEHMKE, *supra* note 150, § 99.09; COOLEY & LUBET, *supra* note 89, § 2.3.

165. COOLEY & LUBET, *supra* note 89, §§ 4-5; ROTH, *supra* note 94, §§ 11-12.

166. COOLEY & LUBET, *supra* note 89, § 4.2.

167. *Id.*

168. 9 U.S.C. § 11; UNIF. ARBITRATION ACT § 9; DOMKE, *supra* note 150, at ch. 35; OEHMKE, *supra* note 150, at ch. 128.

169. 9 U.S.C. § 11; UNIF. ARBITRATION ACT § 9.

170. 9 U.S.C. §§ 2, 9, 13; UNIF. ARBITRATION ACT §§ 11, 14; DOMKE, *supra* note 150, at ch. 37; OEHMKE, *supra* note 150, at ch. 141.

Mandatory or court-annexed arbitration is a hybrid form of adjudication and settlement. One or more arbitrators issue a non-binding award on the merits after hearing evidence from all parties, usually presented in a summary fashion.¹⁷¹ The parties present evidence to one or more triers of fact, but typically retain the right to reject the award.¹⁷² Court-sponsored programs are authorized by federal or state law.¹⁷³ Such programs avoid constitutional challenge because they permit the parties to reject the award and request a trial *de novo*.¹⁷⁴

The attorney must master the expedited procedures that are often key to these programs. It is important to know the procedures and time lines for rejecting the award and the governing statutes and rules.¹⁷⁵ The attorney must determine whether client and attorney attendance and good faith participation are required.¹⁷⁶ Lawyers must also master the lawyering tasks outlined above concerning private arbitration.

10. Other issues

Regardless of the ADR method chosen, attorneys need to consider a number of issues, including when to use ADR, the neutral's qualifications and ethics, confidentiality, and degree of participation of those attending.

Timing. Most ADR processes may be employed at any time that the parties know enough about the case to make an effective assessment of the case. The balance is between late enough to allow time to be prepared for the process and early enough to save costs and prevent entrenchment.¹⁷⁷ Little empirical evidence exists on the issue of timing. Advocates should seek the experience of colleagues who have used ADR processes. As a rule of thumb, where there is more at risk, the parties will want more time to prepare.¹⁷⁸ The worth of the case and the resources of the parties also affect the timing.

Advocates should also realize that ADR offers a great deal of flexibility. Parties may use ADR for some but not all of the issues in a case. They may employ several

171. U.S. DIST. CT. FOR THE W. DIST. OF OKLA., *RESOLVING DISPS. IN FED. CT.: ALTERNATIVES AND OPTIONS FOR CIVIL CASES 5* (1998). *see also* Symposium, *Court-Annexed Arbitration*, 14/2 JUSTICE SYSTEM J. 123, 123-244 (1991). For criticisms of mandatory arbitration programs, see Deborah R. Hensler, *What We Know and Don't Know and Court-Administered Arbitration*, 69 JUDICATURE 270 (1986) and Harry T. Edwards, *Alternative Dispute Resolution: Panacea or Anathema?* 99 HARV. L. REV. 668, 673 (1986). *See generally* BARBARA STONE MEIERHOLFER, *COURT-ANNEXED ARBITRATION IN TEN DISTRICT COURTS* (1990).

172. ROTH, *supra* note 94, § 22.1.

173. *See also* PLAPINGER & STIENSTRA, *supra* note 2, at 4, Tables 1, 3. *See, e.g.*, 28 U.S.C. §§ 651-658.

174. *See generally* ROTH, *supra* note 94, § 22.1. *See, e.g.*, *Davis v. Gaona*, 396 S.E.2d 218 (Ga. 1990); *Firelock, Inc. v. District Court*, 776 P.2d 1090 (Colo. 1989); *Kimbrough v. Holiday Inn*, 478 F. Supp. 566 (E.D. Pa. 1979).

175. ROTH, *supra* note 94, § 22. *See, e.g.*, Robert E. Byrne et al., *Court-Annexed Mandatory Arbitration Practice and Procedure in Illinois*, 1990 CBA REC. 14 (1990). There are similar practice guides in most jurisdictions in which there are court-annexed programs.

176. Edward F. Sherman, *Court-Mandated Alternative Dispute Resolution: What Form of Participation Should Be Required?*, 46 SMU L. REV. 2079 (1993); ROTH, *supra* note 94, § 22.16.

177. GALTON, *supra* note 104, § 2.2; COOLEY, *supra* note 89, § 3.2.

178. For example, in arbitration where the parties face a binding decision with little review, as much preparation as possible is essential. Where the parties have enough information to evaluate the case, even though they are not ready for trial, they may be ready for mediation.

different methods, in sequence or at different times in the same case.¹⁷⁹ As lawyers and clients become more creative, more ADR processes may evolve.

Qualifications. Advocates must investigate the qualifications of neutrals because they vary greatly across jurisdictions. Some states require all neutrals, whether in court-sponsored programs or in private programs, to be certified or licensed or otherwise meet certain credentialing requirements.¹⁸⁰ Other states have no such requirements, except those that may be imposed by a court-sponsored rule.¹⁸¹ Thus, the training and the experience of the neutrals will vary considerably. Lawyers should understand that they cannot rely upon licensing of ADR neutrals as a sign of competence; thus, lawyers must assume responsibility for investigating the qualifications of the neutrals available to them. Often, it is the personal skills and experience of the neutral that will be of greatest value to the process.¹⁸²

Advocates must also determine how, if at all, they can strike arbitrators and what method is used for choosing mediators, evaluators, or settlement judges. Private services usually have a roster of neutrals from which the parties can select through mutual agreement or some other process of elimination.¹⁸³ Private services typically provide some background on the neutrals to help the parties select.¹⁸⁴ Where special expertise is desired, the lawyers must determine if the neutral can offer the expertise desired.¹⁸⁵

Lawyers should inquire as to what ethical norms the neutral subscribes.¹⁸⁶ There are no nationally promulgated ethics guides for neutrals such as the American Bar Association Model Rules of Professional Conduct for attorneys.¹⁸⁷ However, there are a number of standards of professional conduct that govern neutrals.¹⁸⁸ Private services, court-sponsored programs, and professional organizations of neutrals promulgate rules of ethics for arbitrators and mediators. Ethical codes addressed such issues as conflicts of interests, confidentiality, fees, and methods of practice.¹⁸⁹

Confidentiality. Advocates should be sensitive to the issues of privacy and confidentiality. When using the non-binding processes, attorneys usually want to ensure that statements made during the ADR process cannot be used in later

179. For example, parties set on litigation may use mediation to resolve scheduling or discovery disputes. Parties may use neutral evaluation to help them agree on damages, while trying liability. Parties may try mediation prior to filing a lawsuit; should the parties fail to resolve the matter in mediation, one of them can file the lawsuit or proceed to binding arbitration. COOLEY, *supra* note 89, §§ 2.4, 7.

180. *See, e.g.*, FLA. STAT. ANN. § 44.106 (West 1997).

181. COOLEY & LUBET, *supra* note 89, § 1.3.2.

182. Plimpton, *supra* note, 54 at 40.

183. COOLEY & LUBET, *supra* note 89, § 2.6; COOLEY, *supra* note 89, § 2.7.

184. COOLEY & LUBET, *supra* note 89, § 2.6; COOLEY, *supra* note 89, § 2.7.

185. COOLEY & LUBET, *supra* note 89, § 2.6; COOLEY, *supra* note 89, § 2.7.

186. COOLEY, *supra* note 89, § 5.9; COOLEY & LUBET, *supra* note 89, § 2.7; Kovach, *supra* note 120, at xxxviii.

187. *Id.*

188. *See, e.g.*, AMERICAN ARBITRATION ASSOCIATION, ET AL., MODEL STANDARDS OF CONDUCT FOR MEDIATORS (1994); AMERICAN ARBITRATION ASSOCIATION AND AMERICAN BAR ASSOCIATION, CODE OF ETHICS FOR ARBITRATORS IN COMMERCIAL DISPUTES (1977); COOLEY & LUBET, *supra* note 89, § 2.7; COOLEY, *supra* note 89, § 5.7.

189. COOLEY & LUBET, *supra* note 89, § 2.7; COOLEY, *supra* note 89, § 5.9; Kovach, *supra* note 120, at xxxviii.

litigation. Even in arbitration, the parties may want privacy.¹⁹⁰ If the client desires confidentiality, the lawyer should review the law in the applicable jurisdiction.¹⁹¹ For additional protection, the parties may choose to enter into private agreements to protect communications made during the ADR process and prevent the neutral from being called upon to testify at a later hearing.¹⁹² Lawyers should advise clients, however, that public policy may sometimes dictate disclosure of information.¹⁹³

Participation. Attorneys should know what level of participation is required during the ADR process. Court rules often govern who must attend and what authority they must have.¹⁹⁴ Further, some court rules require that those attending participate in good faith, with sanctions for failure to participate in good faith.¹⁹⁵ Attorneys should advise the client as to what is expected and what risks there are for failure to comply with the requirements.¹⁹⁶

V. CONCLUSION

One ADR advocate has written:

The 1980s have seen ADR evolve from an experimental concept to a widespread and growing phenomenon, receiving increasing acceptance and use both within and outside the judicial system. The use of mediation and other forms of ADR can be expected to expand in the 1990s, both as part of the judicial system and as a rubric under which many opportunities for resolving disputes outside the courtroom will be offered....

The legal profession needs to learn more about ADR, what it offers to lawyers and their clients, and how to utilize ADR, where appropriate, in the practice of law. ADR options must be recognized, both in litigation and non-litigation contexts, as strategic and tactical options to be considered at every stage of client representation.¹⁹⁷

The lawyer entering the twenty-first century must be educated about ADR in order to meet the expectations and demands of the courts and the clients. Those attorneys who wish to learn about ADR can benefit from a basic ADR primer. This

190. COOLEY & LUBET, *supra* note 89, § 2.3.

191. COOLEY, *supra* note 89, § 3.8; Kovach, *supra* note 120, at xxvii-xxxiii.

192. COOLEY, *supra* note 89, § 3.8; COOLEY & LUBET, *supra* note 89, § 2.3; Kovach, *supra* note 120, at xxxii; Plimpton, *supra* note 54, at 44.

193. See, e.g., COLO. REV. STAT. § 13-22-307 (Supp. 1995); Symposium, *Standards of Professional Conduct in Alternative Dispute Resolution*, 1995 J. DISP. RESOL. 95, 112-15 (1995); Kovach, *supra* note 120, at xxxiv.

194. COOLEY, *supra* note 89, §§ 3.5, 7.6; COOLEY & LUBET, *supra* note 89, § 7.6; Kovach, *supra* note 120, at xxvi.

195. Kovach, *supra* note 120, at xxvi.

196. Fed. R. Civ. P. 16; G. Heileman Brewing Co. v. Joseph Oat Corp., 871 F.2d 648 (7th Cir. 1989); Edward F. Sherman, *Court-Mandated Alternative Dispute Resolution: What Form Of Participation Should Be Required?*, 46 SMU L. REV. 2079 (1993); Kovach, *supra* note 28, at 575.

197. Plimpton, *supra* note 54, at 38-39.

outline offers the minimum education a lawyer needs in order to be familiar with the ADR options, advise the client as to the value of ADR, and prepare the client and himself for the ADR process chosen.¹⁹⁸

While the readings listed are excellent, personal experience through observation, attendance at continuing legal education programs, discussions with colleagues who have used ADR, and discussions with program administrators will enrich the learning.¹⁹⁹ Learning is on-going in any field, but especially in one developing as rapidly as the ADR field.

This overview of the minimum knowledge of ADR is presented to ADR scholars and practitioners with the invitation to comment. This article is a first step toward a consensus as to what attorneys must know when it is said that attorneys have a duty to know and counsel clients about ADR.

198. There are many more issues related to specialized ADR topics that those working in certain areas of the law must master.

199. *See supra* Part IV.

Appendix

Readings

1. What is ADR:

JACQUELINE M. NOLAN-HALEY, *ALTERNATIVE DISPUTE RESOLUTION IN A NUTSHELL* (1992).

Frank E. A. Sander & Stephen B. Goldberg, *Fitting the Forum to the Fuss: A User-Friendly Guide to Selecting an ADR Procedure*, 10 *NEGOTIATION J.* 49 (1994); Frank E. A. Sander, *Professional Responsibility: Should There Be a Duty to Advise of ADR Options? Yes: An Aid to Clients*, *A.B.A. J.*, Nov. 1990, at 50 (abbreviated version).

Mark A. Buckstein, *An Introductory Primer on Pre-Litigation ADR Counseling for the Outside Lawyer*, *DISP. RESOL. J.*, Jan. 1997, at 35.

David Plimpton, *Mediation Of Disputes: The Role of The Lawyer and How Best To Serve the Client's Interest*, *ME. BAR J.*, Jan. 1993, at 39.

BETTE J. ROTH ET AL., *THE ALTERNATIVE DISPUTE RESOLUTION PRACTICE GUIDE* (1993).

EDWARD A. DAUER, *MANUAL OF DISPUTE RESOLUTION: ADR LAW AND PRACTICE* (1996).

Statutes and rules of applicable federal and state jurisdictions.

Brochures and rules of local courts.

2. How to Choose Whether to Use ADR:

Sander & Goldberg, *supra*.

Plimpton, *supra*.

DAUER, *supra*.

3. Drafting ADR Clauses:

American Arbitration Association, 140 West 51st St., New York, NY 10020-1203.
 Internet address <<http://www.adr.org>>.

AMERICAN ARBITRATION ASSOCIATION, *DRAFTING DISPUTE RESOLUTION CLAUSES—A PRACTICAL GUIDE* (1997).

CORINNE COOPER & BRUCE E. MEYERSON, *A DRAFTER'S GUIDE TO ALTERNATIVE DISPUTE RESOLUTION* (1991).

CPR INSTITUTE FOR DISPUTE RESOLUTION, 366 Madison Ave., New York, NY 10017-3122. Internet address <<http://www.cpradr.org>>.

CPR INSTITUTE FOR DISPUTE RESOLUTION, *DISPUTE RESOLUTION CLAUSES: A DRAFTER'S GUIDE* (1994).

See also clauses for specific types of disputes published in CPR.

4. Mediation:

JOHN W. COOLEY, *MEDIATION ADVOCACY* (1996).

ERIC GALTON, *REPRESENTING CLIENTS IN MEDIATION* (1994).

NOLAN-HALEY, *supra*.

Statutes and rules of applicable jurisdiction.

Rules and procedures of private services, including AAA and CPR above, and JAMS/ENDISPUTE, 1920 Main St., Suite 300, Irvine, CA 92614. Internet Address <<http://www.jams-endispute.com>>

U.S. Arbitration and Mediation Service, 800 Roosevelt Rd., Suite A5, Glen Ellyn, IL 60138. Internet Address <<http://www.USAM.com>>

David Nuffer, *Adversarial or Conciliatory? What Litigators Should Know About Mediation*, *DISP. RESOL. J.*, Jan. 1996, at 24.

Lee Goodman, *Preparing Your Client for Mediation*, 1994 CBA REC. 18 (1994).

5. Early Neutral Evaluation:

Statutes and rules of applicable jurisdiction.

Brochures and guidelines of applicable jurisdiction or private services.

NOLAN-HALEY, *supra*.

6. Summary Jury Trials and Mini-trials:

Rules and guidelines of applicable jurisdiction.

CPR INSTITUTE FOR DISPUTE RESOLUTION, *supra*.

7. Judicial Settlement Conferences:

FED. R. CIV. P. 16.

Statutes, rules, and guidelines of applicable jurisdiction.

8. Private Arbitration:

JOHN W. COOLEY & STEVEN LUBET, *ARBITRATION ADVOCACY* (1997).

MARTIN DOMKE, *DOMKE COMMERCIAL ARBITRATION* (rev. ed. 1984).

THOMAS H. OEHMKE, *COMMERCIAL ARBITRATION* (1995).

FEDERAL ARBITRATION ACT, 9 U.S.C. §§ 1-16 (1999).

UNIFORM ARBITRATION ACT, §§ 1-25, 7 U.L.A. 1 (1997).

State Arbitration Acts.

Rules and procedures of private arbitration services.

9. Mandatory or Court-annexed Arbitration:

Statutes and rules of applicable jurisdiction.

Robert E. Byrne et al., *Court-Annexed Mandatory Arbitration Practice and Procedure in Illinois*, 1990 CBA REC. 14 (1990), and similar practice guides in other jurisdictions.

10. Issues:

SOCIETY FOR PROFESSIONALS IN DISPUTE RESOLUTION, *STANDARDS OF CONDUCT FOR MEDIATORS* (1994).