

I N S I D E T H E M I N D S

Alternative Dispute Resolution Settlements and Negotiations

*Leading Lawyers on Winning Legal Strategies for
ADR, Mediation, Arbitration, and Litigation*



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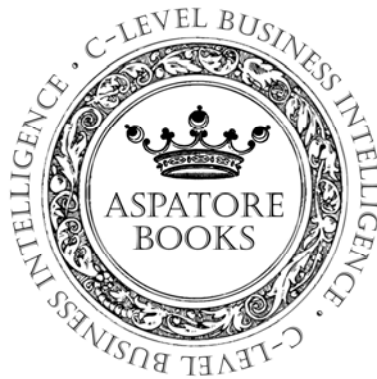
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When to Litigate, When to Mediate, and When to Arbitrate

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I. ADR: Background & Historical Development

Alternative Dispute Resolution—or “ADR”—generally encompasses two distinct forms of dispute resolution: arbitration and mediation.

Arbitration is a method of dispute resolution involving “one or more neutral third parties [the arbitrator(s)] who are usually agreed to by the disputing parties and whose decision is binding.”¹ While more informal than court proceedings, arbitrations generally proceed in a similar fashion, with opening statements, the presentation of witnesses and evidence, cross examination, and closing arguments. Arbitrators then decide cases based on the evidence, and their decision is final and binding on the parties.

Mediation, meanwhile, is an informal dispute resolution process in which “a neutral third person, the mediator, helps disputing parties reach an agreement.”² Unlike an arbitrator, a mediator generally has no power to impose his decision on the parties. Rather, the mediator’s role is to bring the parties closer together through discussions of the strengths and weaknesses in the case for both sides, in an effort to convince each side to compromise to settle the dispute.

With few exceptions, arbitration and mediation are voluntary mechanisms—*i.e.*, parties will be required to mediate or arbitrate only if they contractually have agreed to do so. Absent such an agreement, parties can be sued in court, but they cannot be hauled into a private arbitration or mediation against their will.³ When parties do elect to participate in ADR, they can designate the type of arbitration or mediation to which they submit, how the arbitrator/mediator will be selected, where the arbitration/mediation will take place, the type of discovery that will be permitted (if any), and myriad other issues governing the ADR process. The key for parties agreeing to ADR is to understand their rights and options, and select a process that best fits their particular goals and needs.

¹ See *Black’s Law Dictionary*.

² See *id.*

³ Once in court, parties also can be referred to court-sponsored ADR to attempt to resolve their disputes. See, e.g., *Commercial Division, State of New York, Alternative Dispute Resolution Program*. This use of ADR is discussed briefly below.

ADR owes much of its growth in this country to the labor and employment field. With the passage of the National Labor Relations Act (NLRA) in 1935, unions and management routinely agreed to grievance and arbitration provisions in collective bargaining agreements to resolve their disputes. The complaining party first generally would “grieve” its dispute, *i.e.*, seek to negotiate an acceptable resolution, then would arbitrate disputes that could not be amicably resolved. The National Labor Relations Board (NLRB) developed a doctrine largely deferring to the grievance/arbitration process for matters arising under collective bargaining agreements. Given the passage of the Federal Arbitration Act,⁴ the courts routinely enforced such awards, as well as awards in commercial disputes.

The growth of arbitration agreements in the labor and employment field increased dramatically in 1991, after a landmark Supreme Court case, *Gilmer v. Interstate/JL Corp.*, 500 U.S. 20 (1991), expanded the types of suits that could be subject to binding arbitration. Before *Gilmer*, the Court embraced arbitration of contractual disputes between parties but suggested that claims arising under federal statutes—such as the equal employment opportunity statutes—were inappropriate for arbitration.⁵ In *Gilmer*, however, the Court largely reversed field and found arbitration to be appropriate for resolving even statutory disputes. According to the Court, we were now “well past the time when judicial suspicion of the desirability of arbitration and of the competence of arbitral tribunals inhibited the development of arbitration as an alternative means of dispute resolution.”⁶ From 1991 to 1997, the American Arbitration Association (AAA) reported a whopping *500 percent increase* in the number of AAA arbitrations.⁷ The years 1998 to 2002 saw a further 240 percent rise.⁸

As the figures show, litigants increasingly recognize the advantages of ADR mechanisms to resolve their disputes. ADR proceedings generally are

⁴ See 9 U.S.C. §§ 1-14 (1925).

⁵ See *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974) (“Arbitral procedures, while well suited to the resolution of contractual disputes, make arbitration a comparatively inappropriate forum for the final resolution of rights created by Title VII.”).

⁶ See *Gilmer v. Interstate/JL Corp.*, 500 U.S. 20 (1991) (citing *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.* 473 U.S. 614 (1985)).

⁷ See Dianne LaRocca, *The Bench Trial: A More Beneficial Alternative to Arbitration of Title VII Claims*, 80 CHI.-KENT L. REV. 933, 934 (2005).

⁸ *Id.*

cheaper and quicker than court proceedings and permit parties to resolve their differences more efficiently. Studies have found arbitration proceedings in the employment discrimination area to take an average of 8.6 months to be resolved, whereas the average court case involving alleged employment discrimination takes almost two years.⁹ Businesses and employees thus increasingly are placing ADR clauses in their employment agreements to ensure that any disputes are mediated and/or arbitrated rather than resolved through protracted court litigation.

II. Arbitration

Arbitration proceedings are like informal court proceedings. They tend to take place in conference rooms, rather than courtrooms, at dates scheduled by the parties, rather than a tribunal. The parties often select the particular rules to apply to the arbitration and are free to modify such rules by agreement.

There are several leading arbitration organizations commonly utilized by contracting parties to resolve their disputes. These include the AAA, JAMS Dispute Resolution, and the International Institute for Conflict Prevention & Resolution (CPR), among others. Various associations and entities also oversee their own internal arbitration proceedings. For example, the National Association of Securities Dealers (NASD) and New York Stock Exchange (NYSE) both have adopted binding arbitration procedures to resolve disputes among their members, and many of the major sports leagues—including the National Football League (NFL), National Basketball League (NBA), National Hockey League (NHL), and Major League Baseball—have adopted arbitration procedures to resolve various types of disputes.

Parties often prefer arbitration to court proceedings, finding them more streamlined and “user friendly.” Discovery in arbitrations tends to be less comprehensive and invasive, with arbitrators frequently imposing limits on the number of depositions each party can take (or prohibiting depositions

⁹ See Lewis L. Maltby, *Private Justice: Employment Arbitration and Civil Rights*, 30 COLUM. HUM. RTS. L. REV. 29, 55 (1998).

altogether), the number of document requests each can issue, the other discovery devices that can be used, and the length of the discovery phase of the proceedings. Arbitrators generally know that parties select arbitration in part to *avoid* the cost of court proceedings and issue rulings consistent with these goals.

While arbitrators make evidentiary rulings and can bar evidence and testimony they deem improper, arbitration rules generally eschew strict compliance with the rules of evidence.¹⁰ Rather, consistent with the informal nature of ADR, arbitrators generally err on the side of admitting all evidence and considering evidentiary shortcomings when assigning weight to particular testimony and exhibits.

Unless the parties' arbitration agreement provides otherwise, arbitrators generally are chosen with the help of the designated arbitration organization, through a "rank and strike" procedure. The AAA or other arbitration organization will submit a list of names to the parties, with the parties permitted to eliminate a certain number of names and rank the remaining candidates. The candidate(s) ranked highest by the parties then is asked to arbitrate the dispute.¹¹

A. Arbitration Formats

There are various different arbitration formats from which litigants can choose. The most traditional is for a single arbitrator to act as the judge of the case, *i.e.*, to preside over a trial and then issue a ruling based on the evidence. A slight variation is the use of a panel of arbitrators—rather than a single arbitrator—to hear a dispute. Generally, single arbitrators handle small to medium-sized disputes, with a panel of arbitrators used to resolve

¹⁰ See, e.g., *AAA Rules of the Commercial Division*, R-31 ("The parties may offer such evidence as is relevant to the dispute and shall produce such evidence as the arbitrator may deem necessary to an understanding and determination of the dispute. Conformity to legal rules of evidence shall not be necessary.")

¹¹ See, e.g., *AAA Rules of the Commercial Division*, R-11.

more complicated commercial disagreements, though the parties can designate the number of arbitrators as they see fit.¹²

1. “Baseball-style” Arbitration

Parties also can select other formats for arbitrating disputes. For example, “baseball-style” arbitration (also called “final offer” arbitration) is an ADR method designed to permit parties to affix the price and terms of a given product or service. The format derives its name from Major League Baseball salary arbitrations, in which the player and club each submit a proposed salary figure with an arbitration panel ultimately selecting the more reasonable and fair proposal in light of the relevant market. Baseball-style arbitrations are “winner take all,” with no ability for the arbitrator to “split the baby” or otherwise pick and choose aspects of each side’s proposal.

Baseball-style arbitration has gained significant favor in the business community. Its “winner take all” format encourages each party to submit its “best” possible offer, as the more aggressive a party’s submission, the less likely it is to be chosen by the arbitrator. The Federal Communications Commission (FCC) recently adopted this methodology for dispute resolution under one of its orders,¹³ and parties increasingly have entered into baseball-style arbitrations as a way to bridge gaps in commercial negotiations.¹⁴

2. “Party Arbitrators”

Another variation from the traditional arbitration format involves so-called “party arbitrators.” Unlike traditional arbitrators, who are unbiased “neutrals” and must be free of conflicts of interest, party arbitrators are not

¹² See *AAA Rules for Complex Commercial Cases*, L-2 (“Large, Complex Commercial Cases shall be heard and determined by either one or three arbitrators, as may be agreed upon by the parties.”)

¹³ See *In Re News Corp./Hughes Merger, Memorandum Opinion and Order*, FCC 03-330 (rel. Jan. 14, 2004), at ¶ 222.

¹⁴ See R. Rabin and D. Whittlesey, *Baseball-Style Arbitration: Don’t Strike Out, Broadcasting & Cable* (Jan. 30, 2006).

neutrals and instead are directly appointed by one of the parties. Typically, each party will select its own party arbitrator to join a neutral third party arbitrator who serves as the chairperson of the panel. Various sports leagues, including Major League Baseball, use this format to resolve player grievances, with the Players' Association and the Commissioner's Office each choosing a trusted designee to serve as party arbitrator. This format also is common in the broader labor environment, with a union and management each appointing its own chosen representative to join a neutral chairperson.

The use of party arbitrators adds an additional dynamic to proceedings and can make them more complicated and cumbersome. Party arbitrators generally support the positions of the party who appointed them, and can further their side's case by questioning witnesses and otherwise acting as quasi-advocates. When party arbitrators are at their most active, they almost act as a second layer of counsel, thus protracting a proceeding. In effect, arbitrations involving party arbitrators tend to hinge on the vote of the lone neutral arbitrator, with the two party arbitrators generally ruling in favor of the party that appointed them.

III. Mediation

Mediation entails the efforts of a single neutral—the mediator—to act as an intermediary between parties to help them resolve their disputes. Most mediation proceedings are nonbinding, with the mediator having no authority to compel the parties to reach a resolution. Instead, the mediator's role is to focus each party on the reasons it may want to settle rather than litigate.

The theory behind mediation is that a skillful, respected mediator can act as a “broker” between the parties and help each side see the case from a “neutral” perspective. By pushing and prodding the parties, a mediator also can save the parties time and money, accomplishing in a day of intensive mediation what it would take the parties weeks or months of telephone calls and posturing to achieve.

A. Facilitative Mediation

The most common form of mediation is facilitative mediation. In this format, the mediator uses his best efforts to convince each side of the reasons it should settle, such as the weaknesses in its case, the strengths in its adversary's case, the costs of litigation, the downside risk of not prevailing, and any other factors the mediator believes the parties should focus on in properly assessing the case. Litigation tends to incite strong feelings and emotions among parties, and each side can become overly confident in the strength of its case. A good mediator—respected by the parties, familiar with the type of dispute at issue, and entering the situation with a fresh perspective—can be uniquely well-suited to soften each side's position. He quickly can ascertain the strongest and weakest points in each side's case and may be able to more credibly advance each side's position with the opposing party.

Facilitative mediation sessions generally begin in a conference room, with the mediator and all parties present. Counsel for each party usually is permitted to make an opening statement in support of its case. After this opening session, the parties break out into different rooms, separately meeting with the mediator who shuttles back and forth in an effort to bring the sides closer.

When the mediator is in the room with the defendant, he will try to convince the defendant of all the reasons why it might lose the case, how expensive it will be to try, the possible negative fallout if the litigation is lost, and all the other reasons why reaching a resolution would be wise. After speaking with the defendant, the mediator will go across the hall to meet with the plaintiff and her counsel and will focus on the hurdles the plaintiff faces: how expensive litigation will be for the plaintiff, how difficult it will be to prove her case, and how—absent settlement—the plaintiff could end up with nothing but legal bills to show for her efforts. In a facilitative mediation, the mediator does not formally evaluate the case or promote any particular settlement. Rather, his goal is to find areas of potential compromise between the parties, and creatively search for a resolution acceptable to each.

B. Evaluative Mediation

In evaluative mediation, the mediator not only facilitates discussions between the parties, but also evaluates the claims in issue. The mediator will examine the case, including pleadings and damages models, and arrive at a specific recommended settlement—usually based on his assessment of the likely result of a prospective trial. Even if the mediator’s evaluation does not lead to an immediate settlement, it may focus the parties on a middle ground and form the starting point for negotiations in the ensuing weeks and months.

As is the case with facilitative mediation—and perhaps even more so—it is crucial that the parties respect and trust the person serving as an evaluative mediator. The mediator’s evaluation is only as good as the mediator himself, and if the parties will not value the mediator’s ultimate conclusion, the mediation is likely to be a wasted exercise.

C. Binding Mediation

A third type of mediation is binding mediation, in which a mediator not only evaluates the parties’ respective cases but ultimately imposes a settlement on the parties. This form of mediation is far less prevalent than nonbinding mediation. Parties rarely are willing to entrust their settlements to a third party—no matter how much they trust and respect that party. Rather, if they are going to take the risk of a neutral deciding their case, they prefer a full-blown trial, with all the evidence carefully laid out and the opportunity to prevail in full.

D. Preparation for Mediation Sessions

Like trial or arbitration, mediation sessions require careful preparation by the parties.

As an initial matter, the selection of a mediator is crucial. In most instances, such as when mediation is initiated privately between parties, it is the parties themselves who select the mediator. It is important to choose a mediator respected not only by your side, but the *other side* as well. The goal of the

mediation will be to use the mediator as an instrument to prod the other side to settle on favorable terms, and only a respected mediator is likely to have that ability.

Parties also generally must prepare and submit confidential mediation statements in support of their positions in the case. These statements—which are reviewed by the mediator but not the other side—set forth the parties' claims and/or defenses and the reasons why the party expects to prevail in litigation. They are intended to orient the mediator in the case so that he can be a more effective intermediary.

Counsel also must prepare an opening statement to deliver to the mediator and—even more importantly—to the opposing party at the outset of the mediation. In many cases, this opening statement will be the first time an attorney gets to speak directly to the other side—instead of to opposing counsel—presenting a unique opportunity to persuade the relevant decision-maker(s). Counsel also must be prepared for questions from the mediator and expected points from the other side, as she will not want to be caught off guard by any line of questions at the mediation.

A crucial strategic decision for counsel in every mediation is how much to reveal about a client's case. By the time of mediation, many of the key facts and issues are likely to already be known to the other side through the events giving rise to litigation and/or through discovery, but certain arguments and strategies are likely to remain secret. Presenting such information at the mediation may aid the client's cause and perhaps even inspire the other side to settle. If it does not have this intended effect, however, revealing such information could be costly, as opposing counsel now will be ready for it at trial.

It also is important for counsel to appropriately set the mediator's expectations for what her client will and will not accept in settlement, so that the mediator can be an effective advocate for her side. This does not mean offering a client's "bottom line" at the outset, but if the client has limited flexibility or certain areas in which it will not budge, the mediator should understand that up front. The mediator's goal is to obtain a

settlement—not to reach the result he believes is most equitable—and he is most likely to succeed if he knows in advance what potholes to avoid.

Finally, counsel should ensure that she and her client are on the same page entering the mediation regarding goals, areas of potential compromise, and the key messages for the mediator and other side. Without proper preparation, the mediator may not understand a client's position or degree of conviction and thus will not be as effective in achieving the desired result.

IV. Effective Advocacy in ADR

To be an effective advocate, counsel must understand a client's business goals and make sure her advice is calculated to further those goals.

As an initial matter, an attorney can assist the client in deciding whether to agree to ADR in the first place. While ADR has many benefits, ADR clauses are not always in a client's best interests. For example, if a client is located in a jurisdiction with strong federal and state judges, who move cases forward efficiently, ADR may not make as much sense for that client. Alternatively, a client may be victim of repeated "nuisance" suits, which it seeks to deter. Given the greater cost of litigation over arbitration, eschewing ADR and forcing litigants to initiate more costly court proceedings may help deter such actions in the future. By contrast, some cases are more clearly suited to ADR. If, for example, a client operates in a highly competitive field and zealously wishes to maintain confidentiality over documents and testimony, arbitration proceedings are preferable to court proceedings, as they are closed to the public and permit more stringent confidentiality procedures.

Once a client decides to elect ADR, an attorney can help fashion the specific ADR mechanisms that will be used. As noted above, there are many types of arbitration and mediation proceedings, and attorneys have wide latitude in adopting the specific ADR procedures that will apply to given disputes. Attorneys also can help the parties select the most appropriate set of rules (*e.g.*, for employment disputes, the AAA Employment Arbitration Rules or another set of rules uniquely tailored to

employment disputes) and make appropriate modifications to these rules that are favorable to the client's position. For example, counsel can establish minimum qualifications for the arbitrator(s), designate a favorable location for the arbitration, set forth a specific timeframe in which the arbitration must be completed, and fashion particularly narrow (or broad) discovery provisions depending on the client's needs.

When disputes arise and ADR provisions are implemented, an attorney must be able to guide her client through the ADR process, hopefully to a successful conclusion. An understanding of the particular arbitration organization and its procedures is helpful, as the attorney then can anticipate the course of events and appropriately set a client's expectations. Ultimately, the attorney must be ready to present the case at hearing. She must master the facts, collect the relevant evidence, designate the proper witnesses, elicit favorable testimony, create compelling exhibits, and design effective opening and closing statements, just as she would in court.

V. Negotiating & ADR

Generally, the alternative to litigating a case through trial is reaching a settlement to resolve the dispute. While attorneys who practice in the ADR area generally specialize in litigation, they also are counselors who must be able to advise their client about the prospect of settling the matter short of trial.

To advise a client effectively, the attorney must fully understand the case and the client's goals. The first real step for an attorney upon being retained in connection with a matter is to perform a preliminary investigation of the pertinent facts and issues. The attorney should assess, *inter alia*, the strengths and weaknesses of the client's position, the likelihood of success at hearing, the risks and benefits depending on the result, and the costs of litigating the case to judgment. Ultimately, the decision of whether to seek a settlement is a client's decision—not the lawyer's. The attorney can inform the client of the likely range of outcomes in a case, and his best prediction as to how the litigation is likely to unfold, but it is the client who will have to live with the results. Like a patient who must make decisions based on

the advice of a doctor, a client must make the ultimate decision regarding whether or not to settle a legal dispute based on the advice of his counsel.

To help guide a client through such a decision, an attorney must truly understand the issues and risks the matter poses for the client. Is it solely a matter of dollars and cents? Or are their important principles at stake? If the latter, what are these principles, and how is settling or litigating likely to affect them? The answers to these questions may make settling a case more or less desirable—and more or less difficult.

For example, assume a dispute is largely about money—*e.g.*, about whether an employee was terminated under circumstances triggering a right to severance pay under his employment agreement. The employee claims to be owed \$200,000, while the company believes no severance is due. No other issues are in dispute. Assume the employer's counsel believes the case will cost \$80,000 to litigate through trial.

While no case is “easy” to settle, the above fact pattern is conducive to a settlement, as the parties can readily assess their best and worst case litigation scenarios and thus the parameters for settlement discussions. The employer's “worst-case” litigation scenario is a loss of \$280,000 (\$200,000 in damages plus \$80,000 in litigation costs). Its best case, meanwhile, is the expenditure of \$80,000 in litigation costs to prevail in the case.

The employee's counsel, meanwhile, should be conducting the same type of analysis for her client. Assuming she also believes it will take \$80,000 to try the case, the employee's “best case” litigation scenario is \$120,000 (\$200,000 in damages minus litigation costs). The employee's worst-case scenario, meanwhile, is net negative—*i.e.*, the payment of \$80,000 in attorneys' fees and then losing at trial.

Faced with these clear risks and ranges, the parties should be able to have productive settlement negotiations. The most likely range for a settlement would be \$80,000 to \$120,000, *i.e.*, that portion of the settlement range shared by both sides. To be sure, various other factors will affect the parties' offers and ultimate settlement figure reached (if any)—including, *e.g.*, the perceived likelihood of success held by each party, the risk profiles

of each party, and the leverage each side believes it has in negotiations. The parties' evaluations of these risks and considerations may well pull the parties above or below this range, or potentially obviate the possibility of settlement altogether. But assuming the sides are acting rationally, there is likely to be a dollar figure on which the sides can settle.

At the other end of the spectrum are more complex cases, involving employer policies and principles, which tend to be harder to settle. An example is an employee fired for violating an employer's "No Harassment" policy who seeks damages and reinstatement under his employment contract. The employer obviously may not want to pay a monetary settlement, but there also may be greater issues at stake. The employer may feel an obligation to the harassment victim to remove the offending employee from the workplace. The employer also has potential legal liability as a result of the conduct at issue, and may improve its position by removing the offending employee from its offices. Further, the employer has the more global interest of strictly enforcing its No Harassment policy and making sure employees know violations of this policy will not be tolerated.

The parties' differing interests make this case much harder to settle than the example above. The employee may want relief—such as reinstatement and positive references for future employment—that the employer feels it cannot offer. A strict cost benefit analysis may favor settlement, especially where an employee is willing to accept little or no money if reinstated to his job. But the overriding principles and interests may lead the employer to say, "Let's take our chances on this one—this one is worth fighting over."

Even in complex situations, attorneys can be creative to help parties bridge the gap between them. In the above example, perhaps the harasser is willing to accept a disciplinary suspension, undergo intensive sensitivity training, and then return to a different employer facility, where the harassment victim doesn't work, on a probationary status. Particularly if the employee has a good prior record and history, an employer might be willing to give him a second chance under such circumstances. Sometimes, of course, there is no solution palatable to both sides despite the best work of their counsel, and the parties end up litigating rather than settling.

A. The Life of Negotiations

Negotiations are both an art and a science. To negotiate effectively requires a thorough knowledge of a client's case, the opponent's case, the litigation risks, the client's appetite for litigation, and the client's priorities with respect to the items in dispute. It also requires tact, an understanding of the personalities and interests at play, and the trust and respect of the other side. An attorney does not need to be liked by opposing counsel, but opposing counsel must know that the attorney speaks for her client and that her representations are reliable. A key mistake in negotiations is to be caught in a bluff, threatening to take certain action then not following through. Once this happens, it diminishes the opposing side's trust in counsel and makes favorable settlement far more difficult to achieve going forward.

Particularly in larger cases, negotiations can be long and winding roads. Generally, a claimant will make a demand before ever initiating an ADR proceeding; it is the respondent's rejection of this demand that leads to arbitration. Most arbitration organizations offer voluntary mediation to the parties, and arbitrators often will discuss the prospect of settlement in their Preliminary Conferences. Discovery in a case generally presents another opportunity for settlement discussions, as the facts and evidence become clearer to both sides and as the realities of the costs of litigation start to hit home for the parties. Many cases also settle on the eve of trial—when witness preparation may reveal further nuances about the case and when the imminence of the trial forces greater introspection by the parties. Some cases settle during trial or even after trial, as the parties await a ruling from the arbitrator(s).

None of the mechanisms for resolving disputes—arbitration, mediation, or private negotiations—are exclusive. If counsel is doing her job properly, she is not focused just on arbitrating or just on negotiating; rather, she is at all times considering the best and most efficient way to get her client from the point of dispute to a satisfactory resolution. If counsel thinks a good mediator will help bridge the gap between the parties, she should steer the case toward mediation. If she thinks the other side needs a “reality check” before meaningful dialog can occur, she may press forward with the

litigation. Effective advocates never fully give up on the possibility of settlement, even if a negotiated resolution does not seem realistic in the near term.

B. Preparation for Negotiations

Effective negotiations require careful preparation by counsel. A key element of negotiations—especially early in a case—is to accurately express a client’s view of the case and properly set opposing counsel’s expectations. Opposing counsel tend to have long memories of statements made to them in negotiations; misstatements by attorneys can be difficult to correct and can unnecessarily prolong negotiations for a client.

As a junior attorney, I once attended negotiations in a large wage and hour dispute in which our firm had co-counsel. During the negotiations, our co-counsel intimated that our client would never pay “over \$4 million” to settle the case. The other side took this representation to mean that our client *would* settle the case for any amount up to \$4 million, *i.e.*, a number in the high \$3 million range. While this was not the intimation of our co-counsel, the plaintiff misread our client’s appetite for settlement, and it took years from that date for the case to actually settle (at a figure well below \$4 million).

C. Defining “Success”

“Success” in negotiations is akin to beauty in dating—it is squarely in the eye of the beholder, *i.e.*, the client. While attorneys can master the legal issues involved in a dispute, each case ultimately involves real world problems that parties seek to solve through litigation. Whether the issue is a dispute between a union and a company, a termination of an employee, the alleged breach of contractual covenants such as “non-compete” provisions, or some other matter, it is the *client* who ultimately will live with the consequences. To be an effective advocate, the attorney must understand not only the overall goal—*i.e.*, to win the case—but the client’s underlying interests, the import of the issues at stake, and the client’s priorities in the matter. In essence, the attorney’s goal should be creating a model of what is acceptable to the client in a settlement—what compromises are palatable,

what concessions are not, and what extractions from the other side are needed for a deal. Only by stepping into the shoes of the client can an attorney meaningfully advise regarding a prospective settlement and negotiate on the client's behalf.

Negotiators and mediators often talk about “win-win” resolutions, and this should be the attorney's lodestar in negotiations. Consider a case involving a company wishing to introduce a new technology into the workplace against the union's wishes. The company very strongly believes it needs to introduce this new technology to remain competitive (and that it has the right to do so under the parties' collective bargaining agreement); the union, on the other hand, believes introduction of the technology will lead to layoffs and is improper under the governing agreement. No matter how effective the union's attorney is, he likely never will convince the company to ignore the needed technology—just as management's counsel never will convince the union that it should be willing to sacrifice union jobs in the name of technological advancement. What attorneys can do in such a situation, however, is try to find solutions that address both sides' concerns. For example, I've reached compromises in which the company introduces desired technology, but also guarantees the union certain minimum staffing levels so that the union will not lose a significant number of jobs. The solution may not be perfect for either side, but each gets what it needs to reach a deal.

D. Settlement v. Litigation

The decision whether to litigate or settle is one only the client can make. The role of the attorney in the process is to provide sound counsel to permit the client to make an informed decision. As noted above, the client will want to engage in a cost-benefit analysis considering factors such as the likelihood of success in litigation and the likely costs to litigate, and the attorney can help the client evaluate these considerations. Other factors also will bear on the client's decision, such as the business principles at stake, the client's degree of risk aversion and, unfortunately, raw emotion. Even among the most sophisticated of clients, emotion can come into play, particularly where clients feel they are being taken advantage of or that their integrity is being challenged. An effective advocate will encourage the client

to minimize such considerations, and focus its decision on the business considerations at play.

In practice, I rarely take issue with my client's ultimate decision regarding whether to settle. Litigation involves the client's business interests, resources, and money—not mine—and the decision of whether to compromise is the client's to make. Each client has a different appetite for risk, and I try not to substitute my risk tolerance for that of my client. The most important consideration from my perspective is that the client understand the facts and issues as I see them and the likely process and risks if the case does not settle. As long as my client makes a reasoned decision based on these factors, I view myself as an agent to accomplish its goals.

Obviously, clear communication between client and counsel is necessary for the client to reach a reasoned decision. It's unpleasant when a client is unhappy with the result of a case and "Monday morning quarterback" its attorney's performance. An attorney should make sure the client understands the attorney's view and evaluation of the case ahead of time so that it can make a very informed decision about its options. At that point, it's in the hands of the client. If the client says, "Based on what you've told me, I will settle this case up to \$50,000, but I won't go higher," then the attorney has her marching orders and can try to achieve settlement within that range. The more clearly client and counsel can communicate on these issues the better.

VI. The Future of ADR

I find that today, I am involved in at least as many ADR matters as court cases—and that ADR continues to gain momentum. Once viewed as almost an "experimental" concept, ADR has won the favor of many leading entities and individuals and will likely continue to do so as more people become familiar with ADR proceedings. Even the courts increasingly are embracing ADR to assist them in resolving disputes, such as through court-

sponsored mediation programs. In New York state court, deferral to ADR has led to the successful resolution of cases almost 60 percent of the time.¹⁵

The growth of ADR is all but certain to continue in the future. Submitting cases to arbitration not only is likely to save parties time and litigation costs, but permits the parties to retain greater control over the proceedings than they would in court. As noted above, parties can agree to particular arbitrators or designate qualifications the arbitrator(s) must have (rather than randomly being assigned a judge); can develop or modify the rules for the proceedings, including discovery; can maintain greater confidentiality over the proceedings; and generally can have a much greater say in issues such as venue and scheduling. With federal and state courts now uniformly embracing ADR provisions, there is no reason to doubt that the use of ADR will continue to expand for years to come.

Richard J. Rabin counsels clients and litigates under a variety of laws, including the Americans with Disabilities Act (ADA), the Age Discrimination in Employment Act (ADEA), Title VII of the Civil Rights Act, the Employee Retirement Income Security Act (ERISA), the National Labor Relations Act (NLRRA), the Family and Medical Leave Act (FMLA), the Fair Labor Standards Act (FLSA), the Worker Adjustment and Retraining Notification (WARN) Act, and their state and local analogs. He also litigates commercial disputes in New York and other jurisdictions.

Mr. Rabin has first-chaired several high-profile arbitrations, including matters before the National Association of Securities Dealers (NASD), the American Arbitration Association (AAA), and the Commissioner of Major League Baseball. His representations include a major league baseball club on a variety of labor and employment related issues, including player salary arbitrations, player grievances and disputes between member clubs. He advises clients with respect to employees' duties of loyalty and their obligations under non-compete agreements, non-solicitation agreements, nondisclosure agreements, and arbitration agreements and litigates unfair competition and raiding cases. He has substantial experience defending class suits brought under ERISA, as well as under Title VII and federal and state wage and hour laws.

¹⁵ See Commercial Division, State of New York, Alternative Dispute Resolution Program.

Mr. Rabin also focuses on ERISA litigation, including the defense of benefit claims, claims alleging interference with statutory rights, and complicated claims of fiduciary breach. He served as a lead strategist on a high-profile worker classification case brought by the Department of Labor and has handled ERISA and worker classification matters for a variety of firm clients. He also has written about emerging issues in class ERISA litigation. Mr. Rabin also has significant experience in labor-management relations. He has negotiated collective bargaining agreements on behalf of clients and represented clients in connection with union organizing drives. He has developed negotiation strategies for clients facing simultaneous negotiations with multiple unions and has defended clients from union corporate campaigns. A member of the firm's Native American casino practice team, Mr. Rabin also is familiar with the various special issues presented by Native American sovereignty and by union organizing efforts at Tribal casinos.

*Mr. Rabin has spoken on such topics as alternative dispute resolution, the contingent workforce, and reductions in force and has provided legal analysis in television and radio interviews, as well as in print media. He is the author of "Baseball-Style Arbitration: Don't Strike Out," *Broadcasting & Cable*, January 30, 2006.*

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