

ESSENTIALS OF ALTERNATIVE DISPUTE RESOLUTION

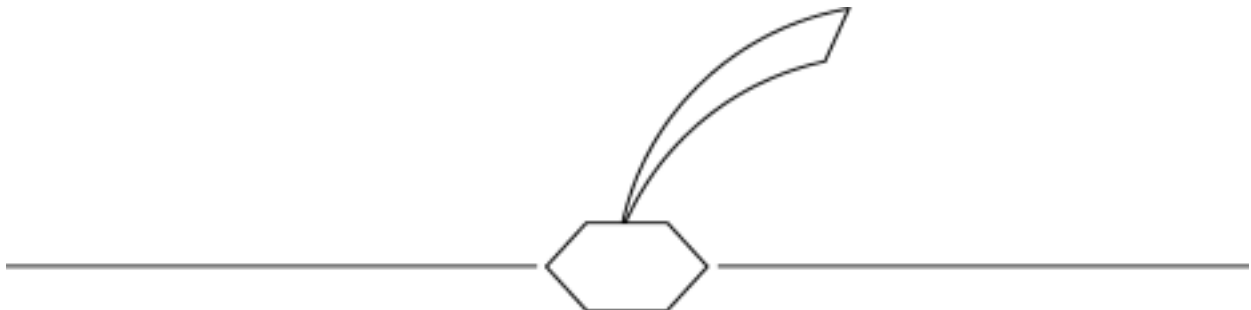
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Second Edition

Instructor's Manual
& Test Bank

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1. Obtain a demand form from the American Arbitration Association or some other arbitration provider; complete such form using the facts from the mediation case study on page 63–66 of the text, and assuming that the Tri-State/Universal contract contained an arbitration clause similar to the one found on page 121 of the text.
2. Visit a major agency in your local area such as the AAA that provides arbitration services in order to become familiar with the staff, facilities, and services provided. A list of national agencies is contained in Appendix 13, some of which have regional and local offices.

VI. Chapter Six – Strategies for Settlement

When instructing this chapter, begin by reviewing the continuum on page 10 of the text.

A. Learning Objectives/Essay Questions

1. With regard to minitrial, SJT, MSC, and private judging:
 - Define each.
 - Describe who presides over each type of proceedings and their roles.
 - Describe the role of the parties and their attorneys.
 - Discuss the types of situation where each type of proceeding would be most appropriate and why.
 - Discuss the advantages of each type of proceeding over both mediation and arbitration.
2. Define each of the following hybrid forms of ADR:
 - med-arb
 - arb-med
 - med-then-arb
 - concilio-arbitration
 - baseball arbitration.
3. Define “multi-door courthouse.”
4. Define “settlement week.”
5. Given all the forms of ADR studied so far, place each on the Resolution Continuum (on page 10) as to “Private Decision Made by the Parties,” “Advisory Decision,” “Private 3rd Party Decision,” or “Legal/Public 3rd Party Decision.”

VII. Chapter Seven – Application of ADR to Specific Disputes

This chapter is very important in that it provides students with the opportunity to examine in more detail the nature of various types of disputes and how to marry them with the strengths and weaknesses of the forms of ADR discussed in this text.

A. Learning Objectives/Essay Questions

1. State the name of the federal act under which most arbitration clauses in construction contracts are enforceable.
2. Describe at least five characteristics of a construction dispute that make litigation cumbersome and costly.
3. Describe at least four ways in which construction mediation differs from other types

the executives to work out a settlement, if possible.

Summary Jury Trial is another technique used to facilitate settlement where the lawyers for the parties present a summary of the proofs and arguments to a mock jury that renders a nonbinding advisory verdict. The technique is used to evaluate what a real jury might decide about the facts and evidence of a case.

Moderated Settlement Conference is an abbreviated trial where attorneys for the parties present their respective cases in summary form to a panel of three lawyers who then render an advisory verdict that enables the parties to better understand the legal strengths and weaknesses of their case.

4. *Explain the benefits and drawbacks to using ADR over litigation.*

As compared with litigation, ADR is generally quicker, simpler and less expensive for litigants. ADR, which is especially suited to straightforward cases, tends to free up courts to handle the tougher matters. ADR is suited to defending the rights of the disadvantaged who do not have the resources to litigate. In addition, ADR can fashion remedies that a court of law cannot impose, such as an apology from the offending party. Finally, ADR avoids the win/lose of litigation and allows everyone to get something. Thus, people are more likely to be satisfied with the outcome.

On the other hand, ADR, unlike lawsuits, does not contribute to the development of standards of public justice and fairness, called precedence. In addition, ADR is often inappropriate for cases where severe damages should be imposed in order to deter negligent or illegal behavior in the future.

5. *Explain what is meant by "ADR takes place within the shadow of the law."*

Most ADR takes place in the context of a lawsuit or a threatened lawsuit. Often, the court with jurisdiction over a lawsuit will order the parties to attempt a settlement using some form of ADR. Even disputes that do not involve a lawsuit have legal underpinnings in that the parties may be trying to enforce rights guaranteed by law. In addition, settlements reached through ADR are usually enforceable as a contract in a court of law. Finally, ADR is often governed and regulated by laws that require its use, set qualification and training standards for ADR practitioners, establish and fund ADR programs, require confidentiality of ADR proceedings and enforce settlement agreements.

Objective Test Questions: Chapter One – Introduction to Alternative Dispute Resolution

1. *Which of the following reasons explains the increasing cost and incidences of lawsuits in the United States? (Answer is G.)*
- A. The growth of the adult population due to the maturing of the post-war baby boom has increased the number of potential litigants.
 - B. Increasing economic competition means that companies are more likely to use lawsuits to protect themselves from unfair competition.
 - C. Inflation, especially in the 1970s and 1980s increased the cost of litigation.
 - D. New laws passed in the last three decades have significantly increased the rights of citizens and, therefore, the types of actions that they can defend in a court of law.

Objective Test Questions: Chapter Three – Mediation

1. Please indicate whether each of the following statements is true or false. A statement should be marked True if it is more true than false, and vice versa.

A. The defining part or phase of mediation is the private caucus.	False
B. Mediators are not neutral about the process of mediation.	True
C. In most states, mediators are required to be licensed attorneys.	False
D. Mediation occurs after a lawsuit has been filed.	False
E. Mediation embodies the concept of cooperative negotiating.	True
F. As a way of settling a legal dispute, mediation is a relatively recent phenomenon.	False
G. The length of time that mediation lasts is the most influential factor in whether or not settlement is reached.	False
H. Highly complex cases involving many issues and several parties typically are not very appropriate for mediation.	False
I. Mediation usually occurs after the parties have completed most of the discovery in a lawsuit.	False
J. Most states require that a mediator be licensed or certified as a third-party neutral.	False
K. The opening session of mediation is usually recorded by a court reporter.	False
L. A mediator is under an ethical duty to fully disclose and explain the basis of his or her compensation, fees and charges as a mediator to the parties.	True

2. What are the three possible outcomes of a mediation?

A negotiated settlement, an impasse, or an agreement to continue the mediation at a later time.

3. Mediation attempts to mitigate some of the problems encountered when the parties or their advocates attempt to negotiate a settlement without the help of a third party. Name at least three problems with negotiation that mediation can mitigate.

- A. No deadlines or sense of urgency in negotiation
- B. Interrupted and distorted communication from advocate to client and back again
- C. No opportunity prior to taking a deposition to hear what the other party is thinking
- D. Personality conflicts between the negotiators are exacerbated by negotiation
- E. Easily influenced by fee arrangements and other self interest of the advocates

4. Mediation is based on what critical principle?
Self-determination of the parties.

IV. Chapter Four – Mediation Law and Policy

judge.

- An arbitrator's decision is not as "appealable" and when appealed, is subject to a less stringent standard than that applied to civil trial verdicts.
- An arbitrator can retain jurisdiction over a dispute after the award, at the request of the parties, whereas a civil trial judge loses jurisdiction once judgment is entered.
- An arbitrator, at least in some states, is restricted in the extent, if any, to which he or she can award punitive damages.
- Despite restrictions on the granting of punitive damages, an arbitrator has a much wider range of remedies available than a civil trial judge or jury in that he or she can fashion an equitable remedy to suit the situation.
- An arbitrator can accept or decline to hear a dispute, whereas a judge must hear cases assigned to his or her court and can be excused only for cause.
- An arbitrator's power comes not from the state but from the agreement of the parties.
- An arbitrator's power is supported by laws favoring settlement rather than resort to the court.
- An arbitrator's power is based in his or her expertise in the subject matter of the dispute which enables the arbitrator to shape how the case is presented. A civil judge can shape a case only through the rules of procedure.
- An arbitrator can render an award tailored to the case whereas a civil judge must always consider precedence or face being overturned on appeal.

13. *Describe the role of the attorney in arbitration.*

The attorney plays a critical role in arbitration, which usually involves parties who are business persons, and a case with complex issues and a significant amount of money and property at stake. An attorney's role begins with making sure that the client's business contracts contain well-drafted, enforceable ADR clauses. When presented with a dispute, an attorney should determine if it is subject to an ADR clause and, if so, to prepare a written demand. If not, the attorney should determine if arbitration is appropriate and, if so, propose it to the other side. If they agree, the attorney should prepare a submission. Conversely, an attorney may want to help a client resist a demand based on legal grounds, such as fraud in the inducement of the contract.

The attorney assists the client to select an arbitrator, prepares statements of the client's case in order to influence the arbitrator, and to persuade the arbitrator to admit favorable evidence and deny admission of unfavorable evidence. The attorney also prepares and transmits discovery, conducts depositions and evaluates evidence from the other side. At the conclusion of discovery, the attorney prepares hearing exhibits, briefs witnesses, drafts an opening statement, and generally prepares for the hearing. At the hearing the attorney will present the evidence, examine and cross-examine witnesses and puts on the client's case. After the award, the attorney will counsel the client regarding whether to appeal and, if so, will prepare the appeal. Conversely, the attorney may counsel the client to ask a court to enter the award as a judgment in order to give the client more power to enforce it and, if so, will facilitate the request.

14. *Describe the role of the paralegal in support of arbitration.*

A paralegal will assist in the preparation of demands, submissions, gathering and assembling documents and other discovery, coordinating transmission of documents to the other side,

public exposure. Therefore, ADR, which is generally a confidential forum, is preferred.

- B. Because the incidence of employment disputes is high but only a fraction are ever considered litigable by plaintiff's attorneys, employers want a forum to resolve these disputes in order to avoid inadvertently undermining employee morale and productivity.
- C. Employment disputes are costly to litigate and often hinge on circumstantial evidence that is expensive to assemble and results in the loss of significant executive time. For this reason, any ADR method that minimizes discovery is preferable.
- D. Employment lawsuits frequently involve large jury verdicts because jurors identify with employee/plaintiffs. Consequently, ADR that results in a negotiated settlement is preferable.
- E. Employment disputes usually do not involve written agreements between the parties to arbitrate or mediate conflicts, especially in the case of smaller employers. Thus the only way for an employee to obtain a hearing is to file a lawsuit. Offering to participate in ADR short circuits this process.
- F. Many employers have internal procedures for resolving disputes which employees are required by the courts to exhaust before bringing suit, and which preserve goodwill in the workplace.

6. *In a wrongful discharge dispute, explain why ADR is likely to be unsuccessful if the issue of whether employment is "at-will" remains unresolved.*

The ability of an employee to recover in a wrongful discharge suit often hinges on the issue of whether the employer had the right to fire the employee for any reason or no reason at all. This is a legal issue which ADR is not designed to resolve, yet if not resolved prevents ADR from going forward in a meaningful way.

7. *Explain the significance of the decision in Gilmer v. Interstate/Johnson Lane Corp. as it relates to the enforcement of agreements to arbitrate employment disputes.*

Under *Gilmer*, the United States Supreme Court ruled that arbitration was a valid forum for the resolution of a discrimination claim brought under the Age Discrimination in Employment Act (ADEA), which is a statutory claim. The concern was that agreeing to arbitration would force the employee to forgo substantive rights afforded by the statute in question. The Court said this was not the case but, rather, by agreeing to arbitrate a statutory claim the party was merely submitting to resolution in an alternative forum. The Court also said that arbitration of a statutory claim is appropriate unless the statute itself said otherwise. Because federal policy favors ADR, *Gilmer* means that agreements to arbitrate statutory claims are more likely to be enforceable.