

# Alternatives



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TO THE HIGH COST OF LITIGATION

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## CPR NEWS

# Speeches Spreading the Word on Business ADR: Assessing Recent Efforts ... And Looking Forward

### PROCEEDING TO YES: A FEDERAL JUDGE LOOKS AT ADR'S FUTURE

BY JOSEPH A. GREENAWAY JR.

*On Nov. 9, the International Institute for Conflict Prevention and Resolution honored Russell C. Deyo, vice president and general counsel of Johnson & Johnson, at CPR's third Corporate Leadership Award Dinner. For more information, see the CPR News column opposite. Below is an edited version of the evening's keynote speech by U.S. District Court Judge Joseph A. Greenaway Jr., with whom Deyo had worked at J&J headquarters in New Brunswick, N.J., before his appointment to the federal bench.*

\* \* \*

When [Russell Deyo] asked me to speak tonight, I accepted with some trepidation, and frankly, I was somewhat taken aback.

God willing, my retirement date from the bench will be 2022, and I wasn't expecting to bone up on ADR just yet. However, I thought that one of the topics that might be of some interest is the future of ADR. Specifically, whether, outside of those claims and causes of action uniquely suited for resolution in the courts, could ADR evolve to become the principal method of dispute resolution?

Let me elaborate on that point. Clearly, certain causes of action and claims can only be resolved within the confines of the court system. If a constitutional claim is raised, or a remedy is sought that falls within the parameters of a court's power, in that circumstance ADR may not be appropriate. The remedies sought through such actions, injunctive or otherwise, are uniquely within the province of the courts. In these instances, ADR is neither possible, nor preferred as a method of dispute resolution.

Before contemplating whether ADR can become the principal method of dispute resolution outside of those areas just mentioned, it may be worthwhile to take a moment to review how we got to this point in the development of ADR.

Some would argue that the rise or explosion of litigation in the second half of the 20th century led inexorably to the rise of

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The author, a U.S. District Court judge in Newark, N.J., was appointed to the federal bench by President Clinton in 1996.

### HOW CONFLICT RESOLUTION EMERGED WITHIN THE COMMERCIAL SECTOR

BY F. PETER PHILLIPS

*In November, CPR Senior Vice President F. Peter Phillips presented a paper—"Creation & Sustenance of ADR in the Commercial & Business Sector"—at the First African ADR Summit, a two-day international ADR conference in Abuja, Nigeria. The conference also marked the 10th anniversary of Nigeria's Negotiation and Conflict Management Group, a nongovernmental nonprofit organization that advocates ADR use in African courts and national conflicts. For more information, see the CPR News column at 24 Alternatives 146 (October 2006). Below is an edited adaptation of his conference remarks.*

\* \* \*

I have been asked to share with you some of the experiences that the CPR Institute has had in stimulating the growth of commercial mediation in the United States. I am pleased to do so with the caveat that, by relating this story, I do not suggest that it is applicable to Nigeria or even to present-day West Africa. Instead, it was a response to certain specific conditions in the United States, and was greatly benefitted by the serendipitous participation of certain key leaders.

Whether these conditions pertain and whether such leaders can be found in Nigeria is a matter upon which I cannot opine. But I will share what has happened to us in the hope that at least some of the story is helpful to you and your colleagues.

U.S. business ADR is thriving in comparison to most other markets. It is understood by most of the Fortune 500 companies, appears in many contracts, and courts not only embrace commercial and civil mediation, but in some instances require it.

Increasingly, lawyers and other professions encourage training as mediators or advocates in mediation. The American Bar Association Dispute Resolution Section of Dispute Resolution

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### ADR HISTORY

scale litigation in the courts—crushing costs, too much time, uncertainty of jury verdicts. . . .

In my judgment, it is a combination of factors, which drive parties to walk away from ADR. In our legal culture, we are inculcated with the notion that the court is the final arbiter of disputes. We might not be happy with the speed at which the courts operate or the result ultimately reached, but we take solace in the fact that we can always appeal.

Second, there are certain claims not easily susceptible to an early assessment of value, so ADR might not be helpful in fleshing things out in the first instance. Truncated discovery may not allay concerns over having missed something. We are always trained to seek the diamond in the rough. Or it may be one of those cases where the client wants to hear what the judge has to say in writing on a critical issue before contemplating settlement.

Third, the current system provides lawyers and clients with a fail-safe backup: If ADR works, great! If, on the other hand, it doesn't work, there is always the court system to fall back on.

Does that lead to less than enthusiastic participation or the old wait and see? More often than not, yes.

One last consideration if we moved toward a mandatory ADR system is the role of lawyers in the process. ADR creates a greater and more integral role for clients. It also cuts down on costs. At times, these realities present challenges for certain members of the bar that are not easily overcome. Lawyers are forced to choose between the cost-efficient model for the client and the economic realities facing the firm.

Can ADR operate under a mandatory paradigm? Probably not, given the current mindset in the marketplace, which views much of ADR as voluntary. But if ADR is truly going to bring about even greater wide-scale changes in how we view

dispute resolution, mandatory participation and agreement to finality is a must.

## PET PEEVES

I would be remiss if I did not mention a couple of pet peeves that were actually the impetus for choosing the subject of whether mandatory participation and agreement to finality is possibly the future of ADR.

Most of the lawyers in this room rarely have the opportunity to appear before me or my colleagues. When your charges come to court please make sure they know what the client values the case to be. Make sure they have a firm grasp on settlement, the upper and lower reaches.

I can't tell you how many times I'll ask a lawyer what the settlement position is at a conference, and the response will be "I didn't discuss it with my client," or "Judge, I didn't expect to be talking about settlement at this conference." For good or bad, I and many of my colleagues discuss settlement at every opportunity, during in-person conferences, telephone conferences, and motions.

Finally, as you participate in ADR or court-ordered settlement, please have the principals present. My experience is that people are very tough negotiators over the phone, but when they have to articulate unreasonable positions in front of a judge, arbitrator, or mediator, the position changes.

What is the future of ADR? Who knows? But it is exciting to see in our lifetime a new manner of proceeding to yes. 🏠

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# How Conflict Resolution Emerged in the Commercial Sector

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is by far the fastest-growing of all of the association's section, attracting more than 1,000 attendees to its annual meeting from countries across the globe.

The reasons for this phenomenon were, at least at the outset, specific to the United States. It is useful to review the conditions of U.S. ADR growth in order to determine the extent to which those conditions prevail elsewhere—and whether such a phenomenon is limited to the United States or might be anticipated to arise in other markets with similar conditions.

In the late 1970s, many business leaders were grossly discontented with the public justice system and were open to suggestions for alternatives to the courts. There were several reasons for this dissatisfaction:

*Cost:* In the United States, the filing costs are not onerous to commence a litigation. Legal fees, however, are very high. And the pre-trial period is exceptionally expensive. Civil litigants are entitled to broad document discovery—including electronic documents—and pre-trial sworn witness testimony, including those whom the parties may not intend to call at trial. A complex commercial case may cost many hundreds of thousands of dollars to advance simply to the point that the parties are prepared to for-

mulate pre-trial motions. Trial, then, is an entirely other, even more expensive, matter.

*Delay:* Not only did it take months, or even years, for the attorneys to prepare a case for trial—it took years, even several years, to get a trial calendar date—particularly in the commercial courts in main urban centers, such as New York and Chicago. A litigant knew that it may be four-to-six years before the case is heard after it is filed.

*Belligerence:* Cross-examination is not a good way to make friends. Indeed, it is a sure way to lose them. The antagonism and accusations that constitute suits are a necessary attribute of the process—and good lawyers are often antagonistic. It is difficult for companies to continue to do business while they are suing each other and vilifying each other's business practices in public. And it is difficult indeed to pick up again once the suit has finished and the harm to the relationship has occurred.

*Limits of Legal Solutions:* Businesses seldom add shareholder value in a courtroom. A senior General Electric Co. attorney once said to me, "This company makes money producing many

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things, from light bulbs to jet engines—but it does not make money writing legal briefs in court.” Not only do court battles represent unproductive time and effort, their results are legal rather than business-like. It might well be that the best solution to a dispute between a dam builder and a hydroelectric turbine manufacturer would be a change in contract specifications and a promise of future work. But the law does not provide for this business-like solution. The law only looks backward to determine what happened in the past. Business, on the other hand, looks forward to what opportunities lie ahead. The legal solutions are a poor fit.

*Lack of Certainty and Uniformity:* Corporate leadership also was concerned about the risks of the legal treatment of problems that were, at heart, commercial. In the United States, there are 50 different states with 50 different sovereign court systems. Winning a case against a claimant in Nebraska is no assurance you will not lose against a Florida claimant. This is especially true where insurance companies are involved, each of which is answerable to state rather than federal law. Once again, winning a suit was not a very good way to do business.

*Waste:* Through all of this, it nevertheless is the case that few business disputes go to trial to verdict. At the time CPR was started, fewer than 5% of filed cases went to verdict, and now the number is fewer than 1%. So all of this money was being spent to prepare cases for trial, despite the overwhelming statistical indication that no trial would in fact be had. The question, for business managers, was this: As long as this controversy was going to result in an agreed-upon settlement, how can one arrive at that settlement early in the process, and save all that money and time?

## MEDIATIONS RISE

Mediation had been a tool primarily used for small disputes such as community conflicts and divorce proceedings. In 1979, a group of corporate attorneys persuaded their companies to contribute to the creation of the Center for Public Resources, now the CPR Institute. The group didn't anticipate that mediation would rise to the center of attention.

The center initially created approaches such as private mini-trials and nonbinding advisory arbitration in an effort to devise alternatives to public adjudication of business-to-business disputes. But mediation was rapidly accepted because its features directly addressed the problems that had been felt by the business community:

*Cost:* Mediation takes one day, sometimes a few more. And preparation is nothing as costly or time-consuming as preparing for adjudicatory, contested processes like arbitration and litigation.

*Delay:* The parties themselves control the timing and the length of the mediation proceeding. It can happen next month, next week or tomorrow, depending on what the parties think is most likely to accomplish the task of settling the case.

*Belligerence:* Accusations and other emotional reactions are part of any disagreement. But in mediation they occur in a conference room, behind closed doors. And once the emotions are

vetted, they are put aside in favor of acting like business people. Companies engage in mediation in order to get the matter behind them, not in order to be vindicated at great expense. So the toll on business relationships is minimized.

*Limits of Legal Solutions:* There are no legal limits to the outcome of mediation. Very frequently, a mediated solution to a business dispute will involve reforming the contract, apologizing, agreeing to do future business, or making a recommendation for later hiring. None of these remedies is available to a court, yet they are the very essence of doing business.

*Lack of Certainty and Uniformity:* Mediation does not create legal precedent; it does not involve matters other than the dispute at issue; and its contours and repercussions are within the control of the private parties. The disputants themselves can agree upon the settlement's impact.

Simply because a new method of doing business was promising did not mean it would be adopted. How commercial mediation actually took hold in the United States is a different story from why it made sense to do so.

## INITIAL ADOPTION STRATEGIES

Once a group of corporate law departments agreed to the idea of a nonprofit center to study alternatives to litigation, certain events and strategies acted to strongly support the growth of a commercial ADR “movement.” These included:

*Corporate Legal Leadership:* James F. Henry founded CPR by convening a small group of influential corporate legal leaders. These included senior attorneys from the law departments within Union Carbide Corp. (now part of Dow Chemical Corp.); General Motors Corp.; Mobil Oil Corp. and Exxon Corp. (now Exxon Mobil Corp.); Bristol-Myers Squibb Co.; Philip Morris (now part of Altria Group Inc.); Xerox Corp., and PepsiCo Inc.

Referring to this initial group, Henry occasionally used the term “bell cows.” By this he meant that these were the people whose accomplishment, professional stature, integrity and prominence made them fit leaders—that is, leaders by example rather than exhortation. Like the cows that wear the bell, the others will follow where they lead. They were confident people with broad vision, and were comfortable looking to the future and planning for a new way of doing business.

The ADR movement was graced in early years by dozens of such people.

The reference here is to business leaders. While prominent politicians, professors, judges, writers and others lent invaluable assistance, the movement would not have progressed unless it was led by the business community itself.

Judges can tell you that ADR is good public policy; scholars can tell you it is economically efficient; mediators can tell you it is quick and painless. But only business people can tell you that it adds shareholder value, that it is a responsible business decision—that they, themselves, intend to use it as a business strategy. This is not the suppliers of a service telling the consumers what they should want. It is the consumers of the service telling the suppliers what they actually do want. And it is powerfully persuasive.

*The CPR Corporate Pledge:* In the mid 1980s, a simple statement was distributed to U.S. corporate leadership. The state-

ment said that the signer would at least consider the use of ADR in any dispute with another company that also has signed the statement. Quite simple, and quite powerful.

For one thing, a manager could not sign this statement. It needed to be signed by both the chief legal officer and the chief executive officer. That is, it needed to be a conscious decision by the enterprise's highest strata of strategic leadership. And, miraculously, the CPR Pledge was signed by or on behalf of more than 4,000 corporations, representing in economic influence more than two-thirds of the gross national product. It was a hit.

For another thing, it boosted mediation awareness into the highest echelons of corporate thinking. ADR ceased to be a clever, marginal idea. It was, in the terms used then, "mainstreamed."

Most of all, however, the CPR Pledge had a genuine and immediate utility. It was, to put the matter plainly, an excuse. Companies in the heat of conflict may each want to negotiate a solution to permit them to put the matter behind them and continue to do business together. But their lawyers will advise them not to pick up the phone and make such a suggestion, because the other side will interpret the gesture as a concession of weakness. The communication should always be, "I am in the right and I am confident I will win this dispute."

The CPR Pledge changed all of that. A pledge signer indeed could be the first to pick up the telephone without risk of sending the wrong "message." A pledge signer could call another pledge signer and say "I am in the right and I am confident that I will win this dispute. However, I see that you signed the CPR Pledge and so did we. Therefore we acknowledge a moral, if not legal, obligation to talk to each other. When shall we have lunch?"

There is no way to reliably measure the shareholder value that has been preserved in the 20 years of the CPR Pledge, because there is no way to count the number of times it has been used in conversation or negotiation. It is clear, however, that it has had enormous impact in stimulating commercial mediation growth on a global scale.

The idea of a predispute noncontractual pledge has been picked up by national industrial organizations, trade associations, and other groups around the world, and it remains a dynamic instrument for rational commercial practices in commercial conflict management.

*Legal Mainstreaming and Credentialing:* When CPR started, its mission was "to put ADR into the mainstream of U.S. legal practice." And the way it chose to do that was not to proselytize or advocate directly—rather, it was to identify certain enterprises and individuals of impeccable integrity and leadership, and have them advocate to their peers.

The strategy had an immediate effect of not only getting the attention of influential lawyers and business people—it made ADR "hot" and "new." It became an idea that was embraced by General Motors, Ford Motor Corp. and Chrysler Corp.

And in the early days, CPR publicly listed high-profile individuals as "neutrals" who were prepared to serve as mediators in particular disputes. This list included governors, attorneys general, retired CEOs and general counsel, senators, and people of undisputed gravity and sophistication. When corporate and law firm attorneys looked at this list, they were disabused of any notion that commercial mediation was mar-

ginal or faddish. They saw that it had been accepted by people whom their boards of directors and senior officers would deeply respect.

With this growing list of corporate pledge subscribers, CPR's corporate and law firm members, and individuals of gravity and prudence enlisted as neutrals, commercial mediation attained what it desperately needed—credentials.

*The Beginnings of a Professional Literature:* The 1981 publication by Roger Fisher and William Ury of their book, "Getting to Yes," was a milestone in the growth of commercial mediation. It states in simple and understandable terms the basic tenants of interest-based negotiation, as opposed to positional negotiation. It invites the reader to entertain new conflict resolution principles—such as creating options for mutual gain, or separating the people from the problem, or insisting on objective criteria—that were not based on maximizing the size of the slice of the pie that any one person got, but rather on maximizing the size of the pie itself. It was a simple and refreshing reminder that, if there is more value to share, then each person who shares it will end up with more value in consequence.

"Getting to Yes" was widely taught in law and business schools during the 1980s. It demystified the process of dispute resolution and suggested that litigation in court pursuant to evidence rules, and formal discovery, was not the only way, and certainly not the ideal way, to get what you want out of a case.

The whole concept of law was reframed from an end in itself to a simple codification of social expectations of appropriate behavior. Litigation became just another tool to attain what you and your neighbors agreed was an appropriate and mutually acceptable outcome.

Picking up on this new movement, professors, students and practitioners began to create a library of negotiation theory, including theories of facilitated negotiation and multiparty dispute management. Academic pioneers wrote incisively on ADR practicalities and ethics; they included Carrie Menkel-Meadow, of Washington, D.C., who is Georgetown University Law Center A.B. Chettle Jr. Chair in Dispute Resolution and Civil Procedure; Prof. Dwight Golann, of Suffolk University Law School in Boston, and former CPR President and *Alternatives'* publisher Thomas J. Stipanowich, now academic director of the Straus Institute for Dispute Resolution at Malibu, Calif.'s Pepperdine University School of Law. In 1983, Harvard University Law School established a Program on Negotiation.

That same year, CPR Institute realized that it would be necessary to "bridge the gap" between the excellent work being done in academia and the needs of the corporate lawyer for best practices and best thinking. So in 1983 it began the practice, still followed today, of publicly acknowledging the best book, scholarly article, student paper, and so on, on an annual basis. Also in 1983, and to similarly help grow ADR, CPR began publishing this newsletter

This not only served the growing consortium of CPR Institute's constituency. It encouraged and awarded the excellent work being done by the academy, and by the program itself spurred more and better research and writing. Now, when we spoke of the "state of the art of ADR," there was something to discuss.

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*State and Federal Courts and Agencies:* Eventually ADR became a matter of public policy. The attention of the various U.S. state legislatures, as well court and government agencies' administrators, focused on mediation because it promised immediate lightening of case loads, and also because civil enforcement agencies were interested in early resolution of their actions. Pioneering work was done in the following:

- The Federal Aviation Agency and the Army Corps of Engineers made rapid progress in establishing systemwide dispute resolution approaches.
- The U.S. Air Force began a rigorous ADR system to handle contract disputes with its procurement methods with private contractors.
- Several state courts—particularly California, Florida and Texas—either authorized judges to recommend mediation of civil cases, or in some cases even required mediation as a condition precedent to getting a trial date.
- The federal government passed legislation encouraging agencies to create ADR management systems, and authorizing federal trial courts—and even appellate courts—to create mediation programs annexed to those courts.

The consequence of these public sector developments wasn't only to further legitimize ADR. It also provoked a demand for mediation, and created pressure to train mediators. Lawyers had to learn how to represent clients in mediation, and a whole new skill arose: learning to be a mediator.

## STRATEGIES FOR CONTINUED GROWTH

After these initial developments, the ADR movement took flight by building on its past successes. Some strategies for this growth may be of interest to this audience.

One strategy was industry-specific commitments. In the early 1990s, a variant of the CPR Pledge was promulgated for leading competitors in a single industry. These industry leaders were invited to work on a protocol to handle disputes arising among them. They agreed that in such instances—and without prejudice to their legal rights—they would engage in mediation upon notice, pursuant to procedures that they helped to frame. They also agreed to use specially identified mediators who came from the industry and knew how the business worked.

One of the early examples is the CPR Inter-Insurer Mediation Forum. Once convened in 1992, the property casualty insurance companies identified as particularly silly and wasteful the disputes that arose between one another, when a claim was made by an insured company to two or more insurance companies, all of whom had policies outstanding.

Traditionally, each would decline coverage, citing one of the others as having initial primary responsibility. This dispute would then go to court for a declaratory judgment on which policy was the primary policy. That judgment would take about three years and cost many hundreds of thousands of dollars.

In the meantime, two unfortunate things would happen: First, the policyholder would become furious and swear never to do business with the insurers again. Second, the state court in which the claim was brought would eventually rule, and a precedent would be created. Even if the primary insurer won this case today, that self-created precedent would hurt it tomorrow when the facts are the other way around.

So 37 insurers all agreed to join the CPR Inter-Insurer Mediation Forum. It was limited to claims between companies, not claims brought by policyholders. But the companies simply swept away hundreds of millions of dollars of cost, and avoided creating their own legal swamps in 50 state courts, by agreeing that they would mediate rather than litigate such disputes.

Similar predispute commitments have been forged in the United States by the chemical industry; over-the-counter drug manufacturers; trademark holders; food manufacturers; franchise organizations, and so on. It is relatively easy to do and it makes sense to all concerned.

## CONTRACT DRAFTING PROTECTS VALUE

Early on it was understood that few disputants would agree to mediate if the suggestion were made after the dispute arose. Rather, they had to be reminded at the time of contracting that there are no perfect contracts, and that if they wanted to realize the benefits of avoiding the court they were well advised to arrange for that process now, rather than later.

There thus arose the concept of a "stepped" dispute resolution clause in commercial contracts. Classically, a "stepped" clause provides that, upon notice of a claim arising from the contract, the parties' authorized representatives would meet at a certain place within a certain period of time and negotiate in good faith for a certain number of days. If they failed to resolve the matter, the negotiation would be continued with more senior representatives.

The next step would be facilitated mediation through the offices of a specified organization, using specified procedures and commencing at a certain place within a certain period of time. If such mediation failed, then the parties would either arbitrate or litigate, again with specifications for time and place.

Unfortunately, too few contracts include stepped clauses. It is common to refer to dispute resolution provisions in deals as "midnight clauses," because the negotiators finally get around to them at about midnight and, exhausted, simply agree to put in boilerplate language about arbitration before the International Chamber of Commerce, or whatever their previous contracts provided.

This is a shame, because the very value that the parties anticipate is not being protected by customized provisions. But as ADR awareness spreads among litigators and academics, so the transactional lawyers also are beginning to catch on to the value they can add to their clients by this means.

## MAKING THE BUSINESS CASE

As ADR has become more established, corporate law departments have recognized it as a management tool, rather than a

means of resolving disputes. For example, large employers know that there is a steady stream of disputes arising from the employment relationship, some of which can end up in litigation or adversarial administrative proceedings.

ADR systems design is an approach to managing those streams of disputes: Identifying them early, using negotiation and facilitation to address them, and saving shareholder value by handling them better, faster and cheaper.

Since that recognition, many companies have maintained records of their outside counsel costs, internal management time, cycle time, or other indicia of cost savings attributable to ADR. Some of these companies have been willing to share their cost-saving experiences, and the effects have been compelling. Johnson & Johnson, General Electric Co., Home Depot U.S.A. Inc., and several other companies have been willing "poster boys" by stating the business case for corporate ADR and keeping accurate costs and benefits records. The result has been a major contribution to the spread of commercial mediation as a management tool, not just a lawyer's technique.

## THE ROLE OF THE JUDICIARY

It was previously noted that certain state legislatures and federal agencies imposed ADR into the state court systems. Certain individual judges have had enormous impacts by taking this authority seriously and using their power to genuinely assist disputants. Two examples among many are worth recounting.

Wayne Brazil, a U.S. Magistrate Judge in California's Northern District, devised an "Early Neutral Evaluation" system for that court. Certain cases filed with the court are selected for the system, getting parallel treatment by a judge other than the assigned. This judge would set a timetable for discovery of facts and preparation of legal arguments.

A half-day would be set aside for the attorneys to present their best arguments, and to refute those advanced by the other side. After lunch the parties would reassemble before the judge, who asks any further questions and then offers the parties an evaluation of what he or she has heard. Everyone involved concedes that it is an "early" evaluation, but it is an evaluation nevertheless rendered not merely by someone who is neutral, but someone who, day after day, hears exactly these kinds of cases.

The information and insight that the parties receive is extremely valuable to their settlement negotiations, and matters that are subject to Early Neutral Evaluation settle sooner than those that are not.

One must also acknowledge Lord Woolf of Barnes, the former Chief Judge of the High Court of England and Wales, whose recommendations for changes to the nation's civil procedure rules changed the way England's litigation is practiced and prompted a huge growth in commercial mediation. Lord Woolf explained in a recent CPR conference that the court's role was not to determine a "winner," but rather to assist disputants in resolving their case. If trial was the best way to do so, then fine, but as all lawyers and judges know, trial seldom is the best way.

Lord Woolf's reforms stand as a monument not only to the ADR's civil case efficacy, but to the profound effect that a small group of judges can have on bringing about needed change, though leadership.

## SUBMISSION AND ENFORCEMENT

The challenge of creating a successful outcome in mediation is less daunting than the challenge of getting the parties to the mediation table in the first place. There is no better way of doing that than placing mediation within the commercial contract itself. The stepped dispute resolution process discussed above is by far the best means of assuring that a commercial dispute will be managed rather than litigated. If you want it, then put it in the contract.

The question of enforcement divides into two areas: whether a contract provision requiring parties to mediate prior to litigation is enforceable, and whether agreements arising from mediation, purporting to settle the dispute, are enforceable.

In general, most jurisdictions in the United States and elsewhere enforce mediation contract provisions. Initially some U.S. courts considered it a mere "agreement to agree" and thus not a binding obligation, but early on that view did not prevail. It is pretty well settled that parties who wish to require mediation of disputes may enforce such a requirement in court.

The split on enforceability of the resulting settlement agreement, however, seems to lie along the lines of civil versus common law jurisdictions. In the United States and the United Kingdom, which are common law countries, the presumption lies that judges can do anything unless they are forbidden. Thus, when presented with a settlement contract, they examine it for enforceability, just like any other contract.

In other jurisdictions, however, the presumption is that judges may not do anything unless it is permitted. So if the agreement is not from an arbitrator or otherwise possessing official indicia, it may not be enforceable in the absence of procedural rules permitting it. Chinese courts, as an example, do not recognize the enforceability of an agreement that arose from mediation unless the mediation took place in the context of a trial before a judge, or an arbitration pursuant to the China International Economic and Trade Arbitration Commission, or Cietac. Legislation is being proposed in China to amend the civil procedure law in order to address this problem.

## MULTINATIONALS, AND THE FUTURE

We live in a shrinking world. Local concerns are becoming regional ones, and regional concerns are becoming global. Economic activity is cross-border, which means that people and institutions from different cultures, with different legal backgrounds and different business expectations, are learning to work with each other.

It is an era of tremendous dynamism and promise. It is also fraught with misunderstanding and the risk of unintended slights. Just as multinational economic activity is inevitable, so are multinational disputes and misunderstandings.

ADR offers not merely an alternative method of dispute resolution, but rather an entirely more efficient way of doing business. Identifying shared interests, particularly shared economic interests, is the very specie of our age. The times in which we live require that we seek to create value, not to vindicate our past behavior as the law is designed to do.

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The challenge, then, will be to ensure that our vital institutions—our businesses, our courts, our public agencies, our religious and political institutions—are peopled with leadership that is confident in the skills of principled, interest-based negotiation, most especially facilitated negotiation, to create value for themselves, their partners, their constituents and their society. And what better hope than that those corporate, legal and

academic leaders who share this vision will assume the mantle of leadership through a convening agency such as Nigeria's Negotiation & Conflict Management Group?

Congratulations to the group on its anniversary, with best wishes as it continues its sterling work of convening, creativity and leadership. 

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## ADR Departments

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neys to require attorneys to be knowledgeable about ADR procedures, and even to recommend such procedures, where appropriate, to their clients. These states impose an ethical obligation on attorneys to advise the client about all reasonable options, especially in the litigation context.

Moreover, all attorneys have a general obligation to counsel their clients regarding the full spectrum of ADR options. The attorney who fails to do so falls short of the obligation to provide complete and competent advice to the client.

The law firm's own corporate clients have had the greatest impact, however, in promoting the use of ADR strategies and options. Thus, clients represent a fourth factor pushing the ADR movement in law firms.

Certain industries, such as aerospace and defense, have a relatively uniform ADR commitment. Clients in these industries cannot and will not retain counsel without ADR expertise. More generally, corporate clients like ADR because it has the potential to avoid the cost, disruption, and delay of litigation and is more flexible than litigation in process and results.

Acting individually through their general counsel and together in industry associations and organizations such as the American Bar Association, the American Arbitration Association, the International Institute for Conflict Prevention & Resolution (which publishes this newsletter with Jossey-Bass), and the Association of Corporate Counsel, companies have tried to institutionalize ADR as an essential part of the dispute resolution process.

To remain competitive in an increasingly aggressive and global marketplace, businesses seek to save time and money in dispute resolution. In turn, law firms that

want to remain competitive must offer their clients ways to contain legal fees. Businesses also seek to assert control and to manage disputes so as to achieve more predictable and productive outcomes.

Therefore, many corporations now require their outside law firms to be knowledgeable and competent with respect to ADR procedures. Some of these companies specifically address ADR in their retention policies. Some corporations undoubtedly use ADR capabilities and results in rating law firms and deciding who to retain.

The law firm that assumes a leadership role in providing ADR services gains a significant competitive advantage in the legal marketplace. An ADR department can help a law firm distinguish itself—or at least prevent the adverse inferences that clients or potential clients might draw if the law firm lacks an ADR practice. The law firm of the future will have to be proficient in using ADR to stay competitive and responsive to its client's needs.

### QUESTION #2: HOW IS ADR DEFINED IN A LAW FIRM?

Law firm ADR can take several forms, including ADR advocacy, the role as settlement counsel, transactional ADR, the role as ADR process counsel, and practice as a neutral. These forms may be viewed as the five "branches" of ADR.

*ADR Advocacy:* Representation of clients in specific ADR proceedings is clearly a revenue-generating practice. For example, an arbitration involving high stakes can be leveraged as much as a piece of litigation. Moreover, in jurisdictions with mandatory court-ordered ADR, failing to know and use ADR to benefit a client may be tantamount to malpractice.

*Settlement Counsel:* Related to the ADR advocacy function, the "settlement counsel" role supports litigation counsel as

part of the litigation team. More and more often lawyers are being engaged as settlement counsel to monitor litigation and develop early exit strategies.

When police bargain for a suspect's confession, they often separate the "good cop" role from the "bad cop" role. The analogous separation of roles between specialized settlement counsel and the litigation counsel often plays well in resolving major suits. The settlement counsel can bring unique skills to bear on a single, critical objective: early and optimal resolution of the dispute.

Settlement counsel is considered part of the litigation team. Business people generally avoid litigation—it is only when sufficient disappointment, distrust, frustration, or anger combine that business litigation occurs.

What the billable hour does not take into consideration is the dissipation of emotional content and resurgence of economic concerns. It creates a trap in which the law firm stays focused on the litigation war it was engaged to fight, while the client's focus shifts from the war back to its business.

A substantial case justifies the early designation of an individual lawyer to act as settlement counsel. Settlement counsel seeks to understand and monitor the client's changing interests and develop innovative strategies and tactics in order to better serve those interests.

Settlement counsel typically is an experienced trial lawyer able to become intimately and quickly familiar with the dispute's subject matter. Settlement counsel also is a specialist in decision tree analysis, and the science and art of interest-based negotiation.

Ideally, settlement counsel also is experienced in mediation advocacy techniques, and may even be familiar enough with the mediators in the community or field to advise and represent