BY RUDOLPH J. GERBER & BRIAN MICHAEL GOODWIN

New Horizons in ADR

"I WAS RUINED ONLY TWICE IN MY LIFE—ONCE WHEN I LOST A LAWSUIT, THE OTHER TIME WHEN I WON ONE."
—Voltaire

A French philosopher's view of French litigation in his day resonates for litigation in America today. With pretrial delays of several years and litigators' daily fees sometimes running into thousands of dollars, alternative dispute resolution techniques present realistic opportunities for lawyers and clients alike. With the adoption of new Civil Rule 16(g) one year ago, arbitration and mediation now serve in Arizona not only as waystations en route to trial but also as potential replacements for trial and pretrial practice. These two forms of alternative dispute resolution (ADR) are increasingly popular and usable to satisfy the Rule 16 requirement.

HISTORY

English common law offers glimpses of some early and unusual forms of ADR. Early Norman trials proceeded by various ordeals, like a battle or a walk over hot coals. The survivor supposedly won because right was on that side. In the time of Henry II, in actions in assumpsit for recovery of a debt, a plaintiff maintained his cause by duel. To establish the truth of the accusation against the debtor, the plaintiff produced paid witnesses to deliver sworn oaths supporting the credibility of the claim. The odds favored the party with the larger purse or tougher skin. In the time of Edward I, if a man fell from a tree, the tree was forfeited. If he drowned in a well, the well was filled. Whatever its shortcomings, the feudal English legal system was quick and inexpensive: It required no long depositions, little balancing of probabilities, no weighing of evidence, no experts and no financial destruction.

One of the feudal ancestors to today's legal procedure codes appeared as a substitute for unsatisfactory private dispute ordeals: the creation of court rules to channel and calm feelings of outrage through elaborate procedural dialectics intended to keep the litigants from killing each other. But as incipient common law procedure moved from "calming" litigants to become an arduous ordeal in its own right, litigation alternatives developed. In colonial America, a form of ADR appeared as early as 1793:

> Loss of this Policy: It shall be referred to two indifferent Persons, one to be chosen by the Assured, the other by the Assurer or Assurers, who shall have full Power to adjust the same; but in case they cannot agree, then such two Persons shall choose a third; and any Two of them agreeing, shall be obligatory to both parties. (1793 insurance policy for Insurance Company of North America)

As this brief history suggests, the early English and American trial grew up in small, rural communities where participants knew each other. But as litigation became more popular, impersonal, urban, expensive and lengthy, the volume of cases and appellate-mandated procedural complexity began to counter the prospect of quick, efficient and cheap individualized decisions.

ARBITRATION AND MEDIATION

Our modern civil trial bears some remote resemblance to the ordeals and tough skin of its common law roots. Thanks to appellate perfectionism, our trials have now reached such an apogee of procedural complexity that they have ceased to be the routine way for resolving most disputes. Former Supreme Court Chief Justice Warren Burger has said, "Our litigation system is too costly, too painful, too destruc-

3

Does the rule modification eliminate the need to comply with mandatory nonbinding arbitration under ARCP 72(d)?

4

Will use of an ADR procedure serve as grounds to delay a case on the Inactive Calendar?

5

If parties cannot agree on an ADR process, must they wait for the court to act?

Thanks for this quiz go to ***Amy Lieberman,*** *who devotes her practice to the mediation of employment and contract disputes. She can be reached at Out-of-Court Solutions, (602) 404-1500.*

Answers on p. 28.
No peeking.

tive, too inefficient for a truly civilized people."[1] Well over 98 percent of civil litigation today, not surprisingly, is resolved apart from trial, either by settlement or by arbitration and mediation conducted by a "rent-a-judge," usually an outside attorney or retired judge. As settlement short of trial has become the norm and trial the exception, the sensible way for competent lawyers to prepare a case now is to conduct discovery in anticipation not of trial but of an assisted settlement.

Alternative dispute resolution is fast gaining acceptance in the commercial arena. A number of the most successful corporate ADR efforts appear in a 1997 Center for Public Resources (CPR) book written by Cathy Cronin-Harris, *Building ADR Into the Corporate Law Department.* In a recent CPR survey, 652 reporting companies using CPR-sponsored programs saved more than $200 million, with an average savings of more than $300,000 per company. Eighty percent of respondents believed that mediation helped preserve business relationships. And recent years show a substantial increase in corporate ADR use, including Deloitte & Touche's 1993 and 1995 studies, a 1996 Price Waterhouse LLP study, a 1996 *ABA Journal* poll and a 1998 survey by the Cornell/PERC Institute of Conflict Resolution. They all show:

- More than 800 corporations with 3,200 subsidiaries have signed the CPR ADR "pledge" to consider ADR in any dispute with another signatory.
- Specific industry-wide protocols for ADR exist within some industries (e.g., the National Association of Securities Dealers, National Healthcare Lawyers Association, World Intellectual Property Organization, the wireless industry, construction industry partnering programs and numerous insurance companies).
- Sophisticated ADR clauses are now inserted into business contracts to invoke ADR before going to court, with more than 1 billion such contracts in effect worldwide today.
- Probably the most striking trend in the corporate use of ADR is the movement toward mediation. The Deloitte & Touche survey clearly indicates this, as do other studies from the construction industry.[2]

ADR GROWTH

Following the renewed interest in litigation alternatives in the mid-1970s, corporate America became an early and outspoken advocate of ADR by also conveying that message to its attorneys. The ADR segment of the bar now is its fastest-growing practice area. The most cited advantages of ADR—expense reduction and time savings—are goals not always met in the traditional court system. For corporations, alternatives to litigation help preserve business relationships and avoid volatile jury awards. Corporate managers also have found that ADR, particularly mediation, protects the most sacrosanct of all corporate objectives: having input into decision-making.

ARBITRATION

Arbitration and mediation constitute the two major ADR mechanisms (for more details on the methods, see "ADR's Scope in Litigation" on p. 27). Whereas mediation allows individuals to find an assisted, voluntary and amicable resolution themselves, arbitration allows the disputants to air their disagreement before one or more attorneys or retired judges who, like traditional judges, weigh the facts and impose a decision binding on both sides.

According to estimates by the National Arbitration Association (NAF), arbitration clauses in contracts have increased many fold in recent years. Lawyers, in particular, like arbitration because it protects their corporate clients from drawn-out, costly and occasionally embarrassing consumer lawsuits. Arbitration in any popular forum operates under rules largely different from a traditional jury trial. Although arbitrators usually apply statutes or follow the precedents of case law, their judgments are generally final, not subject to court alteration except by consent (except for the NAF) and sometimes allow for more creativity than traditional court decisions.

No national procedural standard governs arbitration; each arbitration organization sets its own rules. The American Arbitration Association (AAA), for example, put in place a "consumer due process protocol" that, among other things, provides that the hearing take place at a reasonably convenient location and that the consumer retain the right to take a dispute to small claims court. The Council of Better Business Bureaus also requires companies to disclose the fees consumers pay to file a claim and to get a consumer's signature acknowledging acceptance of the arbitration clause.

Some businesses have policies to make the arbitration process more consumer-friendly. Instead of burying its arbitration clause in a thicket of other contract provisions, a homebuilders' group in Birmingham, AL, has clients sign a separate document acknowledging their acceptance of arbitration for resolving disputes.

MEDIATION

Mediation remains a relatively new ADR process. For the uninitiated, it requires a degree of courage. Mediation is:

- more interactive than arbitration
- without prejudice to further legal proceedings
- nonbinding until a settlement is reached
- successful in 80 percent of cases
- less expensive than traditional litigation or arbitration
- money- and time-saving because it can occur earlier in the litigation process and even outside it

The mediating parties pay the mediator a fee, usually on an hourly basis. The fees in civil business litigation may range from about $100 per hour to $8,000 a day. Talented mediators in civil disputes charge fees from $100 to $350 per hour, somewhat less in family disputes. (The Arizona Dispute Resolution Association publishes a fairly comprehensive mediator referral guide.)

MEDIATION TECHNIQUES

Many mediators request that the parties make a short opening statement prior to

private caucuses. Opening statements present an opposing view of the case directly to the other party, unfiltered by that party's lawyer. The opening can be an important part of the "reality therapy" or venting of emotions. It also gives each party an opportunity to persuasively support a position, thus offering some potential vindication, as well as to learn, perhaps for the first time, the "other side of the story."

The opening statement also gives an opportunity to express empathy for the other side without accepting fault. By acknowledging that the speaker's position is painful and possibly legitimate, the opposing party may become more motivated to resolve the dispute. Mediation recognizes that the dispute exists between parties, not lawyers.

The most effective opening statements are often delivered by the parties, not by their attorneys. The goal of this and other mediation techniques is to facilitate dialogue between the parties under the supervision of the mediator, who prods each side into a "reality check" and encourages willingness to reach a middle ground.

MEDIATION STYLES

At least four mediator styles exist. At the bottom of the list, as the least helpful, is the "number carrier," who instead of addressing the merits merely shuffles back and forth carrying dollar offers. The lawyers on the case can almost always perform this same service as well or better.

Other, harder-working mediators are sometimes called "facilitative" and "evaluative." The facilitative mediator assumes the parties are intelligent, able to work with their counterparts and capable of understanding their case better than their lawyers or the mediator. A facilitative mediator uses probing questions to urge the parties to clarify their positions to resolve the issues themselves. The evaluative mediator provides candid advice about what the mediator sees as appropriate grounds for settlement.

The "transformative" mediator is perhaps the most creative of all mediator types. Because some disputes have roots in rela-

tionships deeper or other than legal, the transformative mediator tries to get to the root of the dispute by exploring personal and psychological issues that may remain after a purely "legal" resolution.

In any style, the best mediator is likely to be a good listener and patient and perceptive about each party's strengths and weaknesses. Regardless of personal methodology, an effective mediator conducts the mediation in a manner consistent with the principle of self-determination by the parties.

CONCLUSION

ADR promises to continue to be the fastest-growing segment of the bar, with arbitration and mediation being the most popular choices. Given Rule 16(g), savvy litigators will see ADR as a necessary and fruitful step in the litigation process and increasingly a replacement for it.[3]

Professionally, the authors practice together at Shughart Thomson Kilroy Goodwin Raup. Each has been professionally trained as a mediator. ***Rudolph J. Gerber*** *retired from the Arizona Court of Appeals in May 2001 and is a certified arbitrator for AAA.* ***Brian Michael Goodwin*** *is a Maricopa County Superior Court Judge Pro Tempore and has conducted more than 100 trials, arbitrations and mediations privately and for the Court.*

endnotes

1. Speech to the American Bar Association, Feb. 12, 1984.
2. Mallarkey, "ADR in Colorado: A Vision for Restoring Community," COLO. LAW, June 1999.
3. *See* some recent helpful sources: CPR Legal Program, *Dispute Resolution Clauses: A Guide for Drafters of Business Agreements* (1994); American Arbitration Association, *Drafting Dispute Resolution Clauses: A Practical Guide* (1993); *A Resolution*, Corinne Cooper & Bruce E. Meyerson, eds., Committee on Dispute Resolution, ABA Business Law Section (1991). The Center for Public Resources makes its clauses available on a user-friendly disk.