



# Alternative Medicine

LEGAL

## Good For What Ails You?

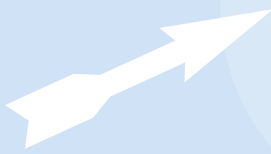
By now, you have lived and worked with the modified Rule 16(g) for almost a year. You know—we hope—that its amendment requires that parties confer about the possibility of settlement or resolution in all cases filed after December 1, 2001, and whether they might benefit from alternative dispute resolution. You also must confer

on the type of ADR process most appropriate, selection of an ADR provider and the anticipated schedule of the ADR proceedings.

Has the rule change been a bludgeon in your practice, or a tool to try alternatives? And have 12 months of enforced ADR made you an old hand at it? Can you explain the pros and cons of ADR methods to clients and opposing counsel? Perhaps, but begin by taking our quiz—you might be surprised. And then read more about the methods and their benefits.

Send your comments on ADR—or divergent quiz answers—to [soundoff@azbar.org](mailto:soundoff@azbar.org).

### THE ADR CHALLENGE QUIZ



1  
How early in a case must a conference between counsel be held?

2  
Are sanctions specified in the rule for violation of counsel's "good faith" obligation?

## 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.