

An Overview: The Use of Alternative Dispute Resolution for Employment-Related Disputes

What Is Alternative Dispute Resolution?

Alternative Dispute Resolution (ADR) is a term that refers to a variety of techniques for resolving disputes without litigation. It includes forms of negotiation; mediation, in which parties to a dispute reach a voluntary settlement with the help of a facilitator; and arbitration, in which the parties choose a third party to render a decision.¹ It is currently being used in a wide variety of disputes relating to business and commerce, contracts, construction, insurance, family, intellectual property, technology, securities, international trade, and even in disputes between foreign countries.² The federal government has encouraged the use of ADR through a series of statutes, regulations, and executive orders.³

Characteristics

* ADR is voluntary – the parties participate because they want resolve a dispute or problem. One practitioner noted that, particularly with employment disputes,

“It's important to keep the voluntarism in ADR to make sure that people go to ADR because both parties are persuaded that this is a better course of action, not because one party feels that it's been railroaded into it.”⁴

* ADR is controlled by the parties; the degree of control varies with the technique selected.⁵ ADR practitioners have recognized the importance of keeping the disputants in control of the dispute in order to obtain a solution that is acceptable to all. It also keeps them involved, and doesn't permit them to walk away and “leave it to the lawyers to handle” in litigation. At the same time, it requires that people work, up front, at recognizing and reducing disputes and conflicts at the early stages.⁶

* ADR emphasizes communication. Many times a party to negotiation will be disappointed with the result, feeling that the other side simply didn't understand his or

her position. Consequently, negotiation is only given one or two opportunities to work. Facilitated ADR, however, focuses on communication between the party, with a trained intermediary helping each party to understand the other's side.⁷

* ADR focuses on interests and encourages creative solutions. The techniques and processes involved in ADR attempt, in varying degree, to emphasize interests more than the parties' relative rights and relative power.⁸ ADR seeks to maximize "win-win" situations that are more likely to lead to constructive solutions to problems.⁹

Techniques

The techniques employed in ADR are summarized on the chart at the end of this paper. This summary groups ADR into major headings of unassisted negotiation, in which the parties attempt to reach a solution on their own; assisted negotiation (including mediation and non-binding arbitration) in which the parties use a third party to help them reach an agreement; and adjudicative procedures, in which a third party renders a decision that is binding on the parties.¹⁰ In reality, there are hundreds of ADR techniques, many of which add or combine processes, and the flexibility of ADR permit the parties to select what best fits their dispute. ADR practitioners emphasize that it is important to "fit the forum to the fuss"; for example, complex contract disputes need attorneys and facilitators who understand the law, while other skills are more important in other kinds of disputes.¹¹ The technique or approach should bear a relationship to the dominant theme of the dispute – interests, rights, or power. The parties to the dispute need to "recognize what mode is dominating or might be best for a particular dispute... ." The burden in terms of turmoil, time, and money increase as one moves from interests to rights to power.¹²

Mediation most effective when parties are desirous of maintaining a continuing business relationship.¹³ It is the technique most commonly used in employment-related disputes.¹⁴

Advantages of ADR

ADR is typically more economical than litigation.¹⁵ In particular, the negotiation and mediation phases are usually the least expensive; as one moves closer to adjudicative procedures, the costs rise.¹⁶ One large construction company reported that it increased its in-house legal staff, with the direction to managers to use the attorneys as mediators and advisors rather than litigators, and cut legal expenses by seventy-five percent in a year and a half.¹⁷ Another restaurant chain confirmed that arbitration clauses in contracts, including employment contracts, enabled the company to conduct business at substantially less legal costs, with good results in the decisions rendered.¹⁸ ADR may be more economical in its results, as well; limited data indicate that claimants are more likely to obtain awards, but less likely to receive very large awards, especially punitive damages.¹⁹

ADR also promotes efficiency and prevents delay.²⁰ One study of arbitration, undertaken by the Federal Judicial Center on Arbitration, showed that disputes were resolved 18 months sooner than if the same matter had gone to trial.²¹ The American Arbitration Association (AAA), a highly respected non-profit organization dedicated to dispute resolution, reported that most mediations it processed were resolved in a few weeks, and most arbitrations within a few months of filing.²²

Flexibility is an important advantage in increasing the parties' satisfaction with the outcome, where relaxed rules of evidence give the parties a greater confidence that they had the opportunity to present their whole story.²³ Hearings can take place at any location, at any time, or even over the telephone.²⁴ Flexibility extends to the remedies available to the parties; tailored resolutions are possible.²⁵

By encouraging parties to come to agreement without acrimonious and adversarial proceedings, ADR helps to preserve relationships, particularly when the negotiation/mediation end of spectrum is used.²⁶ This is a prime reason for its use in the employment context -- an important business relationship is in jeopardy, and a

speedy resolution may avoid undesirable human resource repercussions as other employees learn of the dispute. ²⁷

Other advantages include the ability to use a neutral party who is an expert in the subject matter of the dispute, reducing the time needed to educate a judge or jury about technical aspects of a dispute and increasing the confidence of the parties that the result will be well-informed.²⁸

Privacy is also cited as an important advantage; mediation and arbitration sessions are not open to the public as most courtroom trials are, and hearings and awards are typically kept confidential. That confidentiality also helps in preserving positive relationships. ²⁹

Disadvantages

Since one of the reasons for setting aside an arbitration award during judicial review is the failure of the arbitrator to consider relevant evidence, arbitrators tend to admit more evidence, which can “explode into very expensive and long delayed processes.” ³⁰ Parties can also sabotage the process with delays and objections, and appeal decisions despite previously having agreed not to do so.³¹

The training and professional qualifications of ADR practitioners is a subject of concern, particularly with arbitrators who render binding decisions. ³² However, this concern can be readily overcome by the parties to a dispute through their choice of a mutually agreeable third party.

ADR may reduce the generosity and effectiveness of the remedy for cases in which there has been a wrong, and no deterrent effect occurs when the proceeding is confidential. ³³ However, ADR may facilitate public policy in a different way, by encouraging victims of discrimination and human rights abuses to take action. Many people are reluctant to initiate adjudicative proceedings because they fear a loss of privacy and dignity, or may be regarded as “someone who cannot take a joke” or overreacts to an issue; ADR offers a range of options and choices to address diverse

interests in a non-adjudicative, dispute-settling environment.³⁴ Similarly, ADR is also criticized as a means of opening the floodgates to claims that might not otherwise be brought.³⁵ However, that objection does not appear to be supported in experience.³⁶

ADR should not be used when the parties are interested in obtaining a published opinion by a judicial authority in order to establish a precedent that will be useful in the future, or when one of the parties considers it appropriate to challenge existing judicial precedent.³⁷ In addition, some remedies – such as an injunction or restraining order – are available or enforceable only through the judicial process.³⁸

ADR in the Employment Context

The dependence on the judicial system to resolve employment disputes has grown since the 1940's, largely as the result of a number of factors, including the civil rights movement and the expansion of tort law theories, that developed outside the employment context.³⁹ Today, employees are suing corporations in record numbers; between 1969 and 1989, employment discrimination suits increased 2,166 percent, according to one study.⁴⁰ In many federal courts, the docket is crowded with employment cases, the third most prevalent type of case after drug cases and prisoner habeas petitions. Ironically, the press of cases has created increased pressure to settle, but these settlements are not driven by reconciliation but "by the litigants' dawning realization that one's day in court may be too long in coming, too short to tell the story, too expensive to afford, and too hard to understand."⁴¹

Arbitration has long been a tool for settling disputes over collective bargaining agreements⁴², but the use of other forms of ADR, and the application to other employment-related disputes, is still largely "new and untested"⁴³. The use of ADR for employment-related disputes has grown since the early 1990's, with the recognition that regulation of labor through series of individual lawsuits does not

produce satisfactory results.⁴⁴ As one in-house counsel for a large service company explained,

Like most major companies, [our company] won most of the employment cases filed against it or settled the claims for modest amounts. The amounts we spent on outside lawyers exceeded several times what we paid out in settlement. However, the money [we] spent for the privilege of winning most of its cases had little tangible impact on the company or its employees. Most of the cases were litigated years after the events giving rise to the cases occurred. By that time, the terminated employee was usually working somewhere else, many of the managers and co-employees were gone and there was little institutional value in the events that transpired in the litigation.⁴⁵

In addition, the attorney cited the high financial and human cost associated with litigation, particularly dear in a company that considered its employees and their employment relationships with the company to be the organization's most important asset.⁴⁶

Recognizing that the field of employment-related disputes was a fertile one for application of ADR techniques, the AAA hosted a national conclave in the fall of 1995. A topic of discussion was a pilot program established in California with AAA's Employment Dispute Resolution Rules. The rules provided for procedural fairness, substantive rights and remedies, and arbitral accountability.⁴⁷ Concomitantly, a growing number of companies have been moving to formal structured policies, stressing the creation of systems for the management of employment disputes.⁴⁸ The Federal government, too, has embraced the use of ADR for employment-related disputes, leading to the AAA's creation of a Federal Center for Dispute Resolution in Washington, D.C. Among the center's initiatives include providing employment mediators for federal agencies under a contract administered by the General Services Administration.⁴⁹

Many ADR programs now cover complaints and disputes related to discipline, termination, compensation, unlawful discrimination, and other employment-related claims arising from violation of federal, state, or local law.⁵⁰ ADR is not typically used

for workers' compensation and unemployment benefits disputes because of the state statutory framework.⁵¹

One growing phenomenon is the substitution of ADR programs for the customary grievance procedure; ADR practitioners predict that such implementation will continue to grow.⁵² One study concluded dispute mechanisms were more likely to occur in larger firms, and in firms that attached more importance to the human resource function or had more formalized human resource practices. It further concluded that emergence of formalized workplace dispute resolution procedures, particularly among non-unionized firms, underscore the increasing importance that employees attach to being treated fairly at work, and the increasing tendency of American employers to take seriously the goal of actually being fair to employees.⁵³

Management Perspective

Reports from employers emphasize the greatly reduced costs from personnel-related litigation. As one general counsel put it,

Even the most complex private dispute resolution systems are usually substantially faster than litigation, and are almost always cheaper, at least for the employee.⁵⁴

Employers also believe that ADR offers protection from runaway jury verdicts⁵⁵, particularly when the parties agree upon an arbitrator or third party.⁵⁶ Cost reduction can occur in another way; employers are provided with an opportunity to review a disputed decision in a prompt and non-adversarial way, and to correct mistakes before they become large and costly.⁵⁷

In addition to reducing litigation costs and expensive verdicts, many employers believe that ADR agreements are also "an excellent way to protect employee rights and maintain good employee relations."⁵⁸ Many supporters of ADR programs stress the benefit of improved morale that results when employees have the sense that they are treated fairly.⁵⁹ Employers have recognized that the use of ADR techniques depend on the system being viewed as a benefit, not a "take-

away.” To that end, some employers provide counsel, or financial assistance for counsel.⁶⁰

Employee Perspective

Early research suggested that providing employees a “voice” mechanism, through unionism or grievance procedures, reduces voluntary employee turnover and builds loyalty, and that the likelihood of using voice is a function of how effective the mechanism is perceived to be. Later studies found, however, that employees who were less committed to the firm were more apt to file grievances, and that among these employees, the perceived effectiveness of the grievance procedure did not influence the probability of using it. Ironically, employees who perceived the grievance procedure to be of high quality were less likely to use it -- the more loyal the employee, the less likely he or she is to exercise voice. Rather, such employees are more likely to “suffer in silence.” Fear of reprisal is the most significant reason for employees not exercising voice.⁶¹ These findings suggest that the value of ADR-as-grievance- procedure may well be symbolic for the employees the firm values most.

By contract, another study of both employers and complainants in discrimination cases before a state civil rights commission found that the perception of fairness was indeed a predictor of disputants' willingness to submit their cases to an ADR process. Also important was a sense of urgency, where the immediacy of an adverse action (such as a termination) prompts the disputants to seek speedy resolution without further considerable expenditures. ⁶²

Some employees perceive the quick resolution and the reduction of legal expenses through ADR a great benefit, reducing an employer's advantage in outspending and outlasting an employee in court litigation ⁶³; predictably, disputants are most willing to use ADR when it is available early in the process. ⁶⁴ Other employees have reported that mediation is effective in resolving workplace situations that might not end up in court, but nonetheless make life at work

unpleasant.⁶⁵ However, others complain that plans have the effect of discouraging employees from joining unions.⁶⁶

Experiences with Using ADR

On the whole, the evidence supporting the use of ADR is largely anecdotal:

“Not only are employers just beginning to implement ambitious, sophisticated systems of dispute resolution, but dispute resolution, as a field of serious academic study, is in its infancy. The hard data have yet to be gathered”⁶⁷

but it appears that ADR costs substantially less while doing better job of delivering justice

to the average employee. The anecdotal evidence is encouraging:

* Brown & Root, the service company mentioned earlier, established an ADR system in 1993, after winning a sexual harassment suit that cost \$450,000 in legal fees and altered the careers of numerous employees. Designed with input from employees at all levels and the advice of dispute resolution, legal, and employee communications specialists, the Dispute Resolution Program (DRP) provides a four-option program with multiple processes, ranging from an open door policy to mediation to arbitration . The program encourages collaborative approaches, promotes resolution at the lowest possible level, offers compensated access to legal counsel, and ensures independence by reporting to a policy committee of senior executives rather than to an individual or department. In the first two years of operation, nearly one thousand employees utilized some aspect of the DRP; over seventy-five percent of these issues were resolved within eight weeks of the employee's initial contact. The overwhelming majority were resolved through informal, collaborative processes; about fifty went to outside mediation and fifteen to outside arbitration, with a win/loss record similar to that achieved previously in litigation. Only eighty employees asked for assistance of counsel.⁶⁸ The cost of arbitration has ranged from \$6,000 to \$20,000, saving 50 to 80 percent on legal costs.⁶⁹ At the end of four years,

the company reported similar results, with 2,000 disputes brought by its 30,000 employees, only 30 of which reached the arbitration stage.⁷⁰

* Siemens Corporation, the American holding company for a large, German-based multinational corporation, has adopted ADR procedures for all its disputes arising in connection with its business. Its policy derived from its determination that ADR is a faster, cheaper, and more efficient way of resolving claims, as well as its parent company's cultural preference for private dispute resolution. It adopted ADR processes for employment disputes, having found that mediation and mini-trial were effective ways of resolving such disputes. Both the right for the employee to be heard, and the right to confront the manager that purportedly caused the harm, are considered to be important. Siemens uses an internal education program to explain and promote ADR, and stresses that institutionalization of ADR is a process, not an end in itself.⁷¹

* Publisher McGraw-Hill, with a workforce of over 15,000, implemented its Fast and Impartial Resolution (FAIR) program in 1995, with a three step voluntary program. If informal discussions with a supervisor or human resource representative do not resolve a dispute, it moves to mediation with a neutral third party, with binding arbitration as the third step. The company pays all costs.⁷²

* Polaroid's ADR procedures date back to 1949 but were significantly revised in 1994. Polaroid has a five-step process, ranging from a discussion with the department manager to a peer or officer panel, from there to Polaroid's president, and finally to binding arbitration. Over the past ten years, Polaroid reports, about 25 cases per year are settled at the panel level; three or four go to arbitration.⁷³

* American Savings Bank created a four-step process in 1994 and reported success in the first two years. Seventy of its 3500 employees have used the program, mandatory for all new hires, with seven of the cases ending in mediation and one in arbitration. At the same time, legal costs were reduced by more than 60 percent.⁷⁴

* In its first year, the ADR program at Hughes Aircraft worked so well that 70 percent of all employee claims were resolved before making it to the program's third phase. In the program's first two years, no employee pursued a dispute to the final step of arbitration.⁷⁵

* The AAA's own dispute resolution system consists of a three-step process, which it offers as a model to other employers:

1) Employees first try to resolve workplace issues by internal review by informal discussion with the employee's department head, vice president, or national vice president of human resources.

2) Disputes involving termination or legally-protected rights not resolved through the first step are required to go to the second step, mediation before an impartial, outside mediator.

3) Binding arbitration is available at the option of employee as a third step. All expenses for arbitrators and mediators – selected at the employee's option from one of three sources – are borne by the employer, although the employee may elect to pay up to one-half. The employer also provides a one-time \$1000 reimbursement for the employee's attorney fees for the mediation or arbitration. ⁷⁶

* Lockheed Martin, General Electric, and Darden Restaurants are among employers adopting ADR programs. Typically, the procedures start with informal, internal discussions, and move through mediation and arbitration. ⁷⁷

Issues in the Use of ADR

As more employers adopt ADR systems, two issues in particular are receiving increasing attention – making ADR mandatory, and regulating the ADR process.

Mandatory arbitration

One of the great advantages of ADR lies in its voluntary nature, as previously discussed. It is ironic, then, that one of the most hotly contested legal issues in the human resources arena is the imposition of mandatory ADR procedures, particularly

arbitration.⁷⁸ Used among securities firms for years, many companies are now asking employees to sign agreements, sometimes as a condition for getting or keeping their jobs.⁷⁹

In 1991, the U.S. Supreme Court upheld a mandatory arbitration clause for an age discrimination claim in Gilmer v. Interstate Johnson Lane Corp.⁸⁰ However, subsequent disagreement over the exact application of the case has instigated a series of cases with conflicting rulings. Many circuits have held that where the individual has freely agreed to arbitrate, that decision, like the decision to waive or settle a claim, prevents the pursuit of monetary and other remedies in another forum.⁸¹

Some states, including Georgia, Kansas, and Kentucky, have enacted laws prohibiting agreements,⁸² and recently, the United States Court of Appeals for the Fourth Circuit issued a decision that was based upon its belief that a West Virginia statute had barred mandatory arbitration of certain employment-related topics.⁸³ In actual practice, about 75 percent of employers using alternative dispute resolution plans require new employees to participate in the plan as a condition of employment, half require existing employees to participate, and the rest encourage but don't require current employees to do so. Companies report few objections from employees.⁸⁴

Critics of mandatory arbitration argue that "coerced arbitration as a condition of continuing employment is a perversion of the basic tenets of arbitration."⁸⁵ They stress that it is unfair because inequality in bargaining power between the employee and employer results in the diminishment of the substantive rights of employees, particularly the right to a jury trial under the 1991 Civil Rights Act.⁸⁶ Limitations on discovery, interference with the right to an attorney, caps on damages or fees, and shortening of time limits take unfair advantage of the employee.⁸⁷ Moreover, the privacy of ADR procedures allow employers to follow discriminatory and other

reprehensible practices “with much more assurance that it will never be assessed punitive damages due to public knowledge of prior bad actions.”⁸⁸

The Equal Employment Opportunity Commission is outspoken in its opposition to binding arbitration that is a condition of employment or continuing employment. In a policy paper issued in July of 1997, the EEOC objected to mandatory arbitration because it privatizes enforcement of federal discrimination laws and thus undermined enforcement while limiting claimants’ rights and permitting the employer to manipulate the system to its benefit. The EEOC affirmed, however, that voluntary, post-dispute arbitration balanced legitimate goals of ADR with the enforcement framework of discrimination laws.⁸⁹

Similarly, the National Labor Relations Board has, in some situations, abandoned its customary deferral to internal grievance and arbitration procedures, thereby indicating opposition to mandatory arbitration. In one situation, the NLRB’s general counsel instructed the regional director not to defer to the grievance-arbitration procedure specified in an employment contract on the grounds that its prohibition of processing an unfair labor practice charge defeated a major right of the National Labor Relations Act. The general counsel also indicated that the contract was an unenforceable adhesion contract because the employees were not sophisticated as to their legal rights and consequently had an unequal bargaining position. Moreover, such arbitration would chill the rights of other employees to organize, since the right to arbitrate was, in some situations, illusory.⁹⁰

In 1994, the Commission on the Future of Worker-Management Relations, chaired by former Labor Secretary John T. Dunlop, opposed mandatory arbitration programs as a condition of employment and urged Congress to bar them.⁹¹ In a statement issued to that Commission, the American Civil Liberties Union argued against mandatory ADR agreements because of the potential for abuse, the lack of employee bargaining power, and the need to avoid surrender of civil rights as a

condition of employment.⁹² Similarly, in August 1997, the American Bar Association went on record against mandatory ADR.⁹³

Representatives of management, on the other hand, cite the advantages of arbitration in defense of making it mandatory. The Vice President/General Counsel of the Darden restaurant chain, which uses mandatory ADR agreements, believes that challenges to mandatory arbitration in employment are “fed by either unawareness or disbelief that arbitration is good for both the employee as well as the employer.” He also expressed the belief that the best impetus toward serious mediation is having a clause in the contract, which prevents “escape to the court.”⁹⁴ Another commentator agreed that critics of mandatory arbitration overlook the many advantages arbitration offers both sides in an employment dispute.⁹⁵ However, nearly all of the advantages cited are simply advantages inherent in nontraditional dispute resolution, not an effect peculiar to a mandatory procedure.

Supporters of pre-employment agreements maintain that they are fair as long as an employee understands that he is giving up rights on a limited basis in exchange for a faster resolution, and that ultimately, employees have the choice whether they want to participate in that particular work environment. ⁹⁶ While some note that it was very important that ADR not be seen as second-class justice system by requiring people to use ADR first, rather than go to court, ⁹⁷ most suggest that it is more important that the ADR have procedural fairness, and that a sensible trade-off of risks, benefits, and fairness will lead to a posture that appears more reasonable than aggressive ⁹⁸ – that is, that arbitration agreements could be drafted in such a way as to provide applicants and employees with the same degree of due process available to those in a judicial forum. ⁹⁹ In fact, court and legal experts encourage examination of the content of the ADR procedures, rather than limiting analysis to whether the use of them was mandatory.¹⁰⁰

Rockwell International implemented arbitration procedures in 1992 by requiring 970 executives to sign a mutual agreement to arbitrate employment disputes, including those covered by statute, as a condition of participation in an executive stock plan. The program was later extended to cover all nonunion employees; new hires must sign the agreement as a condition of employment.¹⁰¹ Rockwell's assistant general counsel defends Rockwell's practice as fair, and complained that it was wrong to lump all such ADR programs together: "My concern is that there will always be those outfits that do what we have tried not to do and set up arbitration agreements and procedures that will be seen as, and will be in fact, unfair. These will then be held up as an example of what is going on generally, and Congress will see a need to step in and protect everybody."¹⁰²

The AAA remains unconvinced. While it has announced that it would administer mandatory arbitration agreements because most courts hold them to be enforceable, it echoed the majority of human resource experts when it affirmed that ADR is most effective "when the parties knowingly and voluntarily agree on the process and have confidence in the neutrality of the mediator or arbitrator and the procedures" under which the case was administered. It also announced that it would administer binding arbitration programs required as a condition of employment only if the programs were consistent with its national Rules for the Resolution of Employment Disputes and the Due Process Protocol.¹⁰³

Due process / judicialization

The insistence by the AAA and the courts on protection of employees, and the fear of Congressional intervention, raises a related issue current in the ADR field – that of "judicialization." In order to ensure satisfaction with the results of ADR, among the parties as well as the community, it is important that the process be perceived as fair, and that the results have integrity and credibility – which requires some degree of due process.¹⁰⁴ Unfortunately, accomplishment of this end often means that a

process is “judicialized”, using many of the same rules of evidence and processes as courts.¹⁰⁵ Of course, that increases time and cost. Increasingly, lawmakers are attempting not only to expand the use of ADR, but to regulate the process as well, particularly with respect to the qualifications and certification of third parties, rights of the participants, and rules of confidentiality. Statutes relating to non-traditional dispute resolution quadrupled from 1989 to 1993. One bill introduced in California would have required mandatory mediation in most civil cases.¹⁰⁶

Discovery is a prime example -- one practitioner cites a “growing recognition that discovery should be available in arbitration” and an increasing belief on the part of the plaintiff’s bar that “the individual has a substantive legal right to obtain relevant information from the opposing party to a dispute, without limits on the type of method used to obtain the information.”¹⁰⁷ Judicialization may also restrict the remedies that may be used to resolve a dispute; for example, an arbitrator may impose only those remedies that would be available under law.¹⁰⁸

A related debate rages on what evidence should be allowed in ADR proceedings. Within the field of arbitration of labor-management disputes, the debate centers on whether arbitrators should limit their consideration to the “four corners” of the collective bargaining agreement, or should consider external law in order to reach a decision. The “four corners” proponents feel that arbitration proceedings will become more and more like courts if arbitrators and the parties pay too much attention to the “legal trappings” associated with the court system. One professor refers to this phenomenon as “creeping legalism”, fearing that it will undermine the cost-effectiveness of the arbitration process and defeat the primary reason for its existence.¹⁰⁹

The Future of ADR in Employment Disputes

For those companies looking for assistance in setting up an ADR program,

there are a number of guidebooks and professional consultants. Many of these resources stress that a company needs to examine its legal and labor costs, as well as its ability to initiate new training and communication programs.¹¹⁰ A first step in designing an ADR program is assessing the history of employment conflicts, to determine what kinds of disputes have arisen, how frequently, why the disputes occurred, how they were handled, how long the process takes, the cost, and the degree of participants' satisfaction.¹¹¹

It is also important for companies to know what they want to accomplish, setting goals and procedures that fit within the corporate culture.¹¹² An understanding of that culture will help determine who is likely to support or resist a new program, and what incentives and disincentives may influence its use; procedures that suit a more formal or rights-oriented workplace, for example, will differ from those best suited to a more casual workplace characterized by more open communication.¹¹³ As another example drawn from real practice, Polaroid has long-service employee-owners, with an average age that far exceeds the average, concentrated in a small geographic area; a company with a less cohesive culture may be less apt to empower employee peer panels with grievance settlement power.¹¹⁴ Another practitioner notes that arbitration and mediation can provide an external element to distance the decision-maker from those with a stake in the outcome, but the arbitrator or panel must be educated about the company and the workforce. He concludes, "If you want conflict resolution at a minimal cost, but [want to] allow both parties to maintain control, look at mediation. If you want positive employee relations, use peer review."¹¹⁵

At a symposium sponsored by AAA in early 1996, dispute resolution specialists predicted that the use of ADR for workplace situations would expand. One reason given was the decline of unions, leaving more workers without the benefit of rights and grievance procedures spelled out in collective bargaining agreements. A

second reason given was that many disputes were closer to community issues (i.e., racism) than to a typical union versus management employment situation, and needed resolution in ways other than through collective bargaining agreements.¹¹⁶

An important third reason given is key to the future of ADR -- employees have not been trained to think in terms of dispute resolution, and it is in both employers' and employees' interests for them to do so.¹¹⁷ More employees will come to use the systems as they are viewed as a legitimate questioning of authority, encouraging employees to speak up before a problem reaches the critical state.¹¹⁸ Companies, on the other hand, will continue to move to more formal, structured policies, and will view employment disputes as a management, rather than legal, issue.¹¹⁹ Motorola, for example has instituted a mandatory review process for all claims, disputes, and controversies as part of its TQM program, to determine the appropriateness for private dispute resolution. It seeks to uncover process defects in its employee relations just as it does on the production line. AAA predicts that this is the wave of the future, creating a mindset that dispute avoidance and prevention are expected.

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Conclusion

Employers recognize that ADR offers great advantages in controlling both the financial and human resource impact of disputes related to employment, and are setting up programs in record numbers. The advantages to employees are much less clear, particularly where employees must agree to use the programs as a condition of employment. Employers would be well advised to maximize employee participation in developing the procedures as well as in the process itself, to gain employee acceptance and the willing participation that is so important to making ADR work effectively.

¹ "A Beginners' Guide to Alternative Dispute Resolution", 2 June 1998, www.adr.org/guides/guide.html

² Ibid.; "ADR In the New Century," Dispute Resolution Journal, v. 51 (Apr./Sept. 1996), pp. 10-15, citing the use of ADR in the Dayton peace talks to resolve the Bosnian conflict.

³ Fryling, Robert G., and Hoffman, Edward J., "Step by Step: How the U.S. Government Adopted the ADR Idea", Dispute Resolution Journal, V. 53 (1998). This article discusses the statutory and regulatory framework that define policy for disputes to which the Government is a party. See also "Justice Dept. Official Expresses Support for ADR", Dispute Resolution Journal, V. 53 (1998)

⁴ Richard V. Denenberg, quoted in "ADR In the New Century," op cit.

⁵ "A Beginners' Guide to Alternative Dispute Resolution", op cit. See also Schwartz, Steven L., "The Business and Legal Communities Look to ADR", Dispute Resolution Journal, V. 51 (Apr./Sept. 199), pp. 34-39

⁶ "ADR In the New Century," op cit.

⁷ Berman, Gary S., "Facilitated Negotiation: An Effective ADR Technique", Dispute Resolution Journal, V. 50 (Apr. 1995), pp.18-22

⁸ Hill, Richard, "Overview of Dispute Resolution", www.batnet.com/oikoumene/arbover.html; See also Perry, Mike, "Beyond Dispute: A Comment on ADR and Human-Rights Adjudication", Dispute Resolution Journal, V. 53 (1998).

⁹ Schwartz, "The Business and Legal Communities Look to ADR", op cit. ; Wilburn, Kay O., "Employment Disputes: Solving Them Out of Court", Management Review, v. 87 (Mar. 1998), pp. 17-21. For an excellent primer, not in ADR techniques, but on identifying parties' interests and using the interests to create agreement, see Fisher, Roger; Ury, William; and Patton, Bruce, Getting to Yes: Negotiating Agreement Without Giving In, 2nd ed. (New York: Houghton Mifflin Company) 1991.

¹⁰ The information in the chart is based largely on instructional materials used by the Center for Dispute Settlement, presented at Department of the Army Alternative Dispute Resolution Workshop, Arlington, Virginia, 1992. One leading practitioner has recognized that a commonly accepted vocabulary of ADR terms does not exist, and, in a series of articles, has described these basic techniques as well as a number of hybrids and combinations. See Arnold, Tom, "Vocabulary of ADR Procedures," Dispute Resolution Journal, V. 50 (Oct./Dec. 1995) pp. 69-72; "Vocabulary of ADR Procedures, 2", Dispute Resolution Journal, V. 51 (Jan./Mar. 1996), pp. 60-71; and "Vocabulary of ADR Procedures, (part 3)", Dispute Resolution Journal, V. 51 (Oct. 1996), pp. 74-77. Other basic informational materials include "A Beginners' Guide to Alternative Dispute Resolution", 2 June 1998, www.adr.org/guides/guide.html; Buckstein, Mark A., "An Introductory Primer on Pre-Litigation: ADR Counseling for the Outside Lawyer", Dispute Resolution Journal, V. 52 (Jan. 1997), pp. 35-39; Gill, Brian, "Resolving Employee Conflicts", American Printer, v. 221 (1998); Kuenzel, Robert B., "Alternative Dispute Resolution: Why All the Fuss?", Compensation and Benefits Review, v. 28 (Jul./Aug. 1996), pp. 43-; McDowell, Wyatt, and Sussman, Lyle, "Overcoming the Pathology of

Litigation: An ADR Primer for Executives", Business Horizons, v. 39 (May/June 1996), pp. 23-29; "Resolving Employment Disputes: A Practical Guide", (June 16, 1997) www.adr.org/guides/resolving_employment_disputes.html
Schwartz, "The Business and Legal Communities Look to ADR", op cit.; Zack, Arnold M., "Can Alternative Dispute Resolution Help Resolve Employment Disputes?", International Labour Review, v. 136 (Spring 1997), pp. 95-108.

For information on specific techniques, see Berman, "Facilitated Negotiation: An Effective ADR Technique", op cit.; "Guide for Employment Arbitrators", www.adr.org/guides/employment_guide.html ; "Mediation Pitfalls and Obstacles", www.adrr.com/adr1/essays.htm .; Van Slyke, Erik J., "Facilitating Productive Conflict", HR Focus, v. 74 (Apr. 1997), pp. 17; Wilburn, "Employment Disputes: Solving Them Out of Court", op cit.

A chronology of important events in the development of ADR is found in "Past, Present & Future", Dispute Resolution Journal, V. 51 (Apr./Sept. 1996), pp. 108-115.

¹¹ "ADR In the New Century," op cit.

¹² Arnold, "Vocabulary of ADR Procedures," op cit.

¹³ Buckstein, "An Introductory Primer on Pre-Litigation: ADR Counseling for the Outside Lawyer", op cit.

¹⁴ "Mediation is ADR Method of Choice", Dispute Resolution Journal, V. 52 (Fall 1997), pp. 6

¹⁵ "A Beginners' Guide to Alternative Dispute Resolution", op cit.; see also Caudron, Shari, "Blow the Whistle on Employment Disputes", Workforce, v. 76, pp. 50-52; Howard, Lisa, "ADR Can Cut Hours, Costs, Lawyers Say", National Underwriter, vo. 101 (Apr. 7 1997), pp. 9-10

¹⁶ Arnold, "Vocabulary of ADR Procedures," op cit.

¹⁷"ADR In the New Century," op cit.

¹⁸ "ADR In the New Century," op cit.

¹⁹ DiCesare, Constance B., "Alternative Dispute Resolution", Monthly Labor Review, v. 119 (Jan./Feb. 1996), pp. 79-80.

²⁰ "ADR In the New Century," op cit; see also DiCesare, "Alternative Dispute Resolution", op cit.

²¹ "ADR In the New Century," op cit.

²² "A Beginners' Guide to Alternative Dispute Resolution", op cit.

²³ "A Beginners' Guide to Alternative Dispute Resolution", op cit.; also, DiCesare, "Alternative Dispute Resolution", op cit., citing catharsis as beneficial effect.

²⁴ "A Beginners' Guide to Alternative Dispute Resolution", op cit.

²⁵ Howard, "ADR Can Cut Hours, Costs, Lawyers Say", op cit.

²⁶ Arnold, "Vocabulary of ADR Procedures," op cit.; see also DiCesare, "Alternative Dispute Resolution", op cit.; Kuenzel, "Alternative Dispute Resolution: Why All the Fuss?", op cit.

²⁷ Buckstein, "An Introductory Primer on Pre-Litigation: ADR Counseling for the Outside Lawyer", op cit.

²⁸ "A Beginners' Guide to Alternative Dispute Resolution", op cit., see also Caudron, "Blow the Whistle on Employment Disputes", op cit.; Ganzel, Rebecca, "Second – Class Justice?", Training, v. 34 (Oct. 1997), pp. 84-86.

²⁹ Ibid.

³⁰ Ibid.

³¹ Tillson, Tamsen, "Common Sense Resolution", Canadian Business, v. 70 (Mar. 1997), pp. 83-84.

³² Ganzel, "Second – Class Justice?", op cit.

³³ Ibid.

³⁴ Perry, "Beyond Dispute: A Comment on ADR and Human-Rights Adjudication", op cit.

³⁵ Caudron, "Blow the Whistle on Employment Disputes", op cit. See also DiCesare, "Alternative Dispute Resolution", op cit.

³⁶ Kuenzel, "Alternative Dispute Resolution: Why All the Fuss?", op cit.; McDermott, E. Patrick, "Survey of 92 Key Companies Using ADR to Settle Employment Disputes", Dispute Resolution Journal, V. 50 (Jan. 1995), pp. 8-13.

³⁷ Buckstein, "An Introductory Primer on Pre-Litigation: ADR Counseling for the Outside Lawyer", op cit.

³⁸ Ibid.

³⁹ Bedman, William L., "From Litigation to ADR: Brown & Root's Experience", Dispute Resolution Journal, V. 50 (Oct./Dec. 1995), pp. 8-14.

⁴⁰ Nye, David, "When the Fired Fight Back," Across the Board, v. 32 (June 1995), pp. 31-34. Significantly, the study was completed before the passage of the 1991 Civil Rights Act and the Americans with Disabilities Act.

⁴¹ Ibid.

⁴² Zack, "Can Alternative Dispute Resolution Help Resolve Employment Disputes?", op cit.

⁴³ Caudron, "Blow the Whistle on Employment Disputes", op cit.

⁴⁴ Unlike most other industrialized nations which manage employment by direct government regulation, direct political involvement, and quasi-political labor tribunals, the American model requires individuals to vindicate broad, rights-based policies through tort litigation in independent courts, a process that is slow, expensive and cumbersome. Ibid. See also Zack, "Can Alternative Dispute Resolution Help Resolve Employment Disputes?", *op cit.*

⁴⁵ Bedman, "From Litigation to ADR: Brown & Root's Experience", *op cit.*

⁴⁶ Ibid. Bedman's lament is echoed in a significant number of articles. See, e.g., Wilburn, "Employment Disputes: Solving Them Out of Court", *op cit.*

⁴⁷ "AAA Takes Initiatives in Field of Employment ADR", Dispute Resolution Journal, V. 50 (July 1995), p. 4; "Conclave Held on Employment ADR", Dispute Resolution Journal, V. 50 (Oct./Dec. 1995), p. 3+ .

⁴⁸ Bencivenga, Dominic, "Fair Play in the ADR Arena", HR Magazine, v. 41 (Jan. 1996), pp. 50-56; Ganzel, "Second – Class Justice?", *op cit.* Exact numbers are difficult to establish; a 1995 survey by the General Accounting Office indicated that "almost all employers with 100 or more employees used one or more ADR approaches," but GAO's definition of ADR including informal problem solving and negotiation. GAO also reported that almost 40 percent of the employers surveyed used trained internal mediators, while less than 10 percent had resorted to arbitration. See Kuenzel, "Alternative Dispute Resolution: Why All the Fuss?", *op cit.* Similarly, a 1994 survey by Dispute Resolution Journal included such informal techniques as an open door policy. McDermott, "Survey of 92 Key Companies Using ADR to Settle Employment Disputes", *op cit.* More recently, a 1997 study of 600 major U.S. corporations by Cornell University, Price Waterhouse, and the Foundation for Prevention & Early Resolution of Conflict, reported that 88 percent used mediation in the past three years, 79 percent used arbitration, and 41 percent used "mediation/arbitration." Wittenberg, Carol; Mackenzie, Susan; and Shaw, Margaret, "And Justice For All", HR Magazine, v. 42 (Sept. 1997), pp. 131-132 .

⁴⁹ "AAA Launches Federal Center in D.C.", Dispute Resolution Journal, V. 53 (Feb. 1998), p. 4.

⁵⁰ "Corporations Adopt Employment ADR Programs", Dispute Resolution Journal, V. 52 (Spring 1997), p. 5; see also Crawford, Linda S., "ADR: A Problem-Solving Approach for Business", Dispute Resolution Journal, V. 50 (Apr. 1995), pp. 55-60, and Keil, James H., "Using ADR to Satisfy ADA Compliance Issues", Dispute Resolution Journal, V. 50 (Apr. 1995), pp. 61-62, for discussion on the use of ADR for complaints under the Americans with Disabilities Act.

⁵¹ Bencivenga, "Fair Play in the ADR Arena", *op cit.*

⁵² "ADR In the New Century," *op cit.*

⁵³ Feuille, Peter, and Chachere, Denise R., "Looking Fair Or Being Fair: Remedial Voice Procedures in Nonunion Workplaces", Journal of Management, V. 21 (Spring 1995), pp. 27-42.

⁵⁴ Bedman, "From Litigation to ADR: Brown & Root's Experience", *op cit.*

⁵⁵ Ibid.; Selman, Don, "Court of First Resort", CA Magazine, v. 130 (May 1997), pp. 37-39. A 1995 study reported that in cases who brought suit because of discriminatory hostile work environments, unrelated to sexual harrassment, the median compensatory damage award was \$150,000, with a median of \$160,000 in punitive damages added in 43 percent of the cases. For plaintiffs demoted or denied promotion due to unfair policies or standards, the median compensatory damage award was \$97,558, with punitive damages added in 32 percent of verdicts, for a median award of \$175,000. In unjust dismissal cases, where no discrimination was alleged, the median verdict was \$102,000; punitive damages were added in 26 percent of such cases, with a median of \$150,000. See Nye, "When the Fired Fight Back," op cit.

⁵⁶ Kuenzel, "Alternative Dispute Resolution: Why All the Fuss?" op. cit.

⁵⁷ Ibid.; Wittenberg, Mackenzie, and Shaw, "And Justice For All", op cit.; Zimmerman, Philip, "In -House Dispute Resolution Programs", CPA Journal, v. 68 (1998).

⁵⁸ Caudron, "Blow the Whistle on Employment Disputes", op cit. Caudron cites a 1997 survey by Dispute Resolution Journal, in which more than 75 percent of employers cited litigation cost as their major reason for implementing ADR policies; another 15 percent stated they adopted the policies to improve employee relations.

⁵⁹ Kuenzel, "Alternative Dispute Resolution: Why All the Fuss?", op cit.

⁶⁰ Caudron, "Blow the Whistle on Employment Disputes", op cit. Philip Morris, for example, offers a Dispute Resolution Benefits Plan, under which the employee pays 20 percent of legal costs and the company pays 80 percent up to \$3500. See also DiCesare, "Alternative Dispute Resolution", op cit.

⁶¹ Boroff, Karen E., and Lewin, David, "Loyalty, Voice and Intent to Exit a Union Firm: A Conceptual and Empirical Analysis", Industrial and Labor Relations Review, v. 51 (Oct. 1997), pp. 50 + .

⁶² Stallworth, Lamont E., and Stroh, Linda K., "Who Is Seeking to Use ADR? Why Do They Choose To Do So?", Dispute Resolution Journal, V. 51 (Jan./Mar. 1996), pp. 30-38. This study also concluded that approximately 90 percent of discrimination disputes submitted to mediation were successfully resolved.

⁶³ Caudron, "Blow the Whistle on Employment Disputes", op cit.; Kuenzel, "Alternative Dispute Resolution: Why All the Fuss?", op cit.

⁶⁴ Stallworth and Stroh, "Who Is Seeking to Use ADR? Why Do They Choose To Do So?", op cit.

⁶⁵ Ganzel, "Second - Class Justice?", op cit.

⁶⁶ Ibid.

⁶⁷ Bedman, "From Litigation to ADR: Brown & Root's Experience", op cit.

⁶⁸ Ibid.

⁶⁹ Bencivenga, "Fair Play in the ADR Arena", op cit.

⁷⁰ Caudron, "Blow the Whistle on Employment Disputes", op cit.

⁷¹ Gans, Walter G., and Stryker, David, "ADR: the Siemens' Experience", Dispute Resolution Journal, V. 51 (Apr./Sept. 1996), pp. 40-46.

⁷² Bencivenga, "Fair Play in the ADR Arena", op cit.

⁷³ Nye, "When the Fired Fight Back," op cit.

⁷⁴ Bencivenga, "Fair Play in the ADR Arena", op cit.

⁷⁵ Wittenberg, Mackenzie, and Shaw, "And Justice For All", op cit.

⁷⁶ "American Arbitration Association Implements the Smart Solution, A New Three-Step Dispute Resolution Program to Resolve Disputes with its Employees," Press Release, 9 March 1998, www.adr.org/press/smart_solution.html

⁷⁷ "Corporations Adopt Employment ADR Programs", op cit.

⁷⁸ Goldberg, Adin C., "Top 8 Legal Issues Affecting HR", HR Focus, v. 74 (Dec. 1997), pp. S1 – S3.

⁷⁹ Ganzel, "Second – Class Justice?", op cit. However, use in the securities industry may be on the decline in the wake of the settlement of a sexual harrassment and discrimination suit against Smith Barney. As part of the settlement, Smith Barney agreed to handle discrimination and sexual harrassment cases separately with a three step process leading to an ADR panel, that could provide punitive as well as compensatory damages. See Hoffman, Mark A., "Smith Barney Deal May Cut Use of Mandatory Arbitration", Business Insurance, v. 31 (Nov. 24 1997), pp. 1 et seq.

⁸⁰ 500 U.S. 20 (1991).

⁸¹ See discussion in Equal Employment Opportunity Commission v. Kidder, Peabody & Company, Inc., 1998 U.S. App. LEXIS 21066 (2nd Cir.); 77 Fair Empl. Prac. Cas. 1212, August 28, 1998 (upholding mandatory arbitration provisions because employees may waive rights, and because arbitration supports public policy as enunciated in the Federal Arbitration Act); Mouton v. Metropolitan Life Insurance Company, 147 F.3d 453 (5th Cir. 1998) (upheld agreement to arbitrate Title VII discrimination claims); and Cole v. Burns International Security Services, 105 F.3d 1465 (D.C.Cir. 1997) (superb discussion of all issues and arguments, ultimately concluding that mandatory arbitration agreements are enforceable if standards of due process and fairness are met). See also Prudential Insurance Company of America v. Lai, 42 F.3d 1299 (9th Cir. 1994) (holding that such agreements are enforceable but that the employees in the instant case had not made a knowing waiver of their rights).

⁸² Kelly, Thomas R., and Berke, Danielle L., "What's New in ADR?", HR Focus, v. 73 (Apr. 1996), pp. 15.

⁸³ Price v. Goals Coal Company, 1998 U.S. App. LEXIS 18769 (4th Cir.), August 13, 1998. The court vacated a lower court decision and, in effect, sent the matter back to a state court for final resolution.

⁸⁴ Caudron, "Blow the Whistle on Employment Disputes", citing results of Dispute Resolution Journal survey, 1997. Of course, one must keep in mind that the survey was of employers, not workforce.

⁸⁵ Garrison, Joseph D., "The Employee's Perspective" Mandatory Binding Arbitration Constitutes Little More Than a Waiver of a Worker's Rights", Dispute Resolution Journal, V. 52 (Fall 1997), pp. 15-18.

⁸⁶ Ibid.

⁸⁷ DiCesare, "Alternative Dispute Resolution", op cit.

⁸⁸ Garrison, "The Employee's Perspective" Mandatory Binding Arbitration Constitutes Little More Than a Waiver of a Worker's Rights", op cit.

⁸⁹ "EEOC Rejects Mandatory Binding Employment Arbitration", Dispute Resolution Journal, V. 52 (Fall 1997), pp. 8-23; see also Vargyas, Ellen J., "EEOC Explains Its Decision: Verdict on Mandatory Binding Arbitration in Employment", Dispute Resolution Journal, V. 52 (Fall 1997), pp. 10; Volin, Andrew W., "What's New in Employment Arbitration?", Dispute Resolution Journal, V. 52 (Fall 1997), pp. 7.

⁹⁰ Hunter, Jerry M., "ADR, the NLRB and Non-Union Workers", Dispute Resolution Journal, V. 50 (Oct. / Dec. 1995), pp. 18-22.

⁹¹ Bencivenga, "Fair Play in the ADR Arena", op cit.

⁹² Kuenzel, "Alternative Dispute Resolution: Why All the Fuss?", op cit.

⁹³ Miklave, Matthew T., "Why "Jury" Is a Four Letter Word", Workforce, v. 77 (Mar. 1998), pp. 56-58.

⁹⁴ Cliff Whitehill, Senior Vice President and General Counsel of Darden Restaurants, quoted in "ADR In the New Century," op cit.

⁹⁵ Oppenheimer, Martin J., and Johnstone, Cameron, "A Management Perspective: Mandatory Arbitration Agreements Are an Effective Alternative to Employment Litigation", op cit.

⁹⁶ Bencivenga, "Fair Play in the ADR Arena", op cit. However, an employment attorney quoted in Ganzel, "Second – Class Justice?", op cit., points out that this choice may appear illusory to the employee faced with house payment and loss of health care benefits.

⁹⁷ "ADR In the New Century," op cit.

⁹⁸ Kuenzel, "Alternative Dispute Resolution: Why All the Fuss?", op cit. For a different approach, see Marshall, Joseph C., and Theros, Louis, "The Arbitration Alternative", Risk Management, v. 45 (1998), which gives advice on the best way to write enforceable mandatory arbitration agreements.

⁹⁹ Oppenheimer and Johnstone, "A Management Perspective: Mandatory Arbitration Agreements Are an Effective Alternative to Employment Litigation", op cit.

¹⁰⁰ See discussion in Estreicher, Samuel, "Predispute Agreements to Arbitrate Statutory Employment Claims", New York University Law Review, V. 71 (Dec. 1997) pp. 1344+

¹⁰¹ Ibid.

¹⁰² Marc Kartman, quoted in Nye, "When the Fired Fight Back," op cit.

¹⁰³ "American Arbitration Association Encourages Use of Voluntary Arbitration to Resolve Employment Disputes", Press Release, 9 July 1997, www.adr.org/press/empstatement.html; "Conclave Held on Employment ADR", op cit. See also True, John, "New Rules for New Challenges: The AAA's California Employment Dispute Resolution Rules", Dispute Resolution Journal, V. 50 (Oct. Dec. 1995), pp. 30-35.

¹⁰⁴ "ADR In the New Century," op cit.

¹⁰⁵ Arnold, "Vocabulary of ADR Procedures, (part 3)", op cit.

¹⁰⁶ Bryan, Kenneth C., "California Lawmakers Turn Focus Toward ADR", Dispute Resolution Journal, V. 52 (Spring 1997), pp. 55-59.

¹⁰⁷ DiCesare, "Alternative Dispute Resolution", op cit. See also Zack, "Can Alternative Dispute Resolution Help Resolve Employment Disputes, op cit.

¹⁰⁸ Ibid.

¹⁰⁹ Birch, Steven K. "The Arbitrator's Dilemma: External vs. Internal Law? Narrowing the Debate", Dispute Resolution Journal, V. 53, 1998; see also Buckstein,, "An Introductory Primer on Pre-Litigation: ADR Counseling for the Outside Lawyer", op cit.

¹¹⁰ Bencivenga, "Fair Play in the ADR Arena", op cit.

¹¹¹ Wittenberg, Mackenzie, and Shaw, "And Justice For All", op cit.

¹¹² Bencivenga, "Fair Play in the ADR Arena", op cit.; Verespej, Michael A., "Sidestepping Court Costs: More Companies Are Mandating That Employment Disputes Be Resolved Outside the Courtroom", Industry Week, v. 247 (Feb. 2, 1998), pp. 68.

¹¹³ Wittenberg, Mackenzie, and Shaw, "And Justice For All", op cit.

¹¹⁴ Nye, "When the Fired Fight Back," op cit.

¹¹⁵ Verespej, "Sidestepping Court Costs: More Companies Are Mandating That Employment Disputes Be Resolved Outside the Courtroom", op cit.

¹¹⁶ "ADR In the New Century," op cit.

¹¹⁷ Ibid.

¹¹⁸ Caudron, "Blow the Whistle on Employment Disputes", op cit.

¹¹⁹ Bencivenga, "Fair Play in the ADR Arena", op cit.

¹²⁰ "ADR In the New Century," op cit.; Zimmerman, "In -House Dispute Resolution Programs", op cit.