



# Alternative Dispute Resolution

## INTRODUCTION

- **Alternative dispute resolution (ADR)** refers to alternatives to court adjudication of disputes
- Examples include negotiation, mediation, arbitration, mini-trial, and summary jury trial
- Law students must study ADR to be aware of all the options available as a lawyer when working with clients

## HYBRID PROCEDURES

### THE MINI-TRIAL

- The **mini-trial** is a structured settlement process
- It combines negotiation, mediation, and adversarial case presentation
- It is presided over by a mutually selected neutral advisor
- Each counsel makes short, adversarial presentations of their cases to senior management executives with settlement authority, who then discuss settlement
- Procedure is flexible; it is usually initiated by the parties entering into an agreement that describes the process

### REFERENCE PROCEDURES

- Cases may be referred to private judges with the same authority as public judiciary
- Parties select and pay for the judge
- Advantages include quicker processing, privacy, freedom of choice, and the right to full review of the decision
- Disadvantages include creation of a two-tiered system and the loss of qualified judges from the public system

### MEDIATION-ARBITRATION

- One person acts as the mediator and arbitrator for a dispute
- This provides the parties with the incentive to settle
- More efficient; it may be difficult for a mediator with access to confidential information to act as an impartial arbitrator

### NEGOTIATED RULEMAKING

- Involves direct participation of different groups (i.e., public agency regulators and affected groups) in rulemaking
- Try to reach consensus; it avoids the adversarial approach
- Recognized in *The Negotiated Rulemaking Act of 1990*
- It allows a federal agency to establish a negotiated rulemaking committee
- Several factors are involved (e.g., need, resources)

### OMBUDSPERSON

- Neutral person listens to complaints, performs fact finding, and promotes resolution of disputes through informal methods
- Usually employed by private organizations and act as neutral parties to in-house problems

## DISPUTE RESOLUTION & THE COURTS

### SUMMARY JURY TRIAL

- **SJT** provides lawyers and clients with advance assessment of potential jury decisions
- Non-binding process; lawyers present their case before a jury that provides an advisory decision
- Parties with settlement authority may try to reach an agreement or pursue a full trial
- SJT is useful for cases that will not be managed by traditional settlement negotiations
- It usually takes place after discovery has been completed and pending motions have been resolved
- A six member advisory jury is selected, lawyers make opening statements, summary presentations are made (admissible evidence), rebuttals and closing arguments follow, and then the jury makes a decision

### Evaluation

- SJTs are similar to real trials
- However they provide potential outcomes without being binding
- Time and money are saved during the process
- The courts benefit by providing new case management choices in certain situations
- However, since lawyers make the main case presentations, there is no cross-examination of witnesses (lack of credibility)
- Transaction costs may increase cost of litigation if there is no settlement
- Lack of confidentiality may result in disclosure of privileged information
- Other issues of concern include the power to compel parties to participate, right of access to the media, and the court's authority to compel individuals to participate in the jury process

### EARLY NEUTRAL EVALUATION

- **ENE** involves early, systematic case assessment by a private attorney with experience in the subject matter
- Attorneys and clients must face the facts of the case before entering litigation
- It begins with a status conference, followed by a mandatory confidential evaluation with a court-appointed lawyer
- The parties must submit informative statements seven days prior to the evaluation
- After an introduction from the neutral evaluator, the parties present their cases and exchange information
- There are no rules of evidence, formal examination or cross-examination of witnesses
- The neutral evaluator provides assistance (e.g., identify areas of agreement, estimate liability and damages)

### Evaluation

- ENEs are less complicated than mini-trials
- The neutral evaluator is not bound by the same constraints as judges (e.g., ethical, time)
- Appropriate cases include commercial contract and tort cases

### OTHER METHODS

- Courts may appoint magistrates, special masters, and neutral experts to oversee settlements
- Federal magistrates are appointed under the *Federal Magistrates Act* (28 U.S.C.A. ss. 631)
- They perform specific statutory functions
- Special masters are appointed under the Federal Rules of Civil Procedure (Rule 53) when extraordinary conditions exist in a case; mostly ministerial and adjudicatory
- Neutral experts are appointed under the Federal Rules of Evidence (Rule 706) to study specific issues and report their findings