



The Use of Alternative Dispute Resolution (ADR) in Maryland Business: A Benchmarking Study

2004

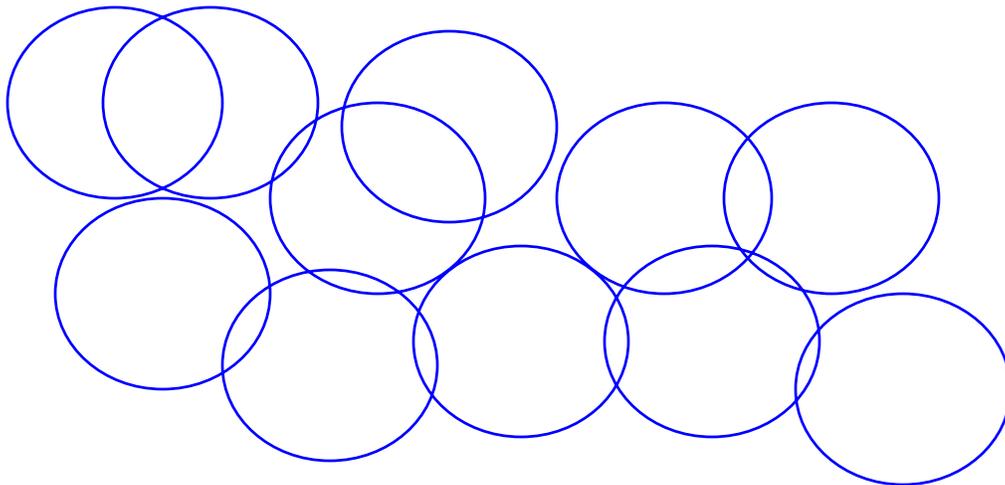


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Preface

This report presents the results of the 2003 Business ADR Benchmarking Study, a project of MACRO and the Maryland Chamber of Commerce. MACRO is Maryland's statewide dispute resolution office, created and chaired by the Honorable Robert M. Bell, Chief Judge of the Maryland Court of Appeals. MACRO works to advance the use of mediation and other appropriate dispute resolution processes in Maryland. Areas of concentration include: businesses, courts, criminal and juvenile justice programs, communities, family programs, government agencies, and schools.

The Maryland Chamber of Commerce is a non-profit coalition of more than 900 businesses who employ more than 340,000 people in the state. Its mission is to represent and promote the issues important to business, such as transportation, unemployment insurance, health care cost containment, environmental regulations and taxes. The Chamber also provides business resources to its members, such as job lists and employee training.

This study was conducted by MACRO's Business ADR Initiative (The Initiative), which is chaired by Robert Fleishman, Esq., of Covington & Burling.

ADR is an umbrella term that refers to a variety of conflict resolution processes that serve as alternatives to litigating disputes in court. ADR processes include negotiation, mediation, arbitration, settlement conferences, conciliation, facilitation, consensus building, and other conflict resolution processes. These and other ADR-related terms are defined in Appendix D of this report.

Executive Summary

Businesses are intimately familiar with the high cost of the American litigation system, and ADR processes can often provide much needed relief. Cost savings and other benefits of using ADR have been documented by several national corporations.

A 1997 Cornell University survey of more than 530 U.S. corporations in the Fortune 1000 category found 90 percent of survey respondents reporting that they viewed mediation as a cost-saving measure. In the same study, corporations with comprehensive, collaborative conflict management systems reported significant litigation cost savings:

- ▶ Brown and Root, a major engineering and construction firm, reported an 80% reduction in outside litigation costs.
- ▶ Motorola, a major electronics firm, reported a 75% reduction in litigation costs over a period of six years.
- ▶ NCR, a major information technology firm, reported a 50% reduction in litigation costs and a drop in pending lawsuits from 263 in 1984 to 28 in 1993.

More recently, the American Arbitration Association published a study titled “Dispute-Wise Management: Improving Economic and Non-Economic Outcomes in Managing Business Conflicts.” That study confirms that major corporations use ADR extensively, with the most “dispute-wise” companies taking a systemic approach to conflict management. The study documents the practices, attitudes and experiences of corporate legal departments and identifies significant operational benefits associated with “dispute-wise” practices.

Despite these documented benefits, most Maryland businesses currently are not using

ADR in a large scale or systematized manner. Experience with mediation, however, is growing, due, in part, to the increasing number of business cases Maryland courts are ordering into mediation each year.¹ As exposure to mediation grows in Maryland, more businesses may want to systematize their ADR use.

The purpose of the study is to provide a benchmark from which Maryland businesses can assess the effectiveness of their ADR efforts against the components of an Integrated Conflict Management System² – a system that: (1) provides dispute resolution options for all types of problems and all people in the workplace; (2) creates a culture that welcomes dissent and encourages resolution of conflict at the lowest level; (3) provides multiple access points to dispute resolution resources; (4) provides multiple options for addressing conflict; and (5) provides systemic support structures.³

The benefits of having an Integrated Conflict Management System include a design focus

¹ MACRO serves as a resource for courts across the state and has provided many jurisdictions with support to establish, expand and evaluate court mediation programs.

² Guidelines for designing components of an Integrated Conflict Management System were developed by the ADR in the Workplace Initiative of the Society of Professionals in Dispute Resolution (SPIDR), which merged with the Academy of Family Mediators (AFM), and the Conflict Resolution Education Network (CRENet) in 2001, to form the Association for Conflict Resolution (ACR).

³ MACRO’s study does not indicate that all Maryland businesses can or should establish Integrated Conflict Management Systems. This determination may depend on the amount of conflict, the general approach to conflict, and business leadership’s support. Even if these conditions are not met, businesses may still be well positioned to use ADR effectively by adopting components of such a system.

on conflict prevention and conflict management. Instead of using a case-by-case analysis after disputes have erupted, businesses adopt Integrated Conflict Management Systems to incorporate new ways of thinking about the reality of conflict, to take steps to prevent conflicts from escalating, and to resolve disputes quickly at the lowest possible level.

The information that is at the core of this study was obtained from three sources: (1) a review of ADR program literature and research found in trade journals, and in published program studies; (2) two surveys distributed to all Maryland private employers with more than 1000 employees, and to a random sample of Maryland businesses with fewer than 500 employees; and (3) interviews with officials from business, government, and ADR associations who commented on the role of ADR in addressing internal and external disputes in Maryland's business organizations.

The surveys were developed and distributed to 444 Maryland businesses, approximately one-third of which were subsequently determined to have had sufficient dispute resolution experience to provide meaningful responses to the surveys. One survey was designed to assess ADR use in external relations conflicts. Such conflicts include disputes with other companies, subcontractors, customers, or the general public. The other survey was designed to collect information related to ADR use in "employment and workplace" conflicts. Such conflicts include personnel disputes, discrimination claims and other day-to-day workplace grievances.

The study examined Maryland businesses' ADR-related activities to assess the extent to which such activities constituted components of an Integrated Conflict Management System.

Some of the key results from the External Relations survey are as follows:

1. The vast majority of respondents "agree" or "strongly agree" that the survey's cost-saving variables are important considerations in assessing the benefits of using conflict resolution processes to resolve external disputes:

Survey Variables	Agree or Strongly Agree
Cost of in-house person hours	65%
Transaction Costs	71%
Indirect Costs	59%
Lowering Costs	66%

2. 70 percent of respondents "agree" or "strongly agree" that the type of dispute at issue is an important consideration in assessing the benefits of using conflict resolution processes to resolve external disputes.
3. 68 percent of respondents report that legal staff is involved in the design of dispute resolution programs.
4. 59 percent "agree" or "strongly agree" that the average time involved in resolving a dispute is an important consideration in assessing the benefits of using conflict resolution processes to resolve external disputes.
5. 35 percent of respondents report that ADR training and education is provided to legal staff.
6. 30 percent of respondents report that ADR is "extensively" or "frequently" explored prior to filing suit.
7. 30 percent of respondents report that ADR is "extensively" or "frequently" explored after a suit has been filed.

8. 16 percent of respondents report that their organization has a tracking system that quantifies historical data and provides a reasonable baseline of average costs against which dispute resolution performance can be measured.
 9. 13 percent of respondents report that ADR training and education is provided to non-legal staff.
 10. 11 percent of respondents indicate that Corporate ADR Policy Statements are applied “extensively” or “frequently” to resolve external conflicts and disputes in their organizations.
 11. 5 percent of respondents report that financial and/or performance incentives are awarded for effective use of ADR.
3. 68 percent of respondents “agree” or “strongly agree” that the type of dispute at issue is an important consideration in assessing the benefits of using conflict resolution processes to resolve internal disputes.
 4. 65 percent of respondents “agree” or “strongly agree” that the culture in their organizations promotes the identification of workplace conflicts.
 5. 52 percent of respondents “extensively” or “frequently” apply formal grievance procedures to resolve conflicts.
 6. 52 percent of respondents report that there is at least one person who functions as an internal, independent and confidential neutral in their organization.
 7. 33 percent of respondents report that their organization has an evaluation and monitoring mechanism for their ADR efforts.
 8. 29 percent of respondents report that dispute resolution training and education is provided to managers.
 9. 26 percent of respondents report that dispute resolution training and education is provided to first line supervisors.
 10. 26 percent of respondents report that there is sincere and visible championship by senior management for ADR processes. 12 percent of respondents report that they have a continuous oversight body that includes representation of key stakeholder groups.
 11. 14 percent of respondents report that there is sincere and visible championship by workplace leaders for ADR processes.

Some of the key results from the Employment and Workplace survey are as follows:

1. The vast majority of respondents “agree” or “strongly agree” that the survey’s cost-saving variables are important considerations in assessing the benefits of using conflict resolution processes to resolve internal disputes:

Survey Variables	Agree or Strongly Agree
Cost of in-house person hours	79%
Transaction Costs	74%
Indirect Costs	68%
Lowering Costs	68%

2. 76 percent “agree” or “strongly agree” that the average time involved in resolving a dispute is an important consideration in assessing the benefits of using conflict resolution processes to resolve internal disputes.

12. 12 percent of respondents report that they have a continuous oversight body that includes representation of key stakeholder groups

What They Say About Managing Conflict

Responses to open-ended questions in both surveys generated various noteworthy statements about ADR and its benefits:

“ADR avoids class action lawsuits against my organization.”

“Resolve at lowest level and without external publicity.”

“Use ADR where at all possible.”

“People are our most important asset. We treat one another with respect, including open, honest feedback about performance. We seek to resolve differences in an honest, straightforward way, recognizing individual rights to hold different opinions.”

Analysis and Recommendations

The survey results were analyzed to measure the extent to which selected variables were related, as well as to determine whether, and to what degree, they were part of an Integrated Conflict Management System. If a connection was found, then certain ADR activities could be classified as potential components of an Integrated Conflict Management System and could serve as a foundation for creating such a system.

The correlation analysis produced 53 statistically significant relationships, the implications of which support the following recommendations for the Maryland business community:

- ✓ Ensure that the company’s top-level employees are supportive of ADR efforts. This includes CEOs, senior-level management, the general counsel’s office, and the human resources office.
- ✓ Examine the types of disputes that are common within your organization, and the frequency with which they occur.
- ✓ Design appropriate and productive ADR processes to apply in multiple areas (e.g., procurement, employee relations), and at various levels throughout the business (e.g., senior management, supervisors, “rank and file” employees).
- ✓ Ensure that at least one person is dedicated to monitoring the ADR program.
- ✓ Create an oversight body to support the visibility and credibility of the ADR program.
- ✓ Ensure that the pools of available and well-trained ADR neutrals are appropriate for the types of disputes at issue.
- ✓ Educate all levels of employees to recognize when ADR is appropriate and to know how to access the corresponding tools and systems appropriately.
- ✓ Include successful use of the ADR program in the performance reviews of those accountable for implementing the programs.

The benefits that businesses following these recommendations can expect include:

- Saving money
- Saving time
- Preserving good business and employee relationships
- Avoiding bad press
- Improving public image
- Increasing employee satisfaction and retention
- Generating creative solutions

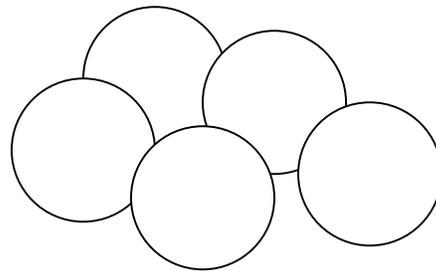
Conclusion

The survey results revealed that Maryland corporations overwhelmingly do not have Integrated Conflict Management Systems, but many of their activities could aptly be considered system components. The survey correlations suggest that dispute resolution system components – particularly (1) allocating resources for dispute resolution, (2) identifying an internal neutral, (3) collaborating with opposing parties regarding ADR use, and (4) training legal staff in ADR -- are all effective tools, which, if pursued, could serve as the foundation for systematizing future ADR efforts.

Most businesses are familiar with arbitration, and as the Maryland courts refer more business cases to mediation, familiarity with mediation is growing.⁴ Certainly businesses are all too familiar with the high costs of the American litigation system. As ADR use continues to grow in Maryland's courts, it is only a matter of time before the benefits of non-traditional dispute resolution processes are validated locally, and are examined, adopted, and systematized within Maryland's business community.

MACRO's hope is that this study will be used by businesses in Maryland, as well as by those interested in the ADR field, to examine the

nature of ADR activity within Maryland's business community, and to set a benchmark for future efforts to evaluate the extent to which the state's businesses increase their ADR use and adopt Integrated Conflict Management Systems over time.



⁴ Maryland circuit courts recently developed an expedited Business and Technology Case Management track with a strong ADR component.

I. Introduction

Alternative Dispute Resolution (ADR) refers to processes in which a third party neutral assists those in a dispute to resolve issues between them. Mediation, early neutral case evaluation, arbitration, settlement conferences, facilitation, and consensus building are examples of such processes. They are increasingly used as alternatives to litigation throughout our courts, communities, schools, government agencies, criminal and juvenile justice programs, and businesses.

While businesses may not have been the first societal institutions to embrace ADR, they are certainly among the most important and influential users. Initially, corporate America became an advocate of ADR because it was believed that ADR reduced legal-related expenses, saved time, and helped corporations retain control of the dispute resolution process. More importantly, many companies believed that ADR allowed them to preserve business relationships and avoid volatile and unpredictable jury awards. For example, Thomas J. Stipanowich, President of the CPR Institute for Dispute Resolution, believes that a primary factor in the evolution of corporate systems is often a horrible experience with the court system or the court system insisting on the use of an ADR process.⁵

The interest in corporate ADR was given a boost in the 1970's with the advent of a number of key events⁶:

⁵ This study incorporates the results from several interviews that were conducted with organizational leaders, as well as with key players within the ADR industry. Each interviewee responded to the same set of questions, and each session was approximately one hour in length. Interviews were held at the business offices of the interviewees, with the exception of those ADR industry leaders whose offices were outside of Maryland.

⁶ Harry N. Mazadoorian, At a Crossroad: Will the corporate ADR movement be a revolution, or just rhetoric?, Dispute Resolution Magazine (Summer 2000).

1. The emergence of protocols such as the CPR Institute for Dispute Resolution "Pledge," whereby 800 major U.S. companies and 3,200 of their subsidiaries agreed to consider ADR to resolve their disputes with another signatory to the Pledge;
2. The development of sophisticated ADR contract clauses and efforts to routinely insert them into many commercial documents, such as those made popular by the American Arbitration Association (AAA);
3. The growing use of ADR in business and law school curricula, although many argue that there also need to be ADR questions on the bar examination to have real impact on future attorneys; and
4. The development of industry-specific ADR procedures for recurring types of disputes, whereby members of a certain industry agree by contract or protocol to utilize ADR. The securities, insurance and construction industries were among the early leaders in this regard.

These key events notwithstanding, the question becomes: have ADR pledges, contract clauses, industry protocols, or ADR education had a meaningful impact in the development and application of corporate ADR programs?

On the surface, the answer is a clear and resounding "yes." A recent U.S. General Accounting Office report indicated a 90 percent growth in arbitration use and more than 70 percent growth in mediation use within employment disputes studied between

1995 and 1997.⁷ William Slate, President of the American Arbitration Association (AAA), noted that there has been substantial expansion of industry-specific ADR programs in the fast food, franchise, chemical, wireless and intellectual property industries. He also indicated that arbitration is the ADR process most frequently used by global corporations, since many of their affiliates have yet to fully develop their sophistication in other areas such as mediation.

State and federal lawmakers have worked on uniform legislation surrounding arbitration and mediation. This expansion may be due in part to the fact that businesses often seek constructive alternatives where the regulatory options are bad. Additionally, as government entities incorporate ADR as part of their conflict management programs, they consequently require their contractors to use ADR if a dispute arises.

On the other hand, there are concerns that there is no systemic corporate use of ADR. For example, there have been legal challenges to the use of mandatory arbitration; concerns regarding the quality of ADR neutrals; the fact that some ADR processes are so complex and time consuming that they may no longer be cost saving alternatives to litigation; and industries may feel forced into ADR, and therefore, participate reluctantly.

Additionally, the successful integration of ADR into law firm practice has not yet been fully realized. One impediment is that while attorneys may be trained in representing parties in disputes, most have not been specifically trained in ADR techniques and processes. A more basic challenge is that many attorneys believe that litigation continues to have a more important role in resolving business disputes,

⁷ Alternative Dispute Resolution: Employers' Experiences with ADR in the Workplace, US General Accounting Office, Report to the Chairman, Subcommittee on Civil Service, Committee on Government Reform and Oversight, House of Representatives (August 1997).

and that there are situations where ADR may not be the best tactical choice.

One of the study interviewees, Jack Hanna – the Director of the Section of Dispute Resolution at the American Bar Association, believes that a systemic approach to ADR is the best way to solve problems. Noting that acceptance and support of attorneys is key to systemic use of ADR, Mr. Hanna was pleased that membership in his section has grown more than 25% in the last few years. However, he believes that true growth will occur when the next generation of attorneys enters the profession. To prepare for this, Mr. Hanna advocates for ADR to be infused to a larger extent in the law school curriculum, and argues that bar examinations should contain ADR questions to ensure that ADR is appropriately covered in the curriculum.

1. The Maryland Business Environment⁸

Maryland's diversified economy is rooted in high technology, biosciences and services. The state's 145,800 businesses employ 1.98 million workers with an annual payroll of \$73 billion. Of these businesses, 3,340 have 100 or more workers. Major employers include Black & Decker, Computer Sciences Corp., General Motors, Hughes Network Systems, Johns Hopkins Institutions, Lockheed Martin, Marriott, McCormick & Co., Northrop Grumman ES3, and Verizon. See Table 1.1 for more facts about Maryland's business sector.

An early factor in Maryland's technology development was its location adjacent to Washington, D.C. The presence of key federal research and regulatory agencies in the Maryland suburbs of Washington and

⁸ Maryland Department of Labor, Licensing and Regulation, Office of Labor Market Analysis and Information (www.dllr.state.md.us), and the Maryland Department of Business and Economic Development.

neighboring areas were, and continue to be, a catalyst for technology activity.

Federal agencies such as the National Institutes of Health, the Food and Drug Administration and the National Institute of Standards and Technology have spawned more than 300 bioscience firms. Whereas the information technology and telecommunications sectors benefit from proximity to key federal agencies such as the Federal Communications Commission, National Security Agency and NASA-Goddard Space Flight Center, academia also plays an important role in the Maryland economy, as evidenced by the University of Maryland's Engineering Research Center and the Johns Hopkins School of Engineering and Applied Physics Laboratory.

Table 1.1. Maryland at a Glance

Among the 50 states, Maryland ...

- Ranks 42nd in size
- 18th in population
- 5th in per capita income
- The Baltimore-Washington corridor is the nation's fifth largest retail market
- 31.4% of workers over the age of 25 hold a bachelor's degree or higher, which is the third highest percentage among the states
- Professional and technical workers are 23% of the workforce, which is the highest rate in the nation
- Ranks 8th in software services employment
- More than 180,000 workers are employed in Maryland's manufacturing sector

MACRO's Business ADR Initiative works to raise ADR awareness in Maryland's business community. To achieve this goal, the Initiative urges participation in a Business ADR Pledge Program conducts a speakers bureau, and sponsors and organizes conferences on ADR in business. The Initiative is also active in applied research on the corporate use of ADR. These activities are highlighted below:

1. The Business ADR Pledge and the Law Firm Pledge

The Maryland Business ADR Initiative urges Maryland businesses to adopt the Business ADR Pledge. Modeled after the CPR Institute for Dispute Resolution's Pledge Program, (a non-profit organization created by general counsels of Fortune 500 businesses), MACRO's Pledge Campaign is designed to encourage business and law firms to utilize ADR processes and recognize those businesses and law firms already employing ADR methods. This Pledge obliges subscribing companies to seriously explore negotiation, mediation, arbitration, or other ADR processes in conflicts arising with other Pledge signatories before pursuing full-scale litigation. Similarly, the Law Firm Pledge encourages subscribing firms to promote ADR to their clients. For copies, visit MACRO online at www.courts.state.md.us/macro or call 410-841-2260.

2. Speakers Bureau

Experienced members of the business and legal communities conduct customized presentations to businesses, law firms, and associations. The presentations provide information regarding different forms of ADR as well as highlight particular advantages to businesses. Speakers Bureau presentations can be requested by any organization. For

2. MACRO and the Business ADR Initiative

more information or to request a speaker, visit MACRO online at www.courts.state.md.us/macro or call 410-841-2260.

3. Conferences

MACRO offers conferences on ADR in business. Recent conferences include: ADR System Design in Business and Government Conference-Spring 2001; ADR in the Healthcare Industry Conference – Fall 2001 and Fall 2003; Resolving Employee and Workplace Disputes Conference – Spring 2002.

4. Applied Research

In 1998, the Business ADR Initiative's predecessor – the Maryland ADR Commission's Business Applications Committee – sent questionnaires to in-state business representatives to assess the extent to which they were using ADR to resolve internal and external conflicts. The results produced several highlights (See Table 1.2) that warrant revisiting. The study's framework was modeled after the work conducted by David B. Lipsky and Ronald L. Seeber at Cornell University (*The Use of ADR in US Corporations*). The Cornell Study is discussed in the next section of this study.

Table 1.2. 1998 MACRO Business ADR Applications Committee Survey Results

External Conflicts

- A higher percentage of companies used mediators who were employed external to the organization than mediators who were employed inside the organization.
- The most important benefits of ADR were: (1) it was less expensive; and (2) ADR provided a quick resolution.
- The most frequently reported obstacles were: (1) the decisions were not binding*; and (2) the organization could still be sued.

Internal Conflicts

- A higher percentage of companies used mediators who were employed inside the organization, than mediators who worked external to the organization.
- The respondents identified the most important benefits of ADR were: (1) it was less expensive; and (2) ADR provided a quick resolution.
- The most frequently reported obstacles were: (1) the organization could still be sued; (2) the decisions were not binding; and (3) there were not enough qualified arbitrators.

*While businesses reported their belief that ADR decisions were not binding, it is important to note that, once signed, mediation agreements are binding contracts, and the vast majority of arbitration awards are binding.

Another example of applied research in a business ADR-related context is found in a 2002 study of workers' compensation cases in the Circuit Court for Baltimore City. The study was conducted by MACRO and the Maryland Institute for Policy Analysis and Research at the University of Maryland, Baltimore County.

Over a 14-month period, 400 workers compensation cases filed in the Baltimore City Circuit Court were randomly assigned: 50 percent were assigned to a control group, and 50 percent were referred to mediation. The most significant findings were as follows:

- Approximately 25 percent of the cases in the mediation group were disposed of within four months, while only 12 percent in the control group were concluded during the same time frame.
- About 43 percent of cases in the mediation group were disposed of prior to their scheduled settlement conference, compared to only 29 percent in the control group.
- About 83 percent of cases in the mediation group were disposed of prior to their scheduled trial date, compared to only 70 percent in the control group.
- Only 37 percent of cases in the mediation group had two or more notices of discovery, compared with 56 percent in the control group.
- The cases referred to mediation had a 46 percent agreement rate by the completion of the mediation, compared to only a 36 percent settlement rate in the control group.

- A total of 202 cases were referred to mediation. Of these only 17 "opted out" of the process.

The length of time per case and the number of discovery motions filed are both indicators of money spent by litigants and court resources used. As such, the findings of the Workers' Compensation study suggest that mediation referrals offer cost saving opportunities for litigants and help conserve court resources.

3. The Use of ADR in US Corporations (The Cornell Study)⁹

In 1997, the Cornell Institute on Conflict Resolution and the Foundation for the Prevention and Early Resolution of Conflict (PERC), with the support of PricewaterhouseCoopers LLP, developed and executed a survey that was designed to find out how many of the 1,000 largest U.S. corporations used ADR, what forms of ADR they used, what kinds of disputes were resolved with ADR, and the prospects for ADR in American business.¹⁰ The nationally distributed survey was the cornerstone of the study (the Cornell Study) that remains one of the most important examinations of corporate use of ADR to date.

Responses from more than 60 percent of the sample population were tabulated. General counsel, deputy counsel, or the chief litigator of the corporations provided the responses.

⁹ David B. Lipsky and Ronald L. Seeber, *The Appropriate Resolution of Corporate Disputes: A Report on the Growing Use of ADR by U.S. Corporations*, Cornell/PERC Institute on Conflict Resolution (Cornell University 1998).

¹⁰ Comprehensive data were unavailable on the extent to which ADR has saved organizations time and money, largely because most ADR programs are relatively new, and because time and cost savings have not been widely tracked or evaluated.

Due to the growing importance of ADR in the workplace, the authors noted the value that exploration of the views of human resource managers would provide. They also noted that additional research was necessary to find out how the use of ADR affected corporate culture and business practices.

The study produced ten frequently cited results and lessons learned:

1. The importance of top management commitment in establishing and maintaining an ADR program
2. The importance of involving employees in the development of the ADR programs
3. The advantage of intervening in the early stages of disputes so as to focus more on underlying interests than on hardened positions
4. The need to balance the desire to settle and close cases against the need for fairness to all concerned
5. Nearly all respondents reported having used some form of ADR
6. ADR was viewed as cost effective
 - 90 percent viewed ADR as a critical cost-control technique
 - 54 percent said cost pressures directly affected their decision to use ADR
7. Growth in corporate ADR is influenced by legal mandates, such as the Civil Rights Act of 1991 (Pub. L. 102-166), and the Americans with Disabilities Act of 1990 (42 U.S.C. 12102 et seq.).
 - 64 percent said they have used mediation because of court mandates
8. Mediation was the most popular form of ADR that was used in the last three years

<u>ADR Process</u>	<u>Percentage of survey respondents</u>
Mediation	88 %
Arbitration	79 %
Mediation-Arbitration	41 %
In-house grievance	23 %
Fact-finding	21 %
Peer review	21%)
Ombudsperson	< 10 %

9. 97 percent reported that mediation saved time and money
10. Mediation provided a more satisfactory process than litigation.

Follow-up site visits and interviews began in 1998, with the express purpose of examining the strategic dimensions of conflict management by corporations. The authors indicated that a draft book of this research is currently underway.

The Cornell study influenced MACRO's 1998 survey on Business ADR in Maryland. In addition, the suggestion in the Cornell Study that human resource managers could have important (and different) input, and the idea that ADR likely had an impact on corporate culture and business practices, were two concepts that the MACRO Business ADR Initiative included in this study.

D. The American Arbitration Association Study of Dispute-WiseSM Corporations

In February 2003, the American Arbitration Association (AAA) conducted a study that examined the attitudes and experiences associated with the use of non-judicial dispute resolution. AAA researchers conducted a 41-question telephone survey with legal

department representatives in 254 companies. The survey respondents included legal representatives of 101 Fortune 1000 companies with average revenues of over \$9 billion each, 103 mid-size companies with average revenues of over \$380 million each, and 50 privately held companies with average revenues of about \$690 million each. The study posed two key questions: (1) can “dispute-wise” companies and their characteristics be identified?; and (2) is there a relationship between “dispute-wise management practices” and favorable business-related outcomes?

The responses to the survey led to the creation of a Dispute-Wise Management Index. This index contains eight characteristics that when examined, indicate the degree to which corporate legal departments have adopted alternative dispute resolution practices. Several of the characteristics are similar to those described in an Integrated Conflict Management System.

In this case, the key findings of the study are that the legal staff in a Dispute-Wise company is more likely to be: (1) highly integrated into the corporate planning process; (2) understanding the broader business issues facing its company and industry; (3) spending a lot of time on highly complex and technical issues; (4) involved in cross-border, international disputes; and (5) working in an environment where senior management is focused on preserving relationships and settling disputes. The study also found that such companies would be (6) less likely to be focused on primarily reviewing legal documents; (7) less likely to favor litigation as a means of resolving disputes; and (8) they would be less likely to pursue litigation.

The second key question posed by the survey produced responses that associated dispute-wise management practices with positive business outcomes. Specifically, the study found that companies adopting dispute-wise management practices: (1) had stronger relationships with customers, suppliers, and stakeholders; (2) valued the speed and fairness of ADR processes; (3) experienced lower legal

department budgets; and (4) utilized legal resources well. The study also noted that the price/earnings ratio (P/E Ratio) for the most dispute-wise companies was approximately 1/3 higher than the mean P/E Ratio of companies that were in the least dispute-wise category.

The study was also designed to compare several results to the Cornell study. Using data contributed by the same 101 *Fortune 1000* companies that participated in the Cornell study, the AAA researchers confirmed a consistency in several key areas:

1. 91 percent of AAA respondents reported that arbitration and/or mediation is required by contract (compared to 92 percent in the 1998 Cornell study);
2. 68 percent of AAA respondents reported that arbitration and/or mediation saves time (compared to 69 percent in the 1998 Cornell study);
3. 65 percent of AAA respondents reported that arbitration and/or mediation saves money (compared to 69 percent in the 1998 Cornell study).

It is not yet clear whether this consistency is indicative of progress, or an indicator that corporations still have much work to do before ADR practices are fully integrated into their culture. The full report of the study is available by contacting the AAA customer service department at 1-800-778-7879, or through its web site at www.adr.org.

VII. The Results of the 2003 Business ADR Study

The benchmarks developed in this study will focus on program infrastructure, performance, cost measures, and changes in employee behavior, while also enabling the measurement of ADR progress over time. It was understood that every Maryland business might not have a formal ADR program. However, most businesses do have processes that are designed to address employee, vendor, and customer disputes without resorting to litigation. In other words, many Maryland business organizations have both formal and informal procedures that, if examined, would indicate components of systemic ADR program design.

1. The Integrated Conflict Management System

This study was developed around the framework of the Integrated Conflict Management System. Such a system enables organizations to align their internal processes for managing conflict with organizational culture, mission and core values. While integrated conflict management systems are being increasingly introduced in businesses, there remains much work to be done truly to systematize these processes. The components of the system are presented in Table 2.1 below.

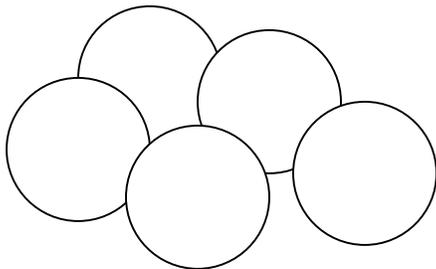


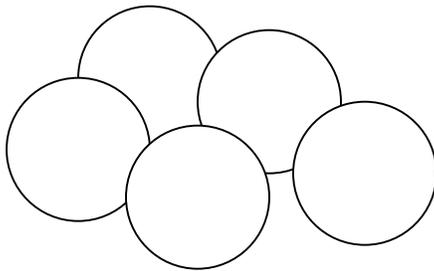
Table 2.1. Components of an Integrated Conflict Management System

An Integrated Conflict Management System...

- Provides options for preventing, identifying, and resolving workplace disputes;
- Fosters a culture that welcomes good faith dissent and encourages resolution of conflict at the lowest level through direct negotiation;
- Provides multiple access points so that employees can readily identify and access knowledge about the conflict management system;
- Provides multiple options for addressing conflict, giving employees the opportunity to choose a problem-solving approach to conflict resolution;
- Provides systemic support and structures that coordinate access to multiple options and promote competence in dealing with conflict throughout the organization. These structures include...
 - (1) sincere and visible championship by senior management and workplace leaders
 - (2) a continuous oversight body composed of representatives from all key stakeholder groups
 - (3) person(s) who function as an internal independent confidential neutral
 - (4) a central coordinating point that spurs development, implementation, and administration
 - (5) a system evaluation and monitoring mechanism
 - (6) training and education for managers, supervisors, and the workforce
 - (7) an alignment of the organization's mission, vision, values and policies with the philosophy of conflict resolution
 - (8) a performance management and evaluation system that rewards continual and exceptional conflict management
 - (9) an interest-based communication strategy
 - (10) an allocation of costs that gives managers and employees incentives to deal with conflict early and effectively
 - (11) the allocation of sufficient financial and human resources.

2. The Use of ADR in External Relations and in the Workplace

For this research we examined the use of ADR by Maryland business organizations to resolve internal and external conflicts. Internal conflicts occur within an organization, either among co-workers or between employers and employees. They typically involve issues such as: personality clashes, discrimination allegations, dissatisfaction with company policies and procedures. External conflicts involve disputes among businesses or between business and consumers. They typically involve issues such as: payment and contractual disputes, and events resulting in physical or property damage. Examples of ADR activity in these areas are presented in Table 2.2.¹¹



¹¹ Sources for Table 2.2: R. Busch, "The Conundrum: Conflict – The solution: Designing Effective Conflict Management Systems," 16 Preventative L. Rep. (1977); E. McDermott and A. Berkeley: *Alternative Dispute Resolution in the workplace: Concepts and Techniques for Human Resource Executives and their Counsel*. Quorum Books (1996); C. Watson and R. Hoffman, "Managers as Negotiators," *Leadership Quarterly* 7 (1) 1996; David B. Lipsky and Ronald L. Seeber, "The Use of ADR in US Corporations: Executive Summary," Cornell University (1998); Richard R. Ross, *The Pros and Cons of Mandatory Company Employment Programs*, CPR Institute for Dispute Resolution (Nov/Dec 2002).

Table 2.2 ADR Facts and Figures

- Fortune 500 senior executives spend 20% of their time in litigation activities.
- Corporations that have developed collaborative conflict management systems report significant litigation cost savings:
 - Kellogg Brown and Root reported an 80% reduction in outside litigation costs;
 - Motorola reported a 75% reduction over a period of six years;
 - National Cash Register Corporation (NCR) reported a 50% reduction and a drop of pending lawsuits from 263 in 1984 to 28 in 1993.
- The average cost of defending a litigated employment claim is \$130,000.
- Arbitrator fees generally run \$800 to \$1,000 per day, and the average cost of employment arbitration is \$20,000.
- 42% of a manager's time is spent on reaching agreement with others when conflicts occur.
- Even when the employer prevails on summary judgment, he has usually spent \$50,000 or more in attorney's fees, in addition to the organization's time and resources.
- The median time between the date a lawsuit is filed and the commencement of a civil trial is about 2.5 years.

A few examples of company activities demonstrate the potential of ADR. The Toro Co., the Minnesota mower and small engine manufacturer with \$1.3 billion in annual sales, established a two-step national mediation program in 1991. According to company-generated statistics for 1992 to 2000, of the 900 products liability claims that were referred to the program, Toro cut its legal costs per claim from an average of \$47,252 to \$10,420. The average resolution amount was reduced from \$68,368 for settlements and verdicts to \$20,248. Toro employs two corporate integrity specialists, both of whom have the authority to settle cases. If they are unable to resolve a matter, Toro's corporate product integrity manager offers mediation to the complaining party.

In 1993, Kellogg Brown and Root, a subsidiary of Texas-based Halliburton Company, implemented a comprehensive employment dispute resolution program for its United States employees. The program offers four options that provide multiple processes, all of which encourage employees to engage in collaborative approaches to resolving disputes at the lowest possible levels. These options are:

- (1) Open Door Policy in which an employee may speak to his or her immediate supervisor or to a higher level manager in the chain of command;
- (2) Conference in which an employee meets with a company representative from the dispute resolution program office to talk about their dispute and to choose a method for resolving it;
- (3) Formal Mediation using a mediator from the American Arbitration Association (AAA); and
- (4) Formal Arbitration that involves the use of the AAA's arbitration program.

One of the most utilized and cost-effective parts of the program is the Ombuds Program, which provides a confidential outlet for current and former employees who have

employment-related problems, primarily through informal mediation.

A high-level committee monitors the program, and data is routinely collected and analyzed in order to evaluate utilization, cost benefit and employee satisfaction. From 1993 to 2000, more than 4,000 employees used some aspect of Kellogg Brown and Root's dispute resolution program. More than 75% were resolved within eight weeks of the employee's initial contact, the majority of which were resolved through collaborative, in-house processes such as informal or formal mediation.

While Maryland businesses may not have ADR programs as storied as Toro and Kellogg Brown & Root, many organizations do recognize the need to address conflict in a productive manner. At Baltimore-based Mercantile Bankshares, Inc., John L. Unger, Esq., Senior Vice President, General Counsel & Secretary indicated that his company is litigation averse. He recognized that litigation not only wastes time and energy, but since the essence of a financial institution is one of trust, "constant involvement in litigation does not engender trust." If after investigation the facts of a dispute favor a complainant, Mercantile will attempt to settle the dispute in a manner suitable to both parties.

However, Mr. Unger noted that many consumer products/service firms often have to stand their ground for the sake of consistency. So where litigation may not be desired, but the organization's reputation is at stake, management must decide which method of resolving the dispute is in the best interest of the company. In the end, financial service entities like Mercantile Bankshares deal with clients who recognize that they have choices. And if the bank of their choice is frequently embroiled in litigation, they may opt for a bank with a less litigious reputation.

At the Landover, Maryland-based Giant Food Inc., senior management has made a strong commitment to resolving disputes at

an early stage. While Giant does not have a formal ADR program, it employs several components of an integrated conflict management system. According to Cindy Hallberlin, Esq. Giant's Senior Director of Fair Employment Practices, Giant mediates most Equal Employment Opportunity claims and cases filed in Maryland's District Courts. Giant has more than 10,000 employees throughout Maryland. Hallberlin reported that of the 800 internal complaints filed in 2002, only 20 became formal complaints, and of those 20 formal complaints, 90% were resolved. She owes it all to the support of senior management, and to her two Fair Employment Practice investigators whose sole mission is to personally respond to, and resolve, workplace complaints.

In 1994, the Dunlop Commission on the Future of Worker Management Relations issued its final report, in which it investigated the usefulness of ADR methods in resolving workplace disputes. The report pointed out two factors that raised the need for alternatives to the traditional system of employment litigation:

- (1) Low-wage workers don't have equal access to the litigation system, since they might not have the time or money to pursue a court case; and
- (2) The traditional litigation system is dominated by ex-employees, rather than by employees who want to continue to work with their current employer.

Given these patterns, the Dunlop Commission recommended that ADR methods be encouraged, notwithstanding the challenges in creating and managing an ADR program. Preparing for and meeting such challenges are central to having an Integrated Conflict Management System.

3. Survey Results

The information that is at the core of this study was obtained from three sources: (1) a review of ADR program literature and research found in trade journals and published program studies; (2) two surveys distributed to all Maryland private employers with more than 1,000 employees, and to a random sample of Maryland businesses with fewer than 500 employees; and (3) interviews with officials from business, government, and ADR associations who commented on the role of ADR in addressing internal and external disputes in Maryland's business organizations.

a. Sample Size

The survey is the focal point of the study. Its objective is to establish benchmarks that will enable companies to assess their use of the systemic components of their ADR efforts against those components found in Integrated Conflict Management Systems. Two separate instruments were developed – an External Relations Survey, and an Employment and Workplace Survey (see Appendix B and C). In most cases, the External Relations Surveys were sent to offices of General Counsel, while the Employment and Workplace Surveys were sent to Human Resources officials. However, there were many instances where one point of contact was identified as the appropriate person to receive and complete both surveys. In all, the surveys were mailed to 444 Maryland business entities.

In order for the desired benchmarks to be developed, there must be confidence that the survey responses from the sample population are representative of Maryland's business community. We begin with the premise that the survey instruments were not designed to gather general opinions. Instead, the survey recipient had to be knowledgeable about the details of their company's ADR efforts. Therefore, if a business did not use or even consider ADR as a means of managing disputes, it was unlikely that they would have

any basis upon which to ground their responses.

Therefore, although 444 companies were each mailed two surveys, the actual size of our survey population with the level of requisite knowledge was likely going to be significantly smaller. An examination of the response rate indicates that of the 888 surveys mailed, 79 were returned, leading to an overall response rate of about nine percent. However, since we did not have prior knowledge regarding the scope of ADR practices in Maryland's business organizations, a third party research firm contacted the 444 companies via a telephone survey to determine how many had programs that they considered to be ADR. The results of that telephone survey are as follows:

- There were 315 valid contacts made. Of these, 105, or 33 percent, were willing to participate in a telephone survey.
- Of these 105 telephone survey participants, 36 percent reported having responded to the mailed survey, 58 percent indicated having not returned the mailed survey, and 6 percent did not answer the question.
- A total of 33 percent reported having an ADR program that is used in resolving employment and workplace disputes.
- A total of 32 percent reported having an ADR program that is used in resolving external disputes.
- A total of 38 percent reported having formally adopted ADR as a way of doing business.
- Of the 40 respondents reporting formal adoption of ADR, 50 percent indicated that they had returned the survey.

Based on the telephone survey, we can postulate that at least 105 companies receiving

the mailed questionnaire had enough ADR information to complete it. Since each company received two surveys, our target population received 210 surveys. Seventy-nine surveys were returned. As such, the survey response rate more closely approximates 38 percent of the companies of interest for purposes of this research.

Notwithstanding the challenges in calculating a meaningful response rate, the demographic information provided by the survey respondents indicated a distribution that was representative of the total population of Maryland businesses. In fact, the sample appears to draw proportionally from each demographic stratum, as indicated in Table 2.3. In essence, the respondent population strongly resembled a stratified random sample.

Table 2.3. Distribution of Responses to the 2003 Maryland ADR Business Survey

<u>Number of Employees</u>	External Relations Survey	Employment & Workplace Survey
Fewer than 250	36%	34%
250 to 999	29%	32%
1,000 to 4,999	29%	29%
More than 5,000	6%	5%

b. Significance

A common method of reporting survey results is to provide a distribution indicating the frequency with which the survey participants marked their choices. This type of analysis provides an important glimpse into the range of responses. But how important are those responses? What does it mean that 35 percent of the respondents indicated that their business organization provides ADR training for members of the legal staff?

A frequency distribution alone will not provide the answer. What statisticians often need to do is to determine whether the results are significant. One way to achieve this is to test for relationships among the responses. In our case, the relationship that is examined is the relationship among variables indicating that a business has components of an Integrated Conflict Management System components and indicators of businesses using ADR-related activities/concepts, descriptions of which are provided in Tables 2.4 and 2.5.

Recall that the study's purpose is to examine businesses that have ADR activities and concepts to assess the extent to which they have an Integrated Conflict Management System.

Table 2.4. Variables Indicating That a Business Has Components of an Integrated Conflict Management System

1. The allocation of sufficient financial and human resources to support the organization's dispute resolution efforts
2. Legal staff are involved in dispute resolution design
3. External conflict resolution practitioners are used in dispute resolution design and/or execution
4. Financial and/or performance incentives are awarded for effective use of ADR
5. Clear guidelines exist regarding the selection of external neutrals
6. ADR training/education is provided for legal staff
7. ADR training/education is provided for non-legal staff
8. Dispute resolution training and education is provided for first-line supervisors
9. Dispute resolution training/education is provided for managers
10. Dispute resolution training is provided within the context of diversity programs
11. The organization collaborates with the opposing party to determine dispute resolution procedures and/or neutrals
12. The organization has a strategy for overcoming barriers raised by opposing counsel regarding the use of alternative dispute resolution processes
13. The organization is frequently involved in disputes, and has agreed to use alternative processes to resolve them
14. A tracking system is used to quantify historical data and provides a reasonable baseline of average costs against which performance can be measured
15. An evaluation and monitoring mechanism exists
16. A continuous oversight body exists that includes representatives of key stakeholder groups
17. At least one person(s) functions as an internal, independent, and confidential neutral
18. A central coordinator or coordinating office spurs the development, implementation, and administration of dispute resolution efforts

Table 2.5. ADR Related Activities/ Concepts

2. In deciding whether to use ADR, the organization determines whether the dispute is one of a recurring type
3. In deciding whether to use ADR, the organization considers the type of dispute at issue
4. In deciding whether to use ADR, the organization considers the estimated transaction costs in terms of outside counsel, experts, etc.
5. In deciding whether to use ADR, the organization considers the indirect costs of the dispute
6. There is a Corporate ADR Policy Statements on ADR use (endorsement announcing ADR interest to opponents and supplying employees with institutional support)
7. Participation in Industry ADR Commitments
7. The use of ADR Suitability Screens (questions that examine whether the parties to the dispute would favor consensual ADR, adjudicative ADR, or litigation)
8. The use of Early Case Analysis (a process administered within the first two months of a case that helps to develop strategy, limit discovery, and chart ADR use)
9. The use of Decision Analysis Aids (a process that helps make an informed judgment about liability and damages)
10. ADR is explored prior to filling suit
11. ADR is explored after suit has been filed
12. Outside counsel is provided incentives to encourage use of ADR approaches
13. ADR is viewed as a cost-saving approach to resolve conflicts
14. In deciding whether to use ADR, the volume of cases currently managed is considered
15. The culture in the business organization promotes the identification of workplace conflicts
16. The parties involved in conflict may take their issues to an organizational ombuds office
17. The parties involved in conflict may schedule a meeting with an external conflict resolution practitioner/provider
18. The use of Internal Mediators (employed in either a full or part-time capacity)
19. The use of External Mediators (hired on a contractual basis)
20. The existence of Formal Grievance Procedures (as identified in policy manuals, and collective bargaining agreements)
21. The presence of sincere and visible championship by senior management for ADR processes
22. The presence of sincere and visible championship by workplace leaders (such as union officials) for ADR processes
23. The existence of a communication strategy for the organization's dispute resolution program
24. The presence of a performance management system that rewards conflict management

The Integrated Conflict Management System Components are the independent variables, as these are the variables that are the hypothesized causes of changes in the ADR related activities/concepts – the dependent variables. The measure that was used to determine whether the variables were related is called the Pearson Chi Square test for significance.¹² Only variables with a measure of .05¹³ or below are deemed to be statistically significant.

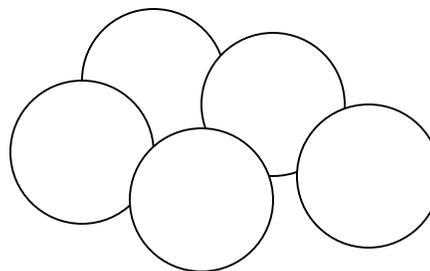
There were more than 150 possible responses to the Maryland 2003 Business ADR Surveys. However, once the significance test was completed, only 46 questions between the two surveys produced responses that were statistically significant. Therefore, roughly one-third of all questions were used to examine whether the ADR activity rose to the level of an Integrated Conflict Management System.

Interestingly, there was no statistically significant correlation between the Integrated Conflict Management System variables and demographic data. This suggests that size and location of the business organization was not a significant factor in determining whether the entity is likely to pursue formal approaches to ADR. Although respondents were asked to identify their industry, a large number of respondents did not answer, rendering the category unreliable.

c. Statistically Significant Frequency Distributions

Tables 2.6 – 2.13 provide the frequency distributions for the survey questions that were found to be statistically significant. They are presented to provide the reader a visual depiction of the range of responses to the questions that every organization with an active ADR program, or those who are considering applying ADR approaches, should ask.

As will be evident, most of the responses indicate a modest amount of acceptance and application of ADR activity and Integrated Conflict Management System components. This was to be expected, given the reported level of ADR use in the business sector; however, the responses serve as an initial reference point as ADR is discussed and advanced throughout Maryland.



¹² A test of statistical significance lets you know the degree of confidence you can have in accepting or rejecting a hypothesis. Although the chi square does not have the complexity and sophistication as do t-tests and analysis of variance, a statistically significant chi square value does denote the degree of confidence you may hold that a relationship between variables is not attributable to random error. However, it is important to note that statistical significance does not ensure that the relationship is theoretically or practically important.

¹³ The .05 level of significance indicates that there is only a 5 percent possibility that the relationship occurred by chance.

a. Results from the External Relations Survey¹⁴

1. The following considerations are important to my business organization as we assess the benefits of using mediation and other conflict resolution processes to resolve external disputes (e.g., disputes with vendors, customers, partners, and competitors):

Table 2.6

	Strongly Agree	Agree	Neither Agree nor Disagree	Disagree	Strongly Disagree
1. Whether the dispute is one of a recurring type (e.g., frivolous claims)	8.1%	43.2%	27.0%	10.8%	8.1%
2. The type of dispute at issue (e.g., contract, tort, etc.)	13.5%	56.8%	13.5%	2.7%	8.1%
3. The estimated transaction costs in terms of outside counsel, experts	40.5%	32.4%	10.8%	2.7%	5.4%
4. The indirect costs of the dispute (e.g., disrupted relationships)	21.6%	37.8%	27.0%	5.4%	5.4%

For Table 2.6, more than half of the respondents agreed/strongly agreed that the considerations were important in determining whether to use a conflict resolution process to resolve external disputes. These considerations suggest a tendency for Maryland's businesses to examine the costs of managing disputes.

2. To what extent are the following approaches/procedures/tools applied to resolve external conflicts and disputes in your organizations?

Table 2.7

	Extensively Applied	Frequently Applied	Occasionally Applied	Seldom Applied	Never Applied
1. Corporate ADR Policy Statements on ADR use (endorsement of interest and institutional support of ADR)	5.4%	5.4%	10.8%	18.9%	56.8%
2. Industry ADR Commitments (collaboratively developed negotiation/mediation/arbitration procedures)	2.7%	8.1%	8.1%	16.2%	62.2%
3. ADR Suitability Screens (examines whether disputing parties would favor ADR)	0.0%	5.4%	16.2%	24.3%	51.4%
4. Early Case Analysis (a process that develops strategy, limits discovery, and charts ADR use)	5.4%	8.1%	13.5%	21.6%	48.6%
5. Decision Analysis Aids (a process designed to help make an informed judgment about the liability and damages that could result from litigation)	8.1%	10.8%	8.1%	24.3%	45.9%

¹⁴ Cases in which respondents failed to indicate their response are categorized as "Missing System," but are not depicted in the tables. Therefore, the percentages for the tables may not total 100 percent.

For Table 2.7, fewer than 18% of the respondents frequently/extensively applied widely recognized ADR tools to resolve conflict. This suggests that Maryland's businesses have not yet systematized their ADR efforts.

3. The dispute resolution efforts in my business organization have the following characteristics:

Table 2.8

	Yes	No
1. ADR training and education for the legal staff	35.1%	56.8%
2. ADR training and education for the non-legal staff	13.5%	78.4%
3. The allocation of financial and human resources sufficient to support our efforts	54.1%	35.1%
4. Legal staff are involved in dispute resolution design	67.6%	24.3%
5. External conflict resolution practitioners are used in dispute resolution design and/or execution	37.8%	51.4%
6. Financial and/or performance incentives are awarded for effective use of ADR	5.4%	86.5%
7. Clear guidelines regarding the selection of external neutrals	10.8%	81.1%
8. The opposing party and my organization collaborate on the recommendation of dispute resolution procedures and/or neutrals	32.4%	59.5%
9. Opposing counsel provides barriers to the use of alternative dispute resolution processes in resolving disputes	24.3%	64.9%
10. My organization is frequently involved in disputes with others, and we have agreed to use alternative processes to resolve those frequent disputes	11.8%	88.2%
11. A tracking system that quantifies historical data and provides a reasonable baseline of average costs against which performance can be measured is used	16.2%	70.3%

For Table 2.8, a majority of survey respondents agreed that their organizations embraced only two of the characteristics – sufficiency of resources and the involvement of the legal staff in program design. The rest of the characteristics were largely absent, suggesting again that Maryland's businesses have not yet systematized their ADR efforts.

4. To what extent are the following practices applied in your organization?

Table 2.9

	Extensively Applied	Frequently Applied	Occasionally Applied	Seldom Applied	Never Applied
1. ADR explored prior to filing suit	10.8%	18.9%	13.5%	16.2%	37.8%
2. ADR explored after suit has been filed	10.8%	18.9%	16.2%	10.8%	40.5%
3. Outside counsel provided incentives to encourage use of ADR approaches	2.7%	2.7%	13.5%	16.2%	59.5%
4. ADR is viewed as a cost-saving approach to resolve conflicts	13.5%	21.6%	13.5%	16.2%	32.4%

Table 2.9 indicates that once legal action becomes an option, Maryland's businesses have not yet applied ADR as the common means of resolving disputes.

b. Results from the Employment and Workplace Survey

1. The following considerations are important to my business organization as we assess the benefits of using mediation and other conflict resolution processes to resolve workplace disputes:

Table 2.10

	Strongly Agree	Agree	Neither Agree nor Disagree	Disagree	Strongly Disagree
1. The volume of cases currently managed	9.5%	31.0%	23.8%	19.0%	14.3%
2. Whether the dispute is one of a recurring type	4.8%	50.0%	28.6%	9.5%	4.8%
3. The type of dispute at issue	14.3%	52.4%	14.3%	9.5%	4.8%

For Table 2.10, more than half of the respondents agreed/strongly agreed that the considerations were important in determining whether to use a conflict resolution process to resolve employment and workplace disputes. The absence of the “cost” considerations that were identified in the external survey (Table 2.5) suggests that actual “costs” were not as important as the need to address conflict in an efficient manner.

2. To what extent do you agree with the following?

Table 2.11

	Strongly Agree	Agree	Neither Agree nor Disagree	Disagree	Strongly Disagree
1. The culture in my business organization promotes the identification of workplace conflicts	9.5%	54.8%	23.8%	4.8%	7.1%
2. The parties involved in conflict may take their issues to an organizational ombuds office	9.5%	16.7%	19.0%	35.7%	16.7%
3. The parties involved in conflict may schedule a meeting with an external conflict resolution practitioner/provider	2.4%	11.9%	23.8%	33.3%	26.2%

Table 2.11 indicates that while businesses may have a culture that supports dispute resolution, very few identified official “points of contact” that are available to employees who seek to resolve their disputes at the lowest levels within the organization.

3. To what extent are the following approaches/procedures/resources applied to resolve conflicts and disputes within the workplace?

Table 2.12

	Extensively Applied	Frequently Applied	Occasionally Applied	Seldom Applied	Never Applied
1. Internal Mediation (trained mediators employed in a full or part-time capacity by company)	2.4%	0.0%	11.9%	26.2%	54.8%
2. External Mediation (trained mediators hired on a contractual basis by my company)	0.0%	0.0%	7.1%	28.6%	64.3%
3. Formal Grievance Procedures (as identified in policy manuals, employee manuals and collective bargaining agreements)	28.6%	23.8%	11.9%	11.9%	23.8%
4. Ombuds Office	7.1%	0.0%	9.5%	9.5%	73.8%

In Table 2.12, formal grievance procedures are shown to be most extensively and frequently applied. Only a small number of businesses make extensive use of mediation and ombuds processes.

4. The dispute resolution efforts in my business organization have the following characteristics:

Table 2.13

	Yes	No
1. A continuous oversight body that includes representation of key stakeholder groups	11.9%	88.1%
2. At least one person or persons who functions as an internal, independent, and confidential neutral	52.4%	45.2%
3. A central coordinator or coordinating office spurs the development, implementation, and administration of our dispute resolution efforts	35.7%	61.9%
4. An evaluation and monitoring mechanism	33.3%	64.3%
5. Dispute resolution training and education for first line supervisors	26.2%	71.4%
6. Dispute resolution training and education for managers	28.6%	69.0%
7. Dispute resolution training in the context of diversity programs	19.0%	76.2%
8. The allocation of financial and human resources is sufficient to support our dispute resolution efforts	57.1%	40.5%

In Table 2.13, a majority of survey respondents agreed that their organizations embraced only two of the characteristics – sufficiency of resources and the presence of an internal neutral. Support for the rest of the characteristics was largely absent, suggesting again that Maryland’s businesses have not yet systematized their ADR efforts. A majority of survey respondents agreed that their organizations have not yet embraced program characteristics such as training and oversight, both of which are evidence of systemic approaches to conflict management.

5. To what extent do you agree with the following?

Table 2.14

	Strongly Agree	Agree	Neither Agree nor Disagree	Disagree	Strongly Disagree
1. In my business organization, there is sincere and visible championship by senior management for ADR processes	4.8%	21.4%	38.1%	28.6%	7.1%
2. In my business organization, there is sincere and visible championship by workplace leaders (such as union officials and leaders of employee-centered organizations) for ADR processes	2.4%	11.9%	47.6%	19.0%	16.7%
3. My business organization has a communication strategy for its dispute resolution program	7.1%	38.1%	19.0%	11.9%	23.8%
4. My business organization has a performance management system that rewards [continual and exceptional] conflict management	4.8%	14.3%	28.6%	40.5%	11.9%

Finally, Table 2.14 indicates that organizational leadership has not yet taken an active role in the support and promotion of ADR within their organizations.

VIII. Benchmarks and Implications

Once the significant frequencies are established, it is useful to describe the relationship between the independent and dependent variables, that is, between the ADR-Related Activities/Concepts and Integrated Conflict Management System Components. It is from these relationships that the following benchmarks and implications are derived.

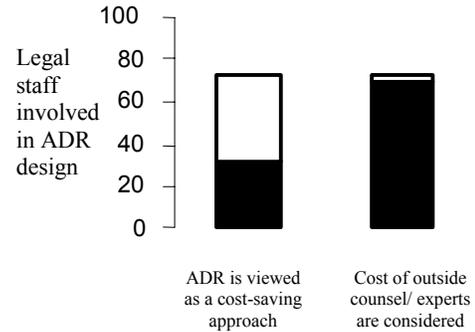
The survey responses were categorized into four areas: (1) ADR Systems Design; (2) Supervision of ADR Programs and Practices; (3) Application of ADR Practices; and (4) ADR Training. The benchmarks are displayed in text, as well as in graphical form. Where the shaded regions of the bar charts occupy a majority of the area, the respective ADR-related activities are well on the way to becoming a systematized component of an Integrated Conflict Management System.

1. ADR Design

BM 1. In approximately 73.0 percent of Maryland businesses that reported using ADR, legal staff is involved in dispute resolution design. Of that 73.0 percent:

- i. 48.0 percent “frequently” and/or “extensively” view ADR as a cost saving approach to resolve conflicts; and
- ii. 95.7 percent “agree” and/or “strongly agree” that their organization considers the estimated transaction costs in terms of outside counsel and experts when deciding whether to use an ADR process.

BM 1

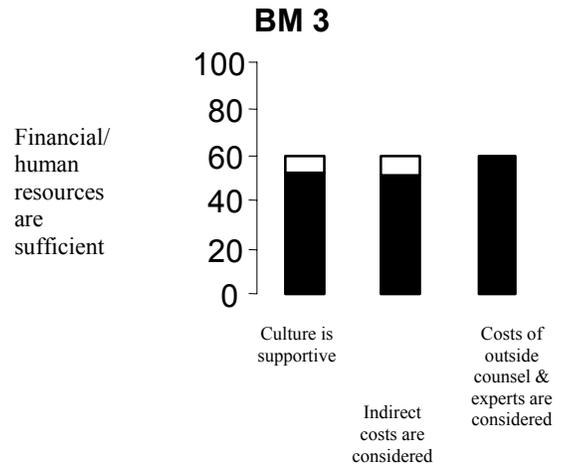
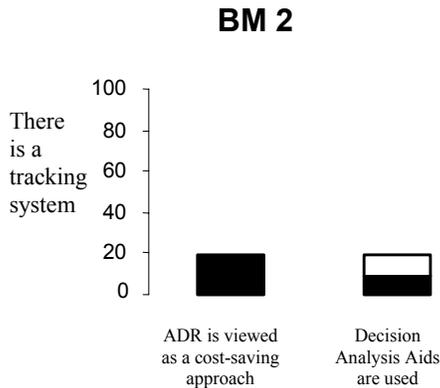


Corporate counsel is the primary figure in the decision to pursue ADR, and cost is the dominant factor in deciding whether to pursue a particular approach. Indeed, there is no substitute for the visibility of corporate counsel in ADR program design and execution. However, Thomas J. Stipanowich of CPR Institute for Dispute Resolution noted that it is important that any designer of an ADR program recognizes that there may be blind spots if the design is the result of a purely legal focus. He stressed that it is critical to involve stakeholders in developing ADR processes that are applicable in a variety of areas, and at various levels throughout the business.

BM 2. 18.8 percent of Maryland businesses that reported using ADR have a tracking system that quantifies historical data and provides a reasonable baseline of average costs against which performance can be measured. Of that 18.8 percent:

- i. 100.0 percent “frequently” and/or “extensively” viewed ADR as a cost-saving approach to resolve conflicts; and
- ii. 50.0 percent “frequently” and/or “extensively” used Decision Analysis Aids to perform a cost-benefit

analysis of the liability and damages that could result from litigation.



Systems require resources and personnel to administer them. Few businesses have allocated resources for the creation of a suitable tracking system, especially where management has determined that the level of conflict is not sufficient to justify the expense. The cost savings that result from the use of ADR may not be factored into this determination.

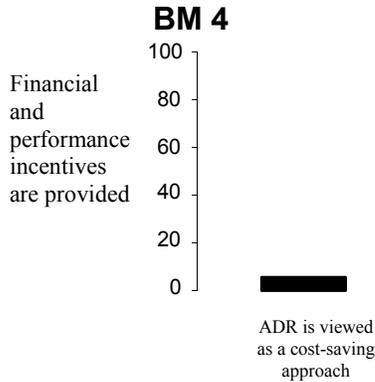
BM 3. Approximately 60.0 percent of Maryland businesses that reported using ADR allocate financial and human resources that are sufficient to support their dispute resolution efforts. Of that 60.0 percent:

- i. 87.5 percent “agree” and “strongly agree” that the culture in their business organization promotes the identification of workplace conflicts;
- ii. 85.0 percent “agree” and/or “strongly agree” that their organization considers the indirect costs of the dispute when deciding whether to use an ADR process; and
- iii. 100.0 percent “agree” and/or “strongly agree” that their organization considers the estimated transaction costs in terms of outside counsel and experts when deciding whether to use an ADR process.

Maryland businesses were fairly optimistic that they had enough resources to support their ADR efforts. However, when examining the survey responses regarding the most frequently used dispute resolution processes, atop the list were (1) negotiation, (2) settlement conferences, and (3) litigation. If this is the extent of an organization’s ADR efforts, then extensive resources are probably not required, and the majority of respondents were correct in indicating that their existing resources were sufficient.

BM 4. About 4.8 percent of Maryland businesses that reported using ADR provide financial and/or performance incentives for effective use of ADR. Of that 4.8 percent:

- i. 100.0 percent “agree” and “strongly agree” that ADR is viewed as a cost-saving approach to resolve conflicts.

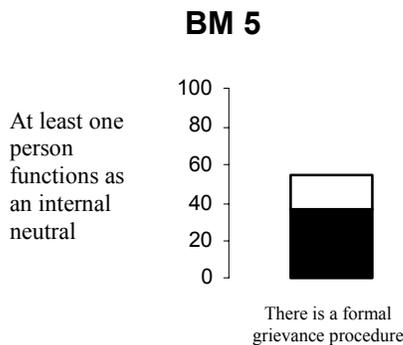


The ADR literature is scant on reports of systematized programs of incentives. Standard economic philosophy states that a business exists in order to return a profit for its owners. Generous salaries and bonuses are frequent rewards for meeting performance objectives. When ADR is truly valued as a business necessity, the number of respondents who indicate that financial incentives are provided for effective use of ADR should dramatically increase.

2. Leadership and Supervision

BM 5. 53.7 percent of Maryland businesses that reported using ADR have at least one person who functions as in internal, independent, and confidential neutral. Of that 53.7 percent:

- i. 68.2 percent “frequently” and/or “extensively” use a formal grievance procedure in their organizations.

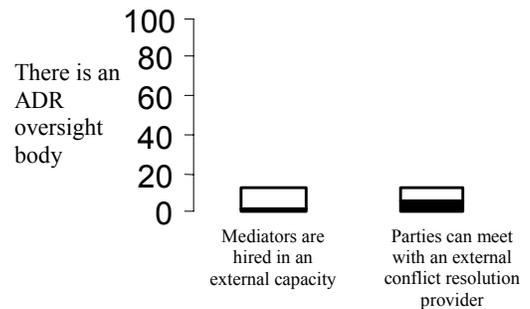


Most medium and large businesses have a formal grievance procedure that is administered out of one office, although the process may or may not include use of an internal ADR “neutral.”

BM 6. Approximately 12.0 percent of Maryland business that reported using ADR have a continuous ADR oversight body that includes representation of key stakeholder groups. Of that 12.0 percent:

- i. 11.9 percent reported that their organizations “frequently” and/or “extensively” hire mediators in an external or contractual capacity; and
- ii. 40.0 percent “agree” and “strongly agree” that the parties in dispute may schedule a meeting with an external conflict resolution practitioner/provider.

BM 6

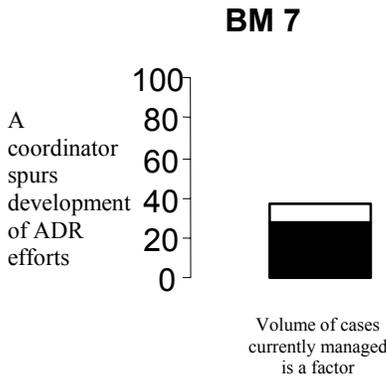


An oversight body will commonly generate perspectives and experiences beyond those found within the boundaries of an ADR program. By its very nature, an oversight body will look “outward” for solutions and resources to support the administration of an organization’s ADR efforts. Whether this “outward” focus is a positive occurrence may depend on the

business' internal culture and its operating environment.

BM 7. About 37.5 percent of Maryland businesses that reported using ADR have a central coordinator or coordinating office that spurs the development, implementation, and administration of its dispute resolution efforts. Of that 37.5 percent:

- i. 73.3 percent “agree” and “strongly agree” that the volume of cases currently managed is a factor in deciding to use an ADR process to resolve a dispute.



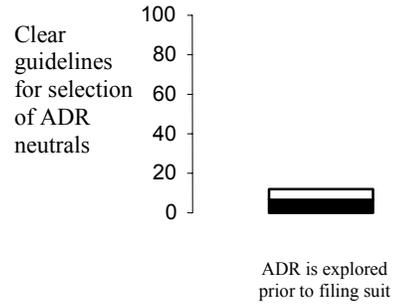
An ADR program costs money to administer. Making that level of investment in the supply-side of conflict management may correspond to the need or demand for those services. The volume of conflict an organization experiences appears to influence the extent and formality of its ADR efforts.

3. Application of ADR Tools and Processes

BM 8. About 11.8 percent of Maryland businesses that reported using ADR provide clear guidelines on the selection of external neutrals. Of that 11.8 percent:

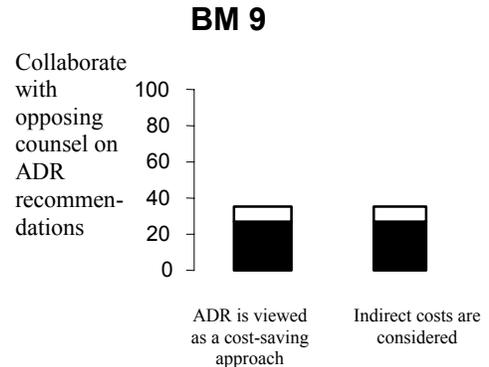
- i. 50.0 percent reported that their organizations “frequently” and/or “extensively” explore ADR prior to filing suit.

BM 8



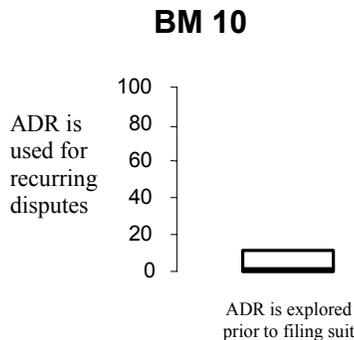
BM 9. About 35.3 percent of Maryland businesses that reported using ADR collaborate with an opposing party on the choice of dispute resolution procedures and/or neutrals. Of that 35.3 percent:

- i. 75.0 percent reported that ADR is “frequently” and/or “extensively” viewed as a cost-saving approach to resolve conflicts; and
- ii. 75.0 percent “agree” and “strongly agree” that the indirect costs of the dispute is a factor in determining whether to use ADR.



BM 10. 11.8 percent of Maryland businesses that reported using ADR have agreed to use alternative processes to resolve disputes that it frequently has with its partners, customers, etc. Of that 35.3 percent:

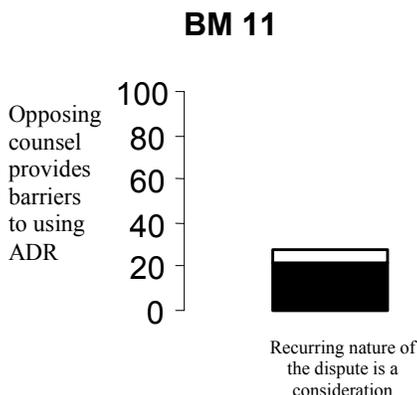
- i. 10.0 percent reported that ADR is “frequently” and/or “extensively” explored prior to filing suit.



Even the businesses that have made commitments to use ADR still appear to use it reactively rather than designing a system to prevent conflicts from escalating.

BM 11. 27.3 percent of Maryland businesses that reported using ADR indicate that opposing counsel provides barriers to the use of ADR processes in resolving disputes. Of that 27.3 percent:

- i. 77.8 percent “agree” or “strongly agree” that whether the dispute is one of a recurring type is a factor in determining whether to use ADR.



The percentages for Benchmarks 8 through 11 indicate that, overall, Maryland businesses use the litigation process to handle disputes. However, once businesses recognize that they are engaging in frequent and repetitive disputes, they become more willing to explore alternatives to litigation. The next decision is “who” will handle the dispute.

The interviewees for this study indicated that the nature of the dispute often determines which neutrals should be used. Interestingly, the discussion did not turn on whether it was more cost efficient to use “internal” or “external” neutrals. The issue was one of subject matter expertise.

For example, they noted that in industries such as construction, fashion, and finance the most important criterion is that neutrals be knowledgeable about specific products and processes. While this does not necessarily dictate that the neutral be an attorney, the interviewees did indicate that attorneys in the organization often stay apprised of the process. It is not uncommon for a business to pursue both settlement and litigation tracks in a particular dispute.

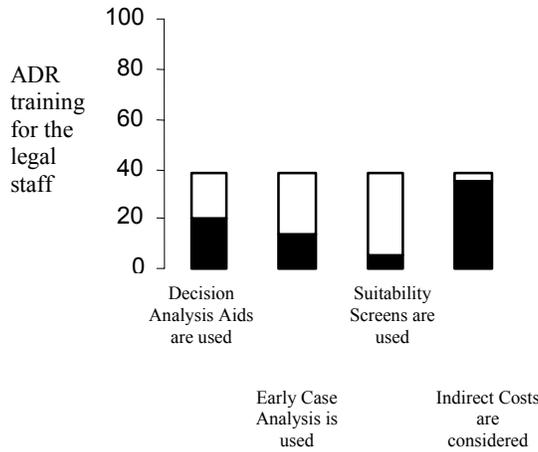
4. ADR Training

BM 12. 38.2 percent of Maryland businesses that reported using ADR provide ADR training and education for the legal staff. Of that 38.2 percent:

- i. 53.8 percent reported that Decision Analysis Aids are “frequently” and/or “extensively” used to inform judgment about the liability and damages that could result from litigation;

- ii. 38.5 percent reported that Early Case Analysis is “frequently” and/or “extensively” used within the first two months of a case to help develop a strategy, limit discovery and chart ADR use;
- iii. 15.4 percent reported that ADR Suitability Screens are “frequently” and/or “extensively” used to determine whether the parties to a dispute would favor consensual ADR, adjudicative ADR, or litigation; and
- iv. 92.3 percent “agree” and “strongly agree” that the indirect costs of the dispute is a factor in determining whether to use ADR.

BM 12



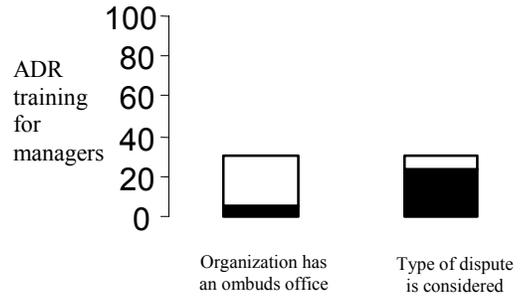
Businesses that invest in ADR training for their legal staff appear to take an analytical and systemized approach to ADR.

BM 13. 29.3 percent of Maryland businesses that reported using ADR provide ADR training and education for managers. Of that 29.3 percent:

- i. 16.7 percent reported that an ombuds office is “frequently” and/or “extensively” used in their organizations; and

- ii. 81.8 percent “agree” and “strongly agree” that the type of dispute is a factor in determining whether to use ADR.

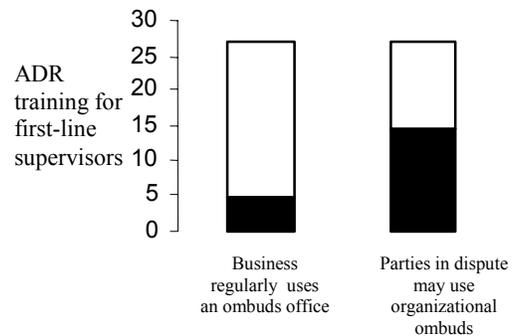
BM 13



BM 14. 26.8 percent of Maryland businesses that reported using ADR provide ADR training and education for first line supervisors. Of that 26.8 percent:

- i. 18.2 percent reported that an ombuds office is “frequently” and/or “extensively” used in their organizations; and
- ii. 54.5 percent “agree” and “strongly agree” that parties in dispute may take their issue to an organizational ombuds office.

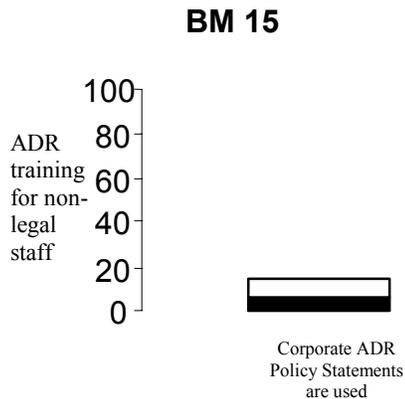
BM 14



BM 15. 14.7 percent of Maryland businesses that reported using ADR provide ADR training and education for the non-legal staff. Of that 14.7 percent:

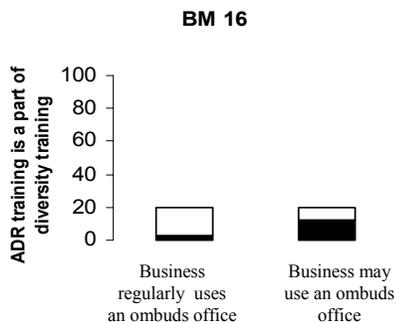
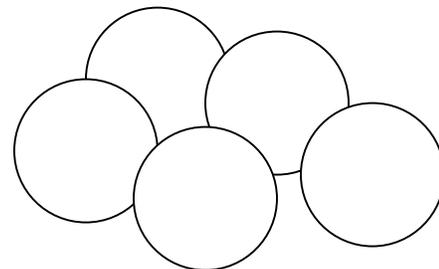
- i. 40.0 percent reported that Corporate ADR Policy Statements are used in their business organization to promote ADR among internal and external stakeholders.

The majority of an organization’s ADR training efforts are directed toward legal staff. As indicated earlier, legal staff is primarily responsible for ADR design. However, placing this responsibility principally on the shoulders of legal counsel may be viewed by some as a good start, while others may view it as a reactive approach. Proactive use of ADR and ADR training is frequently found in the ranks of managers and staff. These are the levels that have the greatest opportunity to detect and resolve disputes before they rise to the level of a formal legal complaint that mandates the active involvement of the legal department. The use of an ombuds office to assist non-legal staff with conflict resolution correlates to giving non-legal staff ADR training. Ombuds offices in corporations such as Shell Oil are greatly reducing the number of employee complaints that escalate into litigation.¹⁵



BM 16. 20.0 percent of Maryland businesses that report using ADR provide ADR training and education within the context of diversity programs. Of that 20.0 percent:

- ii. 12.5 percent reported that an ombuds office is “frequently” and/or “extensively” used in their organizations; and
- iii. 62.5 percent “agree” and “strongly agree” that parties in dispute may take their issue to an organizational ombuds office.



¹⁵Wilbur Hicks, Ombudsman, Shell Oil, presentation at 2002 MACRO Business Initiative Conference, Resolving Conflict in the Workplace.

IX. Recommendations for Maryland Businesses

- (1) There is no substitute for support from leadership in the development and implementation of an ADR program or process. This not only refers to CEOs and senior-level management, but also the general counsel's office and the human resources office. Make sure that your leaders are supportive of your efforts.
- (2) Corporate counsel is the primary figure in the decision to pursue ADR. It is critical to design your conflict management process so that it can be applicable in other areas, and at various levels throughout the business. For example, the survey respondents reported that the most frequently used dispute resolution processes were (a) negotiation, (b) settlement conference, and (c) litigation. A comprehensive ADR design is not necessary if this is the case in your organization. However, such an approach may limit the scope and effectiveness of your organization's ADR efforts by eliminating from consideration more proactive uses of a variety of ADR processes.
- (3) An oversight body lends credibility to an ADR program, as employees and other stakeholders see that the program has some degree of administrative and programmatic oversight. The experiences of oversight bodies, if used effectively, can also be used to ensure that the program is evaluated and has its appropriate place within the organizational hierarchy.
- (4) The results indicate that ADR is likely to be used once businesses recognize that they are engaging in frequent and repetitive disputes. Therefore, some level of research should be done to indicate the types and the frequency of disputes in which your organization is involved.
- (5) It is important to dedicate personnel to monitor an ADR program for effective program management. Tracking systems range from simple approaches (recording the names of parties and neutrals, nature of the disputes, and the resolution) to more complex computer-based models that also track detailed information on the neutrals, program utilization, direct and indirect costs associated with the dispute, and cost-benefit analyses of the program. The most critical point is to ensure that your ADR personnel have the time and resources to perform the level of monitoring desired.
- (6) If your organization is serious about maintaining a well-run ADR program, then those accountable for its success should have some component of their performance appraisals tied to how well they use and promote ADR when appropriate.
- (7) Subject matter expertise may be the key factor in determining "who" to use as your ADR neutral, such as whether to use attorneys, industry experts, or organizational managers. Spend time reviewing the types of disputes at issue, so that you can determine the experiences that potential neutrals should have.
- (8) It is critical that all levels of employees recognize when

ADR is appropriate, and that they have the tools and support to implement solutions. Training is important in this regard. The decision whether to use internal or external trainers depends on the culture and the types of issues faced by your organization. Actively involving more units than just the legal department may be necessary to produce an effective ADR program.

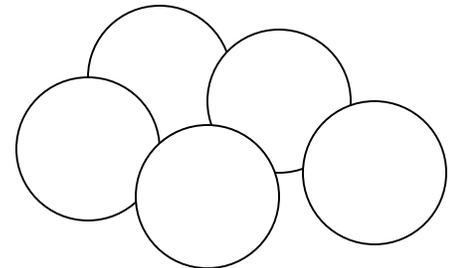
X. Conclusion

The survey results revealed that Maryland corporations overwhelmingly did not have Integrated Conflict Management Systems, but many of their activities could aptly be considered system components. The survey correlations suggest that, if pursued, these components could serve as the foundation for future ADR efforts.

Whether creating and implementing an Integrated Conflict Management System should be the goal of a business organization may depend on the amount of conflict in the organization, and on having an organizational culture that is ready to accept a proactive approach to identifying and resolving conflicts, and organizational leadership that is willing to support and sustain the effort.

Even without these conditions, organizations may be well positioned to adopt components of such a system, and adapt those components to their operating environment.

The Cornell study concluded that ADR use was clearly clustered within certain industries, and that few corporations utilize ADR extensively. Indeed, our study clearly revealed that there generally is a low level of familiarity or sophistication about dispute resolution processes in Maryland businesses.



Appendices

A. MACRO's Background

In 1998, the Honorable Robert M. Bell, Chief Judge of the Maryland Court of Appeals, created the Maryland ADR Commission to bring together a diverse high-level group of 40 people who had a stake in the future development of conflict resolution in Maryland. He chaired the ADR Commission, and appointed members including the Chief Judges from every level of the courts, the Governor's Chief of Staff, the Maryland Attorney General, the president of the Maryland State Bar Association, public officials, legislators, lawyer and non-lawyer ADR practitioners and trainers, community leaders, business leaders, academics and others.

Chief Judge Bell envisioned a role for the Judiciary in helping to prevent disputes from escalating to a point at which court intervention is necessary. Thus, he set the scope of the ADR Commission well beyond the courthouse. He charged the Commission with figuring out how to advance the appropriate use of mediation and other innovative conflict resolution processes throughout Maryland's courts, neighborhoods, businesses, schools, government agencies and criminal and juvenile justice programs.

The Commission used an innovative ADR process, statewide collaborative planning, to advance ADR in a powerful and far-reaching manner. It created a committee structure involving 135 people, and began its work with an information-gathering phase, to see what was already happening in the field of conflict resolution in Maryland and around the country.

To assist in this effort and to create a broad constituency for action, the ADR Commission also created four regional advisory boards across the state, involving almost 600 additional people in the collaborative process.

Following the information-gathering phase, the Commission conducted a gap analysis, a creative brainstorming phase and prioritizing sessions. The aim of these sessions was to develop collaboratively an action plan to advance ADR statewide in every field. As a guide, the Commission worked to create plans that were: 1) supported by a broad general consensus; 2) practical and feasible to implement in Maryland; and 3) designed to make a significant difference in advancing the field. As plans were developed, they were circulated across the state, numerous times, for feedback and refinement.

In this manner, collaborating with over 700 people around the state, the ADR Commission developed a consensus-based practical action plan, *Join the Resolution*. To implement this plan, the ADR Commission evolved into a state dispute resolution office in the Judiciary called MACRO (Mediation and Conflict Resolution Office). Since 1998, the work of the ADR Commission and its successor, MACRO, has catapulted Maryland to its place among the leading states advancing ADR across the country.

Today, MACRO works collaboratively with many others across the state to support efforts to advance effective conflict resolution practices in Maryland's courts, communities, schools, state and local government agencies, criminal and juvenile justice programs, family services programs, and businesses. MACRO provides small grants as seed money to create, strengthen or expand ADR programs. It also co-sponsors ADR conferences and events, offers technical and research assistance, and provides ADR information services to the public, private and non-profit sectors.

MACRO's Honors and Awards

The Honorable Robert M. Bell, Chief Judge of Maryland's highest appellate court, and founder and chair of MACRO, received the ABA Dispute Resolution Section's 2003 D'Alemberte/Raven Award. This prestigious ABA honor recognizes Chief Judge Bell's outstanding service in the field of conflict resolution and his visionary role in advancing ADR in Maryland, through the work of the ADR Commission and its successor, MACRO.

With the assistance of Chief Judge Robert M. Bell and a grant from the William and Flora Hewlett Foundation, MACRO is producing a "how to" manual and video about conducting statewide collaborative processes for social change. The grant also supports MACRO's work with other states and countries interested in adapting this model to advance ADR. MACRO has worked on such efforts with groups in Vermont, Wisconsin, Pennsylvania, Scotland and Mexico.

MACRO was awarded CPR's 2001 Significant Achievement Award for its action plan, *Join the Resolution*. CPR, which was created by a group of general counsels for Fortune 500 companies, is the leading national organization promoting business uses of ADR.

MACRO's Executive Director, Rachel Wohl, received the International Association for Conflict Resolution's (ACR) 2001 Mary Parker Follet Award for innovation in the field of conflict resolution, in recognition of MACRO's work.

For more information read *Join the Resolution* online and get an online status report on MACRO's progress implementing the plan by selecting MACRO at www.courts.state.md.us. To receive a bound copy of *Join the Resolution* or for other ADR related information, please call MACRO, at 410-841-2260, or email rachel.wohl@courts.state.md.us or lou.gieszl@courts.state.md.us.

B. Questions from the Employment & Workplace Disputes Survey

Question 1. The following considerations are important to my business organization as we assess the benefits of using mediation and other conflict resolution processes to resolve external disputes (e.g., disputes with vendors, customers, partners, and competitors):

5 – Strongly Agree
4 – Agree
3 – Neither Agree nor Disagree
2 – Disagree
1 – Strongly Disagree

- a. The volume of cases currently managed
- b. Whether the dispute is one of a recurring type (e.g., frivolous claims)
- c. The type of dispute at issue (e.g., contract, tort, etc.)
- d. The average time involved in resolving the dispute
- e. The estimated cost in terms of in-house hours spent on the dispute
- f. The estimated transactional costs in terms of outside counsel/experts
- g. The indirect costs of the dispute (e.g., disrupted business relationships)
- h. Reducing the risk of adverse decisions in litigation
- i. Reducing exposure to the inconsistency of court judgments
- j. Lowering costs
- k. Freeing-up personnel
- l. Assuring privacy/confidentiality in the conflict resolution process
- m. Other _____

Question 2. To what extent do you agree with the following?

5 – Strongly Agree
4 – Agree
3 – Neither Agree nor Disagree
2 – Disagree
1 – Strongly Disagree

- a. The culture in my business organization encourages the parties involved in conflict to resolve their differences through direct negotiation.
- b. My company provides employee conflict resolution training and/or interest-based negotiations training.
- c. The culture in my business organization is accepting of those who offer dissenting opinions.
- d. The culture in my organization promotes the identification of workplace conflicts.
- e. The culture in my organization promotes the prevention of workplace disputes.
- f. The culture in my organization promotes the resolution of workplace disputes.
- g. The parties involved in conflict may meet with supervisors/management.
- h. The parties involved in conflict may meet with representatives from Human Resources.
- i. The parties involved in conflict may take their issues to the organizational ombudsman's office.
- j. The parties involved in conflict may take their issues to the organizational ethics office.
- k. The parties involved in conflict may meet with an attorney from our internal legal department.
- l. The parties involved in conflict may schedule a meeting with an external conflict resolution practitioner/provider.
- m. Employees in my organization are given the opportunity to choose their own problem-solving approach to conflict resolution.
- n. Other _____

Question 3. To what extent are the following approaches/procedures/tools applied to resolve external conflicts and disputes in your organization?

- 5 – Extensively Applied
- 4 – Frequently Applied
- 3 – Occasionally Applied
- 2 – Seldom Applied
- 1 – Never Applied

- a. Unassisted Negotiation
- b. Employee Assistance Programs
- c. “Open Door” Policy (access to supervisors and/or managers)
- d. Internal Mediation (trained mediators employed in either a full or part-time capacity by my organization)
- e. External Mediation (trained mediators hired on a contractual basis by my organization)
- f. Formal Grievance Procedures (as identified in policy manuals, employee manuals and collective bargaining agreements)
- g. Ombuds Office
- h. Ethics Office
- i. Arbitration
- j. Litigation
- k. Informal Meetings facilitated by members of organizational management
- l. Other _____

Question 4. Please identify the frequency with which the following of workplace conflicts arise in your business organization:

- 4 - Very Frequent
 - 3 - Frequent
 - 2 - Occasional
 - 1 - Rare
 - NA - Not Observed
- types

- a. Employment Contracts
- b. Settlement and Severance Agreements
- c. Performance Appraisals
- d. Work Assignments
- e. Bonus and other Non-Salary Compensation
- f. Employment Benefits
- g. Interpersonal Conflicts
- h. EEO-related issues
- i. Other _____

Question 5. The dispute resolution efforts in my business organization have following characteristics:

- 1 = Yes
 - 2 = No
- the

- a. A continuous oversight body that includes representatives of key stakeholder groups.
- b. At least one person or persons who functions as an internal, independent, and confidential neutral.
- c. A central coordinator or coordinating office to promote the development, implementation, and administration of our dispute resolution efforts.
- d. An evaluation and monitoring mechanism.
- e. Dispute resolution training and education for first line supervisors.
- f. Dispute resolution training and education for managers.
- g. Dispute resolution training and education for the rest of the workforce.
- h. Dispute resolution training within the context of diversity programs.
- i. Financial and/or performance incentives for effective use of ADR.
- j. The allocation of financial and human resources sufficient to support our dispute resolution efforts.

Question 6. On a scale of “1 to 10”, with “10” being the highest, please rate the degree to which your organization’s philosophy of resolving and managing employment and workplace conflicts is aligned with your organization’s:

a. Vision	10	9	8	7	6	5	4	3	2	1	NA
b. Mission	10	9	8	7	6	5	4	3	2	1	NA
c. Values	10	9	8	7	6	5	4	3	2	1	NA
d. Policies	10	9	8	7	6	5	4	3	2	1	NA

Question 7. My organization’s philosophy of resolving and managing employment and workplace conflicts can best be described as:

Question 8. To what extent do you agree with the following?

- 5 – Strongly Agree
- 4 – Agree
- 3 – Neither Agree nor Disagree
- 2 – Disagree
- 1 – Strongly Disagree

- a. In my business organization, there is sincere and visible championship by senior management for alternative dispute resolution processes.
- b. In my business organization, there is sincere and visible championship by workplace leaders (such as union officials and leaders of employee-centered organizations) for alternative dispute resolution processes.
- c. My business organization has a communication strategy for its dispute resolution program.
- d. My business organization has a performance management system that rewards continual and/or exceptional conflict management.
- e. ADR is viewed as a cost-saving approach to resolve conflicts
- f. Those employees involved in conflict management are evaluated on the organization’s use of the dispute resolution program.

Question 9. Please provide any additional comments.

C. Questions from the External Relations Survey

Question 1. The following considerations are important to my business organization as we assess the benefits of using mediation and other conflict resolution processes to resolve external disputes (e.g., disputes with vendors, customers, partners, and competitors):

5 – Strongly Agree
4 – Agree
3 – Neither Agree nor Disagree
2 – Disagree
1 – Strongly Disagree

- a. The volume of cases currently managed
- b. Whether the dispute is one of a recurring type (e.g., frivolous claims)
- c. The type of dispute at issue (e.g., contract, tort, etc.)
- d. The average time involved in resolving the dispute
- e. The estimated cost in terms of in-house hours spent on the dispute
- f. The estimated transactional costs in terms of outside counsel and experts
- g. The indirect costs of the dispute (e.g., disrupted business relationships)
- h. Reducing the risk of adverse decisions in litigation
- i. Reducing exposure to the inconsistency of court judgments
- j. Lowering costs
- k. Freeing-up personnel
- l. Assuring privacy/confidentiality in the conflict resolution process
- m. Other _____

Question 2. Please identify the frequency with which the following types of external conflicts involving your business organization arise:

- a. Breach of Contract
- b. Government Regulation
- c. Government Contracts
- d. Breach of Warranty
- e. Negligence
- f. Fraud, Conversion
- g. Antitrust
- h. Intellectual Property Rights
- i. Indemnification and Contribution
- j. Declaratory Judgment
- k. Libel, Slander
- l. Criminal Prosecution
- m. Injunctive Relief
- n. Tortious Interference with Business Relationships
- o. Environmental Disputes
- p. Other _____

4 - Very Frequent
3 - Frequent
2 - Occasional
1 - Rare
NA - Not Observed

Question 3. To what extent are the following approaches/procedures/tools applied to resolve external conflicts and disputes in your organization?

5 – Extensively Applied
4 – Frequently Applied
3 – Occasionally Applied
2 – Seldom Applied
1 – Never Applied

- a. Corporate ADR Policy Statements on ADR use (endorsement announcing ADR interest to opponents and supplying employees institutional support)
- b. ADR Contract Clauses and Guidelines (clauses requiring sequential use of negotiation, mediation and arbitration)
- c. Industry ADR Commitments (collaboratively developed negotiation and mediation and/or arbitration procedures)
- d. ADR Suitability Screens (questions that examine whether the parties to the dispute would favor consensual ADR, adjudicative ADR, or litigation)
- e. Early Case Analysis (a process administered within the first two months of a case that helps to develop strategy, limit discovery, and chart ADR use)
- f. Decision Analysis Aids (a process designed to help make an informed judgment about the liability and damages that could result from litigation)
- g. The Maryland ADR Pledge (a program where Maryland companies pledge that they will attempt ADR prior to litigation in all appropriate cases).
- h. Other _____

Question 4. The dispute resolution efforts in my business organization have the following characteristics:

1 = Yes
2 = No

- a. An evaluation and monitoring mechanism
- b. ADR training and education for the legal staff
- c. ADR training and education for non-legal staff
- d. The allocation of financial and human resources sufficient to support our efforts
- e. Non-legal staff are involved in dispute resolution design
- f. Legal staff are involved in dispute resolution design
- g. External conflict resolution consultants are used in dispute resolution design
- h. External conflict resolution practitioners are used to conduct the dispute resolution activities
- i. Outside counsel/consultants are used in dispute resolution design and/or execution
- j. Financial and/or performance incentives are awarded for effective use of ADR
- k. Clear guidelines regarding the selection of external neutrals
- l. The opposing party and my organization collaborate on the recommendation of dispute resolution procedures and/or neutrals
- m. In-house legal staff are evaluated on the use of alternative dispute resolution processes in resolving disputes
- n. Outside counsel are evaluated on the use of alternative dispute resolution processes in resolving disputes
- o. Opposing counsel provides barriers to the use of alternative dispute resolution processes in resolving disputes
- p. My organization is frequently involved in dispute with others, and we have agreed to use alternative processes to resolve those frequent disputes

- q. A tracking system that quantifies historical data and provides a reasonable baseline of average costs against which performance can be measured is used

If yes, which costs do you track and what are the approximate ranges (e.g., litigation costs = \$50,000 to \$100,000 annually; the costs of obtaining settlement agreements = \$5,000 to \$50,000 quarterly)?

Question 5. To what extent do you agree that the following practices are used in your organization?

- 5 – Extensively Applied
- 4 – Frequently Applied
- 3 – Occasionally Applied
- 2 – Seldom Applied
- 1 – Never Applied

- a. ADR explored prior to filing suit
- b. ADR explored after suit has been filed
- c. Outside counsel provided incentives to encourage use of ADR approaches
- d. ADR is viewed as a cost-saving approach to resolve conflicts

Question 6. Please identify all of the dispute resolution processes/systems that your organization has used within the past five years to resolve the following conflicts. Refer to the appendix for an explanation of these terms.

CONFLICTS

- a. Breach of Contract
- b. Government Regulation
- c. Government Contracts
- d. Breach of Warranty
- e. Negligence
- f. Fraud, Conversion
- g. Antitrust
- h. Intellectual Property Rights
- i. Indemnification and Contribution
- j. Declaratory Judgment
- k. Libel, Slander
- l. Criminal Prosecution
- m. Injunctive Relief
- n. Tortious Interference with Business Relationships
- o. Environmental Disputes
- p. Other: _____
- q. Other: _____

ADR PROCESSES/SYSTEMS USED TO RESOLVE CONFLICTS	
1	= Unassisted Negotiation
2	= Mediation
3	= Conciliation
4	= Fact-finding
5	= Facilitation
6	= Early Neutral Evaluation
7	= Pre-dispute ADR Contract Clause
8	= Arbitration
9	= Med-Arb
10	= Minitrial
11	= Ombuds
12	= Ethics Office
13	= Negotiated Rule-Making
14	= Settlement Conference
15	= Litigation

Question 7. On a scale of “1 to 10”, with “10” being the highest, please rate the degree to which your organization’s philosophy of resolving and managing external conflicts is aligned with your organization’s:

a. Vision...	10	9	8	7	6	5	4	3	2	1
b. Mission...	10	9	8	7	6	5	4	3	2	1
c. Values...	10	9	8	7	6	5	4	3	2	1
d. Policies...	10	9	8	7	6	5	4	3	2	1

Question 8. My organization’s philosophy of conflict resolution/management can best be described as:

Question 9. Referring to the ADR processes listed in Questions 6, identify the top three processes that are most frequently used by your business organization:

(a) _____ (b) _____ (c) _____

Question 10. Please provide any additional comments:

D. ADR Definitions and Descriptions, from *Join the Resolution: The Maryland ADR Commission’s Practical Action Plan, Dec. 1999*

Term	Definition	Description
“Alternative Dispute Resolution” (ADR)	A process or collection of processes for resolving disputes without going through a trial or committing violence	Generally refers to a broad category of “ADR processes” that include settlement conferences, arbitration, mediation, consensus building, which are defined below, as well as other “alternative” ways of resolving disputes without using violence or having a court decide.

Term	Definition	Description
“Mediation”	A process in which a trained neutral person, a “mediator,” helps people in a dispute to communicate with one another, understand each other, and if possible, reach agreements that satisfy the participants’ needs.	A mediator does not provide legal advice or recommend the terms of any agreements. Instead, the mediator helps people reach their own agreements, rebuild their relationships, and if possible, find lasting solutions to their disputes. Mediation is a process that lets people speak for themselves and make their own decisions.
“Arbitration”	A process in which people in a dispute present their views to a knowledgeable neutral person, an “arbitrator,” who decides how the dispute will be resolved.	Arbitrators review evidence and arguments from people in the dispute and make a decision or “arbitration award.” Arbitration is generally “binding” which means that the participants must abide by the arbitrator’s decision.
“Neutral Case Evaluation”	A process in which people in a dispute present their views, often in written form, to a knowledgeable neutral person who evaluates their dispute and expresses an opinion about the most likely outcome in court.	The neutral person usually has substantial knowledge or experience with issues involved in the dispute. This person’s opinion about how the court would probably decide the dispute helps people come up with appropriate out-of-court settlements.
“Settlement Conference”	A process in which people in a dispute in court present their views to a knowledgeable neutral person who evaluates the case and suggests ways to settle the dispute without a trial.	The settlement conference facilitator is usually a judge or experienced lawyer who can give informed opinions about how the court might decide the case, discuss how similar cases have been settled, provide advice and suggest agreements.

<p>“Consensus Building”</p>	<p>A process in which a neutral person brings “stakeholder” groups and individuals together and facilitates their efforts to solve a common problem or address a complex issue in a way that best meets the participants’ needs.</p>	<p>Consensus building resembles mediation because the process is about people making their own decisions, opening lines of communication, and developing agreements that everyone can support. Consensus building is different because it usually involves a larger group of people and is generally used to prevent or resolve disputes about public policy or other complex issues involving several parties.</p>
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E. More ADR Information and Terminology^{A1}

Some ADR procedures, such as binding arbitration and private judging, are similar to expedited litigation in that they involve a third-party decision maker with authority to impose a resolution if the parties so desire. Other procedures, such as mediation, conciliation and facilitation are collaborative: a neutral third party helps a group of individuals or entities with divergent views to reach a goal or complete a task to their mutual satisfaction.

Arbitration and mediation tend to be the mechanisms most often used and, for many people, are synonymous with the term "ADR." But to respond to specific needs, parties often craft hybrid procedures that combine elements of one or more dispute resolution methods.

The following glossary is designed to help parties communicate about this rapidly changing field. Definitions are not standardized, but flexible and creative like ADR itself. And with all aspects of ADR, what is most important is not that the parties use exactly the same terms, but that they understand each other. Most of these working

^{A1} With the exception of "conciliation" and "facilitation," all definitions were sourced from the Center for Dispute Resolution publication *Building ADR into the Corporate Law Department: ADR Systems Design*, Copyrights © by Alternatives, CPR Institute for Dispute Resolution, November 1995, Vol. 13, No.11. All rights reserved. The "mediation" information and definitions have been altered and minor additions have been made to conform with mediation practices in Maryland.

definitions are derived from prior publications of the CPR Institute for Dispute Resolution, a number of which address particular ADR processes in depth.

Arbitration. The most traditional form of private dispute resolution. It can be "administered" (managed) by a variety of private organizations, or "non-administered" and managed solely by the parties. It can be entered into by agreement at the time of the dispute, or prescribed in pre-dispute clauses contained in the parties' underlying business agreement. Arbitration can take any of the following forms:

- **Binding Arbitration.** A private adversarial process in which the disputing parties choose a neutral person or a panel of three neutrals to hear their dispute and to render a final and binding decision or award. The process is less formal than litigation; the parties can craft their own procedures and determine if any formal rules of evidence will apply. Unless there has been fraud or some other defect in the arbitration procedure, binding arbitration awards typically are enforceable by courts and not subject to appellate review.
- **Non-binding Arbitration.** This process works the same way as binding arbitration except that the neutral's decision is advisory only. The parties may agree in advance to use the advisory decision as a tool in resolving their dispute through negotiation or other means.
- **"Baseball" or "Final-Offer" Arbitration.** In this process, used increasingly in commercial disputes, each party submits a

proposed monetary award to the arbitrator. At the conclusion of the hearing, the arbitrator chooses one award without modification. This approach imposes limits on the arbitrator's discretion and gives each party an incentive to offer a reasonable proposal, in the hope that it will be accepted by the decision-maker. A related variation, referred to as "night baseball" arbitration, requires the arbitrator to make a decision without the benefit of the parties' proposals and then to make the award to the party whose proposal is closest to that of the arbitrator.

- **"Bounded" or "High-Low" Arbitration.** The parties agree privately without informing the arbitrator that the arbitrator's final award will be adjusted to a bounded range.
- **Incentive Arbitration.** In non-binding arbitration, the parties agree to a penalty if one of them rejects the arbitrator's decision, resorts to litigation, and fails to improve his position by some specified percentage or formula. Penalties may include payment of attorneys' fees incurred in the litigation.

Conciliation. A neutral third party helps resolve disputes by improving communications, lowering tensions and identifying issues and potential solutions by shuttling information between the disputing parties.

Confidential Listener. The parties submit their confidential settlement positions to a third-party neutral, who without relaying one side's confidential offer to the other, informs them whether their positions are within a negotiable

range. The parties may agree that if the proposed settlement figures overlap, with the plaintiff citing a lower figure, they will settle at a level that splits the difference. If the proposed figures are within a specified range of each other, the parties may direct the neutral to so inform them and help them negotiate to narrow the gap. And if the submitted numbers are not within the set range, the parties might repeat the process.

Court-Related Mediation. In mediation, a neutral third party, the mediator, facilitates negotiations among the parties to help them reach a mutually satisfactory agreement. The mediation session is confidential and informal. Disputants clarify their understanding of underlying interests and concerns, explore the consequences of not settling, and generate settlement options. The mediator, who may meet jointly and separately with the parties, serves solely as a facilitator and does not issue a decision or make findings of fact. A hallmark of mediation is its capacity to help parties expand traditional settlement discussions and broaden resolution options, often by going beyond the legal issues in controversy.

Mediation works much the same in courts and in private settings, with a few important differences. A court mediation program may be based in the court, or may involve referral by the court to outside ADR programs run by bar associations, nonprofit groups, other local courts, or private ADR providers. Some courts require litigants to use mediation in what are known as *mandatory* mediation programs.

In Maryland, courts order mediation in various civil matters, but, due to opt-out provisions, participation in mediation is voluntary. Mediation can only be mandated over a party's objection in child custody and visitation.

The purpose of the mediation session is unchanged whether litigants enter the program voluntarily or by court mandate. The court mediator may be trained in mediation and compensated by the parties, or may serve as a volunteer. Judges, magistrate judges, or court ADR professionals also serve as mediators in some court programs.

Mediation is the primary ADR process in federal, state and local courts, second only to the traditional judicial settlement conference. Mediation has proved useful in so many kinds of disputes that some experts favor its use in all civil cases, to improve case management and settlement.

Early Neutral Evaluation. Like mediation, ENE is applicable to many types of civil cases, including complex disputes. In ENE, a neutral evaluator – a private attorney expert in the substance of the dispute – holds a several-hour confidential session with parties and counsel early in the litigation to hear both sides of the case. Afterwards, the evaluator identifies strengths and weaknesses of the parties' positions, flags areas of agreement and dispute, and issues a non-binding assessment of the merits of the case. Developed during the mid-1980's in the San Francisco federal court, ENE is now used in 18 federal district courts and several state courts. Usually, attorneys trained by the court serve as evaluators; in some courts, including the Southern District of California, magistrate judges conduct ENE sessions. Originally designed to make both case management and settlement more efficient, ENE has evolved into a pure settlement device in some courts. Used this way, ENE resembles evaluative mediation, in which the mediator uses case evaluation as a settlement tool.

Facilitation. Where a neutral assists disputants in reaching a satisfactory

resolution to the matter at issue. The neutral has no authority to impose a solution.

Fact-finding. A process by which the facts relevant to a controversy are determined. Fact-finding is a component of other ADR procedures, and may take a number of forms.

- In neutral fact-finding, the parties appoint a neutral third party to perform the function, and typically determine in advance whether the results of the fact-finding will be conclusive or advisory only.
- With expert fact-finding, the parties privately employ neutrals, oftentimes former judges, to render expert opinions that are conclusive or non-binding on technical, scientific or legal questions.
- Federal Rules of Evidence 706 gives courts the option of appointing neutral expert fact-finders. And while the procedure was rarely used in the past, courts increasingly find it an effective approach in cases that require special technical expertise, such as disputes over high-technology questions. The neutral expert can be called as a witness subject to cross-examination.
- In joint fact-finding, the parties designate representatives to work together to develop responses to factual questions.

Mediation. A voluntary and informal process in which the disputing parties select a neutral third party to assist them in reaching a negotiated settlement. Parties can employ mediation as a result of a contract provision, by private agreement made when disputes arise,

or as part of a court-annexed program that diverts cases to mediation.

Unlike a judge or arbitrator, a mediator has no power to impose a solution on the parties. Rather, mediators assist parties in shaping solutions to meet their interests and objectives. The mediator's role and the mediation process can take various forms, depending on the nature of the dispute and the approach of the mediator. The mediator can assist parties to communicate effectively; can identify and narrow issues; crystallize each side's underlying interests and concerns; carry messages between the parties; explore bases for agreement and the consequences of not settling; and develop a cooperative, problem-solving approach.

By learning the confidential concerns and positions of all parties, the mediator often can help identify options beyond their individual perceptions.

The mediator's role can take various forms. Some mediators, who favor a "facilitative" style, encourage parties to generate their own settlement options, and will not suggest settlement terms. "Transformative" mediators work to improve the manner in which the parties engage in conflict with one another. At the other end of the spectrum are "evaluative" mediators, who will propose settlement options and try to persuade parties to make concessions.

To guide negotiations in major commercial disputes, parties sometimes ask the mediator to assume a neutral evaluator role. The neutral evaluator or settlement facilitator might assess the merits of claims or defenses, liability or damages, or predict the likely outcome of the case in court. They need subject matter background or expertise to make such assessments. Once a mediator shifts to the evaluator role and gives an

evaluation, he or she can no longer function as a neutral in the case.

Med-Arb. A short-hand reference to the procedure mediation-arbitration. In med-arb, the parties agree to mediate with the understanding that any issue not settled through the mediation will be resolved by arbitration using the same individual to act both as mediator and arbitrator. However, that choice may have a chilling effect on full participation in the mediation portion. A party may not believe that the arbitrator will be able to discount unfavorable information learned in mediation when making the arbitration decision.

Co-Med-Arb addresses the problem by having two different people perform the roles of mediator and arbitrator. Jointly, they preside over an information exchange between the parties, after which the mediator works with the parties in the absence of the arbitrator. If mediation fails to achieve a settlement, the case (or any unresolved issues) can be submitted to the arbitrator for a binding decision.

Minitrial. A structured process with two distinct components. Parties engage in an information exchange that provides an opportunity to hear the strengths and weaknesses of one's own case as well as the cases of the other parties involved, before negotiating the matter.

In the minitrial, an attorney for each party presents an abbreviated version of that side's case. The case is heard not by a judge, but by high-level business representatives from both sides with full settlement authority. It may be presided over by these representatives with or without a neutral advisor, who can regulate the information exchange. Following the presentations, the parties' representatives meet, with or without the

neutral, to negotiate a settlement. Frequently, the neutral will serve as a mediator during the negotiation phase or be asked to offer an advisory opinion on the potential court outcome, to guide negotiators.

Multi-Party Coordinated Defense. A coordinated joint defense strategy in which a neutral facilitator helps multiple defendants negotiate, organize, and manage cooperative joint-party arrangements that are ancillary to the main dispute. In the process, they streamline the steps toward resolution. Coordinated defense efforts include agreements to limit infighting among defendants, use joint counsel and experts, assign and share discovery and research tasks, coordinate and share the results of procedural maneuvers, and apportion liability payments, should they be imposed.

Multidoor Courthouse or Multi-Option ADR. This term describes courts that offer an array of dispute resolution options or screen cases and then channel them to particular ADR methods. Some multidoor courthouses refer all cases of certain types to particular ADR programs, while others offer litigants a menu of options in each case.

Multi-Step ADR. Parties may agree, either when a specific dispute arises, or earlier in a contract clause between business ventures, to engage in a progressive series of dispute resolution procedures.

One step typically is some form of negotiation, preferably face-to-face between the parties. If unsuccessful, a second tier of negotiation between higher levels of executives may resolve the matter. The next step may be mediation or another facilitated settlement effort. If no resolution has been reached at any of the earlier stages, the agreement can provide for a

binding resolution through arbitration, private adjudication or litigation.

Negotiated Rule-Making. Also known as regulatory negotiation, this ADR method is an alternative to the traditional approach of U.S. government agencies to issue regulations after a lengthy notice and comment period. In "reg-neg," as it is called, agency officials and affected private parties meet under the guidance of a neutral facilitator to engage in joint negotiation and drafting of the rule. The public is then asked to comment on the resulting, proposed rule. By encouraging participation by interested stakeholders, the process makes use of private parties' perspectives and expertise, and can help avoid subsequent litigation over the resulting rule.

Ombudsperson. An organizational dispute resolution tool. The ombudsperson is appointed by an institution to investigate complaints within the institution and either prevent disputes or facilitate their resolution. The ombudsperson may use various ADR mechanism such as fact-finding or mediation in the process of resolving isputes brought to his or her attention.

Predispute ADR Contract Clause. A clause included in the parties' business agreement to specify a method for resolving disputes that may arise under that agreement. It may refer to one or more ADR techniques, even naming the third party that will serve as an arbitrator or mediator in the case. Predispute agreements requiring arbitration of consumer disputes, or entered into as a condition of employment, have generated substantial backlash lately from people who argue that these clauses are adhesion contracts.

Settlement Conferences. The most common form of ADR used in federal and state courts is the settlement conference presided over by a judge, magistrate judge, or a volunteer attorney. Almost 94 of the federal district courts use judicial settlement conferences routinely, and nearly one-third of the federal courts assign this role almost exclusively to magistrate judges.

suggestion of settlement would be construed as a sign of weakness.

The classic role of the settlement judge is to articulate judgments about the merits of the case and to facilitate the trading of settlement offers. Some settlement judges, magistrate judges, and volunteer lawyers also use mediation techniques in the settlement conference to improve communication among the parties, probe barriers to settlement, and assist in formulating resolutions. In some courts, a specific judge or magistrate judge is designated as settlement judge. In others, the assigned judge (or volunteer not involved in the case) hosts settlement conferences at various points during the litigation, often directly before trial.

Two-Track Approach. Involves use of ADR processes or traditional settlement negotiations in conjunction with litigation. Representatives of the disputing parties not involved in the litigation are used to conduct the settlement negotiations or ADR procedure. The negotiation or ADR efforts may proceed concurrently with litigation or during an agreed-upon cessation of litigation. This approach is particularly useful in cases when: it may not be feasible to abandon litigation while the parties explore settlement possibilities; or as a practical matter, the specter of litigation must be present in order for the opposing party to consider or agree to an alternative mechanism. It also is useful when the litigation has become acrimonious or when a