What Parties Might Be Giving Up and Gaining When Deciding Not to Litigate: A Comparison of Litigation, Arbitration and Mediation
Deciding whether to litigate, arbitrate, or mediate requires an understanding of three dispute resolution processes. The authors begin with the major characteristics of litigation, and then discuss whether these characteristics are present in arbitration and mediation, and if not, how these processes differ.

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Why one might choose to use an alternative dispute resolution (ADR) process to resolve a legal problem is an interesting question, but it is not the focus of this article. Instead, it focuses on the fundamental attributes of litigation and explores whether these attributes are present in private arbitration and mediation. The purpose is to help people make an informed decision about the process they wish to use to resolve their dispute. This comparison also could help designers of ADR systems identify and preserve attributes desired by parties and jettison those that are not.
We grew up when litigation was the main avenue of dispute resolution. Arbitration was not then accepted by the courts. The attitude of the time toward righting wrongs was to litigate. The phrase “sue the bastard” was in common use.1

The acceptance of the courthouse as the place to resolve disputes has improved the lot of millions of persons worldwide. However, as important a civilizing influence as this was, the courtroom is not, and should not be, the only means of dispute resolution in a civilized society. Abraham Lincoln predicted the importance of litigation alternatives when he wrote, “Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often the real loser—in fees, expenses, and waste of time.”2 He also suggested that lawyers should help the parties settle their disputes out of court and not worry that their income will suffer.3 He recognized that even if the rule of law is the foundation of a civil society, litigation should be used only as a last resort.

In recent years we all have become more familiar with ADR processes. Even the courts have adopted their own ADR programs to better control their dockets and close cases faster. Thus, we now see ADR processes playing a role in maintaining social stability and order.

Yet the main reason for the growth in the use of ADR is not that these processes are inherently superior to litigation. Rather, it is dissatisfaction with the litigation model. Here are some often-quoted reasons for using ADR:4

- to lower court caseloads and expenses;
- to reduce the parties’ expenses and the time it takes to resolve disputes;
- to encourage speedy settlements;
- to improve the public’s satisfaction with the justice system;
- to encourage resolutions that are suited to the parties’ needs;
- to increase voluntary compliance with resolutions;
- to restore the influence of neighborhood and community values and the cohesiveness of communities;
- to provide accessible forums to people with disputes;
- to teach the public to try more effective processes for settling disputes;
- to permit parties to select the person(s) who will judge the dispute;
- to bring expertise to dispute resolutions; and
- to overcome flaws in jury decision-making.

It is no coincidence that the first three reasons involve the perception that litigation costs too much and takes too much time. The other reasons are clearly important, but it is doubtful that ADR would have achieved its current popularity without the perceived deficiencies of the courts. We suspect that if court reforms could reduce the time and expense of discovery as well as the time it takes to get to trial, the impact on ADR would be dramatic. But effective pre-trial reforms of the litigation process are not being made.

**Mediation is likely to be the least expensive private ADR process in terms of counsel fees. However, if a mediation does not succeed, the parties may later find themselves in arbitration or litigation.**

**Essential Attributes of the American Judicial System**

American court systems have the following features:

1. They are created and funded by government and are available in every U.S. jurisdiction.
2. Courts provide theoretical access to all upon application by those with a claim.
3. Decisions are made by a judge trained in the law, and a jury of one’s peers (unless waived).
4. A variety of legal and equitable remedies are available depending on the facts and law.
5. Court proceedings take place in public.
6. Court proceedings are recorded.
7. Court litigation is adversarial in nature.
8. Litigants in court must adhere to strict rules of procedure and evidence.
9. Courts must apply the law.
10. Due process must be afforded in court.
11. A prevailing litigant can obtain assistance from the court to force compliance with a judgment or verdict.
12. Appeals are allowed for legal error.
13. Appellate decisions are usually published.

Next we examine each listed attribute and then determine whether arbitration and mediation are
comparable, and if not, how they differ.

1. Courts are created and funded by government and are available in every U.S. jurisdiction.

The federal and state court systems are created by state and federal constitutions. Government pays the costs of maintaining the judiciary through tax dollars or other revenue.

Courts exist in every state throughout the United States and in most counties. One generally does not need to travel far to find a court to hear a legal claim, although a conflict may arise over which court is the proper forum.

Courts are staffed with judges who are either elected or appointed to office, as well as with clerks, marshals, bailiffs and others who carry out their operations. These employees are provided at taxpayer expense. Litigants do not pay judges to hear their cases. Thus, from the point of view of the public, courts are convenient, easy to find, and not expensive. Court filing fees vary by jurisdiction and are usually not very high.

While the cost of access is low, the cost of prosecution and defense can be onerous because litigants must pay the costs of legal representation (unless the lawyer accepts a contingency fee arrangement). Under the American rule, the parties are responsible for paying the fees of their own counsel. Because litigation is a lengthy process, counsel fees are the largest part of the cost of litigating in court. In addition, litigants must pay the fees and expenses for their own expert witnesses (and expert reports) as well as deposition costs (i.e., court reporter fees).

There are also non-monetary costs due to the disruptive nature of litigation as well as an emotional toll. For business people, the time spent on litigation can not only increase workload, but also reduce business revenue.

Arbitration: A key difference between litigation and arbitration is that arbitration involves additional fees that the parties must pay in addition to their counsel and witness fees.

Filing and other fees. Whether there is a filing fee depends on whether the arbitration is ad hoc or administered. In ad hoc arbitration, the parties and the arbitrator take care of all the details themselves, including negotiating the arbitrator’s compensation. As a result, unless the arbitrator has a filing fee, no fee is necessary to initiate the arbitration process.

In administered arbitration, the parties contract with a neutral arbitration provider, like the American Arbitration Association (AAA), to help facilitate the dispute, provide the arbitration rules and a roster of neutrals from which the parties can select an arbitrator with the appropriate expertise. The provider assigns a case manager to help the parties’ counsel. Providers charge filing and possibly other fees for their services.

Provider filing fees vary based on different factors. Under the AAA Commercial Arbitration Procedures, the claimant pays a filing fee based on the amount of the claim, while the respondent pays a filing fee if it asserts a counterclaim. The AAA also charges a case service fee, which applies only if the case does not settle before the first hearing. The fee is payable in advance of the first hearing date but it will be refunded if the case settles with no hearing held.

The AAA has different fee schedules for different kinds of cases. In employment cases arbitrated under employer-sponsored ADR programs, the AAA Employment Arbitration Rules cap the amount of the filing fee that the employee must pay, placing most of the cost on the employer.

In consumer cases, the AAA’s filing fees are based on the actual damages claimed, and not on any additional damages, such as attorney fees or punitive damages. A special waiver rule applies to consumer cases in California.

Hearing room fees. The parties may need a conference room in a neutral location to hold the hearing. The venue of the arbitration is often stated in the parties’ agreement. In administered arbitration, the parties may be able to rent a conference room from the provider. This cost is borne by the parties. Alternatively, space might be provided free by one of the parties or counsel. The arbitrator may also provide space for a fee.

Arbitrator compensation and expenses. Unlike parties to a lawsuit, arbitrating parties have to pay the decision maker’s (i.e., the arbitrator’s) compensation. Arbitrator fees vary widely. Arbitrators usually bill by the hour but some bill by the day.

Arbitrator compensation includes “study time” and the time spent writing the award. If the parties request a brief written explanation of the award, or more detailed findings of fact and law, the arbitrator’s compensation will be more than if the arbitrator writes a one-line award stating the prevailing party on each of the claims and counterclaims and the amount awarded, if any. Arbitrator compensation will be still higher if the parties desire to use a panel of three arbitrators.

One arbitrator is usually appointed to hear small disputes. However, having to pay the compensation of even one arbitrator in a small dispute could be a disincentive to arbitrating. This impediment is eliminated in employment arbitration cases under employer-promulgated plans and in small consumer arbitrations administered by the AAA. The AAA places the burden of paying the arbitrator’s compensation on the employ-
er. The AAA also has a special rule applicable to consumer arbitrations. It caps the consumer's portion of the arbitrator's fee at $125 for claims under $10,000.9

The parties have to pay the arbitrator's expenses, including those for travel. If the arbitrators do not reside locally, travel expenses will be higher.

_Counsel and witness fees._ Arbitrating parties must pay their own counsel and witness fees. If a party prevails in arbitration, the arbitrator may award attorney fees only if provided for in the arbitration agreement or allowed by law.

Arbitration at its best is less rule-driven (discussed on page 56), and therefore more streamlined and efficient than litigation. For that reason and because there are limited grounds to appeal an arbitration award (discussed on page 58), arbitrating parties should incur significantly lower counsel fees than they would if they were litigating in court.

**Mediation:** In addition to counsel fees, the main cost of mediation to the parties is the mediator's compensation. Most mediators bill by the hour, but some very "in-demand" mediators charge by the day. The parties share the mediator's fee.

There is no "hearing" in mediation and witnesses are rarely needed. In technical cases, however, one or both parties may retain an expert to assist with some aspect of the case. The party who retains the expert must pay the expert's fees and expenses.

Mediation can be arranged directly with a mediator or through an ADR provider, such as the AAA. The AAA does not charge a filing fee for mediation.10

Mediation can be held in any room. A mediation involving a large number of participants might require a conference room, which could involve a room rental fee.

Mediation is likely to be the least expensive private ADR process in terms of counsel fees. However, if the mediation does not succeed, the parties may later find themselves in arbitration or litigation. Statistics show that mediation has a high settlement rate, which offsets this risk for parties that seriously want to find a mutually satisfactory way to end their dispute.

2. **Courts provide theoretical access to all upon application by plaintiffs.**

Access to court is provided by the U.S. and state Constitutions. Anyone can file a complaint in court, although some statutes or court rules require the complainant to verify the claim to screen frivolous lawsuits.11

Courts permit parties to appear without counsel (pro se), which theoretically increases access. Nevertheless, most parties do not wish to litigate without legal representation. The problem is that their claim may be too small to obtain a lawyer. This is a particular problem with employment and consumer disputes.

There are conditions to access particular courts. The plaintiff must ensure that the court has subject matter jurisdiction over the dispute and personal jurisdiction over the defendant. When the court has personal jurisdiction, the defendant must appear. A defendant that fails to appear can have a default judgment entered against it.

As discussed above, there is a relatively small fee to file a case in court, which is not usually an impediment to litigating.

**Arbitration and Mediation:** Private arbitration and mediation are not accessible in the way that courts are. Both ADR processes are contractual in nature. In other words, they require the parties to have entered into an agreement to arbitrate or mediate prior to or after the dispute arose (even after litigation has commenced). When the parties have signed a pre-dispute ADR agreement, each can take legal steps to compel the other to participate in the ADR process.

Sometimes a nonparty to an arbitration agreement tries to compel a signatory party to arbitrate and _vice versa._ There are some theories on which to compel arbitration in these circumstances.12

Thus, access to arbitration or mediation is conditioned on voluntary participation by the parties or a court compelling compliance with an arbitration or mediation agreement.

Ironically, parties who have not entered into an ADR agreement may be compelled to use an ADR process under a court-annexed ADR program. Usually this process is mediation. The prospect of ending up in a court-ordered mediation (or arbitration) should be compared to using private ADR. It may be that the private process has significant advantages, such as the ability to select the neutral.

Parties have the right to be represented by counsel in arbitration and mediation. But having counsel is not a requirement in these more informal processes.

Arbitration fees, discussed in the previous sec-
tion can create an access problem in consumer and employment cases. However, some providers, including the AAA, have ameliorated this problem in their rules by limiting the amount that employees and consumers must pay.

An access problem can arise in consumer contracts where the vendor’s arbitration agreement designates a far-away inconvenient forum for the arbitration. In a few cases involving small consumer claims and the contention that this was unconscionable, consumers were successful in having the forum changed to a more convenient one.13

3. Decisions in court are made by a judge trained in the law or a jury (unless waived).

The United States appears to make the most comprehensive use of juries in the modern world. The jury has virtually disappeared as means of resolving civil disputes in England where it was developed.14 The waning use of juries was supposedly a response to the growing complexity of the civil law and the time and expense consumed by the jury process. A civil jury is now the exception in the United Kingdom.15

Views about the jury process vary. “Why should anyone think that 12 persons brought in from the street, selected in various ways, for their lack of general ability, should have any special capacity for deciding controversies between persons?”16 Nevertheless, the jury is still held in high regard in America.

Court litigants cannot select the judge or jurors. However, they can exclude certain jurors “for cause.” (Neutral decision makers are discussed on pages 57–58.) Most jurisdictions have rules to prevent judge shopping.

A judge assigned to the case or selected through a random process decides the applicable law if it is in controversy (which it often is), and the jury decides the facts based on the evidence submitted and applies the law (as instructed by the judge) to the facts. An exception is the bench trial, in which the litigants waive the right to a jury. In equity cases, the judge is also the finder of fact.

Judges and juries rarely have special knowledge about the field of the dispute. It is not unusual for a juror with special knowledge to be excused for cause from a jury by counsel for one of the parties.

Jurors are essentially unpaid (they may receive a nominal amount per day) and untrained, which can cause flawed verdicts.

Arbitration: Arbitration has an important advantage over litigation in that the parties can select the person who will decide their dispute. This advantage is due to the contractual nature of arbitration, which allows the parties to establish the process that they want.

The arbitrator finds the facts, applies the law, and is the sole decision maker on the issues submitted to arbitration. In effect, the arbitrator performs the same functions as a judge in a bench trial.

The parties can decide whether they want to use one arbitrator or a panel of three. (As noted above, three arbitrators cost more to use, so they are more often used in large cases where there is much at stake.) The parties can agree on the qualifications they want the arbitrator to have and even name the arbitrator.

Arbitrators who are selected by parties to decide cases are rarely, if ever, ordinary laypersons. Most disputants want an expert in the field of the dispute (e.g., a patent lawyer, a construction lawyer) to decide the dispute.17 For the most part, arbitrators selected to hear cases are usually lawyers. This is probably because arbitrators are selected by lawyers (i.e., counsel for the parties and not the parties themselves) and lawyers are likely to feel more comfortable with an attorney-arbitrator. Another reason for selecting a lawyer as the arbitrator is that the parties’ attorneys may be concerned that an arbitrator who lacks legal training might be less able or inclined to apply the law.

Non-lawyer arbitrators are more often chosen when a dispute involves highly technical or scientific matters, calls for a contract interpretation rather than an issue of law, and is highly fact-dependent. It can be advantageous to have a non-lawyer expert on a panel with one or two lawyer-arbitrators.

People expect arbitrators to come up with better decisions than ordinary jurors, especially in highly complex commercial cases. They also expect arbitrators to come up with less emotional decisions.

Mediation: Mediation is also a consensual process, which means the parties can select the mediator of their choice. People who want a facilitative mediation tend to choose a mediator who has excellent mediation skills. People who want a more evaluative mediator tend to select a lawyer-mediator who specializes in the field in dispute (e.g., a patent or construction lawyer). Mediation does not involve a decision by a third party. The mediator’s goal is to help the parties reach a mutually acceptable settlement.

4. A variety of legal and equitable remedies are available depending on facts and law.

Court litigants can seek any remedy in law or equity that is legally allowed for each stated cause of action. Courts may not order other remedies. For example, a court may not require a party to sell its interest in a partnership unless a contract required that party to do so.18

In commercial transactions, the parties can
agreement to limit their legal remedies. However, courts are reluctant to enforce agreements to limit damages that they deem unfair.

Arbitration: Arbitrators have very broad remedial powers compared to a judge. They are not limited to awarding remedies that a court can award. They can order any remedy they consider just and proper in the circumstances. The only limitations on this are state law and the parties’ agreement. The revised Uniform Arbitration Act (RUAAA), which has been enacted in 13 jurisdictions, takes this approach. It restricts an award of punitive or exemplary damages to situations in which such damages are allowed by law and allows awards of attorney fees only if permitted by law or the parties’ agreement.

Parties have great latitude in restricting the arbitrator’s remedies. But this is not the case in consumer and employment arbitration. Limitations on arbitrator remedies in consumer and employment contracts are likely to be held unenforceable if they prevent the consumer or employee from obtaining a remedy available by statute (e.g., treble damages, attorney fees).

Mediation: Damages are not “awarded” in mediation because, as noted previously, there is no third-party decision maker awarding any remedy or relief. Mediation is an assisted negotiation and the parties must agree to the terms of settlement.

5. Court proceedings take place in public.

Consistent with free speech and a free press, trials in American courts are public, with a few exceptions. Anyone can attend a criminal or civil trial, including journalists. Cases that make the front page of the newspaper are an exception because they generate so much interest. Thus, in those cases, court attendance is restricted and monitored.

There is seldom any restriction on trial observers making public their observations about the trial. However, the court may place some constraints on what the parties and their counsel may say. Thus, in general, information about disputes is available to the community and the nation. Court TV and the Internet have provided new meaning to making litigation public.

Arbitration and Mediation: While litigation is public, ADR processes are not. Arbitrations and mediations are held in private offices and conference rooms. This is a key reason that parties choose to use them.

While there is no law in the United States protecting the confidentiality of arbitration, institutional arbitration rules usually require the arbitrator to maintain the confidentiality of the proceedings. The parties can agree to keep the existence of their arbitration and the arbitration award private through a confidentiality agreement. Even when parties enter into a confidentiality agreement, one (or both) could decide it is in its best interest to make public that an arbitration exists or reveal what occurred there. Sometimes this gets reported in the press. When this happens, the cat is out of the bag. The only remedy may be a lawsuit for breach of contract.

Unlike court decisions, arbitrators’ awards are seldom made public. Even when they are published, sensitive information is redacted so that the awards contain limited useful information.

Mediation, on the other hand, has legal privacy protections. There is the privilege in the Federal Rules of Evidence for settlement discussions. In addition, most states have confidentiality laws in place to encourage mediation.
Uniform Mediation Act, which has been enacted in 10 jurisdictions, confers a nondisclosure privilege on private communications between the mediator and each participant in mediation. This privilege, however, only protects mediation communications from disclosure in future legal or administrative proceedings.

Arbitrations and mediations involving a public sector entity may be subject to open meeting laws.

6. Court proceedings are recorded.

Court reporters keep a record of court proceedings. This record is available to the litigants, the court and appellate courts if necessary. Having a record of proceedings is invaluable since it provides a way of determining whether the process was fair and whether any legal errors were committed.

Arbitration and Mediation: Arbitration proceedings (except labor cases) are rarely transcribed. If the parties want a record of the hearing, they must pay for it. Thus, there is rarely any record that a reviewing court can examine. Since the grounds to obtain judicial review of an arbitration award are limited, the need for a hearing transcript may be diminished and may not be worth the cost.

Mediation proceedings are rarely, if ever, recorded or transcribed, since doing so could jeopardize the confidentiality of mediation communications. Even in court-annexed mediation, the court generally may be told only whether the case settled or not.

7. Court proceedings are adversarial in nature.

A fundamental characteristic of the U.S. judicial process is its adversarial nature. The adversarial system places responsibility on each party to prove that it is right and the other side is wrong. As a consequence of the adversary system, each litigant has an absolute right to legal representation (at their own expense in civil trials).

The adversarial process is extremely competitive. It is the reason for our dependence on lawyers. The party with plentiful resources is in a better position because it can afford to pay counsel and thoroughly investigate and prepare its case. Attorney contingency fee arrangements somewhat neutralize this advantage. However, contingency fee arrangements are usually acceptable to attorneys only when they determine that the case involves substantial damages and has a strong likelihood of success. This means that many litigants with small claims may be unable to find legal representation, preventing them from participating in the adversarial process unless they appear pro se, which most people do not feel equipped to do.

The adversary system of litigation exacerbates, rather than reduces, conflict. Litigation may be
civilized combat but it is very wearing, emotionally and financially, on the parties.

Arbitration and Mediation: Arbitration is an adversarial process in that each side is responsible for persuading the finder of fact that it is right. But unlike litigation, arbitration is less formal and highly flexible. The parties can decide to do certain things together, like prepare a book of joint exhibits or a time line that would help the arbitrator understand or decide the case. They would be unable to do this in litigation because of the authentication requirements.

As in the adversarial process, parties in arbitration have the right to legal representation but they must pay for it.

Mediation is not an adversarial process, even though the parties are on the opposite side of the issues and are likely to be very angry at each other. It is a facilitated negotiation. The mediator will generally seek to reduce the tensions caused by the conflict. One mediator technique is to move the parties away from focusing on their “rights” to focusing on their “interests.” Mediators also can diffuse emotions by allowing each side to vent their feelings in private caucuses. This helps the parties address their negative feelings and then move on to considering ways to put the dispute behind them. Mediation is often therapeutic for the disputants.

8. Litigants in court must adhere to strict court procedures.

The courts provide a forum for the parties to present their evidence so the fact finder (usually the jury) can decide which evidence is credible and then apply the law (determined by the judge) to the facts.

The parties’ counsel must strictly follow the applicable codes of civil procedure and evidence. These procedures include, among other things, rules for making various kinds of pre- and post-trial motions, conducting discovery, authenticating evidence, objecting to evidence, and filing pleadings in proper form.

Discovery. Most attorneys consider discovery essential. It often is the only way of obtaining information in the possession and control of the other party. For example, much corporate information is not available unless acquired through document discovery. Discovery also helps to somewhat level the playing field for parties who do not have the resources to conduct an investigation, such as consumers and employees.

Discovery in litigation is usually a long, drawn-out process. It tends to go to excess because the parties usually serve broadly worded document requests and lengthy interrogatories, and take
numerous depositions of each other’s employees. Sometimes this is designed to intimidate the other party. Discovery disputes are common. They often involve refusals to produce documents based on a legal privilege or an objection. Disputes may also arise out of a refusal to produce a party witness for a deposition, or to allow the witness to answer certain questions. These disputes delay the trial and increase counsel fees.

Motion practice/dispositive motions. Motion practice is also common in litigation. Parties often challenge the court’s jurisdiction or venue, or remove the case to another court, or seek a dispositive ruling in the case, such as on a motion to dismiss for failure to state a claim or for untimeliness (statute of limitations defense), or for a summary judgment. Dispositive motions play an important part in litigation because they provide a means to stop litigations that clearly lack merit or are untimely. If a dispositive motion ends the litigation, it saves money.

Motions, especially dispositive ones, are expensive because they must be accompanied by a well written and well reasoned memorandum of law supplemented by affidavits. Each side has a chance to respond to the other’s motion with an opposing brief. Once all the parties have filed their responding papers, the court usually holds a hearing on the motion, which requires an appearance by all counsel. Then the court issues a decision on the motion, which could be appealed. All of this delays the progress of the litigation and raises the cost of litigating.

Arbitration: Arbitration is not as rule-driven as litigation. The arbitrator has great discretion to manage the process in an efficient way while applying the governing arbitration rules. The arbitrator is consensual, the arbitrator induces opposing counsel to reach an agreement on prehearing activities and their scheduling, as well as scheduling the hearing.

In arbitration, judicial rules of procedure and evidence do not apply “unless directed by the contract.” As a result, the parties can prepare joint exhibit books for the arbitrator. Authentication of evidence is not required.

Discovery. Discovery in arbitration is much more limited. This is supposed to speed up the resolution of the dispute and reduce cost and is said to be one of the reasons parties agree to arbitrate. We think the assumed benefits of more limited discovery are worthy of study in the next few years.

The AAA Commercial Arbitration Rules place authority to order document production in the hands of the arbitrator. The RUAA requires the arbitrator to take the parties’ needs into account in making this decision.

The AAA rules call for all exhibits and witness lists to be exchanged by the parties before the hearing. There is no mention of depositions or other types of discovery. But this does not mean that the arbitrator cannot permit them. The RUAA expressly provides that the arbitrator may allow pre-hearing depositions if requested by a party, and doing so would make the proceedings fair, expeditious and cost-effective. Deposits are just not an automatic feature of every arbitration.

The larger and more complex the dispute, the more discovery will be allowed in arbitration. The more discovery, the longer and more expensive the process.

Motion practice is very limited and infrequent in arbitration. In general, the arbitrator determines objections to his or her own jurisdiction (arbitrability issues), including challenges to the validity of the contract containing the arbitration clause. This is the case under both the AAA rules and the RUAA. However, some courts are required to rule on certain arbitrability challenges. Going to court on an arbitrability issue can seriously delay and increase the cost of resolving the dispute.

Dispositive motions may be submitted and heard by arbitrators (these motions are discussed in more detail on page 62), but this is not the norm. Therefore, early dismissal of a meritless claim is less likely in arbitration than in litigation.

Mediation: The mediator determines the procedures. Court procedures do not apply at all. There is no motion practice.

Some (but not full) discovery must have been undertaken for the parties to be able to negotiate and decide whether they want to settle. If no (or an insufficient amount of) discovery has taken place, the mediator may postpone the mediation session until the needed discovery is completed.

If a claim in mediation lacks legal merit, that should become apparent to the party making the
claim in private caucus with the mediator, leading to an early end to the mediation.

The length of a mediation depends on the complexity of the dispute and the number of disputed issues. Small disputes can be mediated in a day or less.

9. Courts must apply the law.

The Internet has made access to the sources of U.S. and state law easier to access than at any time in history. Courts apply the sources of law—federal and state constitutions, statutes, administrative regulations, and judicial precedent (appellate decisions and decisions by the U.S. Supreme Court)—in individual cases. This enables courts to decide cases with similar facts in a similar way. The rule of stare decisis makes it possible to predict how a court might rule. But the outcome is far from certain because judges and juries often make unexpected (and wrong) decisions.

As we note later, because trial court decisions may be reviewed for errors of law, judges tend to be cautious in their application of the law.

Arbitration and Mediation: There is probably less outcome-predictability in arbitration because arbitration awards do not usually serve as legal precedent. More importantly, arbitrators are not required to follow the law unless the parties otherwise provide in their arbitration agreement. Thus, they can decide cases based on principles of fairness and equity. There is also the fact that some arbitrators are not lawyers and thus have no legal training, which could lead to less predictable outcomes. On the other hand, it is the job of the parties’ advocates to make the arbitrator aware of the applicable law so that the arbitrator, whether a lawyer or not, can apply it to the material facts.

In arbitration of statutory disputes, arbitrators must apply the law. The Employment Due Process Protocol, promulgated by the AAA and other organizations, calls for arbitrators to be trained in the relevant statutes. The AAA will not administer employment arbitrations under employer ADR programs that do not comply with this protocol.

The law is also supposed to be applied in international arbitration. The AAA International Arbitration Rules provide that the arbitrator should follow the law designated by the parties, or if no law is designated, the law the arbitrator deems appropriate.

The issue of outcome predictability does not arise in mediation because, once again, there is no outcome decided by a third party. The parties either agree on a settlement or they don’t, in which case the mediation ends. However, a party’s decision to settle is often based on the view that the applicable law is not in its favor. Conversely, a party may resist settlement when it believes the law supports its claims.

10. Due process must be afforded in court.

To protect litigants in court, the basic due process requirements are: fair notice and an opportunity to be heard. Other beacons of due process are a fair hearing, a neutral decision maker, and trial by jury.

Litigation procedures call for the defendant to receive adequate notice of the filing of a claim and its nature so the defendant has time to prepare a response to the claim. Litigants can vacate a default due to inadequate or defective notice.

Litigation rules also provide the parties with the opportunity to gather facts, respond to pretrial motions, and to have their side of the case heard at trial where they can present evidence and testimony, subject to the rules of evidence, and cross-examine adverse witnesses to test their credibility. To help parties present their case, courts can compel witnesses to appear. The court’s subpoena power is critical when adverse witnesses are necessary.

Judges and juries are supposed to be unbiased. Parties can seek the recusal of a judge who has an interest in the matter. As to juries, the parties have a set number of juror challenges for cause when they think a juror may be partial to one side. However, true neutrality is never assured.

Arbitration: Arbitration is supposed to be a fair and expeditious process. When it is properly designed, it has due process protections for users, including notice, a neutral and independent decision maker, an opportunity to challenge the arbitrator for bias, and an opportunity to be heard.

Federal arbitration law provides that arbitrators can subpoena witnesses to attend the hearing and compel them to produce documents.

As noted above, the AAA adheres to the Employment Due Process Protocol. The Association also was involved in promulgating, with other interested organizations, due process protocols for consumer and healthcare disputes.

Courts are sensitive to the issue of due process in employment and consumer arbitration and they have closely examined arbitration agreements that are infected with procedural unfairness, and may refuse to enforce them. Federal and state arbitration laws also allow an arbitration award to be vacated on any ground for the revocation of a contract. This includes unconscionability.

The classic arbitration process contemplates that each side will be able to present its case at a hearing that is somewhat less formal than in court. At the hearing, the parties can put on their
direct witnesses and cross-examine each other's witnesses. Failure to allow a party to present any evidence or witnesses surely constitutes a procedural defect that would result in an award being vacated. However, an arbitrator's refusal of a party's request to hear certain witnesses might not warrant this result if the testimony would be repetitive. The AAA rules instruct arbitrators to make sure to give each side the opportunity to present its case.

There is some case law allowing dispositive motions in arbitration and holding that the right to present one's case does not mean that the parties have a right to a plenary hearing on the merits.

11. Successful litigants can obtain assistance from the court to force compliance with a judgment or verdict.

Court rules provide for post-judgment processes to assist successful litigants in securing compliance with a judgment or verdict. These processes leave much to be desired, but they do exist.

Arbitration and Mediation: In arbitration, parties who wish to enforce an arbitration agreement against an uncooperative signatory have remedies to enforce the agreement. Likewise, prevailing parties in arbitration have court remedies to enforce an arbitration award. The latter process involves transforming an award into a court judgment. Thereafter, judicially provided collection processes are available.

In mediation, one hopes there will be compliance with the mediation agreement. However, if a party to a mediation agreement refuses to mediate, the other party can seek to have the agreement enforced in court, albeit not under the Federal Arbitration Act in the view of the 11th Circuit, which recently held that a mediation agreement is not enforceable under the FAA.

When a party breaches a settlement agreement reached in mediation, the agreement may be enforceable in court, unless it requires ADR to resolve the dispute.

12. Appeals are allowed for legal error.

The court system allows the losing party to appeal an error of law made by the judge in the case (for example, the denial of a motion, the refusal to allow certain evidence, or the giving of a wrong jury instruction). In order to be appealable, counsel for the losing party must have made an objection on the record in the trial. Appeals are routinely filed in litigation, crowding the dockets of the appellate courts.

On appeal, the reviewing court acts as a check on judicial fairness and ensures consistency in the application of the law in the court's jurisdiction.

Arbitration: A losing party in arbitration can appeal an award but only under limited circumstances set forth in federal or state arbitration
law, or under accepted common law doctrine. Technically, this is not an appeal but review by a district court.

The statutory grounds for judicial review of an arbitration award are a denial of due process, arbitrator bias, fraud, or exceeding the scope of the arbitrator’s authority.46 A recognized common law ground is a violation of public policy, which applies mainly in the labor arbitration area.47 None of the statutory or common law grounds permit a party to appeal an error of law by the arbitrator.

The fact that there are limited grounds for judicial review of arbitration awards is considered by many lawyers and parties to be a key disadvantage of arbitration. But the limited scope of arbitration appeals is what makes arbitration less expensive and shorter than litigation.

Does the absence of appeals for legal correctness discourage arbitrators from taking their decision-making responsibilities as seriously as they should in order to produce a fully reasoned decision? It has been suggested that parties require arbitrators to produce a short written explanation of the award to make sure that the arbitrator has thought through the decision.

Mediation: In mediation, there is no decision and therefore no appeal. The result of mediation is a mutually acceptable agreement with which the parties should be satisfied. Unsuccessful mediations simply place the parties back where they were before the mediation; i.e., with an unresolved conflict.

13. Appellate decisions are usually made public.

Appellate court decisions are usually published, creating legal precedent. Commentators often scrutinize and then publish criticism of these decisions, which are sometimes further appealed to a higher court. In this way, obviously wrong trial court decisions are checked by appellate scholarship. The prospect of having their rulings appealed deters judges from making outrageous rulings.

Arbitration: Arbitration awards seldom are published (except for labor awards and international awards involving investor-state arbitration 48). Even when they are, they are not legal precedent. However, this does not mean that an arbitrator will not follow another arbitrator’s reasoning, if known. This happens all the time in the labor area. Labor arbitration has volumes of published decisions creating precedent, which is necessary due to the continuing relationship of labor and management.

Mediation: There are no appeals in mediation because there are no decisions by a third-party.

Conclusion

The litigation system has served America well. It has done so as a protector of freedom and an insurer of stability, infusing trust in the rule of law. Despite its strengths, the judicial system has weaknesses that have created a need for alternatives.

The most well known of these alternatives are arbitration and mediation. Mediation can be more creative than arbitration or litigation in devising solutions to disputes, especially if the parties are educated and experienced with interest-based bargaining. But it is still relatively new to America. While corporate users seem to like the process, the amount of confidence parties have in the process is unknown.

Arbitration has been around a long time. The FAA dates back to 1925. When first proposed, arbitration was disparaged as an insult and invasion of the court’s jurisdiction. It gained credence and converts over the years, including those disturbed by excesses of the judicial system. It overcame the disapproval of the courts and was endorsed by the U.S. Supreme Court. As a result, arbitration has been extended to many different areas, from anti-trust disputes to securities disputes. But no process or idea is without shortcomings and when academics and commentators become aware of them, they can make a career of publicizing them.

We believe that the long-term acceptance, promise, and viability of arbitration and mediation are tied to their appropriate use. One way of assuring appropriate use is to understand how they differ from litigation and from each other. Hopefully this discussion assists that determination.

Using arbitration and mediation has proven in many instances to make good business sense. This is evident from the decision to incorporate arbitration into the collective bargaining grievance process. Long ago, labor and management understood the enormous advantages of having an alternative dispute resolution mechanism in their contract. As a result, they have come to rely heavily on the predictability, consistency, integrity, and high quality of labor arbitration decisions.

With appropriate protocols in place, the same advantages apply to a wide range of business disputes.

We see litigation facing many long-term problems, the effect of which is likely to curtail public access to the courts. Now is the time to establish ADR processes that are infused with due process and demand the highest quality decision-making. Eventually, if done correctly, ADR could become the forum of choice for civil dispute resolution.

(Endnotes are on the next page)
ENDNOTES

1 This was the caption on a comedic figure sold in the 1960s that looked like (but wasn't) "Rumple of the Bailey." These figurines, called "Creepy Creatures," were sold in the late 1960s and early 1970s by Russ & Wallace Berrie & Co. Rumple is a fictional character created by British barrister and author John Mortimer. The BBC series "Rumple of the Bailey" aired on U.S. television on the Public Broadcasting System.


3 Id. ("As a peacemaker the lawyer has a superior opportunity of becoming a good man. There will always be enough business.")


5 In some instances, however, a statute will allow a prevailing party to have its legal costs and expenses paid by the losing party. Also, in a contract, the parties may agree that the prevailing party can recover its attorney fees.

6 The AAA arbitration rules can be accessed at www.adr.org.

7 *AAA Employment Rule R-48.*

8 *AAA Consumer-Related Supplementary Procedure C-8.*

9 *Id.* and AAA Employment Rule R-48.

10 A portion of the mediator's compensation is allocated for AAA's services. *AAA Commercial Mediation Rule M-17.*

11 Some states require plaintiffs in a medical malpractice action to file a verified written medical expert opinion indicating that reasonable grounds exist to find that each named defendant was negligent. *Fla. Stat. Ann.* § 766.203.

12 These involve theories of equitable estoppel, agency piercing the corporate veil, etc.


17 The expert neutral must not stray from the record by using the neutral's own extensive experience (unknown by the parties) to decide the dispute. Going outside the record deprives the parties of due process.


19 These jurisdictions are Alaska, Colorado, District of Columbia, Hawaii, Nevada, New Jersey, New Mexico, North Carolina, North Dakota, Oklahoma, Oregon, Utah and Washington.

20 *RUAA (2000) § 1.*

21 Dominick Dunne provides an amusing discussion of jockeying for seats and placement at the O.J. Simpson trial in *Another City, Not My Own* 70-74 (Crown Pub 1997).

22 Although most web searches for filings provide incomplete information, they can now take place in many jurisdictions. For example, for Sacramento County see website www.saccourt.com/indexes.

23 Some labor awards are published, especially when precedent takes on some importance.


25 This right cannot be waived in jurisdictions that have enacted the RUAA. See cmt. to RUAA § 16: "Section 4(b)(4) provides that a waiver of the right to be represented by an attorney under Section 16 prior to the initiation of an arbitration proceeding under Section 9 is ineffective, but an employer and a labor organization may waive the right to representation by an attorney in a labor arbitration."

26 "A court's task thus divides into two parts: First, it finds the facts of the case—whether one man killed another, or drove eighty miles an hour, or paid his rent, or signed a certain paper. Second, it determines what legal rule covers those facts. The court's decision then results." Jerome Frank, *Courts on Trial, Myth and Reality in American Justice* 3 (1949).


28 *AAA Commercial Rule R-21.*

29 RUAA § 17(c)(c).

30 RUAA § 17(b).

31 *AAA Commercial Rule R-7* and RUAA § 6(c).


33 See "AAA's Policy on Employment ADR" in the AAA employment rules.

34 Art. 28(1).

35 The RUAA permits arbitrators to subpoena witnesses for pre-hearing depositions. Some courts have found that the FAA does not allow witnesses to be subpoenaed except to the hearing.


37 E.g., *Federal Arbitration Act, 9 U.S.C.* § 2 and Cal. Civ. Pro. Code, tit. 9 § 1281, both of which make a written agreement to arbitrate enforceable "save upon such grounds as exist for the revocation of any contract." Awards can be vacated on various grounds, some of which might involve a denial of due process. However, the losing party must allege the specific grounds stated in the applicable statute. See e.g., 9 Cal. Civ. Pro. Code § 1286.2(3).

38 Refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy are grounds for vacating an award under FAA § 10. This could cover the refusal to allow presentation of witnesses and opportunity to cross-examine. See also RUAA § 23(3).

39 *AAA Commercial Rule R-30.*


41 *AAA Employment Rule R-27.*

42 *AAA Commercial Rule R-30(b).*

43 Ferris & Biddle, supra, at 23-24.

44 The Arbitrator Disclosure Sheet provided for arbitrations in California, if applied to judges would, in our opinion, significantly impact the ability of judges to sit on many court cases.

45 *Advanced Bodicare Solutions, LLC v. Thione Int'l*, No. 07-12309, 2008 WL 1775001 (11th Cir. April 21, 2008).

46 FDA § 10.


48 Decisions are supported by extensive written opinions and sometimes published in labor publications which creates precedent and instills some degree of predictability in labor-management relations.