

## **PRACTICE ALERT**

### **New ADR Professional and Ethical Requirements**

Alternative Dispute resolution processes are firmly established under federal and state laws. Competent legal representation therefore requires attorneys to be familiar with those laws and ADR issues, and to advise clients as to ADR alternatives. See Rules 1.1, 1.2(a) and 1.4(b).

Rule 1:40-1 (effective September 5, 2000) provides that State complementary dispute resolution programs are an integral part of the judicial process, and states specifically that “attorneys have a responsibility to become familiar with available CDR programs and inform their clients of them.”

## **Introduction to ADR**

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“Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a real loser – in fees, expenses and waste of time. As a peacemaker, the lawyer has a superior opportunity of being a good man. There will still be business enough.” **Abraham Lincoln**

“I cannot emphasize too strongly to those in business and industry – and to lawyers – that every private contract of real consequence to the parties ought to be treated as a candidate for binding arbitration.” **Chief Justice Warren Burger**

### **What Is Alternate Dispute Resolution (ADR)?**

The use of one or more formal processes by the parties to a dispute, other than civil litigation and associated settlement negotiations, to resolve that dispute.

### **What is Complementary Dispute Resolution (CDR)?**

CDR is ADR conducted under the supervision of New Jersey’s courts in accordance with the New Jersey Rules of Court, R. 1:40-1 et seq., as well as the guidelines of the New Jersey Supreme Court.

### **What Are the Primary Forms of “Alternative” DR?**

→ **Mediation and Arbitration** — The two most common forms of ADR are Mediation and Arbitration, although there are other forms such as Neutral Evaluation.

→ **Mediation** — Mediation is typically a confidential, consensual non-binding process (i.e., one in which the parties voluntarily agree to participate and no party is obligated by participating to compromise their position). Mediation uses a neutral third person to facilitate a discussion by the parties of the basis for the dispute, their respective positions and demands and assists the parties to explore ways in which they may agree to satisfactorily resolve their dispute. The parties to mediation typically agree that what transpires during mediation, i.e., what is said or disclosed to the other party, may not be disclosed or used in any subsequent court or arbitration proceeding.

→ **Arbitration** – Arbitration is a consensual or court mandated process in which each party presents their position regarding a dispute to at least one neutral third person who will then make a determination, based on the merits of each party’s position, the manner in which the dispute will be resolved.

A neutral arbitration “panel” usually consists of either one or three neutrals.

The determination of the panel is called an “award”. The award usually includes a description of the reasons supporting the resolution of the merits of the dispute, and describes the manner in which the dispute will ultimately be resolved, e.g., the amount of damages to be paid or the actions that must be taken by a party. Some awards called “bare” awards only describe the remedy for the dispute.

The determination of the arbitration panel may either be “final and binding” or simply advisory (non-binding) to the parties. The ADR agreement determines whether the arbitrator’s decision and award is final and binding. Most court-annexed arbitration is non-binding arbitration, but may become final and binding unless one of the parties subsequently seeks a determination by the court.

An arbitration award, unlike a judgment of a court, must be “confirmed” by a court, i.e., a party must apply to a court (move) to have the award entered as a judgment.

The decision and award achieved through “final and binding” arbitration has the force and effect of a judgment, when confirmed by a court of competent jurisdiction, and may not usually be appealed. Binding awards may be vacated or modified only on limited statutory or public policy grounds.

→ **Neutral Evaluation** — Neutral Evaluation is a process that mimics an arbitration by a third party neutral and typically requires the parties to present their cases in a more summary fashion, but the Neutral Evaluator’s determination and award is not binding on the parties. These processes provide the parties the benefit of hearing the manner in which the opposing party plans to present their case and how and why at least one neutral third party would resolve the parties’ dispute based on these presentations.

→ **Private Judges & Juries** – Another option available to litigants and one getting increasing press is the use of a private judge and jury rather than an arbitrator to reach a final and binding determination. The private judge (usually a retired local state or federal judge) and jury approach is identical in most respects, albeit abbreviated, to that the parties and their counsel would experience in state or federal court, e.g., the same outward appearance (e.g., the private judge may even wear a black robe and the jury sits in jury box, the same civil procedures and rules of evidence, the judge renders legal determinations, and the jury determines factual issues and the amount of the award). The judge and jury panel are selected by an ADR entity or jury consultant in the manner determined by the parties. The obvious benefits of this procedure in jurisdictions with crowded dockets is that the trial and decision occurs on an expedited schedule and the parties have more control over the criteria for selection of the judge and jury.

→ **What Is “Administered ADR”?** — ADR proceedings may either be “administered” or “non-administered”.

→ **Administered ADR** —Administered ADR occurs under the auspices of a court or an independent ADR entity, like the American Arbitration Association, that functions much like a court or judge’s clerk and arranges and manages conduct of the ADR proceedings. This includes managing the neutral selection process, hosting the ADR proceedings (unless the parties or arbitrators elect another location), receipt of the papers filed with the arbitrator, and the fee billing and collection process. The administering ADR entity often serves as the interface between the parties before the arbitrator is selected and between the parties and the neutral thereafter. The administering independent ADR entity usually charges a fee for its services in addition to that of the neutral.

→ **Non-Administered (or Party-Administered) ADR** — Non-or party-administered ADR occurs under the terms of an ADR agreement that pre-selects a neutral or provides the basis for selecting a neutral and calls for the selected neutral to administer the proceeding in accordance with the agreement. Non-administered ADR may also involve an ADR provider entity, like the CPR Institute for Dispute Resolution and its rules. Such entities simply assist with the selection of neutrals from their panels if called upon by the

parties' agreement or if for some reason the parties are unable to select a neutral. The selected neutral then controls (administers) all aspects of the proceedings not controlled by the parties under their agreement.

*This is one of a group of articles commissioned by the New Jersey State Bar Association's Dispute Resolution Section to help attorneys meet their new ADR professional responsibilities.*

## **ADR INTERNET RESOURCES**

American Arbitration Association

[www.adr.org](http://www.adr.org)

American Bar Association Section of Dispute Resolution

[www.abanet.org/dispute](http://www.abanet.org/dispute)

ADR Resources

[www.adrr.com](http://www.adrr.com)

ADR World

[www.adrworld.com](http://www.adrworld.com)

Association for Conflict Resolution

[www.acresolution.org](http://www.acresolution.org)

CPR Institute for Dispute Resolution

[www.cpradr.org](http://www.cpradr.org)

JAMS-Endispute

[www.jamsadr.com](http://www.jamsadr.com)

National Arbitration Forum

[www.ARBITRATION-FORUM.com](http://www.ARBITRATION-FORUM.com)

The Conflict Resolution Information Center

[www.crinfo.org](http://www.crinfo.org)

Mediation Information and Resource Center

[www.mediate.com](http://www.mediate.com)

State of New Jersey Judiciary Complementary Dispute Resolution

[www.judiciary.state.nj.us/services/cdr.htm](http://www.judiciary.state.nj.us/services/cdr.htm)

NJ Association of Professional Mediators

[www.njapm.org](http://www.njapm.org)

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