CPR

International Institute for
Conflict Prevention & Resolution

ADR SUITABILITY GUIDE

(Featuring Mediation Analysis Screen)

International Institute for Conflict Prevention & Resolution
30 East 33rd Street, 6th Floor, New York, NY 10016
(212) 949-6490 □ Fax: (212) 949-8859 □ www.cpradr.org

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New York, NY 10016
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About the International Institute for Conflict Prevention & Resolution

The International Institute for Conflict Prevention & Resolution (formerly CPR Institute for Dispute Resolution) is an international nonprofit alliance of 500 global corporations, leading law firms and legal academics at the forefront of new alternatives to litigation and conflict management.

- CPR Members – Over 400 general counsel of major corporations, senior partners of major firms, prominent legal scholars and selected public institutions are actively engaged in the work of the CPR Institute.

- CPR Panels of Neutrals – 1,000 prominent attorneys, former judges, legally trained executives, other professional experts and academics serve on CPR's national, international, regional and specialized panels of neutrals. CPR Panelists currently are resolving disputes in excess of $6 billion.

- CPR Pledge Signers – More than 4,000 operating companies have signed the CPR Corporate Policy Statement on Alternatives to Litigation; 1,500 firms have signed the CPR Law Firm Policy Statement on Alternatives to Litigation; leading companies in numerous industries have signed CPR commitments to employ mediation to resolve disputes among themselves or disputes common to their industry.

Since CPR's founding in 1979, our mission has been to build alternative dispute resolution, or ADR, into the mainstream of the law department and firm practice. To fulfill our mission, CPR is engaged in an integrated agenda involving development of ADR procedures and resources, research and development, education and advocacy to reinforce the concept of conflict resolution. To stay abreast of new CPR resources, I encourage you to visit our website (www.cpradr.org).

We are grateful to the many CPR Member Advisory Committees that have played key roles in developing the procedures and practice tools that form the core of the CPR MAPP Series.

F. Peter Phillips, Acting President

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ADR SUITABILITY GUIDE

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CPR ADR SUITABILITY COMMITTEE

(2001)

PROJECT CO-DIRECTOR
KENNETH KRESSEL
Professor of Psychology and Director of the Certificate Program in Conflict Management
Rutgers University
Newark, NJ

PHILLIP M. ARMSTRONG
Associate General Counsel
Georgia Pacific Corporation
Atlanta, GA

KATHLEEN A. BRYAN
VP & Director, Litigation Management
Motorola, Inc.
Schaumburg, IL

BRAD N. FRIEDMAN
Milberg Weiss Bershad Hynes & Lerach
New York, NY

HON. JOHN J. GIBBONS
Gibbons, Del Deo, Dolan, Griffinger & Vecchione
Newark, NJ

JAMES P. GROTON
Senior Partner
Sutherland, Asbill & Brennan
Atlanta, GA

CLAIRE P. GUTEKUNST
Proskauer Rose LLP
New York, NY

ROBERT L. KING
Debevoise & Plimpton
New York, NY

HARRY N. MAZADOORIAN
Quinnipiac Law School
Hamden, CT

CARRIE MENKEL-MEADOW
Georgetown University Law Center
Washington, DC

MARGARET L. SHAW
ADR Associates
New York, NY

GARY WEINER
Sonoma County Superior Court
Office of Alternative Dispute Resolution
Santa Rosa, CA

CPR Staff:

KATHLEEN M. SCANLON
Vice President
Project Co-Director

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ADR SUITABILITY GUIDE

Overview

In 1998, the International Institute for Conflict Prevention & Resolution (formerly CPR Institute for Dispute Resolution) developed an ADR Suitability Screen to assist lawyers and clients in determining whether a particular dispute is suitable for resolution through ADR. That instrument was adapted from a screen developed by Debevoise & Plimpton under the leadership of Robert L. King. In the years since those efforts, empirical research and practitioner experience with ADR has grown, especially in regard to mediation, the most popular of the nonbinding ADR processes. Under the guidance of the CPR ADR Suitability Committee, the current 2001 revision and expansion of the ADR Suitability Screen into the **ADR Suitability Guide** incorporates new knowledge in a practice relevant, state-of-the-art manner.

The Guide is applicable to a wide range of disputes. In some instances, certain sections or questions will be more relevant to one category of disputes (such as business disputes between companies) than to another. The Guide is designed both for the less experienced practitioner and the seasoned attorney.

What Is in the ADR Suitability Guide?

SECTION 1: MEDIATION SUITABILITY

The Mediation Analysis Screen and Accompanying Commentary: The Screen consists of a questionnaire and accompanying Commentary to guide practitioners and their clients in deciding whether a particular dispute is suitable for mediation. The Screen is divided into three diagnostic areas: (1) the Parties' Goals for Managing the Dispute; (2) the Suitability of the Dispute for a Problem Solving Process; and (3) the Potential Benefits of Mediation. A ***Screen Worksheet*** of the questions without Commentary is also included for convenience.

Interpreting Screen Responses and Practice Tips: A scoring guide is provided as an aid to interpreting responses with select practice tips on handling the mediation decision process.

Master's Mediation Summary Checklist: According to the ADR Suitability Committee, the expert practitioner often intuitively determines whether mediation is suitable for a given dispute. However, even the experienced decision-maker can benefit from prompts to more analytic and self-conscious case review. The Master's Mediation Summary Checklist provides a convenient short outline for this review.

SECTION 2: MATRIX OF OTHER NONBINDING ADR PROCESSES

For those disputes that may not be suitable for mediation, another nonbinding ADR process may be appropriate before resorting (or returning) to arbitration or litigation. To guide counsel in this decision-making process, a matrix of other common, nonbinding ADR processes has been prepared.

SECTION 3: COMPARISON OF ARBITRATION AND LITIGATION

When a binding process is required, two common choices are arbitration or litigation. The major criteria for identifying which disputes are better suited for one or the other, rather than mediation, have been identified and highlighted in the Mediation Analysis Screen in Section 1. To assist the decision-maker in selecting between arbitration or litigation, a comparison chart of typical features of each process is provided followed by a set of 10 diagnostic questions in this Section 3.

SECTION 4: REFERENCES

A reference list of the empirical and professional literature cited in the ADR Suitability Guide is provided.

Why Does the Guide Feature Mediation?

> **For the majority of disputes, mediation is the nonbinding ADR process of first choice.**

According to a recent survey of more than 600 corporate attorneys conducted by Cornell University, Foundation for the Prevention and Early Resolution of Conflict (PERC) and PricewaterhouseCoopers LLP (Lipsky & Seeber, 1998) (the "Cornell survey"), nearly 90% of Fortune 500 companies have had experience with mediation; overwhelmingly more than with any other ADR method except arbitration (80%). The respondents were very positive about their experiences with mediation on a variety of grounds (e.g., that it saves time and money, allows the parties to resolve the dispute themselves, and leads to more satisfactory settlements). The great majority also felt they were either "very likely" (46%) or "likely" (38%) to use mediation in the future. Their views on arbitration, although positive in many cases, were generally less favorable. The results of the Cornell survey are reinforced by a study of 449 cases involving a wide array of commercial disputes. Mediation led to settlement in 78% of these cases, regardless of whether the parties had been sent to mediation by a court or had selected the process voluntarily. Mediation also cost far less than arbitration, took less time, and was judged a more satisfactory experience (Brett, Barsness, & Goldberg, 1996).

> **Criteria for helping decide which cases are appropriate for mediation is of particular importance because the primary route into mediation is voluntary decision-making on the part of counsel and clients.**

A voluntary decision by legal counsel and/or the client is the single most common means by which a dispute arrives in mediation. This occurs between 40%-64% of the time, according to available evidence (Brett, et al., 1996; Cornell survey), which is at least twice as often as any other method. (A court mandate sends cases to mediation 25-30% of the time, although anecdotal evidence suggests that this percentage is increasing; an existing contract 10-25% of the time. (Cornell survey)). The Mediation Analysis Screen and Commentary provides a state-of-the-art tool to assist in this important process choice.

SECTION 1

MEDIATION SUITABILITY

- **CPR Mediation Analysis Screen and Commentary**
- **Screen Worksheet**
- **Interpreting Responses and Practice Tips**
- **Master's Mediation Summary Checklist**

International Institute for Conflict Prevention & Resolution

CPR MEDIATION ANALYSIS SCREEN AND COMMENTARY

Overview

Under the guidance of the CPR ADR Suitability Committee, CPR has developed the following *Mediation Analysis Screen* to assist counsel and their clients in deciding whether a particular dispute is suitable for mediation. This decision-making process is still considerably more "art" than "science." The Screen aims to significantly close the gap between the two and is intended to serve as a useful guide to informed decision-making.

The Screen relies on three factors in deciding the suitability of a case for mediation:

(1) the Parties' Goals for Managing the Dispute;

(2) the Suitability of the Dispute for a Problem Solving Process; and

(3) the Potential Benefits of Mediation in Relationship to the Specific Dispute Being Considered.

The division of the decision-making process into three factors has the dual virtues of reflecting the available empirical and anecdotal evidence and being easy to remember.

When using the Screen, two caveats are in order. *First*, the two primary sources of information germane to diagnosing cases that are suitable for mediation are: (i) attorneys' ideas about which cases are suitable for mediation (e.g., CPR ADR Suitability Committee, Cornell survey), and (ii) the few empirical studies of the variables associated with favorable or unfavorable mediation outcomes (e.g., Brett, et al.'s 1996 study of 449 cases of mediation and arbitration). The insights of experienced lawyers about which cases are suitable for mediation are invaluable. Without them it would be impossible to construct a diagnostic perspective with any detail or confidence. However, attorney opinion is ultimately not a substitute for systematic empirical evidence, which is limited. *Second,* the focal question – "Is mediation suitable for a particular dispute?" – does not distinguish sharply between the many forms and types of mediation (Kressel, 2000; Riskin, 1996). Although the Screen suggests that users should keep in mind a "problem solving" model of mediation, counsel needs to be mindful that there exists a variety of mediation forms and styles. See also Commentary to Question 26.

Instructions

The Screen begins with a Benchmark Question followed by a series of questions divided into the three diagnostic areas identified above. When answering each question, keep in mind that, depending on the parties' needs and desires, a mediator can provide many forms of assistance. For example, a mediator can orchestrate the communication process, help the parties identify and focus on underlying interests and concerns, and develop and evaluate settlement options (See generally, CPR Mediation Procedure and Commentary, 1998; Scanlon, 1999).

Beginning with the Benchmark Question, answer each question by indicating the choice that describes most accurately the dispute you are considering.

■ BENCHMARK QUESTION

Before you begin, in order to provide a benchmark against which to compare your analysis, check below whether your instinct tells you that settlement of this dispute:

___ a) Is not foreseeable at any stage.
___ b) Is very likely, even if only on the courthouse steps.

COMMENTARY

The vast majority of cases that are filed eventually are resolved by settlement (Galanter & Cahill, 1994; Kritzer, 1986). Where the probability of eventual settlement is high, mediation in many instances can hasten the process and lead to more mutually satisfying outcomes. An empirical study of 449 cases showed that mediation was capable of settling 78% of the cases (Brett, et al, 1996). For certain types of disputes, such as a patent infringement or libel claim, adjudication may appear appealing for a variety of reasons ranging from need for legal precedent to matters of fundamental principle. Even in those cases, however, the benefits that mediation can offer other than settlement should be carefully considered. (See Factor Three questions).

■ FACTOR ONE: The Parties' Goals for Managing the Dispute

A. OVERARCHING GOALS
B. LEGAL GOALS
C. PRAGMATIC GOALS (COSTS & RISKS)

COMMENTARY

How a dispute will be "managed" is an important factor when deciding whether mediation is appropriate. The management dimension focuses on the overarching objectives to be achieved, the legal goals that guide how a particular dispute is handled, and certain pragmatic goals focused on costs and risks.

– A. Overarching Goals –

1. How important to the parties is maintaining a relationship with each other?

___ a) One or both sides cares only about the substantive outcome; the impact on the relationship with the other side is irrelevant.

___ b) Although the substantive outcome is important, both sides would benefit to some degree from preserving or enhancing their relationship.

___ c) Preservation or even improvement of the relationship is of considerable importance to both sides.

COMMENTARY

In the Cornell survey "preserving good relationships" was cited by 59% of the attorneys as an important reason to seek mediation (Cornell survey at 17). Mediation is especially appealing where the disputants have or would benefit from a continuing business or professional relationship (Lewicki, Saunders, & Minton, 1999; Rahim, 2001). Experimental evidence supports this proposition (Pruitt & Carnevale, 1993). Empirical evidence further supports this premise. A recent study of 60 commercial contract and employment cases reports "relationship repairs" about 17% of the time in cases where the parties had a significant connection before they came into conflict (Golann 2001). (However, the study did not include a comparable sample of adjudicated cases). In a study of divorce negotiations, 30% of those who had mediated their agreements felt the process had improved their relationship with a former spouse. In contrast, only 15% of those exposed to court felt that the legal system improved that relationship. In fact, almost half indicated that adjudication had detrimental effects on their relationship (Pearson & Thoennes, 1989). (See also Commentary to Question 3).

2. How important to the parties is maintaining control over the *outcome* of the dispute?

___ a) Both sides prefer to have a judge [or arbitrator] decide the outcome.

___ b) Maintaining control over the outcome is moderately important to at least one of the parties.

___ c) Controlling the outcome is important to both parties.

COMMENTARY

One of the strongest rationale for using mediation is that it permits the parties to maintain control over the outcome of a dispute, rather than ceding that right to a judge or other third party (e.g., an arbitrator) whose decision may seriously disappoint one or both sides (Lewicki, et al., 1999). The Cornell survey substantiates this notion. After the saving of money, the second most frequently cited reason to use mediation (almost 83% of the respondents) was that it allows

the parties to resolve the dispute themselves; the fifth most cited reason (67%) was that mediation produces more satisfactory settlements (Cornell survey at 17). The study by Brett, et. al. (1996) on a wide range of contractual, tort, and construction disputes, indicates that, compared to parties who had experienced arbitration, parties who mediated their dispute were significantly more satisfied with the outcome and its implementation. (See also Commentary to Question 3).

3. How important to the parties is maintaining control over the *process* by which the dispute is resolved?

___ a) Neither side cares at all about maintaining control over the process used to resolve the dispute.

___ b) Maintaining control over the process is moderately important to at least one of the parties.

___ c) Controlling the process is an important desire of both sides.

COMMENTARY

Substantial research and theory indicate that disputants are as much concerned with "procedural justice" – how fair the process of arriving at an agreement seems – as they are with the substantive outcomes ("distributive justice") (Thibaut & Walker, 1975; Tyler, 1987). While mediation preserves outcome control for the parties (see Commentary to Question 2), it is generally true that mediation is also likely to give the parties a good deal of control over the process of dispute management (although less than they retain in unassisted negotiations). The Cornell survey reports several factors related to a preference of the parties "to have some control over the path to resolution" as important reasons for taking a dispute to mediation. Eighty-one percent of those surveyed said that mediation provided a more satisfactory process than litigation (the third most cited reason behind the saving of money and the ability to resolve the dispute themselves); 59% reported that it preserved good relationships (Cornell survey at 17). Compared to parties who used arbitration, Brett, et. al. (1996) report that parties who used mediation were more satisfied with the process and the neutral and with the effect of the process on the parties' relationship. Several other studies also confirm that mediation receives higher marks from disputants for being a good process than does arbitration (Brett & Goldberg, 1983; Shapiro & Brett, 1993).

The degree of process control can be affected by the mediator and by the intensity of the dispute. There appears to be significant individual differences among mediators in terms of the degree of process control (Kolb et al., 1997; Menkel-Meadow, 1995). Mediators also appear to be more assertive about controlling the negotiating process in high conflict disputes than in conflicts of lower intensity (Kressel, 2000; Lewicki, et. al., 1999).

– B. Legal Goals –

4. What is the likelihood that this case can be disposed of by a prompt, dispositive motion?

___ a) Very likely.
___ b) A possibility.
___ c) Very unlikely.

5. Is injunctive relief, a legal precedent from a court or other relief only available from an adjudicative body needed by a party?

___ a) Very likely.
___ b) A possibility.
___ c) Very unlikely.

COMMENTARY

Disputes that may not be suitable for mediation are those where the relief sought is only available from a court, such as injunctive relief or legal precedent. For example, in a small sample survey of lawyers who participated in the Lanham Act Mediation Program for the Northern District of Illinois, the need for injunctive relief (64%) and the need to establish legal precedent (47%) were cited as disincentives to mediate (Yates & Shack, 2000).

6. How certain is the need to engage in formal discovery?

___ a) Totally certain; only formal and extensive discovery is likely to surface crucial information.

___ b) Uncertain; it may be possible to acquire the relevant information in other ways.

___ c) Unnecessary; both sides would be better served by avoiding burdensome or intrusive formal discovery.

COMMENTARY

A common legal barrier to choosing mediation is the view that formal, often extensive, discovery is essential. Nonetheless, many seasoned corporate lawyers and judicial scholars (Brazil, 1999) argue that formal discovery processes are inflexible and inefficient, and that in many cases information is better sought in other ways, including exchanging necessary information in the course of mediation. A survey of six large corporations regarding 30 business-to-business cases reported that legal counsel who did not follow the conventional approach to engage in extensive, formal discovery, emphasizing instead informal investigation and exchange of information as part of the mediation process, scheduled mediation earlier and had a higher settlement rate in mediation than their conventional counterparts (Rogers & McEwen, 1998).

7. Do the parties only seek a neutral evaluation on the extent of damages or other specific issue?

___ a) Very likely.
___ b) A possibility.
___ c) Very unlikely.

COMMENTARY

A more evaluative form of consensual ADR – such as early neutral evaluation or fact-finding – may be a more appropriate option than mediation in some instances. (See Section 2: Matrix of Other Nonbinding Processes).

– C. Pragmatic Goals (Costs and Risks) –

COMMENTARY

Many pragmatic goals are often better met by mediation than by arbitration or litigation. These goals include saving time and money as well as maintaining privacy.

8. What are the estimated monetary costs of pursuing litigation [arbitration] relative to what either side can realistically expect to recover by a decision in its favor?

___ a) Small, relative to the potential gain.
___ b) The monetary costs are by no means negligible, but may be worth expending.
___ c) High, given what is at stake.

COMMENTARY

According to the Cornell survey, the saving of money was the single most often cited "trigger" for mediation (cited by 89% of the sample) (Cornell survey at 17). The monetary costs of full-scale litigation can be very high and of a different magnitude from those of mediation. Arbitration costs also can be quite high. Even parties with ample resources are likely to welcome the potential savings in monetary costs that mediation can provide. Multiparty cases often greatly escalate the time and cost of litigation and, on those grounds alone, increase the attractiveness of the mediation option. In determining the estimated monetary costs of pursuing litigation, appellate costs should also be considered. A number of reports provide empirical evidence that mediation does indeed save money for corporations. For example, Toro estimates that since it began its early intervention program that uses mediation as a cornerstone, its total claims handling expenditures have been reduced by an average of more than $45,600 per claim, with a total direct cost savings of more than $3.6 million (Olivella, 1999). Deere & Company estimates savings of 50% of all litigation costs when a case is concluded within one year through its mediation program (CPR, 1999). (See also Commentary to Question 9).

9. How important is a speedy resolution of the dispute?

___ a) Either unimportant to both parties or one party is best served by delaying resolution.

___ b) Moderately important to both sides.

___ c) Very important to both sides.

COMMENTARY

In the Cornell survey, the saving of time was cited as a compelling reason to use mediation, almost as frequently as the saving of money (80% and 89%, respectively) (Cornell survey at 17). Credit Suisse First Boston's Employment Dispute Resolution Program reports that its mediation component had an average resolution time of 4 months, as compared to 22.5 months using arbitration or litigation, and average transaction costs of $12,700 as compared to $63,100 using arbitration or litigation ("Going Public," 2000).

10. Is there a need for privacy in the resolution process?

___ a) No, this is not a need of either side.

___ b) Yes, this is a likely need, but only for one side.

___ c) Yes, this is a likely need of both sides.

COMMENTARY

Mediation offers a maximum degree of privacy, in sharp contrast with the public nature of litigation. Mediation also can provide more privacy than arbitration, however, the contrast is not as sharp. (See Section 3: Comparison of Arbitration and Litigation). Moreover, unlike either litigation or arbitration, mediation can offer confidentiality protections that enable parties to disclose to the mediator information that would not be disclosed to the other side that may facilitate a settlement. (See generally, Scanlon, 1999).

11. How likely is it that a party will gain a financial bonanza by going to court [or arbitration]?

___ a) Very likely.

___ b) The possibility is there, but with low probability.

___ c) Virtually nonexistent.

COMMENTARY

Empirical research has identified one pragmatic factor that weighs heavily against mediation: a firm belief of one of the parties that winning will be a financial bonanza of such proportions that nearly any legal cost or risk is worth taking (the so-called "jackpot" syndrome, Brett, et al., 1996).

■ FACTOR TWO: The Suitability of the Dispute for a Problem Solving Process

A. THE PARTIES' CAPACITY FOR PROBLEM SOLVING
B. THE QUALITY OF THE PARTIES' RELATIONSHIP
C. PRACTICAL REALITIES

COMMENTARY

Mediation's most significant advantage over adjudication is the potential it offers for problem solving. A dispute's suitability for a problem solving approach may be gauged most directly by the parties' attitudes towards concession-making and compromise. Suitability is also likely to be a function of the quality of the relationship between and among the parties and counsel. The appeal of mediation may also be affected by certain practical circumstances.

– A. The Parties' Capacity for Problem Solving –

12. To what extent are matters of fundamental principle at stake?

___ a) Clearly at stake for at least one of the parties.
___ b) Hard to judge with accuracy.
___ c) Not a factor for either side.

COMMENTARY

There is evidence that disputes involving matters of fundamental principle are frequently unresponsive to mediation (Kressel, 2000). However, when assessing this variable, it is important to carefully consider whether the claim truly involves a matter of principle as opposed to a fixed position arising from emotions or a calculated bargaining strategy.

13. How important to the parties is the securing of public vindication?

___ a) An important objective for at least one side.
___ b) Moderately important or hard to judge.
___ c) Of no interest to either side.

14. How certain are the parties that they will prevail in court [or in arbitration]?

___ a) At least one side is confident it will prevail.
___ b) Hard to judge with accuracy.
___ c) Neither side is certain it will prevail.

COMMENTARY

This item touches on the matter of timing – in other words, a dispute's "ripeness" for mediation. Some members of the CPR ADR Suitability Committee noted that the use of mediation can become more appealing after a failed dispositive motion or some other development, such as a damaging deposition, that decreases confidence in a legal victory. By contrast, others maintained that an atmosphere of "maximum uncertainty" adds to the appeal of mediation because both sides are vulnerable. There is no conclusive empirical research on "ripeness." In a small sample survey of lawyers who participated in the Lanham Act Mediation Program for the Northern District of Illinois, nearly a quarter of the responding lawyers thought that mediating early in the case was a positive factor (23%), with only 5% saying that an old case was amenable to mediation, while 25% thought is was unsuitable (Yates & Shack, 2000). Scholars of international mediation have noted that nation-states will often accept mediation only when they have reached a "hurting stalemate." (Touval & Zartmann, 1989).

There is also evidence for what has been called the "overconfidence" heuristic: The tendency of negotiators to overestimate their probability of being successful (Lewicki, et. al., 1999; Neale & Bazerman, 1983). The effect may be particularly strong for negotiators with high self-esteem and optimistic mood (Kramer, Newton, & Pommerenke, 1993). This suggests that answering this particular question objectively may be difficult, unless a conscious "correction" for the overconfidence heuristic is made. (See Commentary to Question 26 on the general topic of cognitive heuristics and their impact on the negotiation process).

15. How receptive is the leadership on each side to the general idea of mediation?

___ a) Unsupportive or uninterested.

___ b) Moderately receptive but with little or no experience with mediation.

___ c) Very receptive.

COMMENTARY

There is evidence that companies with a "culture" that is predisposed to ADR, especially those which have had experience with mediation, are much more likely to be receptive to the mediation option (Cornell survey at 23); and that parties who enter mediation with optimism are more likely to have a positive experience (Kressel & Pruitt, 1989). The Cornell survey also suggests that mid-level managers, whose decisions are often the source of many corporate disputes, may sometimes find mediation threatening: "A representative from a leading pharmaceutical company told us that the company had estimated that ADR would save millions of dollars in litigation costs but that it had not instituted a policy of using ADR because its middle management thought such a policy would undercut their authority." (Cornell survey at 24).

– B. The Quality of the Parties' Relationship –

16. What is the emotional climate between the parties?

___ a) One of deep-seated hostility, contempt, and distrust.

___ b) Moderately antagonistic and distrustful.

___ c) Relatively objective.

COMMENTARY

In many kinds of disputes, low to moderate levels of conflict, distrust, and tension between the parties have been associated with favorable mediation outcomes (Kressel & Pruitt, 1989). It is evident to many practicing mediators that the more strained the emotional climate, the harder their job is likely to be. However, some empirical research has found no relationship between "emotional climate" and mediation outcomes for commercial disputes (Brett, et. al., 1996).

17. What is the relative "power" of the parties as to their financial resources and business sophistication?

___ a) So disparate that one side may gain advantage over the other outside the civil justice system.

___ b) There is a moderate disparity in power.

___ c) Substantially comparable.

COMMENTARY

There is some empirical evidence that in disputes in which one party is more powerful than another, mediation is less likely to result in a settlement than in cases in which power is more nearly equal. This evidence comes from studies of divorce conflict (Kelly & Gigy, 1989) and disputes between nations (Bercovitch, 1989). Commentators also have cautioned that disputes in which there are great power disparities may create serious risk of unfairness that cannot be overcome by a mediator (Brazil, 1999).

18. How compatible are the styles of opposing counsel (as distinct from the parties themselves)?

___ a) It would be hard to imagine more contrasting legal styles and frameworks for dealing with conflict.

___ b) Moderate differences exist.

___ c) The attorneys' styles and frameworks for dealing with conflict are highly compatible.

COMMENTARY

Although mediators may provide assistance bridging communications problems, where there are strong "stylistic" differences between the attorneys, the case may do poorly in mediation. There is empirical evidence of such stylistic differences, particularly in regard to a preference for either a "cooperative" or "competitive" approach (Kressel, 1985; Schneider, 2000; Williams, 1983). (See generally Menkel-Meadow, 1984; Mnookin, 2000). A recent study of 60 commercial contracts and employment cases reports that mediators commented more frequently on the importance of the attitudes of lawyers than those of the parties as a factor affecting the likelihood of a repair to a disrupted relationship through mediation (Golann, 2001).

– C. Practical Realities –

19. Do the parties have the necessary resources to negotiate worthwhile trade-offs or to create new options?

___ a) A major problem is the lack of resources of any kind.
___ b) Resources exist, but are not abundant.
___ c) Reasonably good resources are available.

COMMENTARY

When there is little or nothing to divide up, it can be impossible to reach settlement through mediation (Kressel & Pruitt, 1989). However, even when the parties believe that there are too few resources, mediation offers them an opportunity to fully explore the possibility of creating options. Nonetheless, there may be categories of cases where mediation is not productive because one party is closed to the possibility of creating new options.

20. Is this a dispute that involves critical areas of managerial responsibility (e.g., matters of corporate finance or corporate reorganization)?

___ a) Yes, and in very significant ways.
___ b) Perhaps.
___ c) No.

COMMENTARY

Mediation may be unacceptable to corporate leadership when the dispute involves fundamental issues of managerial prerogative in high stakes disputes. When asked to predict the future of mediation, corporate attorneys surveyed in the Cornell study gave a generally optimistic assessment, except in the areas of corporate finance and financial reorganization. The authors of the study remark: "We believe our results suggest that where the stakes are very high, corporations prefer to fight their battles in front of judges rather than in front of mediators or arbitrators." (Cornell survey at 30).

21. What is the stance towards mediation of the jurisdiction in which the dispute is pending?

___ a) The court has little or no interest in mediation and/or has taken no steps to encourage mediation.

___ b) Ambivalent, unclear, or modest.

___ c) Very positive and encouraging and/or mediation is required for this kind of dispute.

COMMENTARY

Increasingly, judges and court mediation programs are playing a significant role in placing disputes into mediation (see Niemic, Stienstra & Ravitz, 2001; Plapinger & Sienstra, 1996). If a case will be filed or is pending in a jurisdiction which has a mandatory or active mediation program, this practical reality should be factored into counsel and clients' decision-making process.

■ FACTOR THREE: The Potential Benefits of Mediation for the Dispute in Question

COMMENTARY

The full range of potential benefits that mediation can offer other than settlement can be underestimated by attorneys and their clients. A checklist of questions to highlight such benefits is provided below. The questions are framed in terms of some of the most common obstacles to reaching a settlement. When responding to the questions, imagine a mediator whose primary activities include asking relevant questions to help the parties better understand their underlying needs and interests; preventing anger or other negative emotions from disrupting the problem solving process; serving as a "reality check" for unrealistic ideas; suggesting creative solutions for the parties to consider; and being a conduit for offers and counter-offers.

Would mediation benefit the parties by:

22. helping them clarify the issues in dispute?

___ a) No.

___ b) Perhaps.

___ c) Yes.

COMMENTARY

The issues that negotiating parties initially bring to the table, and eventually to a court or arbitrator, do not necessarily represent the full panoply of issues that divide them. Moreover, they are not

necessarily fully reflective of the parties' underlying concerns, which, if addressed, could resolve the conflict to everybody's satisfaction. Helping parties identify the genuine issues that divide them has been shown to be a central mediator activity and to increase the chance of reaching mediated settlement agreements (Kressel & Pruitt, 1989).

23. helping them to channel or control anger or other negative emotions?

___ a) No.
___ b) Perhaps.
___ c) Yes.

COMMENTARY

Anger is a common component in legal conflict and a common barrier to settlement. Although the adversarial litigation and arbitration processes may provide cathartic opportunities for venting, they are widely perceived as more likely to heighten tensions by creating additional occasions for each side to take offense at the behavior of the other and to retaliate with legal counter-moves of its own. In theory, mediation introduces a more cooperative problem solving context and provides opportunities for each side to form a more realistic picture of the other through guided interaction. Moreover, mediation itself provides the opportunity for a certain amount of "sabre rattling," such as during the opening presentations of the parties. There is evidence from mediation of industrial, divorce, and community conflicts that mediation can indeed reduce anger and hostility (Kressel, 2000).

24. giving one or both parties an opportunity to tell their stories and to be fully heard by the other side?

___ a) No.
___ b) Perhaps.
___ c) Yes.

COMMENTARY

An important aspect of procedural justice (see Commentary to Question 3) is the sense that one has had a reasonable opportunity to express important feelings and ideas about the dispute. Mediation is often viewed as more satisfactory than adjudicative procedures in this regard (McEwen & Maiman, 1989; Pearson & Thoennes, 1989).

25. providing an opportunity for an apology?

___ a) No, an apology would not be relevant or helpful.
___ b) Perhaps.
___ c) Yes, an apology would be very useful.

COMMENTARY

Scholars have examined the many benefits of apology in resolving a dispute (Cohen, 1999). Mediation provides a safe-haven for an apology because of the privacy and confidentiality protections typically in place (Cohen, 1999). For certain types of disputes, a primary concern of one of the parties may be to have their concerns validated by an apology from the other for harm done. This was a primary motive of complainants in a study of mediation in medical malpractice cases and the offering of an apology by the physician appears to have been an important element in many successful mediations (Feld & Simm, 1998). The experience of one hospital's use of apology suggests that at times it may be in the injurer's best financial interests to apologize (Cohen, 2000). Although there is little empirical research on the role of apology in the mediation process, it is a common belief among mediators that acts of genuine acknowledgment of wrong-doing or of inadvertent harm caused can dramatically improve the climate for a mediated settlement through a sense of "restorative justice" (Peachey, 1989).

26. providing them with a "reality check" from a knowledgeable intermediary on their positions or expectations?

___ a) No.
___ b) Perhaps.
___ c) Yes.

COMMENTARY

There is considerable evidence from research on cognitive processes in negotiation that the "reality checking" potential of mediation is often sorely needed, given the propensity of negotiators to rely upon a variety of convenient, but limited decision-making tools (or "heuristics"). These heuristics help simplify the task of decision-making under complex and uncertain conditions, but they frequently lead negotiators seriously astray. For example, in forming their bargaining positions negotiators may give undue consideration to a dramatically high court award, and neglect or undervalue more representative, but less "colorful," statistical information about what the courts typically do in cases like theirs (the "availability" heuristic). Negotiators are also prone to significantly overestimate the extent to which the other party is acting out of some internal negative characteristic (such as greed or malice), rather than from situational constraints or pressures, not the least of which may be the negotiator's own rigid or unrealistic behaviors and demands (the so-called "fundamental attribution error").

Many negotiators also fall prey to the mythical "fixed pie" assumption – the belief that all negotiations (not just some) involve a "fixed pie." The fixed pie assumption leads to rigid bargaining positions and weak efforts to search for mutually beneficial tradeoffs and creative settlement solutions. There are a host of other well-documented cognitive biases which appear to contribute significantly to irrational and rigid negotiating commitments and expectations (see Lewicki, et. al, 1999, for a review). A knowledgeable mediator can do much to help counter such biases by providing more accurate information and challenging untested assumptions. (See also Commentary to Questions 30 & 31).

If the parties seek "reality checks" of legal positions during the mediation, they need to ensure that the mediator selected is able and willing to provide such input (See Scanlon, 1999). Mediation styles range from "facilitative" to "evaluative," including gradations between the two. Although the definitions are not precise, a facilitative mediator avoids advice to the parties and predictions of outcome. By contrast, an evaluative mediator may analyze the parties' positions and offer an opinion on how a dispute might be resolved.

27. providing a confidential setting in which to explore each other's interests and needs?

___ a) No.
___ b) Perhaps.
___ c) Yes.

COMMENTARY

For practitioners, the *sine qua non* of mediation is that it permits the parties to move away from the limitations of positional bargaining, which typically assume a "fixed pie" and a narrow range of acceptable solutions, and towards an examination of their underlying interests, which fosters an elaboration of a much wider array of acceptable, or even creative solutions (Moore, 1996). It is perhaps for this reason that the fifth most popular reason cited by the Cornell survey as to why corporate attorneys choose mediation (cited by 67%) is that it produces more "satisfactory" settlements (Cornell survey at 17).

28. helping them to explore the possibility for trade-offs or creative solutions?

___ a) No.
___ b) Perhaps.
___ c) Yes.

COMMENTARY

A recent study of 60 cases involving mostly commercial contracts and employment claims reports that mediators obtained a settlement with at least one significant integrative term – in other words, some form of a trade-off or creative solution – in almost half of the survey cases (47%). Equally significant, settlements with an integrative term constituted almost two-thirds of all the reported settlements (28 cases out of the 44 that settled) (Golann, 2001). There is also evidence from research on divorce and small claims mediation that mediated settlements may produce more integrative agreements (Emery & Eyer, 1987; Pearson & Thoennes, 1989).

29. helping to educate the decision-makers on either side?

___ a) No.
___ b) Perhaps.
___ c) Yes.

COMMENTARY

If subordinates are conducting the negotiations, there may be strong pressures on them not to appear "weak" in the eyes of the actual decision-makers, thus preventing a settlement in unassisted negotiations. However, a skillful mediator may offset this problem by arranging to bring the decision-makers into the negotiations. Moreover, by involving the decision-makers, a mediator can also help overcome any barriers arising from the principal/agent relationship between the client and counsel that may be preventing a settlement (Mnookin, 1993).

30. providing an intermediary who could make offers and counteroffers more acceptable by presenting them as his or her own ideas?

___ a) No.
___ b) Perhaps.
___ c) Yes.

COMMENTARY

There is compelling experimental evidence that negotiators are prone to devalue their opponent's offers for a variety of psychological reasons, irrespective of the objective value of those offers (Ross, 1995). This

tendency towards "reactive devaluation" may be offset by a third party mediator who proposes settlement terms as his or her own, even though their origins may come in whole or in part from information gleaned in private caucuses (Mnookin, 1993).

31. providing an intermediary who can reframe proposals?

___ a) No.
___ b) Perhaps.
___ c) Yes.

COMMENTARY

Scholars have hypothesized that an important cognitive barrier to dispute resolution is "loss aversion" – the tendency of decision-makers to give so much weight to avoiding a certain loss that they are often willing to take chances that entail even greater risks than the loss they are intent on escaping (Kahneman & Tversky, 1995). By emphasizing to both sides the potential gains of an agreement and de-emphasizing the losses that settlement may entail, a mediator may serve as a corrective to loss aversion, thereby facilitating settlement (Mnookin, 1993).

CPR MEDIATION SCREEN QUESTIONS WORKSHEET

■ BENCHMARK QUESTION

Before you begin, in order to provide a benchmark against which to compare your analysis, indicate here whether your instinct, unaided by analysis, tells you that settlement of this dispute:

___ a) Is not foreseeable at any stage.

___ b) Is highly likely, even if only on the courthouse steps.

■ FACTOR ONE: The Parties' Goals for Managing the Dispute

– A. Overarching Goals –

1. How important to the parties is maintaining a relationship with each other?

___ a) One or both sides cares only about the substantive outcome; the impact on the relationship with the other side is irrelevant.

___ b) Although the substantive outcome is important, both sides would benefit to some degree from preserving or enhancing their relationship.

___ c) Preservation or even improvement of the relationship is of considerable importance to both sides.

2. How important to the parties is maintaining control over the *outcome* of the dispute?

___ a) Both sides prefer to have a judge [or arbitrator] decide the outcome.

___ b) Maintaining control over the outcome is moderately important to at least one of the parties.

___ c) Controlling the outcome is important to both parties.

3. How important to the parties is maintaining control over the *process* by which the dispute is resolved?

___ a) Neither side cares at all about maintaining control over the process used to resolve the dispute.

___ b) Maintaining control over the process is moderately important to at least one of the parties.

___ c) Controlling the process is an important desire of both sides.

– B. Legal Goals –

4. What is the likelihood that this case can be disposed of by a prompt, dispositive motion?

___ a) Very likely.
___ b) A possibility.
___ c) Very unlikely.

5. Is injunctive relief, a legal precedent from a court or other relief only available from a adjudicative body needed by a party?

___ a) Very likely.
___ b) A possibility.
___ c) Very unlikely.

6. How certain is the need to engage in formal discovery?

___ a) Totally certain; only formal and extensive discovery is likely to surface crucial information.

___ b) Uncertain; it may be possible to acquire the relevant information in other ways.

___ c) Unnecessary; both sides would be better served by avoiding burdensome or intrusive formal discovery.

7. Do the parties only seek a neutral evaluation on the extent of damages or other specific issue?

___ a) Very likely.
___ b) A possibility.
___ c) Very unlikely.

– C. Pragmatic Goals (Costs and Risks) –

8. What are the estimated monetary costs of pursuing litigation [arbitration] relative to what either side can realistically expect to recover by a decision in its favor?

___ a) Small, relative to the potential gain.
___ b) The monetary costs are by no means negligible, but may be worth expending.
___ c) High, given what is at stake.

9. How important is a speedy resolution of the dispute?

___ a) Either unimportant to both parties or one party is best served by delaying resolution.
___ b) Moderately important to both sides.
___ c) Very important to both sides.

10. Is there a need for privacy in the resolution process?

___ a) No, this is not a need of either side.
___ b) Yes, this is a likely need, but only for one side.
___ c) Yes, this is a likely need of both sides.

11. How likely is it that a party will gain a financial bonanza by going to court [or arbitration]?

___ a) Very likely.
___ b) The possibility is there, but with low probability.
___ c) Virtually nonexistent.

■ FACTOR TWO: The Suitability of the Dispute for a Problem Solving Process

– A. The Parties' Capacity for Problem Solving –

12. To what extent are matters of fundamental principle at stake?

___ a) Clearly at stake for at least one of the parties.
___ b) Hard to judge with accuracy.
___ c) Not a factor for either side.

13. How important to the parties is the securing of public vindication?

___ a) An important objective for at least one side.
___ b) Moderately important or hard to judge.
___ c) Of no interest to either side.

14. How certain are the parties that they will prevail in court [or in arbitration]?

___ a) At least one side is confident it will prevail.
___ b) Hard to judge with accuracy.
___ c) Neither side is certain it will prevail.

15. How receptive is the leadership on each side to the general idea of mediation?

___ a) Unsupportive or uninterested.
___ b) Moderately receptive but with little or no experience with mediation.
___ c) Very receptive.

– B. The Quality of the Parties' Relationship –

16. What is the emotional climate between the parties?

___ a) One of deep-seated hostility, contempt, and distrust.
___ b) Moderately antagonistic and distrustful.
___ c) Relatively objective.

17. What is the relative "power" of the parties as to their financial resources and business sophistication?

___ a) So disparate that one side may gain advantage over the other outside the civil justice system.
___ b) There is a moderate disparity in power.
___ c) Substantially comparable.

18. How compatible are the styles of opposing counsel (as distinct from the parties themselves)?

___ a) It would be hard to imagine more contrasting legal styles and frameworks for dealing with conflict.
___ b) Moderate differences exist.
___ c) The attorneys' styles and frameworks for dealing with conflict are highly compatible.

– C. Practical Realities –

19. Do the parties have the necessary resources to negotiate worthwhile trade-offs or to create new options?

___ a) A major problem is the lack of resources of any kind.
___ b) Resources exist, but are not abundant.
___ c) Reasonably good resources are available.

20. Is this a dispute that involves critical areas of managerial responsibility (e.g., matters of corporate finance or corporate reorganization)?

___ a) Yes, and in very significant ways.
___ b) Perhaps.
___ c) No.

21. What is the stance towards mediation of the jurisdiction in which the dispute is pending?

___ a) The court has little or no interest in mediation and/or has taken no steps to encourage mediation.
___ b) Ambivalent, unclear, or modest.
___ c) Very positive and encouraging and/or mediation is required for this kind of dispute.

■ FACTOR THREE: The Potential Benefits of Mediation for the Dispute in Question

Would mediation benefit the parties by:

22. helping them clarify the issues in dispute?

___ a) No.
___ b) Perhaps.
___ c) Yes.

23. helping them to channel or control anger or other negative emotions?

___ a) No.
___ b) Perhaps.
___ c) Yes.

24. giving one or both parties an opportunity to tell their stories and to be fully heard by the other side?

___ a) No.
___ b) Perhaps.
___ c) Yes.

25. providing an opportunity for an apology?

___ a) No, an apology would not be relevant or helpful.
___ b) Perhaps.
___ c) Yes, an apology would be very useful.

26. providing them with a "reality check" from a knowledgeable intermediary on their positions or expectations?

___ a) No.
___ b) Perhaps.
___ c) Yes.

27. providing a confidential setting in which to explore each other's interests and needs?

___ a) No.
___ b) Perhaps.
___ c) Yes.

28. helping them to explore the possibility for trade-offs or creative solutions?

___ a) No.
___ b) Perhaps.
___ c) Yes.

29. helping to educate the decision-makers on either side?

___ a) No.
___ b) Perhaps.
___ c) Yes.

30. providing an intermediary who could make offers and counteroffers more acceptable by presenting them as his or her own ideas?

___ a) No.
___ b) Perhaps.
___ c) Yes.

31. providing an intermediary who can reframe proposals?

___ a) No.
___ b) Perhaps.
___ c) Yes.

Interpreting Screen Responses and Practice Tips

Once you have answered all the questions, add up and record the number of (a), (b), and (c) responses in each of the three diagnostic categories.

- **FACTOR ONE: The Parties' Goals for Managing the Dispute** (11 items)

  a) ____ b) ____ c) ____

- **FACTOR TWO: The Suitability of the Dispute for a Problem Solving Process** (10 items)

  a) ____ b) ____ c) ____

- **FACTOR THREE: The Potential Benefits of Mediation in Relationship to This Dispute** (10 items)

  a) ____ b) ____ c) ____

Interpreting the Scores

The Screen is intended as a stimulus to analytic thinking and decision-making, not as a definitive measure of which cases should and should not be mediated. A response pattern in which (c) responses are significantly more frequent than (a) or (b) responses for all three factors suggests a dispute that is an excellent candidate for mediation. A preponderance of (b) responses for all factors suggests a dispute for which mediation may have value, despite some inauspicious signs. Alternatively, this may be a sign that the dispute is better suited for another type of nonbinding process, and a review of those processes should be made before deciding upon mediation (See Section 2: Matrix of Other Nonbinding Processes). A significant number of (a) responses across all three factors suggests that arbitration or litigation may be more appropriate. Guides to assist in deciding between these two processes are provided in Section 3.

The response pattern also should be compared with the response to the Benchmark Question. A preponderance of (b) and (c) responses across all three factors is consistent with a (b) response to the Benchmark Question – that is, settlement is inevitable at some point and mediation may assist the parties in arriving at that point sooner and better. A preponderance of (a) responses is consistent with an (a) response to the Benchmark Question – that is, settlement is not foreseeable at any point, and mediation may not be an efficient use of the parties' resources. (But look at response patterns to Factor Three, which focuses on many of the benefits of mediation other than settlement. A preponderance of (c) responses in Factor Three argues in favor of mediation.)

When in Doubt

If the pattern of responses across the three factors is contradictory or if the overall results suggested by the Screen contrast strongly with the response to the Benchmark Question, consider the following three possibilities:

(1) Are non-analytic screen factors operating? The Screen incorporates the extant empirical research on mediation and the best thinking of seasoned practitioners and scholars about case characteristics relevant to the mediation choice. In the great majority of cases, it will provide a useful "reading" of all relevant factors. However, in cases where counsel's intuitive feeling about a case is contradicted by the screen analysis, counsel should consider whether there are factors not tapped by the Screen that nonetheless bear on the dispute in question.

(2) Are some factors or elements weighted more heavily than others in this case? While the Screen identifies and quantifies the three factors that bear most directly on suitability for mediation – the parties' goals for managing dispute, the suitability of the dispute for a problem solving process, and the benefits of mediation – the weight to be given to each of these factors and their component elements must be assessed individually in light of experience and good judgment. In some cases, a single item or factor may provide such a compelling reason for mediation, or such an overwhelming obstacle to it, as to outweigh several counter-indicative answers.

(3) Would consultation with a colleague be useful? The Screen is intended to assist thinking by counsel and clients along dimensions known to be relevant. When the results of the Screen are contradictory across factors, discussion with a trusted colleague may be helpful in resolving uncertainty.

Reassess as Arbitration or Litigation Progresses

If the conclusion reached by counsel and their clients is not to engage in mediation, a later use of the Screen is recommended as the arbitration or litigation progresses. The answers in some diagnostic areas may well shift as these processes unfold. For example, the International Institute for Conflict Prevention & Resolution Rules for Non-Administered Arbitration and the International Institute for Conflict Prevention & Resolution Rules for Non-Administered Arbitration of International Disputes each has a separate Rule that provides that "[w]ith the consent of the parties, the Tribunal *at any stage of the proceeding* may arrange for mediation of the claims asserted in the arbitration by a mediator acceptable to the parties." (Rule 18) (CPR Arbitration Rules, 2000) (emphasis added).

Persuading the Other Side to Mediate

A significant barrier to mediation often is the opposing party's unwillingness to try it (Cornell survey at 26). If the results of the Screen suggest mediation and the other side is resistant, below is a readily-accessible, non-exhaustive list of reasons that may convince them to agree to try the process:

- ***Low risk*:** Mediation is a nonbinding process that either side can walk away from. It also is a confidential process.
- ***Control*:** Mediation provides an opportunity to craft your own solution, and how it is crafted. It provides a chance to involve business people in the solution.
- ***Timing*:** If one side thinks it is too early in the dispute, the other party can note that an atmosphere of maximum uncertainty can be a good time for mediation, when both sides feel vulnerable and may be more willing to explore mutually beneficial solutions.
- ***Practicalities*:** Most cases settle eventually. The earlier a case is settled, the less resources are expended by both sides.
- ***Incentives*:** One party can offer to pay more than its share of the costs of mediation and/or allow the other side more discretion when selecting the mediator.
- ***Corporate or Law Firm Policy*:** Is the party a signer of CPR Corporate Pledge? Has the law firm representing the client signed the CPR Law Firm Pledge? If so, the Pledge can be used to convince the other side to consider mediation.

Master's Mediation Summary Checklist

Three Factor Review of Mediation Suitability

Factor One: The Parties' Goals for Managing the Dispute

- **Overarching:** To maintain the relationship with the other side; keep control over process and outcome.
- **Legal:** To bypass discovery of uncertain value; no prompt, dispositive motion likely; no injunctive relief, legal precedent or other relief only available from adjudicative body needed.
- **Pragmatic:** To maintain privacy; save time/money.
- **Other Case Specific or Party Goal?**

Factor Two: The Suitability of the Dispute for Problem Solving

- **Parties' capacity for problem solving:** No deep desire for vindication or revenge; no fundamental principles at stake; moderate to high uncertainty of "winning" in court; leadership "cultures" not hostile to mediation.
- **Quality of the parties' relationship:** No deep-seated contempt or distrust; no extreme power imbalance or major lawyer incompatibilities.
- **Practical realities:** Dispute likely to settle at some point; jurisdiction receptive to mediation; tradeoffs/creative options possible; no critical corporate reorganization or finance issues involved.
- **Other?**

Factor Three: The Potential Benefits of Mediation for Case

- **Contextual:** to control emotions; to use confidential setting to explore mutual needs/interests; to provide opportunity to be heard; to educate decision-makers.
- **Substantive:** to help clarify issues; to provide opportunity for apology; to provide "reality check" on expectations or positions; to develop tradeoffs/creative solutions; to provide an intermediary to frame proposals and present offer and counteroffers.
- **Other?**

Should Presumption to Mediate Prevail?

Contraindications for Mediation

- The parties need to attain a goal that only a court [or arbitrator] can provide.
- A "bet the company" case that *requires* full procedural protections.
- One party is unequivocally committed to litigation.
- The parties have full information and only seek a neutral opinion on the extent of damages or other limited issue.
- A wholly frivolous claim – if so, client may have standard policy for handling.

SECTION 2

MATRIX OF OTHER NONBINDING ADR PROCESSES

MATRIX OF OTHER NON BINDING ADR PROCESSES*

	Nonbinding Arbitration	Confidential Listener	Early Neutral Evaluation	Fact-Finding	Minitrial (See CPR Model Minitrial Procedure)**
Definition	Process works the same way as binding arbitration, except arbitrator's decision is advisory only. Parties may agree in advance to use the advisory decision as a tool in resolving their dispute through negotiation or other means.	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 as may be defined by the parties. The parties may direct the neutral to assist them if offers are within a negotiable range.	A neutral evaluator holds confidential sessions with parties and counsel early in the litigation to hear both sides of case. Part of court-annexed processes in some jurisdictions.	A process by which the facts relevant to a controversy are determined.	An adversarial "information exchange" followed by management negotiations, with or without the assistance of a third-party neutral.
Involvement of Neutral Third Party	Yes	Yes	Yes	Yes	Not necessarily
Discovery	Provides discovery of the materials arbitrator and parties deem necessary to render decision.	Not necessarily	No discovery typically occurs.	Allows discovery of materials third-party neutral and parties deem necessary to determine facts relevant to dispute.	Often a certain amount of document and deposition discovery has already occurred.
Disputed Factual Issues	Nonbinding resolution	No resolution	Nonbinding assessment provided.	Parties determine in advance whether results of fact-finding will be binding or advisory only.	No resolution
Disputed Legal Issues	Nonbinding resolution	No resolution	Nonbinding assessment provided.	Process can be adapted to involve an expert who can render opinions on legal questions. Parties determine in advance whether opinions will be binding or advisory.	No resolution
Other			Evaluation also can flag areas of agreement and disagreement.	Useful in technical or scientific area.	If neutral is involved, may be asked to assist in negotiations as a mediator or to provide an advisory opinion.

* See CPR ADR Glossary for a comprehensive listing of other ADR processes, including partnering, settlement counsel, private judging, summary jury trials (www.cpradr.org).

** For a copy of the CPR Model Minitrial Procedure, see www.cpradr.org (Clauses and Procedures).

SECTION 3

COMPARISON OF ARBITRATION AND LITIGATION

COMPARISON OF TYPICAL FEATURES OF ARBITRATION AND LITIGATION

ARBITRATION		LITIGATION
Adversarial	↔	Adversarial
Private, high degree of confidentiality	↔	Public
Parties may select & tailor procedures	↔	Formal, inflexible procedures govern
Parties have more control over scheduling; how efficiently and quickly the process is handled depends on arbitrators' schedules and management skills and also on parties' and attorneys' schedules and willingness to cooperate	↔	Can entail docket delay, scheduling in large part outside parties' control.
Often limited document production; interrogatories are rare, depositions are uncommon and limited if used (depends on arbitral rules selected and on arbitrator's discretion)	↔	Broad discovery
Arbitrators, often with special expertise, decide; parties typically have input in selection of arbitrators	↔	Generalist judge or jury decides
Party-selected standards can govern awards (e.g., law, business standards or equity); decisions set no formal precedent	↔	Law & precedent govern decision
In some instances, can limit arbitrator's authority to award remedies & damages	↔	Full remedies available
Award is final & binding; limited grounds to vacate or modify award; parties may seek to expand scope of judicial review by so providing in arbitration agreement or parties can agree to appellate review by a private panel of arbitrators	↔	Broad right of appeal

Can reduce adjudication costs ↔ High adjudication costs

QUESTIONS REGARDING CHOICE OF ARBITRATION OR LITIGATION

The following series of questions may assist in deciding between arbitration or litigation. An (a) response below indicates a case characteristic suggestive of arbitration; a (b) response indicates a case characteristic suggestive of litigation.

1. Does a party seek to secure a decision in a public setting?

__ a) no
__ b) yes

2. Does a party want to prevent the specter of a massive or unpredictable jury award?

__ a) yes
__ b) no

3. Is establishment of precedent or articulation of public policy an important goal for either party?

__ a) no
__ b) yes

4. Is a vital corporate interest or "bet the company" case involved that requires the full panoply of procedural protections afforded by a court, including full appellate rights?

__ a) no
__ b) yes

5. Is there a need for continuing court supervision of the case or parties?

__ a) no
__ b) yes

6. Is the ability to have some degree of control over case scheduling issues an important objective for either party?

__ a) yes
__ b) no

7. Does either party (or both) seek to retain unabridged appellate rights?

__ a) no
__ b) yes

8. Is the selection of the decision-maker an important objective for either party?

__ a) yes
__ b) no

9. Does the case require an understanding of complex or technical factual issues?

__ a) yes
__ b) no

10. Is the ability to conduct full discovery an important objective for either party?

__ a) no
__ b) yes

Interpreting Questionnaire Results

a) _____

b) _____

A response pattern in which (a) responses are significantly more frequent than (b) responses suggests a dispute that is an excellent candidate for arbitration. If the results are more evenly divided, the weight to be given to responses to particular questions must be assessed on an individual basis. For further guidance, see Commercial Arbitration at Its Best: Successful Strategies for Business Users (T.J. Stipanowich & P.H. Kaskell, Editors, CPR/ABA, 2001).

SECTION 4

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