

***Alternative Dispute Resolution In The Entertainment Industry***  
**by A. Nicole Weaver**

Alternative dispute resolution (A.D.R.) is a creative solution to a creative industry with creative problems. Suppose that there are two artists, who worked together on a sculpture, and both of these artists want sole claim to the work. In a court of law they would both present their sides, and one artist would win the sculpture. However, A.D.R. allows for the possibility of a more creative solution to this problem. For example, lets suppose that artist A wants sole claim to the sculpture so that he may photograph it, and artist B wants sole claim of the sculpture to be able to put it in his museum. By taking the disagreement out of an adversarial environment (litigation,) and putting it into an environment that is more like assisted negotiation, ADR could allow both artists to come up with a mutually agreeable solution.

**To Use ADR Or Not To Use ADR**

According to several interviews I conducted, the guilds and the unions, involved in the entertainment industry, are most likely to use arbitration as a means of resolving their disputes. There seemed to be a general consensus that companies in the entertainment industry did not choose, on their own, to use alternative dispute resolution. However, the guilds use the ADR option quite frequently. “Disney does not use arbitration clauses, or the like, in their contracts, and with the exception of guild contracts Disney will require that the clause be waived. The same was true of Spalding, [a sporting goods store,] when I

worked with them.”<sup>1</sup> ABC is another company that normally does not employ the use of A.D.R. However, “we only use arbitration when it is required by a court or a guild, and even then it is only used, for the most part in the employment arena either before or during litigation.”<sup>2</sup> I began to see a pattern developing after these two conversations, and that pattern was even further developed after speaking to several other attorneys at other companies. That pattern was, “only when the guilds require it, however, it is effective in those cases.”

If companies are so adverse to the concept of alternative dispute resolution, then why is it used in the guild collective bargaining agreements so frequently? To answer this question, I began questioning general counsel at several of the guilds. “We find that alternative dispute resolution, provides a more effective means of settling disputes than the court system because it is low in cost, speedy, maintains relationships, and the decision makers understand the business so you do not have to educate them.”<sup>3</sup> Additionally, according to a 1997 survey the “entertainment industry is increasingly using mediation and arbitration to resolve disputes, and can be expected to use both procedures more often in the future.”<sup>4</sup> This study listed the reasons mediation and arbitration is used more often as: “cost, efficiency, maintaining working relationships, and the ability to [tailor-make] agreements.”<sup>5</sup>

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<sup>1</sup> Susan Somers Paralegal Specialist at Disney

<sup>2</sup> Gean Zoeller, Vice President of Litigation – ABC, Los Angeles

<sup>3</sup> Elliott Williams, General Counsel – Directors Guild of America, Los Angeles.

<sup>4</sup> Gerald F. Phillips, *The Entertainment Industry is Accepting ADR*, DRS Newsletter, Fall 1998.

<sup>5</sup> Gerald F. Phillips, *Entertainment Industry Recognizing Benefits of Mediation*, 17 Entertainment and Sports Lawyer 29, Winter 2000 at 29-30.

Approximately 80% of respondents to the survey in both New York and California “strongly agree” or “agree” that mediation is an inexpensive way to settle disputes.<sup>6</sup> Additionally, “even when a case is not completely resolved through mediation, ‘the litigants may save money by narrowing the issues and reaching agreement about more focused and efficient conduct of the case.’”<sup>7</sup> One respondent to the survey commented, “[a]rbitration generally provides a forum for obtaining a reasoned decision on the merits without the substantial delay and expense of litigation. It works well in most instances.”<sup>8</sup> Another reported, “[i]t settled what would have been an expensive litigation.”<sup>9</sup>

“On average, 82% of attorneys [in New York and California who responded to the survey] agree to some extent that mediation is an efficient alternative to litigation.” Approximately 80+% of companies and attorneys who responded to the Phillips survey stated that their experience with arbitration was “excellent” or “good.”<sup>10</sup> Additionally, several arbitration clauses allow for expedited procedures if specific circumstances appear. The Directors Guild of America Collective Bargaining Agreement specifically states, “if a grievance will become moot or damages will be increased by reason of delay if processed through the [regular] Grievance and Arbitration Procedure.”<sup>11</sup>

On average, approximately 60+% of attorneys, in New York and California, who responded to the survey, agree to some extent that mediation helps maintain

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<sup>6</sup> *Id.* at 29.

<sup>7</sup> *Id.* at 29.

<sup>8</sup> Gerald F. Phillips, *The Entertainment Industry is Accepting ADR*, Vol 21 NO. 1 Entertainment Law Reporter 5, June 1999 at 6 &8.

<sup>9</sup> Gerald F. Phillips, *Survey Shows Hollywood Warming Up to ADR*, 53 Dispute Resolution Journal 7, February 1998 at 7.

<sup>10</sup> Gerald F. Phillips, *The Entertainment Industry is Accepting ADR*, Vol 21 NO. 1 Entertainment Law Reporter 5, June 1999 at 6 &8.

<sup>11</sup> Directors Guild of America Basic Agreement of 1996 as published by The Directors Guild of America, Inc. at Article 2 Section 2-400 – 2-401.

relationships.<sup>12</sup> “Mediation cuts through a great deal of bureaucracy and can allow parties to face each other and resolve their differences in an informal way.”<sup>13</sup> “I feel the reason relationships are better preserved through arbitration has to do with the arbitration process being less adversarial, usually, than litigation.”<sup>14</sup> In fact, “the nature of the entertainment industry makes maintaining relationships critical.”<sup>15</sup> Therefore, “taking the adversarial path may prove more costly, even if a party is victorious in court.”<sup>16</sup> Taking a confrontational posturing of positions can terminate existing relationships, and impair interaction on future projects. “The process is particularly effective when disputes arise in mid-term of a contract and the parties must continue to work together. Additionally, initiating mediation signals a commitment to the business relationship and to the work itself.”<sup>17</sup>

“Mediating [and arbitrating] entertainment disputes allows parties to devise ‘tailor-made’ agreements[, which are] not available in the court system.” “‘In Hollywood, a screenwriter’s name is his most coveted asset’ and that screen credit ‘can propel him to other work – perhaps to the next blockbuster.’”<sup>18</sup> Therefore, “[s]creen credit disputes are so common in Hollywood that the Writers Guild of America administers an arbitration procedure for resolving them, using procedures and standards that are part of the WGA

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<sup>12</sup> Gerald F. Phillips, *Entertainment Industry Recognizing Benefits of Mediation*, 17 Entertainment and Sports Lawyer 29, Winter 2000 at 30.

<sup>13</sup> Gerald F. Phillips, *Survey Shows Hollywood Warming Up to ADR*, 53 Dispute Resolution Journal 7, February 1998 at 7.

<sup>14</sup> Elliott Williams, General Counsel – Directors Guild of America, Los Angeles.

<sup>15</sup> Gerald F. Phillips, *Entertainment Industry Recognizing Benefits of Mediation*, 17 Entertainment and Sports Lawyer 29, Winter 2000 at 30.

<sup>16</sup> *Id.* at 30.

<sup>17</sup> *Id.* at 30.

<sup>18</sup> *Writers Guild Decision That Wendell Wellman Was Not entitled to Screen Credit On Movie “Fair Game” is Affirmed*, 20NO. 6 Entertainment Law Reporter 15, 1998.

collective bargaining agreement.”<sup>19</sup> The entertainment industry is full of unconventional people and unconventional deals. Therefore, traditional courtroom legal resolutions do not necessarily create solutions that are workable. “[Creative people have ‘eccentric personalities, unusual designs and unheard of requests. Thus a rigid body of law... is not necessarily equipped to deal with artists’ concerns.” Additionally, the Alternative Dispute Resolution clauses can be “tailor-made” to fit the particular business that one is currently dealing with. For example, some people “choose to require an arbitrator with a specific amount of experience or knowledge [dealing with movie deals] in their Dispute Resolution Clause.”<sup>20</sup> Further, mediation allows participants to formulate a resolution that is mutually agreeable, rather than a one sided victory as would be in litigation. Another advantage to alternative dispute resolution is the ability to specify whether legal rules or industry practice will govern in the dispute.

Mr. Phillips also informed me that the various forms of ADR lend themselves well to a process called “dueling experts” because of the relaxed procedural rules.<sup>21</sup> This process allows “experts [from both sides of the disagreement] to answer informal questions from [both] the lawyers, comment on each other’s answers and eventually talk with each other while the lawyers take notes. This procedure [allows] the [neutral] to easily identify the differences among experts.”<sup>22</sup> By allowing the experts to eventually debate each other on the issues where they differ, it is sometimes possible that the experts could end up

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<sup>19</sup> Id.

<sup>20</sup> Gerald F. Philips, Partner – Phillips, Salman & Stein. He is also a mediator and arbitrator for both the AFMA and AAA. (See appendix 3)

<sup>21</sup> Id.

<sup>22</sup> Gerald F. Philips, *Dueling Experts*, Verdicts & Settlements, December 8, 2000, at 11.

agreeing.<sup>23</sup> The process makes it easier for both the parties to understand each other's logic, and also gives the neutral well-reasoned information from which to base his/her conclusion.

### **Forms of ADR**

Alternative Dispute Resolution encompasses several forms. The forms of possible dispute resolution include, but are not limited to arbitration, mediation, med-arb, and mini-trials, neutral evaluation, and summary jury trials. However, the entertainment industry most commonly uses arbitration and mediation. "Historically and currently, the entertainment industry is more prone to have tried some form of arbitration. However, the trend now is moving toward mediation because it is quicker and less expensive."<sup>24</sup>

"The mini-trial is not a trial but rather a structured dispute resolution method in which senior executives of the parties involved in a dispute meet, sometimes in the presence of a neutral advisor. After hearing presentations on the merits of each side of the dispute, they attempt to formulate a voluntary settlement."<sup>25</sup>

"A clause may provide first for mediation under the AAA's mediation rules. If the mediation is unsuccessful, the mediator could be authorized to resolve the dispute under the AAA's arbitration rules. This process, is sometimes referred to as 'Med-Arb.' Except in unusual circumstances, a procedure whereby the same individual who has been serving as a mediator becomes an arbitrator when the mediation fails is not recommended, because it

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<sup>23</sup> Id.

<sup>24</sup> Id.

<sup>25</sup> AAA website: [www.adr.org](http://www.adr.org)

could inhibit the candor which should characterize the mediation process and/or it could convey evidence, legal points or settlement positions *ex parte*, improperly influencing the arbitrator.”<sup>26</sup>

Currently, the American Federation of Television and Radio Artists (A.F.T.R.A), Directors Guild of America (D.G.A), Motion Picture Association of America (M.P.A.A.), Screen Actors Guild (SAG), and Writers Guild Association (W.G.A.) all have arbitration provisions in their collective bargaining agreements. These arbitrations provisions most commonly provide for arbitration to be used when issues have developed due to the collective bargaining agreement. However, they also usually provided for solutions to issues such as screen credit, advertising, compensation, or creative rights. “Most arbitration is only over the contract, but we also arbitrate any dispute between members and signatures involving unpaid compensation claims over \$450,000, over scale credit, and creative rights.”<sup>27</sup> “Occasionally, it is used in the employment arena.”<sup>28</sup> “In all our Codes, there is an arbitration clause.” Arbitration is provided for “in our broadcasting contracts, [specifically], there is a grievance and arbitration clause.”<sup>29</sup>

Practically speaking, “arbitration is similar enough to courtroom procedures, but more laid back and less adversarial. Therefore, it has been easier to implement in our collective bargaining agreements.”<sup>30</sup> Arbitration allows disagreeing parties to have their dispute presented and resolved by to one or more neutral persons for a conclusive and binding decision. Arbitration allows participants to exercise additional control over the

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<sup>26</sup> AAA website: [www.adr.org](http://www.adr.org)

<sup>27</sup> Elliott Williams, General Counsel – Directors Guild Association

<sup>28</sup> Gean Zoeller, Vice President of Litigation – ABC, Los Angles

<sup>29</sup> Id.

<sup>30</sup> Guild collective bargaining negotiator who chooses to remain nameless.

process by adding specific provisions to their contracts. Arbitration is different from court in that evidentiary rules are more relaxed, the arbitrators generally have specific training in the area of dispute, and the issues are generally more focused due to the tailoring of the arbitration clause within the contract. Furthermore, although appeal is available in arbitration, it is rare, therefore arbitration decisions tend to be more final in nature.

While none of the above listed guild collective bargaining agreements have formal mediation provisions, and “it is not formally used,”<sup>31</sup> some guilds, specifically the D.G.A legal counselors, are of the opinion that “it could have facilitated more creative solutions.”<sup>32</sup> Especially when dealing with creative rights because personality conflicts, stubbornness and communication cause these types of problems to get irritated. However, if you can get through those things, ultimately both sides want what is best for the picture.”<sup>33</sup> Additionally, “there is a general feeling that mediation is beginning to grow more quickly than arbitration.”<sup>34</sup>

Mediation is a means of assisted negotiation that allows for less hostility and posturing. Mediation creates an environment, which is less competitive, which allows interests rather than positions to create options for a mutually acceptable outcome.<sup>35</sup> For example, using the opening hypothetical the following chart represents example mediation technique possibilities:

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<sup>31</sup> Elliott Williams, General Counsel – Directors Guild Association

<sup>32</sup> Id.

<sup>33</sup> Id.

<sup>34</sup> Gerald F. Philips, Partner – Phillips, Salman & Stein. He is also a mediator and arbitrator for both the AFMA and AAA. (See appendix 3)

<sup>35</sup> *Getting to Yes, Negotiating Agreement Without Giving In*, by Robert Fisher and William Ury, with Bruce Patton, Editor. 2nd Edition by Fisher, Ury and Patton, Penguin Books, 1991.

	Position	Interest	Options	Outcome
Artist A	Wants the sculpture	Wants the ability to photography	Have sculpture: -long enough to take a few photos -X times a year to photograph	Any mixture of the listed options
Artist B	Wants the sculpture	Wants to show the sculpture in museum	Have sculpture: -X amount of the year for show -after A is done photographing -for a particular show in the museum	Any mixture of the listed outcomes

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As you can see from the chart, by taking positions out of the equation, the different interests of the various parties are allowed to be recognized. Therefore, new unconventional options may be created to reach a mutually agreeable solution.

Out of those that I interviewed, the majority of those who use ADR consistently have found that it is an effective means of resolving disputes. According to the directors Guild, they “would be lost with out it. We have over 180 cases a year, and if we had to litigate each of those cases we would never walk out of the court room, not to mention we would be broke.”<sup>37</sup> Additionally, A.F.T.R.A. found arbitration to be extremely effective, and claimed that they “intend to continue using ADR, more than likely, in the current form [arbitration] that is being used.”<sup>38</sup> However, those who either did not use ADR regularly, or were forced by a court into using some form of ADR found it to be less effective. “I think mediation is and can be an effective way of resolving disputes if both parties agree to

<sup>36</sup> Clark Freshman, University of Miami Professor. Professor Freshman used the chart minus the hypothetical to teach the basics of the concept in the book “Getting to Yes,” which is cited above.

<sup>37</sup> Elliott Williams, General Counsel – Directors Guild Association

<sup>38</sup> Donna M. Mirande, Administrative Assistant - AFTRA New York.

use that form of dispute resolution. However when mediation is required by a court system it is less likely to work because if people don't have a mind to settle they are likely not going to start merely because a court requires them to try."<sup>39</sup> Nevertheless, the general tone regarding ADR was a positive response.

### **We Don't Need No Education! Or Do We?**

Considering the positive aspects of using A.D.R., why have entertainment industry companies not warmed up to the idea of using A.D.R.? This reluctance can be explained by at least two factors. First, management has a lack of knowledge about mediation and arbitration.<sup>40</sup> Of the companies who responded to the Phillips survey "60% reported their executives are not knowledgeable about mediation and arbitration."<sup>41</sup> Additionally, of the entertainment counselors who responded to the survey 78% did not believe that the "business executives and talent in the industry are generally knowledgeable with respect to mediation and arbitration outside of labor matters."<sup>42</sup> "In some companies it is not considered because such costs are not charged to the department but to the general overhead and does not affect the departments bottom line."<sup>43</sup> I found this to be the case from experience working at two major entertainment corporations. When the business

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<sup>39</sup> Gean Zoeller, Vice President of Litigation – ABC, Los Angeles

<sup>40</sup> Gerald F. Phillips, *Survey: A Look At ADR In The Entertainment Industry*, 54 *Dispute Resolution Journal* 57, May 1999 at 58.

<sup>41</sup> Gerald F. Phillips, *The Entertainment Industry is Accepting ADR*, Vol 21 NO. 1 *Entertainment Law Reporter* 5, June 1999 at 6.

<sup>42</sup> *Id.* at 8.

<sup>43</sup> Gerald F. Phillips, *Survey: A Look At ADR In The Entertainment Industry*, 54 *Dispute Resolution Journal* 57, May 1999 at 60.

affairs department could not solve the problem it automatically went to the legal department. From there, the legal department does what it knows best to do, and litigates.

Additionally, “[t]he personalities of executives, corporate politics, and emotional factors play a large role in attorneys not recommending mediation. Executives consider the way to success is to be “tough as nails.”<sup>44</sup> They feel that if they appear easy prey to those that wish to assert a claim, the company will be deluged with strike suits.”<sup>45</sup>

However, “what they fail to recognize is that suggesting mediation is not a reflection of weakness. It more often conveys the opposite message.”<sup>46</sup> One respondent to the survey said, “we prefer the structure of the litigation process...[because we] prefer for the claimant to have to incur expenses, while we get the benefit of the rules of evidence.”<sup>47</sup>

However, what this respondent failed to recognize is that they too are incurring additional unnecessary expenses, and an arbitration clause can be tailored to require that the rules of evidence be followed. Also, “some of the companies that favor mediation are reluctant, however, to [make] it mandatory by requiring it in a contractual provision. They believe that for mediation to work it must be completely voluntary.”<sup>48</sup>

The second reason for reluctance toward ADR is that legal counselors are “trained to be litigators, and few [are trained] with respect to mediation and arbitration.”<sup>49</sup> The Phillips surveyors lectured at “legal department[s] of various large entertainment companies[, and] to [their] amazement, when asked how many of the attorneys present in

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<sup>44</sup> *Id.* at 59

<sup>45</sup> *Id.* at 58.

<sup>46</sup> *Id.* at 60.

<sup>47</sup> *Id.* at 58.

<sup>48</sup> Gerald F. Phillips, *Survey Shows Hollywood Warming Up To ADR*, 53 *Dispute Resolution Journal* 7, February 1998, at 7. (See also *infra* at pg 13)

<sup>49</sup> Gerald F. Phillips, *Survey: A Look At ADR In The Entertainment Industry*, 54 *Dispute Resolution Journal* 57, May 1999 at 58.

the room had read the California Arbitration Law, the AAA Commercial Arbitration Rules or the AAA Commercial Mediation Rules, the vast majority admitted that they had never read the law of arbitration or the AAA rules.”<sup>50</sup> The “attorneys are not very knowledgeable about ADR, and therefore when drafting entertainment agreements do not raise the question of whether there should be a dispute resolution provision in the contract.”<sup>51</sup> Additionally, when a dispute arises due to lack of knowledge the attorneys do not suggest the option of using ADR. “Some lawyers are fearful to agree to mediate without a full opportunity to gather the facts through discovery. They feel that to do so would... prevent them from giving a well reasoned opinion based on the facts.”<sup>52</sup> Again, however, one can specifically tailor an arbitration to meet evidentiary standards, therefore, fearing a lack of evidence is no excuse not to use ADR. Furthermore, and on a more negative note “it is hinted that counsel whom base their fees on billable hours are reluctant to [use ADR] because it would reduce the billable hours and therefore their fees would be substantially reduced.”<sup>53</sup>

If knowledge is the problem, then what has been, or can be done to educate? On Feb 21, 1998 Gerald F. Phillips, who conducted the survey referred to several time in this paper, held an ADR Seminar. The seminar was comprised of “a distinguished panel of entertainment executives and outside counsel,” that discussed “the findings of the survey and the comments made by the respondents.”<sup>54</sup> Also, in “1999, a mediation seminar was

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<sup>50</sup> *Id.* at 60-61.

<sup>51</sup> *Id.* at 61.

<sup>52</sup> *Id.* at 61

<sup>53</sup> *Id.* at 61

<sup>54</sup> Gerald F. Phillips, *Survey Shows Hollywood Warming Up to ADR*, 53 *Dispute Resolution Journal* 7, February 1998 at 7.

presented by AAA in conjunction with New York Women in Film and Television. Attended by 60 members of the entertainment industry, the aim of the seminar was to educate business people in the use of mediation to resolve disputes in that industry.”<sup>55</sup> Another more long-term solution is for companies to develop an ADR management structure, and make other management aware of what disputes are ripe for ADR as opposed to litigation. Furthermore, currently, several law schools offer classes in ADR techniques. Also, the Dispute Resolution Journal is a good way to keep up with recent events in ADR. Moreover, the ABA, AAA, and AFMA each sponsor continuing legal education courses in ADR techniques. Additionally, the AAA has a website that is full of history, current events, and general information about arbitration and mediation.

### **Getting Into ADR**

As a practical matter how does ADR work? One way ADR is used is when there is a contract, and the parties agree within the contract to use some form of ADR. Another way ADR comes about is after the development of a dispute. In this case either the parties will agree to use some form of ADR, or a court may require the parties to use ADR.

If ADR comes about via contract, then the parties have agreed, prior to a dispute, to resolve conflicts, which arise out of a contract or relate to a contract using some form of ADR. The following are two sample arbitration and mediation clauses suggested by the American Arbitration Association, which incorporate basic drafting concerns and incorporate the AAA Rules:

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<sup>55</sup> The AAA website. [www.adr.org](http://www.adr.org)

**Arbitration:**

Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be settled by arbitration administered by the American Arbitration Association in accordance with its Commercial [or other] Arbitration Rules [including the Emergency Interim Relief Procedures], and judgment on the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof.<sup>56</sup>

**Mediation:**

If a dispute arises out of or relates to this contract, or the breach thereof, and if the dispute cannot be settled through negotiation, the parties agree first to try in good faith to settle the dispute by mediation administered by the American Arbitration Association under its Commercial Mediation Rules before resorting to arbitration, litigation, or some other dispute resolution procedure.<sup>57</sup>

However, if a client agrees to some form of ADR, failure to discuss specific language changes to the standard clause could be an act of legal malpractice.<sup>58</sup> “Among the sections of the model rules cited is 1.4(b) that requires a lawyer to explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.”<sup>59</sup>

When drafting a contract an attorney should discuss with a client whether or not the client wishes to include an ADR clause, and inform the client of the various types of ADR. Then the attorney and client should decide what type of clause the client would like to include. Some of the issues an attorney should keep in mind when drafting an ADR clause are whether or not to use a provider (such as the AAA, AFMA, or JAMS), to allow

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<sup>56</sup> Id.

<sup>57</sup> Id.

<sup>58</sup> Gerald F. Phillips, *What Your Client Needs To Know About ADR*, 55 *Dispute Resolution Journal* 64, February 2000.

<sup>59</sup> Id. at 64.

punitive damages, to require a written/reasoned opinion, to have one or more neutrals (mediators/arbitrators), what powers to grant the neutrals, and what issues should be determined in ADR.<sup>60</sup> The AAA provides a checklist of elements to keep in mind when drafting an ADR clause on its website.<sup>61</sup> When ADR is implemented after a dispute arises it is either via voluntary agreement through the disputing parties, or a court requires the parties to use ADR. According to the Phillips survey 57% of companies and 50% of legal counselors recommend using either mediation or arbitration after a dispute arises where there was “no prior agreement to use ADR.”<sup>62</sup> Mandatory ADR may be required by a court, however, courts usually only require some form of ADR that is non-binding. Courts do not compel arbitration where there is no agreement to arbitrate due to the binding nature of arbitration. (Those who arbitrate are bound by the result.) In Parker v. Twentieth Century-Fox Film Corp., which involved a producer’s petition to compel arbitration of a dispute with an actor, the petition was denied. The court would not compel arbitration where the parties did not agree to arbitrate.<sup>63</sup> This was a 1981 case, which has not been overturned, nor does it have any negative history. According to Volt Information Sciences, Inc. v. Leland Stanford University, which held that: “the FAA does not require parties to arbitrate when they have not agreed to do so... nor does it prevent parties who agree to arbitrate from excluding certain claims from the scope of their arbitration agreement.... It simply requires courts to enforce privately negotiated terms.”<sup>64</sup> Therefore,

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<sup>60</sup> Gerald F. Phillips, Partner – Phillips, Salman & Stein. He is also a mediator and arbitrator for both the AFMA and AAA. (See appendix 3.)

<sup>61</sup> The AAA website: [www.adr.org](http://www.adr.org). See also appendix 1 of this paper.

<sup>62</sup> Gerald F. Phillips, *The Entertainment Industry is Accepting ADR*, Vol 21 NO. 1 Entertainment Law Reporter 5, June 1999 at 7 & 8.

<sup>63</sup> Parker v. Twentieth Century-Fox Film Corp., 118 Cal. App. 3d 895, 1981.

<sup>64</sup> Volt Information Sciences, Inc. v. Leland Stanford University, 489 U.S. 468, 1989.

when it comes to arbitration agreements courts are required to enforce arbitration agreements like any other contract, in accordance with its terms.

Some believe that ADR must be completely voluntary for it to work. They feel that mandating ADR makes the process counterproductive and/or prevents its usefulness.<sup>65</sup> However, this belief may indeed be nothing but a fallacy. According to the “Northeastern Survey... concluded that the settlement rate of mediation was not affected by whether the case went to mediation voluntarily or not.”<sup>66</sup> The survey indicated that “67% of involuntary mediation cases settled and 79% of the voluntary cases settled. The difference is not statistically significant, and provides evidence that mediation is successful when parties are directed into mediation as it is when they voluntarily select mediation.”<sup>67</sup>

### **Decisions, What Are They Based On**

ADR is different from court in that decisions are not necessarily based on *stari decises*. This distinction springs partially from the fact that there are no written opinions in several types of ADR, unless the ADR clause calls for one. Requiring a written opinion is more time consuming, but a “written/reasoned opinion makes the arbitrator/mediator more careful and informed decision.”<sup>68</sup> On the other hand, “as a practical matter having a written/reasoned opinion can be *stari decisis* in that it helps a party that returns frequently

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<sup>65</sup> Gerald F. Phillips, *What Your Client Needs To Know About ADR*, 55 *Dispute Resolution Journal* 64, February 2000 at 65.

<sup>66</sup> *Id.* at 65.

<sup>67</sup> *Id.* at 65.

<sup>68</sup> Gerald F. Phillips, Partner – Phillips, Salman & Stein. He is also a mediator and arbitrator for both the AFMA and AAA. (See appendix 3.)

to arbitration or mediation make better arguments in the future when the same or a similar set of facts present themselves.”<sup>69</sup>

Another reason ADR is not based on *stari decisis* is because the specifications of each ADR clause can call for decisions to be based on different things. For example, an ADR clause may contain a provision that states, “the arbitrator/mediator will base his decision on film editing industry standards.” The tailor-made specifications advantage to ADR allow the contracting parties to decide whether the resolution will be based on state or federal law, industry standards, the ADR provider rules, Federal Arbitration Act (FAA) rules, or something else. According to the AAA, their “arbitrators base their decisions on: our rules, national and state laws, the Federal Arbitration.”<sup>70</sup> If the contract is not specific, “I generally go purely on the facts of each case, and the contract (if one exists.)”<sup>71</sup>

### **ADR, It’s Got Appeal**

Although there is an availability for appeal with arbitration cases, it is quite rare. Courts have based their decisions for not allowing appeal on cases such as Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp., which states, “arbitration is favored in the law. The court has also cited, Remmy v. Paine Webber, Inc., which states that [a] policy favoring arbitration would mean little, of course, if arbitration were merely prologue to prolonged litigation.<sup>72</sup> Moreover, the Eljer Mfg., Inc. v. Kowin Development Corp., case held that an award reached by an arbitrator pursuant to an arbitration agreement is not subject to

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<sup>69</sup> Elliott Williams, General Counsel – Directors Guild Association

<sup>70</sup> Yolanda Rouse, American Arbitration Association.

<sup>71</sup> Gerald F. Philips, Partner – Phillips, Salman & Stein. He is also a mediator and arbitrator for both the AFMA and AAA. (See appendix 3.)

<sup>72</sup> Remmy v. Paine Webber, Inc., 32 F.3d 143, 1994.

judicial reversal for “errors in the arbitrator’s interpretation of law or findings of fact.”<sup>73</sup>

The Eljer, decision rational was that the benefit of using arbitration was to “reduce delay and expense,” therefore, “a restrictive standard of review is necessary to preserve these benefits.”<sup>74</sup> Furthermore, when parties agree to use this form of dispute resolution the parties assume the risk that the arbitrator might make mistakes or commit errors of law or fact Moncharsh v. Heily & Blasé.<sup>75</sup>

However, there are cases, which allow for an arbitration award to be vacated. Both Rodriguez v. Prudential-Bache Securities, Inc. and Brown v. Rauscher Pierce Refusnes, Inc. recognize sections of the FAA that allow for an arbitration award to be vacated.<sup>76</sup> These cases refer to sections 9, 10 and 11 of the FAA.<sup>77</sup> Specifically, the Rodriguez case lists three possibilities for successful challenge, which are: 1) unfounded in reason and fact; (2) based on reasoning so palpably faulty that no judge, or group of judges, ever could conceivably have made such a ruling; or (3) mistakenly based on a crucial assumption that is concededly a non-fact.”<sup>78</sup> Brown lists the possibilities for successful challenge of an arbitration award as: (1) if the award is arbitrary and capricious; (2) enforcement of the award is contrary to public policy; (3) manifest disregard for the law; or (4) no rational basis upon which the arbitrator could have relied.<sup>79</sup> However, although the Brown court recognizes manifest disregard, it has declined to adopt manifest disregard as a standard.<sup>80</sup>

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<sup>73</sup> Eljer Mfg., Inc. v. Kowin Development Corp., 14 F. 1250, 1994.

<sup>74</sup> Id.

<sup>75</sup> Moncharsh v. Heily & Base, 3 Cal. 4<sup>th</sup> 1, 1992.

<sup>76</sup> Rodriguez v. Prudential-Bache Securities, Inc., 882 F. Supp. 1202, 1995. See also, Brown v. Rauscher Pierce Refsnes, Inc., 994 F.2d 775, 1993.

<sup>77</sup> 9 U.S.C. §§9-11.

<sup>78</sup> Rodriguez v. Prudential-Bache Securities, Inc., 882 F. Supp. 1202, 1995.

<sup>79</sup> Brown v. Rauscher Pierce Refsnes, Inc., 994 F.2d 775, 1993.

<sup>80</sup> Id.

In fact, the California Faculty Association v. Superior Court declined to follow the Moncharsh case on the basis that the “arbitrators exceeded their powers and the award cannot be corrected without affecting the merits of the decision upon the controversy submitted. .... In determining whether the arbitrators exceed their power, the court must give ‘substantial deference to the arbitrators’ own assessment of their contractual authority.’”<sup>81</sup> In this case the agreement did not contain the typical clause that allowed for all disputes arising out of a particular contractual relationship to be arbitrated, but rather the arbitrator had a limited task under specific standards.<sup>82</sup> In cases where the arbitrators authority is in question, according to Advanced Micro Devices, Inc. v. Intel Corporation the remedy an arbitrator fashions will not exceed his/her power if it bears only a “rational relationship” to the underlying contract as interpreted by the arbitrator.<sup>83</sup> Therefore, because the standard of review is set at rational basis it is rare for a decision to be vacated, but it is possible.

Since mediation is not binding, it is not often that it is appealed. However, there are some cases in which the terms of mediation can become binding. Mediation can rise to the level of becoming a settlement agreement.<sup>84</sup> However, it must either be entered into orally before a court, or set in writing and signed by all parties in order to be enforceable in court. A settlement agreement is essentially a contract, thus it is legally binding.

The Phillips survey attempted to appraise the effect of Moncharsh and Advanced Micro Devices. The survey questioned companies and attorneys to see if the Moncharsh or

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<sup>81</sup> California Faculty Association v. Superior Court, 75 Cal. App. 4<sup>th</sup> 935, 1998.

<sup>82</sup> Id.

<sup>83</sup> Advanced Micro Devices, Inc. v. Intel Corporation, 9 Cal. 4<sup>th</sup> 362, 1994.

<sup>84</sup> AAA website: [www.adr.org](http://www.adr.org)

Advanced Micro Devices cases deterred companies or attorneys from using ADR in a contract dispute. The respondents replied in the following manner:

**The Moncharsh Decision:**

“The [Moncharsh] decision does not generally deter them from using arbitration, according to 71% of those who replied.”<sup>85</sup> In fact, a similar “percentage stated that they take comfort in knowing that the arbitrator’s award will almost certainly mean an end to the dispute.”<sup>86</sup> Their respondents reasoned that, “[it] can be partially dealt with by choosing [the] ‘right’ arbitrator; [and]... with clumsily...drafting language in [the] arbitration paragraph.”<sup>87</sup> “Those who stated the Moncharsh decision did deter them from using arbitration explained: ‘In material contracts I want [the] benefit of overturning decisions based on errors of fact and law.’... ‘Though a trial costs more, there are remedial measures for a lousy judge or jury.’”<sup>88</sup>

**The Advanced Micro Devices Decision:**

The Advanced Micro Devices “decision does not deter entertainment companies from using arbitration either, according to 85% of those who replied to the survey.”<sup>89</sup> The reasoning was the following: “[c]hoice of arbitrator and language in provision can help get the desired end.”<sup>90</sup> Furthermore, “[t]here are very few cases in which I believe there is any real risk that the arbitrator will go beyond what I would consider to be reasonable remedies. Moreover, in the entertainment industry, there is a tendency for parties to use

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<sup>85</sup> Gerald F. Phillips, *The Entertainment Industry is Accepting ADR*, Vol 21 NO. 1 Entertainment Law Reporter 5, June 1999 at 8.

<sup>86</sup> Id.

<sup>87</sup> Id.

<sup>88</sup> Id. at 9.

<sup>89</sup> Id.

<sup>90</sup> Id.

incomplete contracts or otherwise fail to specify important parts of the agreement. In these cases, it is essential that the arbitrator be allowed to ‘fill out the contract.’ If a party could effectively challenge every arbitration awards on the bases of the specific contractual remedy, it would deter finality in many entertainment arbitrations.”<sup>91</sup>

### **Instances Of Appeal Related To The Entertainment Industry**

Weddington Productions v. Steve Flick is an entertainment industry case that illustrates how mediation was not sufficiently definite enough to constitute a settlement agreement.<sup>92</sup> In this case, Mr. Flick, a sound effects editor “joined with colleagues to form Weddington Productions.”<sup>93</sup> A sound effects studio uses a “library” of sounds to add the appropriate sound to a visual. Mr. Flick, his colleagues, and other employees of Weddington, assembled Weddington’s library.<sup>94</sup> After a dispute arose Mr. Flick took a copy of the sound library, and began his own company.<sup>95</sup> Weddington sought to prohibit Flick from using the sound library.<sup>96</sup> The parties attempted mediation, and “[t]he mediation yielded a one-page memorandum covering many [of the] material terms, but also [provided] that the parties would ‘formalize’ additional material terms later.... When the parties attempted to ‘formalize’ the additional terms, numerous disputes became apparent.”<sup>97</sup> The parties had agreed to a licensing agreement, but there were no other significant terms. Additionally, the subsequent attempts to formalize were an indication

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<sup>91</sup> Id.

<sup>92</sup> Weddington Productions v. Stephen Flick, 60 Cal. App. 4<sup>th</sup> 793, 1998.

<sup>93</sup> Id. at 798

<sup>94</sup> Id.

<sup>95</sup> Id.

<sup>96</sup> Id.

<sup>97</sup> Id. at 796

that there had been “no meeting of the minds on the meaning of the terms ‘Licensing Agreement’ or ‘fully paid up license’ as of the time the Deal Point Memorandum was signed.”<sup>98</sup> The court agreed that a “settlement agreement is a contract, and the legal principals which apply to contracts generally apply to settlement contracts.”<sup>99</sup> However, they reasoned that “an essential element of any contract is ‘consent,’”<sup>100</sup> and “the law of contracts [would preclude] specific enforcement of a contract when it cannot be determined exactly what terms the parties agreed upon.”<sup>101</sup> Thus, denying enforcement of the terms set forth in the Deal Memorandum formed as a result of mediation.

Another sticking point in the entertainment industry is the “form” contract. The entertainment industry is full of “form” contracts that are drafted by the party of superior strength often to the detriment of the inferior party. The inferior party is left with the only choice to either accept the contract or reject the contract, which often denies the inferior party an opportunity to either record, act, be produced, or some other variation. A contract which one must sign or be denied an opportunity is a contract of adhesion. “[T]he court has virtually eliminated the defense of adhesion to the enforceability of arbitration agreements.”<sup>102</sup> The reasoning is that these contracts may be a necessary part of industrialized economy, and that parties are free to contract with whom ever they please, therefore, they assume the risk by choosing to sign.<sup>103</sup> Additionally, even if a court finds a contract to be adhesive and thus voidable, it does not necessarily mean that it will find the

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<sup>98</sup> *Id.* at 800

<sup>99</sup> *Id.* at 810

<sup>100</sup> *Id.*

<sup>101</sup> *Id.* at 801

<sup>102</sup> Thomas E. Carbonneau, *Cases and Materials on The Law and Practice of Arbitration*, 2ed, 2000 at 200.

<sup>103</sup> Richard A. Hausler Contracts Class, 1999.

ADR clause voidable. This is called the doctrine of separability. Separability provides that the agreement to arbitrate is separate from and independent of the main contract.<sup>104</sup>

An illustration of an entertainment industry arbitration decision being vacated against the separability doctrine, and as a result of adhesion can be found by viewing Bill Graham v. Scissor-Tail.<sup>105</sup> In this case the plaintiff Graham is an experienced promoter who signed a standardized contract (form contract) written by the American Federation of Musicians (A.F. of M.) to which the defendant Scissor-Tail (corporation set up for artist) is a union member.<sup>106</sup> All contracts in question were “prepared on an identical form known in the industry as an A.F. of M. Form B Contract.”<sup>107</sup> The form contract declared that any disputes arising from the relationship be determined in arbitration using a branch of the A.F. of M. as the provider, and using the Constitution, “By-laws, and Rules and Regulations of the Federation.”<sup>108</sup> The dispute arose over a profit loss at an Ontario concert.

Graham argued that according to industry practice his share of the profits reflected a 9 0/10 or 8 5/15 contract where such losses should accrue without offset to Scissor-Tail, and not a “normal” contract where the promoter bears the risk of loss because he/she takes larger percentage of the profits.<sup>109</sup> In arbitration, Graham presented several examples of this industry practice, and Scissor-Tail produced no evidence rebutting such evidence.<sup>110</sup>

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<sup>104</sup> Id. at 20

<sup>105</sup> Bill Graham v. Scissor-Tail, 28 Cal. 3d 807, 1990.

<sup>106</sup> Id.

<sup>107</sup> Id. at 812

<sup>108</sup> Id. at 813

<sup>109</sup> Id. at 815

<sup>110</sup> Id. at 815. It should also be noted that there was a prior arbitration ruling in Scissor-Tails favor that was decided without hearing. Scissor-Tail allowed the arbitration to re-open in attempt to obtain attorneys fees and interest on the existing award.

After the arbitration ruled in favor of Scissor-Tail, Graham sought to have the order vacated. The lower court upheld the arbitrator's decision.

However, upon appeal the court found that the A.F. of M. contract was one of adhesion, in which even the arbitration clause was unconscionable. The court reasoned that regardless of the contracting parties "prominence all members of A.F. of M. (Scissor-Tail's) are not permitted to sign any form of contract other than that issued by the [A.F. of M.,]" thus Graham was presented with the option to accept and sign a non-negotiable A.F. of M. contract or not do business at all.<sup>111</sup> The court also further reasoned that to remove all adhesive characteristics from the contract one would also have to remove the arbitration clause because the union also dictated the forum for resolution in that the drafting party acted in the capacity of arbitrator using the drafting parties Constitution, By-laws, and Rules and Regulations for the terms of settlement.<sup>112</sup> The court further stated, "to allow the A.F. of M. to sit in judgment of a dispute arising between one of its members and a contracting nonmember is so inimical to fundamental notions of fairness as to require nonenforcement." Thus, because the entire contract was so one sided toward the drafting party it was found to be unconscionable in its entirety.

An example of an arbitrator exceeding the "rational basis" power given to him in an arbitration clause as was discussed in the case Advanced Micro Devices, Inc. v. Intel Corporation<sup>113</sup> can be found in Linland v. United States of America Wrestling Association.<sup>114</sup> In this case, Linland is an amateur wrestler who wrestled against Sieracki

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<sup>111</sup> Id. at 818-819

<sup>112</sup> Id. at 807, 813, 819, 821

<sup>113</sup> Advanced Micro Devices, Inc. v. Intel Corporation, 9 Cal. 4<sup>th</sup> 362, 1994

<sup>114</sup> Linland v. United States Wrestling Association, 227 F. 3d 1000

for a spot on the Olympic team. Linland brought an arbitration claim pursuant to the Olympic and Amateur Sports Act because referees had erred in scoring their original match.<sup>115</sup> He was given the opportunity for a re-match, and won.<sup>116</sup> Thus, giving him a spot on the Olympic team. Sieracki filed a collateral attack by initiating his own arbitration claim. The result of this counter attack was that Sieracki was to be named to the team, and that the first arbitrator's decision should be vacated.<sup>117</sup> However, when Sieracki went to have the decision confirmed, the District Court did not agree. They ruled in favor of the first arbitrator in Linland's case because the Olympic and Amateur Sports Act did not authorize arbitration regarding another arbitrator's decision, therefore, the arbitrator in Sieracki's case had exceeded the authority granted in the arbitration clause.<sup>118</sup>

Another interesting case involving arbitration is Grigson v. Creative Artists Agency.<sup>119</sup> This case involved a tort claim between the movie producer's (Grigson) of the movie *Return of the Texas Chain Saw Massacre* and actors Matthew McConaughey and Renee Zellweger.<sup>120</sup> The producers claimed that McConaughey and Zellweger, through their agent (Creative Artist Agency), tortuously interfered with the movie distribution contract between the Grigson and Columbia TriStar by convincing Columbia TriStar to limit the release of the movie in order to take advantage of their success in subsequent movies.<sup>121</sup> McConaughey and Zellweger sought to have the claim arbitrated using the arbitration clause between Columbia TriStar and Grigson. The court ruled that

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<sup>115</sup> Id. at 1001

<sup>116</sup> Id. at 1002

<sup>117</sup> Id. at 1002

<sup>118</sup> Id. at 1000

<sup>119</sup> Grigson v. Creative Artists Agency, 210 F. 3d 524.

<sup>120</sup> Id. at 525

<sup>121</sup> Id. at 526

McConaughey and Zellweger were entitled to arbitrate the claim under the agreement even though they were not parties to the arbitration agreement between Grigson and Columbia TriStar.<sup>122</sup> The court reasoned that “[e]xisting law demonstrates that equitable estoppel allows a nonsignatory to compel arbitration in two circumstances:” 1) where “equitable estoppel applies when the signatory to a written agreement containing an arbitration clause must rely on the terms of the written agreement in asserting its claims against the nonsignatory;”<sup>123</sup> and 2) where “the signatory to the contract containing an arbitration clause raises allegations of substantially interdependent and concerted misconduct by both the nonsignatory and one or more of the signatories to the contract.”<sup>124</sup> The court stated that they agreed with the “intertwined-claims test” in application to this case. Moreover, the court noted that “parties to arbitration agreements cannot avoid them by casting their claims in tort, rather than in contract.”<sup>125</sup> Therefore, McConaughey and Zellweger were entitled to arbitrate their claim under the agreement between Grigson and Columbia TriStar.

Wellman v. Writers Guild of America<sup>126</sup> is another interesting case. In this case, Wellman claimed that the “WGA breached its duty of fair representation.”<sup>127</sup> He claimed, “the arbitrators had not been sufficiently thorough in reviewing the scripts and other materials that had been submitted to them.”<sup>128</sup> The court ruled that the WGA procedures provided for by [the] review Board, therefore, the issue was “whether the Board’s decision

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<sup>122</sup> Id. at 524, 530

<sup>123</sup> Id. at 527

<sup>124</sup> Id.

<sup>125</sup> Id. at 524

<sup>126</sup> Wellman v. Writers Guild of America, 146 F. 3d 666.

<sup>127</sup> *Writers Guild Decision That Wendell Wellman Was Not entitled to Screen Credit On Movie “Fair Game” is Affirmed*, 20NO. 6 Entertainment Law Reporter 15, 1998.

<sup>128</sup> Id.

to affirm the arbitrators had been adequate.”<sup>129</sup> Thus, Wellman had to prove that the Board had conducted a “discriminatory or bad faith investigation of the depth and attention the arbitrators had paid to their task.”<sup>130</sup> He attempted this argument by claiming that by the Board reaching its conclusion only two hours following the hearing. However, the court disagreed with this assumption claiming that they disagreed that the Board could not have “conducted a diligent review... in that span of time.”<sup>131</sup>

### **How Do ADR Career Opportunities Knock**

How does one begin a career as a moderator/arbitrator? Gerald F. Phillips was vice president and counsel of United Artist Corp and a private attorney at Phillips, Nizer, Benjamin, Krim & Ballon. He has had a long legal career in entertainment. He said, “after years of experience he wrote in to the A.F.M.A. and got someone to support him.”<sup>132</sup> Someone did, and he became an A.F.M.A. neutral. The A.A.A. has stringent requirement qualifications some of which are: Minimum of 10 years of senior-level business or professional experience or legal practice; educational degree(s) and/or professional license(s) appropriate to your field of expertise; honors, awards and citations indicating leadership in your field, training and experience in arbitration and/or other forms of dispute resolution; freedom from bias and prejudice; ability to evaluate and apply legal, business or trade principles; ability to manage the hearing process; thorough and impartial evaluation of testimony and other evidence; held in the highest regard by peers for

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<sup>129</sup> Id.

<sup>130</sup> Id.

<sup>131</sup> Id.

<sup>132</sup> Gerald F. Philips, Partner – Phillips, Salman & Stein. He is also a mediator and arbitrator for both the AFMA and AAA. (See appendix 3.)

integrity, fairness and good judgment; and a letter of recommendation, just to name a few of the qualifications.<sup>133</sup> A representative for the A.A.A. also stated, “neutrals are nominated to the National Roster of Arbitrators and Mediators of the American Arbitration Association by leaders in their industry or profession.”<sup>134</sup> Another possibility is to get training as a neutral, and be hired by private attorneys. Additionally, guild agreements such as the Directors Guild have their own lists of neutrals. Once someone becomes a neutral for a provider, guild, or in private practice how do they get hired by parties which are in dispute? In the case of the guilds, some of their collective bargaining agreements have lists of possible arbitrators included in the agreement. In the case of the DGA, Article 2 Section 2-304(a) contains a list of arbitrators for both Los Angeles and New York.<sup>135</sup> Other guilds choose to use governing rules from arbitration associations such as the American Arbitration Association (A.A.A.), American Film Marketing Association (A.F.M.A), or (J.A.M.S.) (in the case of mediation.) In which case the association provides a list of arbitrators the parties may choose from. From these lists the parties decide on one or more neutrals depending on the agreement.

According to a representative at A.F.T.R.A, “[a]n arbitrator is chosen in our broadcast contracts after a grievance is not resolved. The National Representative files with the American Arbitration Association and requests a panel of arbitrators.... Under most of our Codes, the American Arbitration Association (AAA)sends a list of potential arbitrators to both sides. Both sides strike names and send back acceptable names. The

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<sup>133</sup> The AAA website: [www.adr.org](http://www.adr.org). For a complete list see appendix 2

<sup>134</sup> The AAA website: [www.adr.org](http://www.adr.org).

<sup>135</sup> Directors Guild of America Basic Agreement of 1996 as published by The Directors Guild of America, Inc. at Article 2 Section 2-304(a).

process is repeated until the parties agree on an arbitrator. If no match is reached after three lists are reviewed, an arbitrator is chosen by the AAA.... Hopefully, out of this list, both parties will decide on a mutual arbitrator. The cost is split evenly between BOTH sides.”<sup>136</sup>

According to the Directors Guild Bargaining Agreement Article 2 Section 2-304, the parties attempt to mutually agree on an arbitrator, and if no resolution is made, then the “Arbitrator next in rotation on an Employer by Employer basis from the following list of persons shall be automatically assigned to the arbitration.”<sup>137</sup>

What do parties look for when picking an arbitrator? “The factors that AFTRA looks at when determining which arbitrators they will accept and those they do not wish to accept are the following: 1. Reputations - arbitrators do develop reputations so we ask around to other unions and locals and see what their experience has been with that particular arbitrator. 2. Whether or not we want a lawyer to handle the case or not -it depends on the type of case that it is. 3. The cost of the arbitrator - some arbitrators charge outrageous fees even if you cancel within the time limits. AFTRA looks for arbitrators with reasonable fees and cancellation policies.”<sup>138</sup> “The Directors Guild looks for: litigation experience, labor law experience, academic background, entertainment experience, transactional work, and experience with drafting collective bargaining

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<sup>136</sup> Donna M. Mirande, Administrative Assistant - AFTRA New York.

<sup>137</sup> Directors Guild of America Basic agreement. (Note: list not included in this paper.)

<sup>138</sup> Donna M. Mirande, Administrative Assistant - AFTRA New York.

agreements.”<sup>139</sup> “In drafting ADR clauses for clients I suggest that the client request someone with knowledge and experience.”<sup>140</sup>

With a little more education A.D.R. could be the entertainment industry’s most valuable asset. ADR is a new viewpoint to the continuous thorny litigation process. It is a way to discern a creative solution to a creative industry with creative problems. It will allow both parties and the art to win because it can fashion solutions that a court cannot. Furthermore, by taking disagreements out of an adversarial environment (litigation,) and putting the disagreement into an environment that is more like assisted negotiation, ADR allows both artists to come up with a mutually agreeable solution in less time, that is more effective, with reputations in tact, and with less hostility. Therefore, everyone comes out winning.

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<sup>139</sup> Elliott Williams, General Counsel – Directors Guild of America, Los Angeles.

<sup>140</sup> Gerald F. Philips, Partner – Phillips, Salman & Stein. He is also a mediator and arbitrator for both the AFMA and AAA. (See appendix 3.)

## Appendix 1

### I. A CHECKLIST FOR THE DRAFTER

It is not enough to state that "disputes arising under the agreement shall be settled by arbitration." While that language indicates the parties' intention to arbitrate and may authorize a court to enforce the clause, it leaves many issues unresolved. Issues such as when, where, how and before whom a dispute will be arbitrated are subject to disagreement once a controversy has arisen, with no way to resolve them except to go to court.

Some of the more important elements a practitioner should keep in mind when drafting, adopting or recommending a dispute resolution clause are:

- The clause might cover all disputes that may arise, or only certain types.
- It could specify only arbitration - giving a binding result - or also provide an opportunity for non-binding negotiation or mediation.
- The arbitration clause should be signed by as many potential parties to a future dispute as possible.
- To be fully effective, "entry of judgment" language in domestic cases is important.
- It is normally a good idea to state whether a panel of one or three arbitrators is to be selected, and to include the place where the arbitration will occur.
- If the contract includes a general choice of law clause, it may govern the arbitration proceeding. The consequences should be considered.
- If the parties wish to exclude punitive damages, they should specifically so state.
- Consideration should be given to incorporating the AAA's Supplementary Procedures for Large, Complex Disputes for potentially substantial or complicated cases.
- The drafter should keep in mind that the AAA has specialized rules for arbitration in the construction, textile, patent, securities and certain other fields. If anticipated disputes fall into any of these areas, the specialized rules should be considered for incorporation in the arbitration clause. An experienced AAA administrative staff manages the processing of cases under AAA rules.
- The parties are free to customize and refine the basic arbitration procedures to meet their particular needs. If the parties agree on a procedure that conflicts with otherwise applicable AAA rules, the AAA will almost always respect the wishes of the parties and will implement the agreement as written.

## Appendix 2

### Qualification Criteria for Admittance to the AAA National Roster of Arbitrators and Mediators

The American Arbitration Association (AAA) is the nation's leading provider of alternative dispute resolution services. Openings on our Regional Roster of Neutrals are extremely limited, based primarily on caseload needs and user preferences. Consequently, even candidates with strong credentials may not be added to our roster.

Applicants for membership on the AAA National Roster of Arbitrators and Mediators must meet or exceed the following requirements:

#### 1. QUALIFICATIONS

- a. Minimum of 10 years of senior-level business or professional experience or legal practice.
- b. Educational degree(s) and/or professional license(s) appropriate to your field of expertise.
- c. Honors, awards and citations indicating leadership in your field.
- d. Training and experience in arbitration and/or other forms of dispute resolution.
- e. Membership in a professional association(s).
- f. Other relevant experience or accomplishments (e.g. published articles).

#### 2. NEUTRALITY

- a. Freedom from bias and prejudice.
- b. Ability to evaluate and apply legal, business or trade principles.

#### 3. JUDICIAL CAPACITY

- a. Ability to manage the hearing process.
- b. Thorough and impartial evaluation of testimony and other evidence.

#### 4. REPUTATION

- a. Held in the highest regard by peers for integrity, fairness and good judgment.
- b. Dedicated to upholding the AAA Code of Ethics for Arbitrators and/or Standards of Conduct for Mediators.

#### 5. COMMITMENT TO ADR PROCESS

- a. Willingness to devote time and effort when selected to serve.
- b. Willingness to support efforts of the AAA.
- c. Willingness to successfully complete training under the guidelines of the Commercial Arbitration Development Program.

## **6. LETTERS OF RECOMMENDATION\***

Furnish letters from at least four active professionals in your field, but outside of any firms or professional associations in which you are employed or on which you currently serve as an officer, director or trustee. Each letter must address the following:

- a. Nature and duration of the relationship
- b. Why the applicant would be qualified to serve

Recommended sources for letters:

3. Current AAA Panel member
4. Current or former state or federal judge\*\*
5. An attorney who served as your opposing counsel\*\*
6. Former employer or client

\* Letters of recommendation must be sent directly to the AAA Vice President from the writers, in sealed envelopes.

\*\* Suggested for attorney applicants.

## **7. PERSONAL LETTER**

Submit a letter explaining why you feel you would like to be included on AAA's Roster of Arbitrators and Mediators. Your letter should provide a detailed description of your willingness to commit yourself to serving and representing the Association. Also indicate in the letter whether or not you are currently a neutral with any other ADR agencies.