Chapter 1

INTRODUCTION TO ALTERNATIVE DISPUTE RESOLUTION IN COLORADO

SYNOPSIS

§ 1.1 • INTRODUCTION

The word "alternative" in the phrase "alternative dispute resolution," refers to alternatives to the judicial system. Conceptually, the phrase is a broad term that covers a variety of alternative methods to resolve disputes in lieu of litigation. While such a broad and inclusive definition might well include fistfights, dueling, or even wars, our reference is to peaceful and civilized methods of dispute resolution. The term should include dispute resolution methods not yet tried or even thought of. Hopefully, the term envisions a constant effort to find dispute resolution processes that are quicker, more economical, and more satisfactory to the participants and the public.

This book focuses on the law of conventional, tried-and-true alternative dispute resolution processes that usually will resolve disputes economically, justly, speedily, and efficiently. The bulk of this law is about arbitration, which, generally, is the only alternative dispute resolution (ADR) procedure resulting in a binding conclusion without the consent of the parties to the resolution.

§ 1.2 • WHAT IS ALTERNATIVE DISPUTE RESOLUTION?

Alternative dispute resolution refers to alternatives to the judicial system to resolve or help resolve disputes between two or more persons or entities. Commonly, the processes known as ADR include mediation, dispute review board, fact finding, mini-trial, private judge, early neutral evaluation, special master, and arbitration. While each process will be discussed in greater detail later in this book, these alternative dispute resolution procedures can be generally described as follows:

Mediation means "an intervention in dispute negotiations by a trained neutral third party with the purpose of assisting the parties to reach their own solution."[1] The Colorado Dispute Resolution Act defines a mediator as "a trained individual who assists disputants to reach a mutually acceptable resolution of their disputes by identifying and evaluating alternatives."[2]

Dispute Review Boards generally are used in the construction industry. The board usually consists of three "construction industry experts who periodically visit the site, attend project meetings, conduct hearings on disputes between parties, and issue written recommendations for the disposition of such claims."[3] Dispute review boards differ widely in the scope of their activities and powers, but generally do not issue binding decisions.

Fact Finding is defined as "an investigation of a dispute by a public or private body that examines the issues and facts in a case and may or may not recommend settlement procedures."[4] The facts, after investigation, are stated, but not the conclusions to be drawn therefrom. The facts found may or may not be conclusive on the parties, depending upon the terms of submission.

Mini-Trial means "a structured settlement process in which the principals involved meet at a hearing before a neutral advisor to present the merits of each side of the dispute and attempt to formulate a voluntary settlement."[5] It usually does not result in a binding decision, although it can. Normally, if there is a decision, it is advisory only. Often, there is no decision. Sometimes presentations are made (in brief form) with actual witnesses; sometimes the presentation is by counsel in the form of a combined opening and closing statement.

Private Judge means a retired or resigned Colorado judge who is appointed pursuant to statute by the parties to hear a dispute. Such judges have much of the same authority as a sitting judge.[6] The agreed-upon compensation and expenses are paid by the parties.

Early Neutral Evaluation means "an early intervention in a lawsuit by a court-appointed evaluator to narrow, eliminate, and simplify issues and assist in case planning and management. Settlement of the case may occur under early neutral evaluation."[7] Thus, among other things, an early neutral evaluator may organize, define, and simplify the case, and may make an evaluation of the claims and defenses. An evaluator may be charged with establishing binding procedures, but does not render any decision.

Special Master is defined as "a court-appointed magistrate, auditor or examiner who, subject to specifications and limitations stated in the court order, shall exercise the power to regulate all proceedings in every hearing before such special master, and to do all acts and take all measures necessary

or proper for compliance with the court's order."[8] A master is typically appointed by a court and operates with power delegated by a court pursuant to C.R.C.P. 53 and F.R.C.P. 53. Normally, no binding decision is rendered.

Arbitration "means the referral of a dispute to one or more neutral third parties for a decision based on evidence and testimony provided by the disputants."[9] While this definition is in the Dispute Resolution Act, arbitration also recognizes the use of non-neutral arbitrators, if at least one member of the panel is neutral. The Colorado Revised Uniform Arbitration Act[10] defines an arbitrator as "an individual appointed to render an award, alone or with others, in a controversy that is subject to an agreement to arbitrate." This book primarily deals with arbitration as defined for purposes of application of the state and federal arbitration statutes, which is somewhat narrower than the typical usage of the term.

The notice of claim process under the Colorado Defect Action Reform Act (CDARA), C.R.S. § 13-20-803.5, can be an alternative dispute resolution proceeding under the terms of an insurance policy.[11] The court accepted the *Black's Law Dictionary* definition of alternative dispute resolution: "a procedure for settling a dispute by means other than litigation, such as arbitration or mediation."

As hereinafter discussed, all arbitration within common vernacular may not be "arbitration" for other purposes, such as applicability of the arbitration statute.

§ 1.3 • SCOPE OF THIS BOOK

This book provides an overview of the Colorado law of alternative dispute resolution, *i.e.*, those means of resolving disputes other than through the court system. While arbitration is the dominant topic of this book, mediation, dispute review boards, fact finding, private judges, and early neutral evaluation are briefly discussed, and are also important tools in the dispute resolution process.

The type of "arbitration" that is the principal topic of this book is that which is used in the state and federal arbitration acts and is the dispute resolution process to which those statutes apply. This definition excludes some forms of dispute resolution procedures that some people include in their reference to arbitration.

This book attempts to cover the principal Colorado and federal statutes governing the arbitration process, as well as the principal Colorado state and Colorado federal judicial decisions. Given the vast number of judicial decisions concerning the arbitration process, no attempt is made to cover all cases. Rather, this book covers only some cases rendered by the state or federal courts in other states.

In some instances, out-of-state case law is cited, particularly on those issues on which the Colorado state and federal courts have not ruled, since federal and state court decisions in other states may provide some guidance. The relatively few out-of-state cases that are cited are not comprehensive, and, at most, provide a starting point for further research. Indeed, there are some areas of arbitration law in which new decisions are being rendered monthly.

The reader should be aware of the importance of carefully reviewing the applicable statutes and case law. This book is merely a starting point to the solution of issues presented by ADR generally and arbitration in particular.

There are specialized applications of ADR that are only briefly mentioned, or not mentioned at all. For example, labor arbitrations, particularly under a collective bargaining agreement, are very similar to "general" arbitration, but have well-established variations that are not covered. Similarly, mediation of public policy issues is not covered.

§ 1.4 • THE BENEFITS AND OBJECTIVES OF ADR

There are many goals and benefits of ADR. In large part, the main goal is to avoid the cost, time, formality, and complexity of modern civil litigation. Of the common ADR methods, only binding arbitration and private judges result in a binding decision by a third party resolving the dispute by a decision to which the parties' consent is not required.

Mediation results in a resolution of the dispute only by agreement of the parties through the assistance of the mediator. The mediator may recommend a resolution of the dispute for the parties to agree upon, but has no power to bind the parties to a resolution. ADR procedures, such as non-binding arbitration, dispute review boards, fact finding, and early neutral evaluation, may move a case much closer to resolution by arbitration, mediation, negotiation, or a court, but in themselves normally do not provide a resolution.

However, the goals of all ADR processes are approximately the same. They are to:

- Reduce the cost of resolving the dispute;
- Increase the speed of resolving the dispute;
- Have the issues decided (or the parties assisted) by a third person having knowledge, and perhaps expertise, in the subject matter of the dispute;
- Maintain a better relationship between the disputing parties;
- Achieve a first-level final resolution of the dispute, and avoid multi-levels of re-consideration such as exist in the judicial appellate system;
- Provide greater control over the dispute resolution procedure, especially related to discovery, duration of proceedings, etc.;
- Avoid juries;
- Achieve fair and just results; and
- Provide more predictable results.

Not all ADR methods and procedures can or should accomplish all of these objectives; similarly, the benefits of ADR vary from case to case. The objectives are not the same for both parties to a dispute. However, each of the methods of ADR is designed and intended to accomplish some of these objectives. The comparison is always to the judicial system and its perceived inadequacies. Obviously, however, some of the ADR procedures, *e.g.*, mediation, can be combined with the judicial process.

§ 1.5 • INTERNATIONAL ADR

Arbitration has long been favored for resolving commercial disputes between individuals or companies that are residents of two different countries because the entities involved are often not willing to submit their dispute to the judicial processes of a foreign country; hence, the two companies instead agree to arbitrate, *e.g.*, in a process administered by the International Chamber of Commerce. Chapter 23 introduces this topic.

§ 1.6 • COLORADO COURTS FAVOR ADR

Throughout this book, there will be frequent commentary on how the courts look with favor upon arbitration, a positive and supportive attitude that extends to ADR generally.

In *City & County of Denver v. District Court*,[12] the contractor and subcontractor on the DIA airport construction project brought an action against the City and County of Denver. The city moved to dismiss the claim for failure of the contractor and subcontractor to pursue alternative dispute resolution procedures defined in the contract (incorporating provisions in the Municipal Code) and to stay the litigation. The district court denied the motion, and the city moved for a writ of prohibition under Colorado Rule of Appellate Procedure 21 in the Colorado Supreme Court to prevent the district court from proceeding further with the case because of the agreement for ADR. Thus, it was treated similarly to a district court's denial of a motion to compel arbitration, except the city's alternative dispute resolution procedures probably did not constitute arbitration as defined by the Colorado Uniform Arbitration Act.

The supreme court, following the principles of arbitration law, stated:

> Alternative dispute resolution mechanisms are favored in Colorado as a convenient, efficient alternative to litigation. We issued a rule to the district court to show cause because enforcement of non-arbitration ADR procedures in appropriate cases provide guidance and foster stability for those seeking the benefits of similar dispute resolution procedures in their business dealing. . . . The right of parties to contract encompasses the correlative power to agree to a specific procedure for the resolution of disputes. Failure to follow the mandate of a valid ADR clause contravenes Colorado's public policy of supporting ADR as well as frustrates the intent of the parties who originally agreed to an alternative remedy to resolve their disputes. . . . The ADR clause of the Contract is broad in scope, and we apply a presumption in favor of alternative dispute resolution to PCL's claims.[13]

The court further noted that a writ of prohibition is an appropriate remedy when the trial court has abused its discretion and where an appellate remedy would not be adequate. The court compared it to C.R.S. § 13-22-221(1)(a) (2003), the Colorado Uniform Arbitration Act. The court further noted:

> This case involves enforcement of ADR provisions not involving arbitration, and the party seeking to compel ADR has no immediate appellate remedy for an abuse of discretion by the district court. Colorado possesses a tradition of supporting alternative dispute resolution mechanisms when agreed to by the parties. . . . ADR procedures promote settlement of controversies in a manner which avoids the cost of litigation and contributes to the efficient functioning of our judicial system. . . . Enforcement of ADR procedures in appropriate cases provides guidance and fosters stability for those who seek to use similar mechanisms in their business dealings. Appellate review after litigation of PCL's claim against Denver would be an inadequate remedy for Denver because the litigation would not only frustrate the intent of the parties in this case, but would also violate Colorado's strong public policy of encouraging alternative dispute resolution.[14]

The court noted that the court of appeals in *Kiewit Western Co. v. City & County of Denver*,[15] upheld a similar municipal ADR clause by rejecting the contractor's arguments attacking the ADR clause on due process grounds:

> An ADR provision requiring the parties to resolve disputes through an administrative process serves the same public policy interest as does an ADR provision which requires the parties to submit to arbitration. Both ADR provisions allow the parties to agree upon an alternative non-judicial forum to resolve disputes which is simpler and more expedient than normally encountered in our judicial system. . . .[16]

The court also seemed to rely upon *In re Siegel*,[17] holding that the arbitration clause that named the attorney for one of the parties as the arbitrator was valid where full disclosure occurred; absent the real possibility that injustice would result, the court will not rewrite the contract for the party. The court discussed "Guidelines for Courts in Addressing ADR Provisions."[18]

§ 1.7 • FEDERAL COURTS FAVOR ADR

The U.S. Supreme Court has indicated a strong policy in favor of arbitration, reflected by Congress's passing the Federal Arbitration Act (FAA). *See* Chapter 2. However, it is difficult to find a strong federal policy in favor of other forms of ADR.

§ 1.8 • ADR PROVIDERS

Colorado has numerous ADR providers, primarily with respect to providing arbitration and mediation services. There are numerous individual providers, as a review of the Colorado Legal Directory (Fields of Practice — Alternative Dispute Resolution) shows. In addition, there are many groups offering ADR services by multiple ADR providers. Some of those include:

- American Arbitration Association (AAA);
- Judicial Arbiters Group (JAG); and
- JAMS.

Some arbitrators and mediators are specialists, *e.g.*, providing services in domestic relations matters.

In addition, there are various government-sponsored ADR providers. *See* Chapter 21.

§ 1.9 • BIBLIOGRAPHY

American Arbitration Association Publications:

A Beginner's Guide to Alternative Dispute Resolution
A Guide for Commercial Arbitrators
A Guide to Mediation and Arbitration for Business People (2007)
A Guide to Mediation for Financial Planning Disputes
A Guide to the Management of Large, Complex Cases
AAA Mediation: Questions and Answers
Construction ADR (2014)
Building Success for the 21st Century — A Guide to Partnering in the Construction Industry (1996)
Drafting Dispute Resolution Clauses — A Practical Guide (2007)
Resolving Commercial Financial Disputes — A Practical Guide (Including Sample Clauses and Mediation and Arbitration Rules)
Resolving Employment Disputes — A Practical Guide
Resolving Professional Accounting and Related Services Disputes — A Guide to Alternative Dispute Resolution
The Construction Industry's Guide to Dispute Avoidance and Resolution (2009)
Handbook on Arbitration Practice (2013)
Handbook on Commercial Arbitration
Handbook on Construction Arbitration and ADR
Handbook on Employment Arbitration and ADR
Handbook on International Arbitration and ADR
Handbook on International Arbitration Practice
Handbook on Labor Arbitration
Handbook on Mediation
Yearbook on Arbitration and the Law (published annually)

Dubue, "ADR is Reducing the Number of Cases Tried," *For the Def.* 36 (April 2005).

Bizar & Weiner, "Arbitration is Not Always Quick," *Nat'l L.J.*, Feb. 17, 2003.

American Bar Association Publications:

Yearbook on Arbitration and the Law (published annually)
Securities Arbitration: Practice and Forms
Law and Practice of Arbitration
Arbitration Clauses for International Arbitration

How Arbitration Works (2012)
Client's Guide to Mediation and Arbitration: The Strategy for Winning
Commercial Arbitration at its Best: Successful Strategies for Business Users
Advanced Arbitration Insight: 20/20 (2006)
Re-imagining Arbitration (2011)
A Courtroom Lawyer's Guide to Arbitration (2005)
How ADR Works (2002)
ADR Hot Topics: Appellate Arbitration, Sanctions and Arbitrability
Arbitration: Innovative Problem Solving for Health Care Business Disputes
The Practitioner's Guide to Securities Arbitration
Mills & Brewer, A Courtroom Lawyer's Guide to Arbitration
Ethical Aspects to Consider While Building an Arbitration Practice
FINRA Arbitration: Inside Information for Advocates and Neutrals Audio
The Arbitration Award, Remedies and Post Award Process
Utilizing Mediation to Navigate the Perils of Electronic Discovery in Arbitration
Balancing Party Control and Efficiency: Managing the Parties and Preparing for the Arbitration Hearing
Managing the Arbitration Hearing and Evidence
Guides to ADR in Construction and Government Contracting (Package)
Alternative Dispute Resolution: A Practical Guide for Resolving Government Contract Controversies
Alternative Dispute Resolution in State and Local Governments: Analysis and Case Studies
The Complete Guide to Mediation: How to Effectively Represent Your Clients and Expand Your Family Law Practice
What Is ADR in Health Care Disputes?
Solutions for Common Ethics Issues in ADR
Construction ADR
Ethics in ADR
Environmental Dispute Resolution: An Anthology of Practical Solutions
General Counsel's Decision Making on Dispute-Resolution Strategies in Complex Business Transactions

Colorado Lawyer Articles:

Russell, "Arbitrator and Mediator Disclosure Obligations in Colorado," Sept. 2005, p. 53.
Epstein, "Mediation Handbook: Effective Strategies for Litigators," June 2007, p. 68.
Shields, "Mediation in State Government," Oct. 1997, p. 19.
Kenney, "Mediation Privilege," Nov. 2000, p. 65.
Fullerton, "2007 Recommendations for Mediators, Prepared by the CBA ADR Section and the Colorado Council of Mediators and Mediation Organizations," March 2008, p. 23.
Friedman, "The Basics of Effective Mediation," Aug. 2009, p. 73.
Coates, "Brief Overview of Parenting Coordination, A," July 2009, p. 61.
Epstein & Epstein, "Co-Mediation," June 2006, p. 21.
Peppet, "Colorado Ethics Opinion 115: Next Steps for Colorado's Collaborative Lawyers," Sept. 2007, p. 37.
Daly, "Colorado's Community Conflict Resolution and Restorative Justice Services Mini-Grants Program," Dec. 2007, p. 27.
Tanaka, "Determining Contract Validity and Arbitrability," April 2007, p. 15.

Fullerton, "The Ethics of Mediation-Arbitration," May 2009, p. 31.
Miller, "Fact-Finding Investigation in the Workplace: A Powerful ADR Tool," Sept. 2006, p. 57.
Burnett & Ortner, "The Holistic Practice of Conflict Resolution," Dec. 2006, p. 25.
McMahon, Jr., "Moving Mediation Back Toward Its Historic Roots—Suggested Changes," June 2008, p. 23.
Liebman & Riggs, "The State of the Intertwining Doctrine in Colorado," Jan. 2007, p. 15.
Seal & Kirtland, "Using Mediation in Guardianship Litigation," March 2010, p. 37.
Tarpey, "ADR Forum: One Step in an Evolving Process," June 2001, p. 53.
Murray, "Arbitrator and Mediator Disclosure Obligations in Colorado," Sept. 2005, p. 53.
Thoennes, "Assessing Whether Mediation Benefits the Courts," March 2003, p. 53.
Choquette, "Colorado Law on Mediation: A Primer," March 2006, p. 21.
Ortner & Shields, "Colorado Now Has Model Standards of Conduct for Mediators," June 2000, p. 45.
Thoennes, "Dependency Mediation in Colorado's Fourth Judicial District," Feb. 2001, p. 41.
Henn, "Dispute Review Boards: An ADR Form for the Construction Industry," March 1999, p. 51.
Epstein, "The Powers of Psychodynamics in Shaping Mediation Outcomes," Jan. 2004, p. 45.
Peppet, "Transactional Mediation: Using Mediators in Deals," Oct. 2003, p. 81.
Carr, Kenney, Savage & Willis, "The Uniform Mediation Act: Its Potential Impact on Colorado Mediation Practice—Part I," May 2002, p. 61; Part II, June 2002, p. 67; Part III, July 2002, p. 101.

NOTES

1. C.R.S. § 13-22-302(2.4) (Dispute Resolution Act).
2. C.R.S. § 13-22-302(4).
3. McMillan & Rubin, "Dispute Review Boards: Key Issues, Recent Case Law, and Standard Agreements," *Constr. Law.* (Spring 2005).
4. C.R.S. § 13-22-302(2.1).
5. C.R.S. § 13-22-302(4.3).
6. C.R.S. § 13-3-111.
7. C.R.S. § 13-22-302(2).
8. C.R.S. § 13-22-302(8).
9. C.R.S. § 13-22-302(1).
10. CRUAA, C.R.S. § 13-22-201(2) (2016).
11. *Melssen v. Auto-Owners Ins. Co.*, 285 P.3d 328 (Colo. App. 2012).
12. *City & County of Denver v. Dist. Court*, 939 P.2d 1353 (Colo. 1997).
13. *Id.* at 1357.
14. *Id.* at 1361.
15. *Kiewit Western Co. v. City & County of Denver*, 902 P.2d 421 (Colo. App. 1994).
16. *City & County of Denver*, 939 P.2d at 1362.
17. *In re Siegel*, 358 N.E.2d 484 (N.Y. 1976).
18. *City & County of Denver*, 939 P.2d at 1363.