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Alternative dispute resolution : a guide for state societies

American Institute of Certified Public Accountants. Subcommittee on Accountants' Legal Liability

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ALTERNATIVE DISPUTE RESOLUTION

A GUIDE FOR STATE SOCIETIES

American Institute of CPAs
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AMERICAN INSTITUTE OF CERTIFIED PUBLIC ACCOUNTANTS

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Alternative Dispute Resolution

Introduction

Alternative dispute resolution (ADR) is a term used to describe a variety of techniques for resolving conflicts without taking legal action. Within the past few years, the use of these techniques as a method of resolving business disputes has gained momentum. ADR provides a way to save time and money, protect confidentiality, avoid setting legal precedents and, hopefully, preserve a client relationship.

There is a growing use of ADR by federal agencies and business organizations, and by state courts using ADR programs to ease their caseloads. A number of professions have supported ADR programs and have provided significant benefit to their members. Many state bar associations have developed arbitration programs to handle disputes between members and their clients over fees. Professionals such as engineers and architects, and members of the financial services industry, including banks and stockbrokers, frequently use ADR techniques.

A recent review by the Center for Public Resources showed 142 companies have saved more than $100 million in legal expenses by resolving major disputes through ADR. There also have been many recent articles in business periodicals discussing the benefits of ADR. As a result of this trend, CPAs can expect that they eventually will be encouraged, if not required, to use ADR techniques to settle some disputes.

A recent survey by the AICPA's Subcommittee on Accountants' Legal Liability, however, found that only five state CPA societies have sponsored ADR programs. Most of these programs were established to handle fee disputes. Two other State Societies coordinate efforts with business organizations.

As a result of research it has done, the Subcommittee has concluded that ADR offers accountants the potential to help mitigate current liability costs. Studies have indicated that almost 50 percent of practitioners don't carry malpractice insurance.

For these members, ADR may provide even greater benefit. The Subcommittee urges State Societies to give serious consideration to implementing ADR programs. With the assistance of several State Societies, the Subcommittee has developed this Guide to assist societies that want to determine whether to promote the use of ADR.

There are many ADR techniques, but they generally fall into three broad categories: (1) negotiation, (2) mediation and (3) arbitration. The main distinction among the categories is the amount of control the disputing parties have over the process and the outcome. At one extreme is negotiation, in which the parties deal with one another and have maximum control. At the other is binding arbitration, in which a neutral third party renders a decision that the parties have agreed in advance to accept. In the middle is mediation, in which a neutral third party tries to help the parties reach an agreement but has no power to order one.

In many respects, an arbitration decision is even more binding than a judgment or ruling in a court trial, because none of the parties can challenge it. A decision by a court can be appealed for all sorts of reasons, including errors in procedure, in evidence or in instructing the jury. Most courts, however, have strictly limited the right to appeal a binding arbitration award to such circumstances as fraud or undisclosed bias or prejudice by the arbitrator. An example is an arbitrator who didn't disclose a financial interest in the case, or who had a close personal relationship with one of the parties or their attorneys.

If a negotiated solution is an acceptable outcome to a dispute, ADR is an option that should be considered ahead of a lawsuit. Studies show that 90 to 95 percent of all lawsuits are resolved without a trial, when the parties finally decide to negotiate a solution. But this point often comes only after angry confrontations, delays, costly discovery procedures and expensive trial preparations. In the process, the parties may have decided that the court system has become too slow, too busy, too crowded, too overburdened with criminal cases that must get first priority.

ADR offers a faster, more economical means of resolving disputes. It is particularly effective in business disputes, where the issues are generally unemotional and often technical.

ADR's other benefits include:

- encouraging the parties to explore alternative solutions thoroughly without basing settlements on the perceived expense of taking the case through litigation;
- giving the parties confidentiality and helping them avoid publicity and public scrutiny;
- preserving business relationships by relying on consensus and avoiding the hostility of a lawsuit;
- providing a mediator or arbitrator who, unlike a judge or jury, usually has expertise in the business involved and knowledge about complex or highly technical matters unique to the business.

Overview of Implementation Process

Introduction

Most efforts by State Societies to implement alternative dispute resolution have focused primarily on fee-related disputes. While resolving fee disputes is an important application of ADR, the AICPA Subcommittee on Accountants' Legal Liability believes the profession can derive significant benefits through expanded use of ADR techniques. For example, the Florida Society of CPAs has recently instituted a program to encourage mediation of service-related disputes between CPAs and their clients.

The Subcommittee believes State Societies can and should play an integral role in implementation of ADR by their members. The State Society is best suited for resolving on a state-wide basis insurance and regulatory issues that might hinder use of ADR techniques, for sponsoring member education on ADR, for identifying ADR service providers in the state and for helping identify or develop a panel of neutral individuals to serve as mediators or arbitrators in the ADR process.

This section of the Guide outlines five steps for use by State Societies in evaluating the ADR environment in their states, and in implementing ADR techniques if they decide to do so.

The goal of this section of the Guide is to present, in a "cookbook" format, a step-by-step implementation plan that will result in increased use of ADR techniques by the profession.

Following these five steps will enable your State Society to:

- identify the current environment in your state for the use of ADR by accountants;
- eliminate barriers to use of ADR by its membership; and,
- identify or develop, if needed, tools and resources for the membership's use of ADR.

Your State Society should tailor the implementation process to your state, based on its assessment of the current ADR environment and the needs of its members. The Handbook on Alternative Dispute Resolution that accompanies this Guide and the implementation process are comprehensive, and will complement a State Society's existing ADR program. Since the use of ADR has potential to benefit all CPAs, it should appeal to and receive the support of a broad range of State Society members.

These materials and the program they outline are not intended to offer legal advice. You can and should obtain such advice from legal counsel in connection with any agreement and the dispute resolution process. In addition, the insurance carriers operating within your state should be consulted prior to recommending to the membership that they undertake any ADR procedures.

(Note—Although potential opportunities exist for accountants to provide ADR services to existing or potential clients, this Guide does not address them. This service area is addressed briefly in section VI of the accompanying Handbook on Alternative Dispute Resolution.)

STEP 1: Developing a framework for action

ACTION ITEMS

- Create a task force, or assign responsibility to an existing committee, to determine what role, if any, your State Society should play in supporting implementation of ADR among the society's members;
- Draft a well-defined charge;
- Enlist a committed State Society leader to serve as chair;
- Assure the task force includes a broad cross-segment of State Society membership;
- Prepare a budget to cover legal, administrative and miscellaneous costs;
- Report progress routinely to the Executive Committee and/or Board of Directors.

STEP 1 TIME FRAME: 1 to 2 months

The first step in the implementation process is to make the use of ADR techniques a priority in your state. Some state societies can do this by having the Executive Committee, Board of Directors or appropriate committee, such as the Management of an Accounting Practice (MAP) Committee, adopt it as a priority. It's critical to identify the body within the State Society that will be the champion of the ADR program and have that group fully embrace the program.

Forming the ADR Task Force

The first, and perhaps most important, step in the ADR program is creating an effective, well-organized ADR Task Force. The task force must be given a clearly-defined charge setting guidelines, reporting requirements and timing. (An example of an ADR Task Force charge is on page 10.)

Selecting the chairperson

Crucial to the success of the ADR Task Force is the enlistment of a visible and respected State Society leader to serve as chairperson. The chairperson must be someone committed to controlling and reducing members' legal liability costs. He or she also must be able to devote time and energy to make the program succeed. The chairperson should help select other task force members. The chairperson is responsible for making sure the task force meets its deadlines, has access to necessary resources, and fully investigates all areas of potential concern in connection with implementation of ADR methods.

Broad participation is important

Because ADR techniques can be applied to a wide range of service areas and can handle claims of all sizes, the task force should include a cross-segment of State Society membership. In particular, members who have opted to practice without insurance coverage, and who have a strong interest in reducing the cost and time involved in resolving claims, should be represented.

Whenever possible, task force members should be experienced, senior-level professionals. It is helpful to include CPA/attorneys and CPAs who specialize in litigation support services, as well as representatives from existing regulation, insurance and practice management committees of the State Society. Senior-level State Society staff, particularly communications staff members, also should take part in the process.

Budget considerations

The process of forming the task force should include budgeting sufficient funds to cover its legal, administrative and miscellaneous costs. In developing a budget, the task force should consider the costs of:

- a survey of firms throughout the state concerning knowledge and use of ADR;

- legal counsel to review relevant state statutes and accountancy act provisions, as well as recommendations and implementation issues; and,
- miscellaneous administrative costs.

As discussed elsewhere in this section, the costs of some of these items could be reduced by performing them in conjunction with other activities, especially legal liability efforts, that your society undertakes.

ADR Task Force Charge

(Example)

Recognizing the increased use of alternative dispute resolution (ADR) techniques by a variety of business, professional and other organizations and the potential benefits offered by ADR, the (State Society) has given priority to a review of the current and potential use of ADR techniques by the society's members.

The Society has established this ADR Task Force to examine what, if any, role the Society should serve to support implementation of ADR by the members. In particular, the Task Force should:

- identify the current environment in the state for the use of ADR by accountants;
- determine action needed to eliminate any barriers to use of ADR by the membership;
- identify existing tools and resources, or develop if needed, to facilitate the membership's use of ADR; and,
- fully investigate all areas of potential concern in connection with implementation of ADR.

The Task Force, through its chairperson, should maintain regular communication with (the Executive Committee, the Board of Directors or (appropriate committee)) and should provide a formal report at the completion of each step in the process, including a recommendation whether to continue with the project.

The Task Force is expected to complete its work in 9 to 12 months.

STEP 2: Analysis and diagnosis of the current ADR environment and the needs of society members

ACTION ITEMS

- Consider surveying members to determine their current knowledge and use of ADR techniques, and whether sufficient need exists for society involvement;
- Retain legal counsel to review relevant state statutes and accountancy act provisions, including independence considerations;
- Contact primary insurance providers in the state and determine their support for, or restrictions on, the use of ADR;
- Inventory the ADR service providers and programs already functioning in your state (i.e., the American Arbitration Association, Better Business Bureau, etc.);
- Decide whether to proceed with an ADR project.

STEP 2 TIME FRAME: 2 to 3 months

After developing an overall framework for action, it is necessary to analyze and diagnose the current ADR environment in the state and the needs of society members. A decision must be made whether the membership will benefit from having ADR policies and procedures created and recommended.

Survey your members

Does a need for ADR really exist? What are the attitudes of society members towards using ADR techniques? Have they experienced first-hand the use of mediation or arbitration? Do they currently have an ADR program in place?

To answer these questions and others, your State Society may wish to survey its members about their experiences with and perceptions about ADR. This survey could be performed in conjunction with a membership survey about liability, insurance and risk management issues. The survey results will help assess how much members know about ADR, their willingness to use ADR techniques and any organizations they are currently using to provide ADR rules, administration and panels of neutral persons to serve as arbitrators and mediators. This information will help determine if a need for State Society involvement exists. Some of the state societies contacted in the course of preparing this Guide felt that a survey would only confirm the assumptions. They believe that ADR is not well known. However, their leadership saw an opportunity to provide a member service and determined to launch the project in a way that informed the members and encouraged the use of ADR.

Analyze the state's legal environment for ADR

Which laws in your state may affect the use of ADR? To what extent do the courts already require the use of ADR techniques, primarily mediation? Would a pre-dispute commitment to use ADR techniques, particularly binding arbitration, affect accountants' independence under existing state accountancy laws? Can punitive damages be assessed as part of an ADR proceeding in your state? Must pre-litigation settlements using ADR techniques be reported to the Department of Licensing? These are among the questions that must be answered in a review of the current legal environment in your state.

Your State Society may decide to ask outside legal counsel to do the review. Many of the legal issues affecting the use of ADR require knowledge of case law and relevant court procedures. To obtain counsel capable of doing a comprehensive analysis, your task force members and other knowledgeable senior-level CPAs can be asked to identify law firms and attorneys who have used ADR methods and who have represented accounting firms in liability cases. Again, it is possible this

review could be performed in conjunction with a comprehensive analysis of CPAs' current liability exposure in your state. This research will form the basis for future ADR decisions.

Determine insurance carrier support for ADR

Another critical element in your state's ADR environment involves how insurance carriers look at ADR. Some professional liability insurance policies available to accountants bar certain forms of ADR (particularly binding arbitration). In addition, even carriers who agree to ADR's use on a claim-by-claim basis might not agree to pre-dispute commitments to use ADR. Your ADR Task Force may be able to obtain information about insurance carrier restrictions and support as part of a wider analysis of liability, insurance and risk management issues that also would produce summary information about claims against CPAs. An insurance claims analysis could help identify areas in which members are having problems that might be conducive to resolution through ADR.

The Task Force should contact the AICPA's insurance carrier, through the plan administrator, as well as state-sponsored insurance plans or other insurance carriers widely used in your state, to determine their views on the use of ADR. All Society members should read their professional liability policies and obtain authorization from their insurers before agreeing to any use of ADR. Even if a policy doesn't prohibit use of ADR, its use might be deemed a violation of the policy's cooperation clauses.

Prepare an inventory of current ADR service providers and programs

The task force should be able to compile a list of court-related and private providers of ADR services in your state by using information from the member survey discussed earlier, through discussions with the attorneys who review the state's current legal environment and from organizations listed in the supplemental materials to this Guide ("ADR service providers and programs (partial listing)").

Among the information the task force should seek is whether the service provider has developed rules for use of ADR techniques, how it administers ADR proceedings and whether it has developed a panel of neutral persons to serve as mediators and arbitrators.

By completing the analyses outlined in this step of the implementation process, your State Society can determine if ADR techniques are beneficial and available to its members, and whether a shortfall exists in their current use. Based on these conclusions, the task force can decide whether to go forward by creating and recommending ADR policies and procedures.

STEP 3: Creation and Recommendation of ADR Policies and Procedures to Meet Member Needs

ACTION ITEMS

- Determine whether the society should operate its own ADR program or facilitate members' use of existing ADR service providers;
- Ensure that the necessary ADR infrastructure is in place;
- Obtain insurance company support and resolve any regulatory restrictions.

STEP 3 TIME FRAME: 3 to 4 months

This Guide assumes that the analysis and diagnosis performed in Step 2 resulted in a determination that the need for ADR services in your state warrants further involvement by the State Society. The balance of the Guide is designed to guide societies in developing and implementing their ADR policies.

Although the State Society's level of involvement can vary, Step 3 will help the task force identify the infrastructure needed to support the use of ADR in your state and address barriers that inhibit its use. The society needs to create and recommend ADR policies and procedures that will lead to expanded use of ADR techniques by its members. The AICPA Subcommittee believes that, at a minimum, all states should consider the expanded use of mediation.

Sponsorship of program

The task force's findings in the first two steps of this process will determine whether your State Society should develop and operate its own ADR program or that it should encourage use of existing ADR service providers by its members. The AICPA Subcommittee on Accountants' Legal Liability believes there are enough qualified ADR service providers in most states that operation of a separate program is unnecessary.

In addition, clients and other nonmembers might perceive inherent bias in a program sponsored by a State Society. Paradoxically, operation also could expose the society and its officers and directors to potential liability should disputes arise about the process itself. The Subcommittee's recommendation not to operate your own program also reflects a desire to minimize time and resources for the program and to provide greater flexibility.

Many decisions need to be made in determining the scope of an ADR program —the forms of ADR to be available, the minimum and maximum size of claims to be eligible, whether ADR should be available on demand by either party, whether a pre-dispute commitment should be used, how costs should be borne by the parties. These decisions can be deferred to the individual members if an existing ADR service provider is used. Likewise, decisions regarding the types of disputes to be eligible—fee issues; service-related for audit and attestation, tax and consulting; etc.—can be decided by members based on the size and nature of their practices, the types of disputes they encounter and recommendations of their own legal counsel and insurance carriers regarding use of ADR.

Identify the infrastructure required

Three basic functions need to be carried out so parties to a dispute can use ADR techniques: The proceeding must be administered, a panel of neutrals must be provided from which an arbitrator(s) or mediator can be selected and rules of procedure must be established. While the society can fill some or all of these functions, the Subcommittee, as noted previously, recommends selecting an ADR service provider(s) (i.e., the AAA) to carry out these functions.

- The administrator's duties include handling communications between the parties and with the neutral, appointing the neutral in some cases, scheduling meetings, providing or obtaining use of facilities, and being generally available to the parties and the neutral, offering whatever assistance is required;

- Most ADR service providers maintain their own pools of neutrals to serve as mediators, arbitrators, etc. The parties to a dispute will normally select a neutral from one of these pools for help in resolving their dispute. Key factors in deciding which pool of neutrals to use are the eligibility requirements, experience and expertise of the pool members. Because people serving as neutrals are undertaking serious responsibilities, they also are incurring important ethical obligations. Before deciding on a particular pool of neutrals, the society should determine whether the ADR service provider(s) has a code of ethics that governs the conduct of its neutrals;
- The rules of procedure govern the actual mechanics of the ADR process. They define selection of neutrals, production of relevant documents, allowable communications—in other words, the when, where, how and before whom a dispute will be resolved. While these rules could be specified in the engagement letter or other agreement between the parties, it is usually best to incorporate them by reference from rules already developed by an ADR service provider. Rules are normally flexible and can be varied by mutual agreement of the parties, either as part of a pre-dispute commitment to use ADR or after a dispute arises. The American Arbitration Association (AAA) has developed a guide, included in the supplemental materials to this Guide, which can provide help in drafting dispute resolution clauses.

One of the most important role(s) your State Society can fill in helping its members implement ADR is to ensure that there is a qualified pool of neutrals in your state. The specific role will be determined by whether the Society decides to operate its own program or facilitate the use of existing ADR service providers. The society should be satisfied with the qualifications and training requirements for arbitrators and mediators, as well as the breadth of experience represented on the panels. Based on the inventory of current ADR providers and programs within your state, your society should be able to recommend to its members qualified pools of neutrals with expertise in accounting-related issues. If no such pools

exist, the society should be prepared to work with an existing panel, either a court-annexed or private ADR service provider, to develop such a pool.

The AAA has recently made available "Arbitration Rules For Professional Accounting and Related Services Disputes." These rules, developed by a committee that included representatives from the accounting profession, are focused specifically on accounting-related disputes. A copy of the rules is in the supplemental materials to this Guide. The rules suggest that parties to a dispute first try to settle it by mediation, before resorting to arbitration. The development of these rules is an important step in the effort to increase the accounting professions' use of ADR. We commend the AAA for devoting time and resources to their development and recommend that State Societies give them serious consideration. The AICPA, however, has not yet endorsed any specific ADR service provider.

Resolution of insurance and regulatory issues

The analysis performed in Step 2 may show a need for the your State Society to communicate directly with liability insurance carriers operating in the state to overcome any restrictions on the use of ADR. Although insurance carriers have indicated an increased receptiveness to the use of mediation, hurdles still exist in most states to use of pre-dispute commitments and binding arbitration.

Although the AICPA has concluded (and the Securities and Exchange Commission staff has indicated) that pre-dispute commitments to use ADR techniques don't compromise an accountant's independence, your State Society may need to work directly with the state board of accountancy to remove any restrictions that may have shown up during Step 2.

STEP 4: Implementation of an effective ADR program

ACTION ITEMS

- Develop a communication plan for roll-out of ADR to the membership, including an educational program incorporating the ADR Handbook (Exhibit I);
- Encourage each member firm to designate an Implementation Specialist;
- Develop a feedback mechanism to monitor members' use of the ADR program and to provide information for evaluating the program's effectiveness.

STEP 4 TIME FRAME: 2 to 3 months

Now that your State Society has developed its major ADR policies and procedures, and dealt with issues of implementation, such as insurance and independence, only one major hurdle remains. . .convincing the membership to use ADR!

Communication efforts

Although forms of ADR have been in existence for a long time, only recently has there been a heightened public awareness of the benefits of ADR. Thus, informing members of these benefits and of the application of ADR to the profession are critically important. Making members aware of ADR initiatives being offered by the your State Society is an equally important element of an overall communications plan. Educating members involves not only explaining ADR, its benefits and its limits, but also overcoming the resistance that often arises to new and unfamiliar ideas.

Consider obtaining space in your State Society's newsletter or professional journal for a column dedicated to the ADR program. Additional opportunities for communicating with members include: Presentations at chapter meetings, making

copies of the ADR Handbook and video tapes of actual or recreated ADR proceedings directly available to members, and including information on ADR as part of general communications on legal liability. Both presentations and publications can offer first-hand stories from members on their use of ADR techniques and the experiences they encountered in applying them. Other topics could include updates on pending court cases, new types of ADR techniques and other developments affecting use of ADR by members.

Designation of an Implementation Specialist

To expedite implementation of ADR, your State Society should ask each member firm to designate a person to serve as an Implementation Specialist and work within their practice unit to resolve implementation issues. One of the most important characteristics an Implementation Specialist can have is a commitment to ADR as a force for positive change. The Implementation Specialist should help colleagues learn about and make effective use of available ADR options, keep them apprised of relevant developments and coordinate education and training. Specifically, the Implementation Specialist should be responsible for:

- identifying and evaluating any existing use of ADR within the practice unit;
- identifying intended new applications of ADR, including potential pilot projects;
- assessing the need for training to enable personnel to use ADR effectively;
- planning a long-term training agenda and setting training priorities; and
- encouraging experimentation with use of ADR.

Monitor results of the ADR program

Evaluating your State Society's program as it advances can produce data useful in determining whether it is worth continuing, how it might produce better results and how it might be made more efficient. There are two major types of evaluations. "Process evaluations" are aimed at showing whether a program is working the

way it was designed to work. "Outcome evaluations" show whether the program's goals are being met; for example, whether cases resolved through ADR are being resolved more quickly than cases in more traditional processes.

Collecting data for evaluation may require you to develop surveys, or it could involve interviews and reviews of case files. It's important to decide what kinds of information you will want or need to collect as your State Society begins to set up its ADR program, so program operations include data-collection mechanisms. ADR programs can be evaluated through a number of measurements comparing them to litigation and other traditional methods of resolving disputes—costs to the parties, amounts of time needed to resolve disputes and satisfaction levels of members whose disputes were resolved.

STEP 5: Evaluation

ACTION ITEMS

- Develop an evaluation strategy to provide feedback on program results and recommend future level of State Society support for the program.

STEP 5 TIME FRAME: 2 to 3 months

As a final step in the implementation process, your State Society needs to assess the program's results and decide whether to establish continued support for the program.

Assessment of the program

The most efficient way to arrive at a decision on whether your State Society should continue to support the program is to use feedback obtained from members during the implementation process (see Step 4).

What attitudes did society members express to using ADR techniques? Do they plan to continue using ADR in the future? Which method (arbitration, mediation, etc.) was judged most beneficial? Responses to these and other questions can help your State Society decide whether the ADR program provides enough benefits to members to warrant continued support.

Your State Society can provide continued support for the ADR program in several ways:

- by making members aware of new developments in ADR, particularly new types of ADR techniques;
- by identifying new ways in which members can use ADR, such as its expansion to third-party suits or additional service areas, and by identifying additional support needed by members;
- by monitoring court rulings on the use of ADR and enforcement of awards;

- by working with insurance carriers to allow the expanded use of ADR and pre-dispute commitments to use ADR, particularly binding arbitration;
- by maintaining a qualified pool of neutrals or assessing the pools offered by ADR providers; and,
- by recommending modifications to the State Society's ADR policies and procedures to enhance their effectiveness or streamline the process.

Institutionalize the ADR Process

Your State Society may assign responsibility for continued support of ADR to an existing committee or, preferably, create a new subcommittee within the Management of an Accounting Practice, Legal Liability or Risk Management committees. Members of the original ADR Task Force may be excellent candidates for the subcommittee.

Once an ADR support body is designated, it must routinely provide the State Society leadership with progress reports. This will help ensure that the society's ADR efforts remain visible and continue to receive the resources and status needed for ongoing success.

Conclusion

The legal liability situation is a critical issue facing all State Societies. Many other professionals, including engineers, architects and those in the financial services industry, such as bankers and stockbrokers, also confront this issue and have responded by adopting ADR techniques to deal with it. An ADR program can compliment your State Society's other efforts to reduce the burden of excessive liability exposure, or it can be implemented independently to help lighten members' liability costs. The AICPA Subcommittee on Accountants' Legal Liability hopes this Guide will help State Society members experiment in the use of ADR. It also can help State Societies develop more timely, less costly and less time-consuming alternatives to traditional litigation through the courts. Most recurring users of ADR are convinced of the effectiveness of ADR techniques.

ALTERNATIVE DISPUTE RESOLUTION

SUPPLEMENTAL MATERIALS

—EXHIBIT I—

HANDBOOK ON
ALTERNATIVE DISPUTE RESOLUTION

American Institute of Certified Public Accountants
Subcommittee on Accountants' Legal Liability

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Handbook on
Alternative Dispute Resolution

I. INTRODUCTION

A. Purpose and scope of Handbook

Within the last few years, the use of alternative dispute resolution (ADR) has gained momentum as a method of resolving business disputes. ADR saves time and money, protects confidentiality, avoids setting legal precedents and, hopefully, preserves client relationships.

This Handbook has been produced by the American Institute of Certified Public Accountants Subcommittee on Accountants' Legal Liability.

The Handbook's purposes are to familiarize CPAs with the benefits and pitfalls of alternative dispute resolution techniques, to inform them about the types of ADR techniques most commonly utilized, and to encourage them, and provide practical guidance, in implementing ADR. As the use of ADR becomes more prevalent, CPAs should also be made aware of possible opportunities to provide ADR services as a public service and to generate fees.

This Handbook is an introduction to ADR—not a comprehensive guide. Because each of the 50 states has its own laws relating to arbitration, it isn't possible to address issues related to a specific state. Accordingly, you should check your state's laws and not consider this Handbook a substitute for legal advice.

II. BACKGROUND

A. What is ADR?

Alternative dispute resolution is a term used to describe a variety of techniques for resolving conflicts privately without taking legal action. There are many ADR techniques, but they generally fall into three broad categories: (l) negotiation;

(2) mediation; and (3) arbitration. The principal difference between these categories is the amount of control the parties have over the process and its outcome. At one extreme is negotiation, in which the parties have maximum control; in the middle is mediation, in which a neutral third party assists the parties to reach an agreement; at the other extreme is arbitration, in which a neutral third party (or parties) makes either a binding or an advisory decision.

Negotiation is also distinct from the other two options in that it doesn't involve a neutral third party. Because many articles and books on negotiation tactics are already available, this Handbook doesn't address that topic.

Here are brief explanations of a few common varieties of ADR.

Mediation. The parties try to reach an agreement to resolve their dispute with the help of a neutral third party who doesn't have the power to order a judgment or decision.

Settlement Conference. A settlement conference is generally regarded as the same thing as mediation, but some providers of ADR services consider the two to be different. In a settlement conference, the neutral third party offers his or her opinion on the merits of each party's claims — but the opinion is just that, and not binding. Some ADR experts say mediation is different because the mediator doesn't offer an opinion, but is confined to keeping the parties talking and focused on the relevant issues and facts.

Non-Binding Arbitration. Some purists argue that non-binding arbitration is an oxymoron because the purpose of arbitration is to resolve a dispute finally with a binding decision. Nevertheless, non-binding arbitration is frequently used to describe a process that is a hybrid of mediation and pure arbitration. While the arbitrator has the authority to make a decision to resolve the dispute, any of the parties has the option of rejecting that decision within a specified time after receiving it.

Non-binding arbitration is sometimes referred to as judicial arbitration or court-annexed arbitration. It most frequently is used by courts that sponsor

non-binding arbitration programs as a means of resolving pending lawsuits without a formal hearing and trial. After a lawsuit is filed, for example, many courts will require the parties to submit the case to non-binding arbitration. If none of the parties rejects the arbitrator's decision within a certain period, the decision becomes final and binding and can also become a court judgment. Courts cannot compel litigants to submit their dispute to binding arbitration because that would take away their constitutional rights to due process and a jury trial.

Binding Arbitration. The arbitrator's decision in binding arbitration is final, and none of the parties can reject it. In many respects, in fact, an arbitration decision is even more binding than a judgment after a trial in state or federal court. Court judgments can be appealed for all sorts of reasons, including procedural, evidentiary and jury-instruction errors. In most state and federal courts, the right to appeal a binding arbitration award is extremely restricted. It often is limited to such matters as fraud, undisclosed bias or prejudice on the part of the arbitrator; for example, an arbitrator who didn't disclose a financial interest in the case or who had a close personal relationship with one of the parties or attorneys.

Med/Arb. This is a hybrid dispute resolution method in which a third party first acts as a mediator to help the parties enter into meaningful negotiations and try to resolve their differences by agreement. If this mediation effort fails, the neutral third party then renders a binding arbitration decision.

Mini-Trials. A mini-trial is really a structured settlement procedure. In the ideal mini-trial, the pre-trial period is shortened, and the parties make abbreviated presentations of their cases before principals of the parties who have the power to settle the dispute. The mini-trial generally doesn't follow formal rules of procedure and evidence. It may either be conducted just for the benefit of the parties and their representatives, or also involve a neutral third party to preside and possibly mediate at the end.

Rent-A-Judge. This refers to retaining a retired judge, or distinguished attorney, to preside over some form of ADR.

As the use of ADR by federal agencies, state court-annexed programs and business organizations increases, CPAs can expect eventually to be encouraged, if not required, to use ADR techniques to settle claims. This Handbook will concentrate on mediation and arbitration, the two most-often used ADR techniques.

B. Why use ADR?

ADR is a possible option in any dispute in which a negotiated solution is an acceptable outcome, and such disputes include most lawsuits. Studies indicate, after all, that 90 to 95 percent of all lawsuits are resolved without a trial. All too frequently, however, these lawsuits are resolved only after adversarial confrontations, delays in the trial process and expensive trial preparation. ADR drives home the fact that the court system is often too slow, too busy, too crowded and too expensive.

Even at its best—where court delays are minimal—civil litigation is expensive and time-consuming. Many courts—both federal and state—have become overloaded to crisis levels. In addition to a surge in civil litigation, the explosion of criminal cases during the past 20 years in many large urban centers has caused additional delays in civil cases because the courts must, by law, give criminal cases priority. In many areas, there are simply more cases in the court system than can be processed in a reasonable time.

Litigants and their attorneys are increasingly choosing some form of ADR to resolve disputes faster and more economically. ADR is particularly effective in resolving business disputes, where the issues are generally less emotional and often technical. Many professionals, including engineers, architects and those in the financial services industry, such as bankers and stockbrokers, use ADR techniques. A competent mediator or arbitrator may be able to obtain a resolution without the open-ended and costly discovery procedures that are part of every court case.

A recent review by the Center for Public Resources showed that 142 companies saved more than $100 million in legal costs by resolving major disputes through ADR.

While ADR is not appropriate for all business disputes, it should definitely be considered prior to litigation, and at various stages throughout the litigation process.

Additional benefits provided by the use of ADR include:

- encouraging the parties to explore alternative solutions thoroughly without basing settlement on the perceived expense of taking the case through litigation;
- giving the parties confidentiality and helping them avoid publicity and public scrutiny;
- preserving business relationships by relying on consensus and avoiding a lawsuit's hostility;
- providing a mediator or arbitrator who, unlike a judge or jury, usually has expertise in the business involved and knowledge about complex or highly technical matters unique to the business.

III. APPLICATION OF ADR TO THE ACCOUNTING PROFESSION

A. Current Activity

Since the mid-1980s, several State Societies have promoted the use of ADR, primarily mediation to resolve fee disputes. Efforts to increase the accounting profession's use of ADR appear to have increased in the last few years. For example:

- the American Arbitration Association (AAA) has established an Accounting Advisory Committee to initially focus on the use of ADR in client agreements. The committee has published a set of arbitration rules specifically designed for professional accounting and related services disputes;
- the Florida Institute of Certified Public Accountants has developed a pilot program to resolve conflicts voluntarily through the use of mediation. The program involves including a standard mediation clause covering disputes with clients in engagement letters;

- one national accounting firm is doing a pilot program in selected offices that provides for a two-stage ADR process. The first stage involves facilitated negotiations using mediation services from a neutral third party. If, after 60 days, the parties are unsuccessful, binding arbitration is used.

B. Pre-dispute commitment

The effectiveness of ADR is enhanced when parties agree in advance of an engagement to use some form of ADR in case a dispute arises. Early application of ADR techniques can avoid the breach that frequently results from intense and protracted negotiations or discovery. Often, one party may be concerned that suggesting use of ADR after a dispute has developed will be viewed by the other party as a sign of weakness; such concern can be minimized when the parties have agreed ahead of time to use ADR. The customer agreements used by many banks, stockbrokers and insurance companies require the use of ADR, particularly binding arbitration, in case a dispute arises.

Accountants could implement a pre-dispute commitment as part of a standard engagement letter, in the following situations:

- *Directly with clients* to cover first-party claims in service and fee disputes.
- *With third parties* (such as lenders or significant investors) where privity can be established contractually. These latter situations, among others, could cover attest or other services, such as litigation support or mergers and acquisition services, where use of our work product is restricted to certain named parties.

In any contractual situation, CPAs should contact their attorneys for advice on drafting contract language or before undertaking the use of ADR in specific situations. This Handbook does not purport to provide such legal advice. In addition, insurance carriers should be consulted before committing to the use of ADR.

C. Issues confronting implementation

The accounting profession's biggest concerns about using ADR come from two sources: The restrictions in most professional liability insurance policies that preclude certain forms of ADR (particularly arbitration), and our own skepticism about whether ADR will produce the presumed benefits. For these reasons, many early ADR approaches by the profession focused on mediation and mini-trials—forms of ADR in which the participants retain the most control.

Another concern over the use of ADR, particularly the use of pre-dispute commitments, is the impact the commitment or proceeding would have on the accountant's independence under AICPA or SEC rules and regulations. The AICPA Ethics Committee has determined that the use of a pre-dispute commitment in the audit engagement letter to use various ADR approaches, including binding arbitration, doesn't impair auditor independence. The SEC staff has indicated that they do not have independence concerns with the use of a pre-dispute commitment to use ADR.

Implementing ADR in third-party claims against accountants is much more difficult. For attest services, many of the parties who rely on our reports aren't known to us; thus, establishing a pre-dispute commitment to use ADR might not be practical. These claims also typically involve a number of parties. The Center for Public Resources has developed model ADR procedures, titled "ADR in Securities Disputes," which offer us some precedents. These model procedures propose ADR mechanisms that can be applied to four broad categories of securities disputes: Class actions brought under Rule 10b-5; contribution litigation; shareholder derivative suits and SEC enforcement actions. These procedures are intended to embrace all defendants to a claim, including the client, its officers and directors and its advisers, such as underwriters, accountants and lawyers.

Another advantage of ADR: If ADR produces a settlement before a lawsuit is filed, the CPA may not be required to report the proceeding to his or her state board of accountancy or department of licensing and regulation. After a lawsuit's

filing, however, the board or department likely will have to be notified of any settlement or a court finding of liability.

IV. USING MEDIATION TO RESOLVE DISPUTES

While some people distinguish between mediation and settlement conferences, we will address them together because their objective is the same and the processes are very similar. The objective of both is to help the parties to agree to a resolution of their dispute. Although the methodologies are somewhat different in theory, in practice they are often combined.

A. How it works

In mediation, the mediator helps the parties communicate and explore the facts and issues, but doesn't communicate his or her own position on the issues. In a settlement conference, the facilitator not only communicates his or her position but frequently does so very forcefully and persuasively, in an effort to get the parties to change their positions and compromise. Judges conduct settlement conferences as part of the pre-trial process, but they also are conducted by private rent-a-judges and others. In practice, some facilitators do strictly adhere to the differences between settlement conferences and mediations, but more often both settlement conference techniques and mediation techniques are used at various stages of a mediation or settlement conference.

The mediation process itself varies, depending on the organization sponsoring the mediation, the mediator's skills and experience, and the personalities of the parties involved. As a general rule, mediation is somewhat analogous to diplomacy. At some stage in the mediation, the mediator will generally get all the parties together in the same room to define the issues in dispute and the common ground. The mediator also holds separate discussions with each of the parties regarding issues, facts and settlement positions. To encourage the parties to

speak freely, the mediator often promises to hold certain conversations in confidence. Frequently, a "shuttle diplomacy" occurs, with the mediator moving back and forth between short conversations with each of the parties.

Mediations can take place at almost any stage of a dispute. Parties often object to mediation at an early stage because they haven't had chance to conduct discovery and determine all the facts. A mediation, however, also can be an effective tool in learning about the claims and contentions of the other party that may have been misunderstood.

The length of a mediation depends greatly upon the number of parties involved, the complexity of the facts and issues and the amount of damages claimed. Typically, a mediation requires two to eight hours, although in large cases involving many parties, mediations can require many days and take place over several months.

B. Benefits and pitfalls of mediation

There is almost nothing for an accountant to lose by taking part in a mediation, other than the direct cost and time of the process itself, because a mediation doesn't result in a decision or award that must be accepted. If a dispute can be settled through mediation, however, the benefits can be great. First, there will be no additional cost for the dispute itself, such as attorneys' fees and lost time. Second, if the mediation is conducted at an early enough stage, the CPA may be able to maintain the client relationship.

The greatest single hazard in mediation is a poor mediator. In many ways, the mediator's task is much more difficult than an arbitrator's. Arbitrators must only gain a full understanding of the facts and issues for themselves. A mediator not only must understand the facts and issues themselves, but must enable the parties to understand them, including the relative strengths and weaknesses of their own claims. The mediator must then convince the parties to compromise their entrenched positions. A mediator must have keen understanding of people and the

psychology of disputes. Before a CPA suggests mediation or accepts a suggestion to use it, he or she must determine the sources and quality of mediators in the CPA's practice area. Mediators can be found using the same sources as those for arbitrators listed in Section V-A.3 of this Handbook, "Individuals and organizations that facilitate arbitrations."

Lawyers and parties sometimes claim a mediation can be detrimental because it can permit the other side to find out some of the great ammunition they have. In other words, one side may be afraid to show its hand. While this is a legitimate concern, it is often overrated. The fact that fewer than 10 percent of all lawsuits result in a trial means that settlement at some stage is very likely. Moreover, the only way to convince the other side to settle is by showing them the strength of your hand. Occasionally, this may not be wise until you have committed the other side to deposition testimony. In general, however, the earlier each side shows its hand, the earlier the dispute can be resolved.

Typically, the parties share the cost of mediation equally, although they may agree upon some other allocation. The rates for professional mediators tend to be in the same general range as rates for the accounting profession. The cost of mediation in the vast majority of cases is insignificant in comparison to the cost of continuing to litigate the dispute. Moreover, even when the mediation doesn't resolve the dispute, it frequently saves the parties money by focusing the dispute on the real issues, which may not have been known before the mediation.

C. Professional liability insurance considerations

While we encourage mediation, this doesn't mean that you should handle a professional liability claim on your own. All professional liability policies with which we are familiar require the insured to provide notice to the insurer of all claims made. The insurance company generally has certain rights to control the litigation and any settlements. If you agree to a settlement without the insurer's authorization, the insurer usually isn't required to pay for it—even when the claim

otherwise would have been covered. To avoid this problem, you should be familiar with your professional liability policy, and get authorization from the insurer before agreeing to any mediation or settlement.

If you aren't insured, the benefits of some forms of ADR may be even greater than if you were, because the cost of defense can be greatly reduced.

D. How to implement

As discussed earlier, you can agree to enter into mediation either at the time your services are contracted or after a dispute has arisen. You may insert a clause in an engagement letter requiring both you and the client to submit to mediation in the event of a dispute.[1] Exhibit B shows an example of such a clause. Forcing a client into mediation may not be wise, however, because the results of mediation are voluntary and depend on the willingness of the parties to compromise and settle the dispute. If both parties have agreed in advance to use mediation, however, they will be more likely to accept its use in a dispute. As previously mentioned, mediation can be suggested at any time, including when the dispute arises.

V. USING ARBITRATION TO RESOLVE DISPUTES

As noted earlier, arbitration places all of the decision-making power in one or more neutral third parties, the arbitrator(s). Although there are two basic forms of arbitration, binding and non-binding, there is little difference in the applicable procedures.

[1] Such a clause would probably be enforceable in most states, although the law is not nearly as well established as for arbitration clauses. Moreover, even if a party breached this agreement, it would be difficult to prove damages resulting from that breach.

A. How it works

1. The procedure

There are as many different types of arbitrations as there are parties taking part in them, because the parties agree upon the arbitration procedure to be followed when they elect arbitration. Nevertheless, arbitrations tend to have the following characteristics in common:

- ***A fair hearing.*** Each party gets a chance to present its evidence and facts, and then to make an argument to the arbitrator on how the facts and evidence should be interpreted. A fair hearing, of course, doesn't necessarily lead to a fair decision, although there hopefully is some correlation between the two.
- ***Relaxed rules of evidence.*** Arbitration generally doesn't require sticking strictly to the rules of evidence used in trials. Some arbitration rules explicitly say that all relevant evidence may be admitted, even if it doesn't conform with state or federal rules of evidence. Other arbitration rules adopt state or federal rules of evidence. Even in those instances, as a practical matter, the arbitrator may not strictly enforce the rules of evidence. In such arbitrations, for example, the arbitrators may admit evidence that doesn't comply with some of the rules regarding hearsay.
- ***Arbitrators aren't judges.*** Arbitrators generally are not judges, although there has been a trend to use retired judges, sometimes referred to as rent-a-judges. Arbitrators, in fact, as a rule aren't even required to be lawyers. Many are selected because they have specialized knowledge on the subject of dispute. For example, doctors sometimes hear arbitrations regarding medical malpractice, and architects and engineers frequently hear cases involving construction problems.
- ***Restricted right to appeal.*** As discussed earlier, the right to appeal an arbitration decision generally is much more restricted than the right to appeal a judgment after trial. In fact, there are even cases stating that the

arbitrator doesn't need to follow relevant state or federal law. Because the parties have agreed to arbitration by contract, the courts find that restricting the right to appeal doesn't violate due process. Most courts find a very strong public policy in favor of making arbitration awards final.

2. How to elect arbitration

Except for non-binding arbitration ordered by a court, arbitration can be elected only by agreement of all parties to a dispute. The agreement, of course, should be in writing. The agreement to arbitrate may be made either before or after a dispute has arisen. In most instances, the parties elect arbitration before the dispute, by a provision in the contract between them. For example, some hospitals and banks, and virtually all securities brokers, require their patients and customers to agree to arbitrate any dispute.

The parties also can elect arbitration after a dispute has arisen, simply by signing an agreement to have their dispute resolved by arbitration.

The exact form of the written agreement to arbitrate depends upon the rules and procedures the parties want to use, and the person or organization they select to administer the dispute and select, or serve as, the arbitrator. Here is the standard clause to elect arbitration using rules and procedures of the AAA:

> ***Any controversy or claim arising out of or relating to this contract or engagement letter, or the breach thereof, shall be settled by arbitration in accordance with the Arbitration Rules for Professional Accounting and Related Services Disputes of the American Arbitration Association, and judgment upon the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof.***

If you decide to use AAA rules, this clause can be inserted in your engagement letter before the client signs it. Even if you decide to use AAA rules, you may

want to change this standard clause to reflect modifications you and your client agree to. And even if you already have agreed to arbitration, you should continue reading this handbook so you are aware of the pitfalls (see page 43) and what you should do to maximize the benefits of ADR.

3. Individuals and organizations that facilitate arbitrations

Thousands of individuals and numerous organizations, both for-profit and non-profit, assist in arbitration as ADR service providers. Some of these organizations not only conduct arbitrations, but also have rules and procedures that parties may include in their arbitration agreements.

The largest and best known such organization is the AAA, which has offices throughout the United States. The AAA has developed Commercial Arbitration Rules, composed of 57 relatively simple guidelines, as well as Arbitration Rules for Professional Accounting and Related Services Disputes. These rules are published in pamphlets that can be obtained without charge from any AAA office. Although not required, one of AAA's approved arbitrators can conduct the arbitration if AAA rules are selected. The arbitrator can be selected in a process described in the AAA Rules or under any other method agreed to by the parties.

In addition to AAA, numerous firms, composed primarily of retired judges and former litigators, specialize in conducting mediations and arbitrations. These firms sometimes have their own set of written arbitration rules, although they generally use the Commercial Arbitration Rules of the AAA. The best way to select an arbitrator is to talk to people who have been involved in arbitrations. Sources include your attorney, your State CPA Society, your professional liability insurer and other professionals. Some local bar associations also publish directories of attorneys who have expertise in arbitrations and other forms of ADR.

Finally, the AAA maintains a database of more than 600 organizations that provide administrative, educational and promotional assistance in ADR services. This database can be accessed by contacting the Eastman Arbitration Library of

the American Arbitration Association located in New York, New York (telephone number 212–484–4127). The library charges a nominal fee, based on the type of database search requested.

B. Benefits and pitfalls of arbitration

While arbitration offers clear and substantial benefits, some of the benefits also can be perceived as pitfalls. Because the benefits and pitfalls are intertwined, we will discuss them together with the aim of providing sufficient information for you to decide if you should use arbitration.

1. Cost and time savings

The primary benefit of arbitration is a substantial savings of costs and time. The Institute for Civil Justice[2] surveyed 350 legal cases filed between January 1, 1985 and December 31, 1987, and concluded that the cost was on average 20 percent lower for litigants who were assigned to the arbitration process by the courts than for litigants who weren't and merely were subject to standard pre-trial procedures.

The time and cost savings of arbitration can be credited to at least four factors:

- ***Reduced discovery.*** Discovery in arbitration is generally more limited. While discovery in a typical lawsuit is conducted as a matter of right, without any court order, discovery in arbitration must be authorized by the arbitrator.
- ***Relaxed rules.*** Relaxed procedural requirements and rules of evidence make it easier to introduce evidence in arbitration. In a court action, even small procedural issues can be very expensive to resolve. For example, a formal motion and hearing may be needed to get a court order to continue

[2] The Institute for Civil Justice is a part of The Rand Corporation, a non-profit corporation headquartered in Santa Monica, California. The findings are based on a study of a court-annexed (non-binding) arbitration program in the U.S. District Court for the Middle District of North Carolina. The results of this study are detailed in *Arbitrating High-Stakes Cases: An Evaluation of Court-Annexed Arbitration in a United States District Court* (R-3809-ICE), by E. Allan Lind.

the trial date. In arbitration, all that may be needed is a telephone call to the arbitrator and the other parties. Moreover, evidence in arbitrations can be introduced by more efficient, less expensive means. For example, some testimony might be introduced through affidavits and declarations instead of live witnesses, and the need for basic, or "foundational," evidence may be reduced or eliminated.

- ***More knowledgeable decision-maker.*** Arbitrators are frequently more knowledgeable than a judge or a jury about the subject matter of the dispute. In fact, arbitrators are sometimes selected because of their special expertise. This can eliminate the need for the parties to retain expert witnesses or resort to extraordinary efforts to make the subject matter understandable, as they may need to do in a jury trial.
- ***Expedited decision.*** In almost any jurisdiction, an arbitration hearing will take place much sooner than a trial. Not only is a trial slower, but the way courts schedule and order trials often wastes the parties' time and money. For example, many courts schedule a trial date, requiring the attorneys to have their cases fully ready and to appear in court on the scheduled date, and then make them wait hours—or sometimes days. Even a case that is assigned for trial can be continued by the court for several months, which forces the parties to start the entire process over again. Obviously, the false starts and long waits can be very expensive when attorneys are charging by the hour.

An incidental benefit of arbitration is that the parties generally are more satisfied with the result than if they had gone through pre-trial procedures and settled the case without a trial or an arbitration. After an arbitration, the parties more often feel satisfied that they had a fair hearing and their "day in court."

2. No attorney required

A party to a dispute, other than a corporation, generally doesn't need an attorney, even in court, but the procedural obstacles in civil lawsuits are so

burdensome that litigants representing themselves are greatly disadvantaged. The streamlined, less complicated rules used in arbitrations make self-representation more feasible. A party should still seriously consider retaining an attorney, particularly when the stakes are high.

3. Possible encouragement of claims

If contracting parties know in advance that any disputes they have will be arbitrated, they may be more likely to make a claim, primarily because arbitration is less expensive, less time consuming and less complicated. A study by the Institute for Civil Justice of tort reform involving medical malpractice claims found that arbitration seems to increase claim frequency, but reduces the average severity of each claim.[3]

4. May not include all parties

When arbitration takes place under an arbitration clause in a contract, only parties who signed the contract are bound by the clause. Any other people involved in the dispute cannot be compelled to take part in the arbitration. For example, if a client sues her accountant for improper advice on a computer installation, the accountant might want to bring a cross-complaint against the vender of the software or the hardware. Though the accountant is compelled to arbitrate the dispute with her client, she may be unable to persuade the hardware or software vender to take part in the arbitration. Architects routinely encounter similar situations.

If a third party is responsible for part of the loss, but isn't a party to the arbitration, the CPA may find herself saddled with paying an arbitration award of 100 percent of the damages. She would have to pursue the third party in a court

[3] Arbitration statutes apparently increased the total number of claims, but reduced the average amount of damages for a single claim. The end effect was that the total amount of damages paid for claims in the aggregate increased, although there were fewer high awards. *The Frequency and Severity of Medical Malpractice Claims: New Evidence* (R-3410-ICE), by Patricia M. Danzon.

of law for contribution. For this reason, the Subcommittee recommends that standard language for pre-dispute commitments be modified to make an exception in the use of arbitration in third-party litigation.

5. "Split the baby" mentality/Fewer astronomical awards

The concept of "splitting the baby," of course, stems from the biblical story of King Solomon threatening to cut a baby in half to resolve a dispute between two women who each claimed the baby as her own. Although King Solomon didn't actually cut the baby in half (he gave the baby to the woman who offered to give up the baby to save its life), many arbitrators seem to forget this. The common folklore in the legal and business communities says that arbitrators don't want to make anybody terribly unhappy (after all, the unhappy attorney or party may be a source of future business). Thus, goes the folklore, they are more likely than juries to split the differences between the parties rather than making a hard decision. However, a study conducted by the AAA of approximately 4,600 commercial arbitration awards indicated that in only ten percent of the cases did the arbitrator award 40 to 59 percent, i.e., "split the baby", of the amount claimed.

Besides, splitting the award isn't always a bad result, particularly if the alternative would have cost you much more money. Most lawyers recognize that the potential for a run-away judgment is much higher in a jury trial than an arbitration. However, if you feel strongly about your case a compromise award by an arbitrator may not appeal to you.

6. Limited rights to appeal

As noted earlier, the right to appeal a binding arbitration award generally is limited to cases in which the arbitrator had an undisclosed bias or prejudice, or was guilty of fraud. Even the arbitrator's failure to follow relevant state or federal laws may not be sufficient basis for an appeal. Depending on your perspective, the finality of binding arbitration is one of its virtues or one of its faults.

7. Punitive damages

Generally, arbitrators are much less likely than juries to award large punitive damages. On the other hand, some disturbing court decisions allow arbitrators to award punitive damages even when AAA arbitration rules are followed.[4] Moreover, some courts have held an arbitrator may award punitive damages even in situations where state law prohibits punitive damages.[5]

8. Flexibility

The parties may structure the arbitration to meet their special needs. For example, they may create their own rules to require strict adherence to the rules of evidence or, perhaps, no rules of evidence. The parties also may want the arbitration to just decide a single issue in their dispute, such as if a mistake was made in a tax return, rather than decide the entire dispute, which would include damages and liability. The parties may decide to arbitrate the dispute in a certain fashion, such as agreeing in advance that the award be within minimum and maximum parameters.

9. Professional liability insurance considerations

Professional liability issues involved in using arbitration to resolve disputes are similar to the matters discussed under using mediation to resolve disputes.

The insurance company generally has certain rights to control litigation and any settlements to be covered under the policy. Some professional liability insurance policies bar certain forms of ADR, particularly binding arbitration. In addition, even carriers who agree to ADR's use on a claim-by-claim basis might not agree to pre-dispute commitments to use ADR. Your state CPA Society may be able to provide information about insurance carrier restrictions and support.

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[4] The courts in *Todd Shipyards Corp. v. Cunard Line Limited* 943 F.2d 1056 (9th Cir. 1991), *Ratheon Co. v. Automated Business Systems Inc.* 882 F.2d 6 (1st Cir. 1989) and *Bonar V. Dean Witter Reynolds Inc.* 835 F.2d 1378 (11th Cir. 1988) all interpreted the language of AAA Rule 43 to allow arbitrators to award punitive damages.

[5] *Garrity v. Lyle Stuart, Inc.* 386 N.Y.S.2d 831 (N.Y. 1976)

All CPAs should read their professional liability policies and obtain authorization from their insurers before agreeing to any use of ADR. Even if a policy doesn't prohibit use of ADR, its use might be deemed a violation of the policy's cooperation clauses.

VI. PROVIDING ADR SERVICES

Accountants today know there are opportunities to develop their practices by serving as expert witnesses, but there are also similar opportunities to act as arbitrators or mediators. Arbitrators generally don't need to be attorneys; architects, engineers, accountants and members of many other professions serve as arbitrators.

When working with non-profit organizations or court-annexed programs, arbitrators and mediators often provide services free or for a nominal charge. Yet the opportunity to serve as a mediator or arbitrator can be not only personally fulfilling, but also another opportunity to make contacts. Private mediators and arbitrators, moreover, are often compensated at their full hourly rates without any discounting.

Training as a mediator or arbitrator is offered by various professional organizations and societies. In addition, many colleges and universities have begun to offer courses on mediation and dispute resolution.

EXHIBIT A

SUMMARY OF ARBITRATION STATUTES IN UNITED STATES

The following states have adopted arbitration statutes to enforce agreements to arbitrate existing controversies that may arise in the future. An * denotes states that have adopted the Uniform Arbitration Act, although some of them adopted the act with modifications. A ■ denotes statutes that are relevant to construction disputes only.

Alaska* (Alaska Stat., §§ 09.43.010 *et seq.*)

Arizona* (Arizona Rev. State., §§ 12-1501 *et seq.*)

California (California Code Civ. Proc., §§ 1280 *et seq.*)

Colorado* (Colorado Rev. Stat., §§ 13-22-201 *et seq.*)

Connecticut (Connecticut Gen. Stat. Ann., §§ 52-408 *et seq.*)

Delaware* (Delaware Code Ann., Title 10, §§ 5701 *et seq.*)

District of Columbia* (District of Columbia Code, Title 16, §§ 16-4301 *et seq.*)

Florida (Florida Stat. Ann., §§ 682.01 *et seq.*)

Georgia■ (Georgia Code, §§ 9-9-80 *et seq.*)

Hawaii* (Hawaii Rev. Stat., §§ 658-1 *et seq.*)

Idaho* (Idaho Code, §§ 7-901 *et seq.*)

Illinois* (Illinois Rev. Stat., Chapter 10, §§ 101 *et seq.*)

Indiana* (Indiana Code Ann., §§ 34-4-2-1 *et seq.*)

Iowa* (Iowa Code, §§ 679A.1 *et seq.*)

Kansas* (Kansas Stat., §§ 5-401 *et seq.*)

Kentucky* (Kentucky Rev. Stat., §§ 417.045 *et seq.*)

Louisiana* (Louisiana Rev. Stat., §§ 9:4201 *et seq.*)

Maine* (Maine Rev. Stat. Ann., Title 14, §§ 5927 *et seq.*)

Maryland* (Maryland Cts. & Jud. Proc. Code Ann., §§ 3-201 *et seq.*)

Massachusetts* (Massachusetts Ann. Laws, Chapter 251, §§ 1 *et seq.*)

Michigan (Michigan Comp. Laws, §§ 600.5001 *et seq.*)

Minnesota* (Minnesota Stat. Ann., §§ 572.08 *et seq.*)

Mississippi*■ (Mississippi Code Ann., §§ 11-15-1 *et seq.*)

Missouri* (Missouri Ann. Stat., §§ 435.350 *et seq.*)

Montana* (Rev. Montana Code Ann., §§ 27-5-111 *et seq.*)

Nebraska* (Nebraska Rev. Stat., §§ 25-2601 *et seq.*)

Nevada* (Nevada Rev. Stat., §§ 38.015 *et seq.*)

New Hampshire* (New Hampshire Rev. Stat. Ann., §§ 542:1 *et seq.*)

New Jersey (New Jersey Stat. Ann., §§ 2A:24-1 *et seq.*)

New Mexico* (New Mexico Stat. Ann., §§ 44-7-1 *et seq.*)

New York (New York Civ. Prac. Law, §§ 7501 *et seq.*)

North Carolina* (North Carolina Gen. Stat., §§ 1-567.1 *et seq.*)

North Dakota* (North Dakota Cent. Code, §§ 32-29.2-01 *et seq.*)

Ohio (Ohio Rev. Code Ann., §§ 2711.01 *et seq.*)

Oklahoma* (Oklahoma Stat. Ann., Title 15, §§ 801 *et seq.*)

Oregon (Oregon Rev. Stat., §§ 33.210 *et seq.*)

Pennsylvania* (Pennsylvania Stat. Ann., Title 42, §§ 7301 *et seq.*)

Puerto Rico (Puerto Rico Laws Ann., Title 32, §§ 3201 *et seq.*)

Rhode Island (Rhode Island Gen. Laws, §§ 10-3-1 *et seq.*)

South Carolina* (South Carolina Code, §§ 15-48-10 *et seq.*)

South Dakota* (South Dakota Codified Laws Ann., §§ 21-25A-1 *et seq.*)

Tennessee* (Tennessee Code Ann., §§ 29-5-302 *et seq.*)

Texas* (Texas Rev. Civ. Stat. Ann., Title 10, Articles 224 *et seq.*)

Utah (Utah Code Ann., §§ 78-31a-1 *et seq.*)

Vermont* (Vermont Stat. Ann., Title 12, §§ 5651 *et seq.*)

Virginia* (Virginia Code Ann., §§ 8.01-577 *et seq.*)

Washington (Washington Rev. Code Ann., §§ 7.04.010 *et seq.*)

Wisconsin (Wisconsin Stat. Ann., §§ 788.01 *et seq.*)

Wyoming* (Wyoming Stat., §§ 1-36-101 *et seq.*)

The following states have not adopted statutes enforcing agreements to arbitrate controversies that may arise in the future. Their statutes apply to existing controversies only.

Alabama (Code of Alabama, § 6)
West Virginia (Code of West Virginia, § 55)

Note that the United States Arbitration Act, 9 USC § *et seq.*, governs agreements that affect "interstate commerce" (as that constitutional phrase has been interpreted by the courts), regardless of the state law. The United States Arbitration Act does enforce agreements to arbitrate existing controversies and agreements to arbitrate controversies that may arise in the future.

The information for this exhibit was provided through the courtesy of the American Arbitration Association. Laws change from time to time and are subject to varying interpretations, so readers should not rely on this exhibit as legal advice.

EXHIBIT B

Editors note: The following suggested arbitration language was developed for use in engagement letters with California law in mind.

In the event of a dispute over [Insert type of dispute such as "fees" or "any dispute"] for our engagement, we mutually agree to try in good faith to resolve the dispute through mediation by selecting a third party to help us reach an agreement. If we are unable to resolve the [Insert type of dispute "fee"] dispute through mediation, client and accountant agree to submit to a resolution by arbitration in accordance with the rules of the American Arbitration Association. Such arbitration shall be binding and final. IN AGREEING TO ARBITRATION, WE BOTH ACKNOWLEDGE THAT IN THE EVENT OF A DISPUTE OVER [TYPE OF DISPUTE], EACH OF US IS GIVING UP THE RIGHT TO HAVE THE DISPUTE DECIDED IN A COURT OF LAW BEFORE A JUDGE OR JURY AND INSTEAD WE ARE ACCEPTING THE USE OF ARBITRATION FOR RESOLUTION.

This agreement to seek mediation and to arbitrate does not apply to any action or proceeding involving (or potentially involving) parties other than the two of us.

Before entering into agreements providing for mediation or arbitration, CPAs should contact their attorneys and insurance carriers.

ALTERNATIVE DISPUTE RESOLUTION

SUPPLEMENTAL MATERIALS

—EXHIBIT II—

ADR SERVICE PROVIDERS AND PROGRAMS

PARTIAL LISTING

ADR Associates

Provides ADR training and services to major law firms and large corporations.

American Arbitration Association
140 West 51st Street
New York, NY 10020-1203
212-484-4000

Additional offices in approximately 35 cities nationwide.

Along with arbitration, the AAA has developed and promoted other dispute resolution mechanisms, including mediation. The AAA provides neutrals, case administration and education services, and has developed general and industry-specific rules and guidelines for using arbitration and mediation. Recently, the AAA published new rules and guidelines for arbitration and mediation of accounting disputes.

Arbitration Forums, Inc.
3350 West Busch Boulevard
Buschwood III, Suite 295
Tampa, FL 33618
813-931-4004

Additional offices in approximately 25 cities nationwide.

Center for Dispute Settlement
1666 Connecticut Avenue, N.W.
Washington, DC 20009
202-265-9572

The Center for Dispute Settlement provides mediation, facilitation, training and design of systems for resolving disputes.

Center for Public Resources, Inc.
366 Madison Avenue
New York, NY 10017-3122
212-949-6490

The Center for Public Resources (CPR) has developed model ADR procedures and rules, and provides neutrals for a variety of ADR services, including mediation and arbitration. CPR also sponsors Corporate and Law Firm Policy Statements on ADR, which commit subscribing companies and law firms to explore early settlement through ADR before pursuing litigation with other signatories to the policy statements.

ENDISPUTE Incorporated
1201 Connecticut Avenue, N.W.
Suite 501
Washington, DC 20036
202-429-8782

Additional offices: Boston, Chicago, New York, San Francisco
1-800-448-1660

Provides dispute resolution, dispute management and training services, separately or in combination. Also provides neutrals to serve as mediators and arbitrators, and in a number of ADR other capacities.

Judicate

National Headquarters:
1979 Marcus Avenue
Suite E125
Lake Success, NY 11042
800-473-8853

Eastern Sales Office:
1500 Walnut Street
Suite 300
Philadelphia, PA 19102
800-473-6544

Western Sales Office:
2111 Business Center Drive
Irvine, CA 92715
800-488-8805

Provides all types of ADR services, including mediation and arbitration.

Judicial Arbitration & Mediation Services, Inc. (JAMS)
Orange, CA.

Eighteen offices in four states.

National Institute For Dispute Resolution
1901 L Street, N.W.
Washington, DC
202-466-4764

U.S. Arbitration & Mediation, Inc.

Based in Seattle, Washington with 45 offices nationwide.

ALTERNATIVE DISPUTE RESOLUTION

SUPPLEMENTAL MATERIALS

—EXHIBIT III—

THE FLORIDA INSTITUTE OF CPA's
PROFESSIONAL LIABILITY COMMITTEE

presents

ALTERNATIVE DISPUTE RESOLUTION:
A CPA's GUIDE TO MEDIATION AND ARBITRATION

January 1993

INTRODUCTION

The flood of professional liability claims has significantly impacted American business, including CPAs. Undoubtedly, client disputes with CPAs and CPA vs. CPA disputes will arise in the course of business. Once a dispute has arisen, if the matter is not resolved by discussion between the parties, a more formal dispute resolution will be sought by the aggrieved party.

These materials provide Florida CPAs with a guide to understanding Mediation and Arbitration, the two most frequently used forms of Alternative Dispute Resolution, as well as a comprehensive program of elective pre-litigation mediation.

Major advances accomplished in this mediation program include:

- CNA's Florida CPA Professional Liability insureds may participate without breaching the terms of their insurance agreement.
- A formal process designed to achieve resolution satisfactory to both parties without the time and expense of the litigation process.
- Pre-litigation settlements may not require Department of Professional Regulation reporting saving additional time and expense.

It is not the purpose of these materials and the program outlined herein to offer legal advice. Such advice can and should be obtained from legal counsel in connection with any agreement and the dispute resolution process.

EXECUTIVE SUMMARY

This booklet:

1. Describes the mediation and arbitration processes as they are frequently applied to Florida CPAs in the dispute resolution process.

2. Distinguishes private pre-litigation mediation from court ordered mediation and shows the Florida CPA how to utilize each.

3. Provides Florida CPAs with information to initiate the alternative dispute resolution process in consultation with legal counsel and their insurance carrier.

4. Provides a program of elective pre-litigation mediation and sample engagement letter language.

5. Outlines opportunities for the Florida CPA to work in the mediation process.

WHAT IS ALTERNATIVE DISPUTE RESOLUTION (and why should a Florida CPA be interested in such a program)?

Alternative Dispute Resolution (ADR) collectively embodies many concepts of resolving disputes outside of the traditional court system. ADR can include mediation, arbitration, negotiation or a combination of all of the above.

The cost of traditional litigation often exceeds the dollar amount in issue in CPA professional liability cases. Extensive discovery (depositions, document production, interrogatories and the like) coupled with expert witnesses, procedural maneuvers and time of trying and appealing a case combine to produce a time consuming and costly resolution to disputes. Use of ADR is likely to provide a quicker and less costly resolution.

MEDIATION: THE FIRST STEP IN A COMPREHENSIVE ALTERNATIVE DISPUTE RESOLUTION PROCESS

Mediation. A non-binding process of resolving disputes based upon the principles of negotiation and problem solving. In mediation the decision making power of approving or rejecting a resolution remains with the parties, the

mediator fills the role of skilled facilitator defining issues, exploring alternatives and assisting the parties in resolving the issues.

Mediation can be voluntary, taking place before or during the litigation process, or court ordered.

Voluntary mediation is frequently undertaken by parties to a dispute to fast track negotiations *before litigation.* The intervention of an experienced third party mediator serves to focus the attention of parties on discussing and resolving matters in contention.

Of key importance in developing a solution is that the mediation conference frequently is the first face to face meeting of both parties to a dispute after the allegations are raised. The mediation process, unlike litigation, is non-adversarial. Mediation focuses on the needs of the parties while litigation often focuses on the rights of the parties. Frequently, use of mediation will save a client relationship.

Florida courts began in the late 1980's ordering many pending cases to pretrial mediation both as a supplemental means of discovery, and as a successful method of inducing settlement between the parties. Courts found that pretrial mediation resulted in settlement of pending matters in as many as 80% of the cases referred. To date, court ordered mediation has been most common in personal injury tort law suits, family law (custody and divorce), and civil disputes involving matters under the jurisdiction of County courts (presently disputes up to $15,000).

Mediation conference discussions and offers of settlement, if any, are not admissible in court proceedings.

Stages of Dispute Process. Typically, a dispute between parties will initially be characterized by a demand or claim made by the aggrieved party against a particular prospective defendant. In this pre-litigation stage, it is possible for the parties to have agreed either by contract or by subsequent agreement to voluntarily privately mediate the issue prior to litigation. Pretrial mediation (after a lawsuit is filed) is frequently ordered by judges in Florida. The Florida judiciary has quickly embraced mediation as an excellent method of moving cases through a dispute resolution system and facilitating a prompt settlement. Mediation works best at

two different times in the dispute resolution process (1) at the time the party declares that it has been wronged and, (2) shortly before significant court hearings or the trial.

Dispute comes to light. (1) *

Aggrieved party makes demand. (1) *

Aggrieved party files suit. (2) **

Discovery and pretrial litigation phases. (2) **

Trial and appeals.

* Voluntary pre-litigation mediation appropriate.

** Typically, mediation is court ordered and administered.

Controversies Ripe for Mediation. Fee disputes, tax return preparation controversies, claims of questionable merit and, controversies of small dollar amounts are frequently good candidates for mediation. Voluntary pre-litigation mediation is an effective method of resolving disputes before a lawsuit is filed, post lawsuit filing mediation frequently leads to case resolution before trial.

Use of pre-litigation mediation to resolve such matters may, under current administrative regulations, permit the CPA to forgo reporting of the settlement to the Department of Professional Regulation as required under Chapter 21A-36.001(22) Florida Administrative Code.

How a Mediation Conference is Arranged. Whether a conference is scheduled voluntarily, as stipulated in a contract or, under the order of a court, the process is similar. A mediator is selected by the parties or assigned under a rotation system. Mediators are often independent contractors paid by the parties and arranged through private mediation providers. For court ordered mediation some jurisdictions have programs to furnish mediators at little or no cost. The mediator, unlike a judge or arbitrator, may have prior and continuing contacts with either or both parties. Mediation results must be agreed to by the parties. Mediators attempt to facilitate resolution, they do not render decisions.

The process works as follows:

A. Parties contract for mediation in initial agreement or, after the dispute comes to light the parties agree to pre-litigation mediation.

B. Mediation Provider Selected.

C. Mediator Selected or appointed by Provider.

D. Conference scheduled and held, parties may or may not reach a settlement.

The Mediation Conference. Both parties accompanied by their attorneys and joined by an experienced mediator typically meet in a neutral location. During the conference the mediator will typically utilize his or her skills to attempt to facilitate settlement between the parties. The parties to an action may schedule mediation at any time in a dispute resolution process.

At the mediation conference the parties present the facts of their case to the mediator and each other. The mediator utilizes his/her training to attempt to facilitate a settlement.

Each mediator is likely to have developed their own unique style in approaching the organization of a mediation conference. Nevertheless, most conferences follow a similar path:

1. Plaintiff's attorney presents a summary of the case.
2. Defendant's attorney presents a summary of the case.
3. Mediator discusses the case.
4. Mediator confers privately with each party in a session known as a caucus.
5. Mediator presents settlement proposals.
6. Conference continues until resolution or impasse.

Mediation is not binding on any party without his/her consent. Mediation conferences can be scheduled voluntarily by parties prior to the filing of a lawsuit as under the FICPA Mediation Program outlined in Appendix B. The recent enactment of Florida Statutes Chapter 627.745 requires (at the demand of either party) pre-litigation mediation for certain automobile claims.

In many contracts (including a CPA's engagement letter) pre-litigation mediation may be included as a contract provision requiring the parties to

participate in non-binding mediation prior to seeking a court ordered solution. With ever increasing frequency both state and federal courts are ordering parties to engage in pretrial non-binding mediation. Mediation affords a significant time and cost savings in cases where matters are resolved well before trial and significant cost savings if a trial can be avoided.

How is a Mediator Selected? When a court orders mediation, a list of acceptable mediators maintained by the Clerk of Court is available to the parties to select from. Voluntary pre-litigation mediation requires that the parties agree upon a private mediator or request that a private mediation provider (e.g. American Arbitration Association) supply a mediator if the parties can't agree.

Pre-Litigation Mediation: The First Step, Selecting a Private Mediation Provider. The Florida Supreme Court's Florida Dispute Resolution Center maintains a list of those mediators meeting its certification requirements. The American Arbitration Association, and other private mediation providers (a complete list of Supreme Court approved private mediation training providers is located in Appendix A) can also supply information to assist in selecting a mediator or can appoint a mediator for a particular matter. The parties to a dispute will frequently utilize the services of a private mediation provider rather than attempt to locate a mediator on their own.

A number of organizations train and some subsequently maintain a catalog of mediators that have agreed to be bound by the organization's code of ethics. These firms are referred to as providers. Perhaps the best known is the American Arbitration Association, a 38 office national not-for-profit organization which maintains offices in Orlando and Miami. Most of the private mediation providers use individuals that have been certified by the Florida Supreme Court and are also available for court ordered mediation.

The Florida Institute of CPAs has worked closely with the American Arbitration Association to make certain that a pool of qualified mediators is available for its elective pre-litigation mediation program along with a tested set

of rules of commercial mediation. The FICPA's Mediation Program is detailed later in the booklet. The FICPA has not endorsed any private mediation service provider; however, the FICPA's Professional Liability Committee has recommended a number of standards which it believes are important for use by the CPA in selecting a private mediation provider. Among these are:

A. Availability of mediators throughout Florida

B. Mediation training

C. Extensive file of mediators available for service

D. Experience or longevity in the business.

How is a Mediator Obtained After Selection of a Mediation Provider. Once mediation has been selected how is it accomplished? If mediation is court ordered the process falls under court administered rules and mediators will be appointed under those rules. Private pre-litigation mediation is typically handled through private mediation providers with the parties selecting a provider as described in the preceding paragraph.

Once a provider is selected, the parties will request a mediator, or a list of available mediators from a mediation provider. When selecting a mediator in pre-litigation matters, a mediator may have been utilized by either of the parties in a prior case or matter, or may have been affiliated with either or both of the parties. The mediator is not a judge or jury and may be familiar with one or both parties or their attorneys. A mediator will be bound by the provider's code of ethics.

OTHER MEDIATION ISSUES

Mediation Effectiveness. A great percentage of all matters referred to mediation ultimately settle within seven days of the mediation conference. Virtually any dispute is ripe for pre-litigation mediation. A mediation conference prior to extensive pretrial preparation may serve to eliminate unwelcome costs and fees. Often, a mediation conference scheduled shortly before trial can bring the parties to a resolution. Many lawyers utilize both an early mediation conference and, if unsuccessful, a conference shortly before trial. A number of commentators

have suggested that mandatory mediation or mediation and arbitration clauses be inserted into CPA engagement letters for the purpose of promoting for expedited settlements. The FICPA's Mediation Program described in Appendix B provides sample language for voluntary private pre-litigation mediation of CPA-Client disputes.

Court Ordered Mediation. In Florida, court ordered mediation includes a number of key features. At any mediation ordered by a Circuit Court, the parties to a suit must be represented by an individual who has authority to settle the full amount of the claim. Parties participating in Circuit Civil ordered mediation must appear and are subject to sanctions if they fail to do so.

Mediation and Insurance. CNA Insurance, working closely with the FICPA, has approved engagement letter language permitting non-binding pre-litigation mediation at the request of either party. That progressive position is evidenced by the sample mediation language provided later in this booklet. Before entering into any engagement agreement providing for mediation, each CPA should contact their attorney and insurance carrier.

Non-Insured CPAs. A recent FICPA survey disclosed that less than half of practicing CPAs in Florida are currently covered by insurance, it may be worthwhile to consider mandatory mediation and/or arbitration provisions within an engagement letter. As in any contractual situation, it is important that the individual CPA contact their attorney to receive legal advice as to how a contract should be drafted. This booklet does not purport to provide that legal advice. Constant changes in the law require that each CPA utilize qualified legal counsel in drafting of engagement contracts. An appendix to this pamphlet provides sample language for mandatory mediation, which may be incorporated into an engagement letter upon the advice of a CPA's attorney.

Summary. Mediation is defined as a voluntary process wherein the parties engage in non-binding settlement discussions. A settlement or resolution may only be reached by the agreement of all of the parties to a mediation. Typically, a mediator will be selected by the parties, based on that individual's skill in dispute

resolution. The mediator need not be an independent third party, and may have worked as a representative for either of the parties in the matter in dispute. Mediation is characterized by the sharing of information and positions by and between the parties in a frank, open series of discussions facilitated by a skilled professional mediator. It is important to remember that mediation can only result in a settlement when all of the parties to a dispute agree to be bound by the terms of the settlement reached in mediation.

ARBITRATION: A BINDING RESOLUTION PROCESS

Arbitration is a process of dispute resolution, wherein a decision is reached. An impartial arbitrator or panel of arbitrators is appointed from a panel list maintained by an arbitration provider such as the American Arbitration Association. The panel, or some of the members, are typically subject to approval by the parties in most cases.

The arbitration proceeding is conducted using a relaxed code of evidence on a timetable that is frequently expedited in comparison to the civil court system. Often, the arbitration panel includes individuals with professional expertise in the area of dispute. For example, many securities industry disputes are arbitrated by a three person panel, at least one of which is experienced in securities matters.

Once a decision is reached by the arbitration panel then only in cases of extreme arbitrator misconduct or prejudice is an arbitration panel's decision reviewed by the court system. Most states, including Florida, and the federal government have statutes protecting the arbitration process (F.S. Chapter 682). Arbitration has been a significant means of dispute resolution in the construction industry, in labor disputes and in baseball contract matters, among others, for several decades. Recently, the United States Supreme Court validated the securities industry's mandatory use of arbitration in brokerage service contracts. Today, virtually every brokerage firm in the nation requires mandatory arbitration of client disputes. The Securities Industry Arbitration Rules require that at least one

member of the three member panel be from the securities industry. It is important to note that the arbitration process involves an assured resolution to a matter.

The chief benefits of arbitration are frequently cited as time savings by avoiding the court system and cost savings because the proceedings are typically less formal and are not bound by rigid rules of evidence.

The arbitrator or panel of arbitrators arrive at a decision which often includes an award in favor of one of the parties. Unlike mediation, an arbitration panel must be comprised of individuals without prior knowledge of the case matter or conflicts of interest in dealing with the parties.

Arbitration and Insurance. Since an insurer has contractually obligated itself to answer for all or part of an individual CPA's professional misdeeds the carrier is given the right to determine the forum for dispute resolution. Most insurance carriers have indicated that arbitration is not a forum that they wish to contractually be bound to in an engagement letter. Consequently, insurance carriers have, for the most part, not approved incorporation of a mandatory arbitration provision into the engagement letter. Inclusion of such a provision could, absent prior approval from the carrier, exclude from coverage any claim arising out of an engagement incorporating such language. It is important to note that insurers will select the forum for dispute resolution in order to best meet insurer needs. Not always is an expeditious settlement the goal of the insurance carrier.

Pros and Cons; Arbitration vs. Mediation. Arbitration is binding, mediation is only binding when a resolution acceptable to all parties is reached.

Both are effective methods of dispute resolution outside of a formal trial.

Successful pre-litigation mediation may permit a CPA to resolve a CPA-Client dispute prior to a suit being filed and DPR reporting requirements triggered.

In short, arbitration reaches a seldom appealable decision, mediation is often (up to 80% of the cases) successful in reaching a mutually agreeable resolution.

Statutes Addressing Alternative Dispute Resolution. Florida, like many states, has a number of statutes which address alternative dispute resolution.

The Florida Arbitration Code, which largely parallels a national model act on the same subject, is contained in Florida Statutes Chapter 682. The arbitration statute provides, among other things, that an arbitration board's rulings, absent misconduct or bias on the part of the arbitrators, will not be subject to judicial review.

Florida Statutes have provided for a court-sponsored mediator certification program. This program is divided into Circuit/Civil and County certification, which is available only to individuals who are members of the Florida Bar, and the Family Court mediation program, which is open to members of the Bar, mental health professionals, CPAs, and a number of others as set forth in Florida Statutes Chapter 627.

OPPORTUNITIES FOR CPAs AS MEDIATORS

An increasing number of Florida CPAs have recognized mediation as a new area in which to practice. The diligent efforts of the FICPA's Governmental Affairs Department have opened doors for CPAs to serve as mediators of certain disputes, principally family law and auto insurance matters.

Mediator Certification. Mediation is frequently conducted by individuals who have developed mediation practices or who have become certified through training programs approved by the Florida Supreme Court. Typically, certification programs require a minimum of forty hours of training in relatively small mediation classes, and for individuals attempting certification subsequent to July 1, 1990 an apprenticeship program is also required. Mediators completing the training program and meeting other education and background requirements are certified by the Florida Supreme Court and register with courts and counties in which they elect to mediate. Typically, these Circuit Court, County Court and Family Court mediators are referred in court ordered mediation either on a rotating or on a selection method by mediation programs administered in each judicial circuit. Voluntary mediation is typically administered by a number of private mediation providers including the American Arbitration Association.

Each private provider maintains a database of individuals utilized as mediators by that organization. These private providers will typically endeavor to match mediator backgrounds to appropriate cases through use of a database of mediator qualifications.

Florida has established a formalized program for certifying mediators. This certification is divided into Circuit/Civil, County, Family Court, and Insurance Department mediation. Family Court and Insurance Department Mediators may be individuals with business backgrounds which may include CPAs that have completed training under a Florida Supreme Court certified program. Circuit Civil Mediators must be members of the bar. Under a program introduced in 1990 pursuant to F.S. 627.745 (the program is currently being subjected to administrative revision) all auto insurance disputes are subject to statutorily mandated pre-lawsuit mediation at the request of either party if the amount in contest is less than $10,000.

Mediators who wish to be certified in either program, must complete a 40-hour training course and, depending upon the date of certification, an apprenticeship program. The Circuit/Civil and the Family Court certifications are separate and distinct from one another. Supplemental training is required to participate in the Department of Insurance Program.

In 1992, efforts of the FICPA's Governmental Affairs staff were successful in obtaining an amendment to the regulations of this program so that CPAs having completed the Supreme Court training program can mediate in the Department of Insurance Program. A state-wide program is operated under contract with the Florida Department of Insurance by Mediation, Inc. Under the current program, mediators are chosen on a rotating basis within each judicial circuit in which they have agreed to accept cases. Each party to the dispute is responsible for paying a $150.00 fee (a total of $300.00) for the mediation prior to conference scheduling. Once the mediation has been scheduled, the parties meet at the mediator's office, or at some other mutually convenient location, to complete the mediation conference.

The automobile insurance program has not been utilized to a great degree; it is currently undergoing an administrative review to increase its ease of use and popularity. Lack of public knowledge, perceived undue delay in administration, and low mediator compensation have been cited as explanations for the program's limited use.

Private mediation providers and individuals serving outside the court system set their own rates for mediation conferences, cancellation fees and conference locations on a case by case basis.

An experienced mediator in private disputes may have specialized knowledge of the issue at hand. For example, an architect may have valuable experience in a contractor-owner dispute. When selecting a mediator, the mediator's training, experience and knowledge are important criteria.

The Florida Supreme Court has adopted Mediator Standards of Conduct and Rules of Discipline that apply to court ordered mediation proceedings. The American Arbitration Association and other private mediation providers maintain a Code of Ethics subscribed to by its private mediators.

Remember, mediation is not an ultimate resolution without all the parties consenting to a settlement.

Appendix A

Florida Supreme Court's

Florida Dispute Resolution Center

Florida Dispute Resolution Center
Supreme Court Building
Tallahassee, Florida 32399-2905
(904) 644-2086

Authorized Mediation Training Providers, September, 1992:

American Arbitration Association
800 Southeast Bank Building
201 East Pine Street
Orlando, Florida 32801-2742
(407) 648-1185

American Arbitration Association
99 Southeast Fifth Street
Miami, Florida
(305) 358-7777

Dispute Management, Inc.
18 Wall Street Plaza
Orlando, Florida 32801
(800) 541-7855

Florida Atlantic University
Division of Continuing Education
P.O. Box 3091
Boca Raton, Florida 33431
(407) 367-3000

Mediation Resources, Inc.
3119 Manatee Avenue West
Bradenton, Florida 34205
(813) 746-4008

Mediation Services, Inc.
2627 Biscayne Boulevard
Miami, Florida 33137
(305) 446-4345

NOVA University
3301 College Avenue, S&S
Ft. Lauderdale, Florida 33314
(305) 424-5700

Appendix B

FLORIDA INSTITUTE OF CPA's ALTERNATIVE DISPUTE RESOLUTION MEDIATION PROGRAM

In order to provide a program of pre-litigation mediation the Florida Institute of CPAs, working with CNA Insurance and The American Arbitration Association has developed the following program for use by Florida CPAs. Pre-litigation mediation may be invoked by either party prior to the filing of a lawsuit.

1. CONSULT WITH YOUR LEGAL COUNSEL AND INSURANCE CARRIER TO DETERMINE IF ELECTIVE PRE-LITIGATION MEDIATION IS FOR YOU.

2. IF YOU DECIDE TO DO SO, INCLUDE ELECTIVE PRE-LITIGATION MEDIATION LANGUAGE IN ENGAGEMENT CONTRACT.

Suggested Engagement Letter Language. The drafting of an engagement letter contract is an important legal document. Each CPA should retain the advice of legal counsel and insurance carrier, if any, in drafting their engagement letter contracts. The mediation anticipated by the language shown below is non-binding pre-litigation mediation but can also be used to force a pretrial mediation conference. CNA Insurance, for the use of its Florida professional liability policyholders, has approved the following language for use by its CPA policy holders in Florida:

> Parties to this engagement agree that any dispute that may arise regarding the meaning, performance, or enforcement of this engagement will be submitted to mediation upon the written request of any party to the engagement. The party requesting mediation shall select the mediation

provider from the list of mediation training providers approved by the Florida Supreme Court. The mediation shall be conducted in accordance with the Commercial Mediation Rules of the American Arbitration Association or such other rules as may be agreed upon by the parties. The results of this mediation shall not be binding upon either party. Costs of any mediation proceeding shall be shared equally by both parties.

NOTE: Only CNA has, to date, approved this language. Other carriers may consider such a clause.

3. IN THE EVENT OF A DISPUTE, ONE PARTY ELECTS TO SUBMIT THE MATTER TO MEDIATION PRIOR TO FILING OF A LAWSUIT.

Some matters may be conveniently resolved prior to filing of a lawsuit. Use of pre-litigation mediation to resolve such matters may, under current administrative regulations, permit the CPA to forgo reporting of the settlement to the Department of Professional Regulation as required under Chapter 21A-36.001(22) Florida Administrative Code.

4. ONCE A DISPUTE ARISES AND PRE-LITIGATION MEDIATION IS ELECTED BY EITHER PARTY.

A. Obtain a copy of the Commercial Mediation Rules from the American Arbitration Association by calling the Orlando office (407) 648-1185 or the Miami office at (305) 358-7777 or agree with the other party to the engagement to utilize some other rules.

B. Select a mediation training provider from the list of providers maintained by the Florida Supreme Court's Dispute Resolution Center and then obtain a list of available mediators and their qualifications from the provider (see Appendix A of these materials for a list current as of September, 1992).

C. Submit the matter to mediation under the American Arbitration Commercial Mediation Rules or such other rules agreed upon by the parties.

D. The parties may mutually agree to a mediator or, absent agreement, the private mediator provider will select a mediator. However selected, the mediator must have completed the Florida Supreme Court's Mediator Training, be certified as a mediator by the Florida Supreme Court, and agree to be bound by the Code of Ethics prescribed by the mediation provider.

E. The costs of the mediation, including the administrative fee charged by the mediation provider, if any, are to be borne equally by the parties. Most private mediation providers will require payment in advance of the mediation conference.

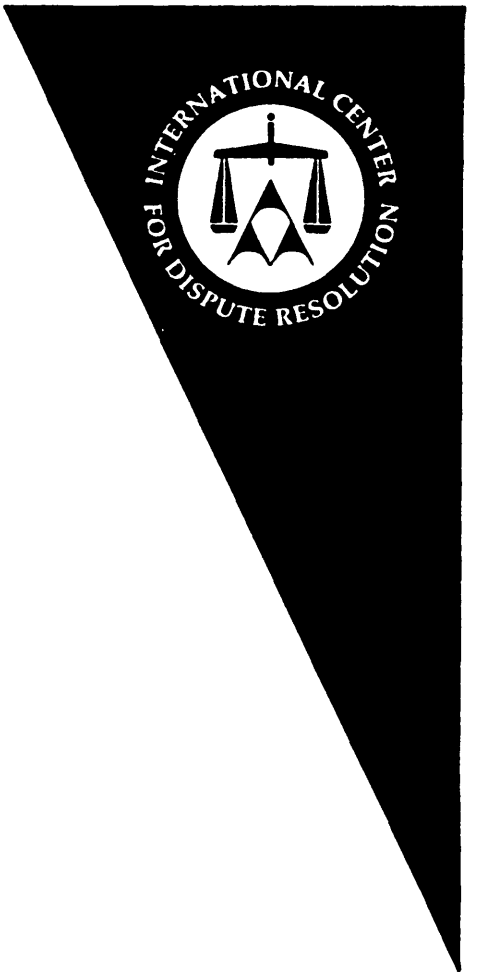
5. PARTICIPATE IN THE MEDIATION CONFERENCE.

A settlement may be reached voluntarily by the parties at the time of the conference, following the conference, or not at all. Unless both parties agree, no settlement will be reached.

ALTERNATIVE DISPUTE RESOLUTION

SUPPLEMENTAL MATERIALS

—EXHIBIT IV—



American
Arbitration
Association

RESOLVING PROFESSIONAL ACCOUNTING AND RELATED SERVICES DISPUTES

A Guide to Alternative Dispute Resolution

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Introduction

The last decade has presented an unprecedented increase in professional liability claims, including those brought by businesses and individuals against accounting firms. Traditionally, these disputes have been addressed through litigation which, in more than 95% of the cases, results in a settlement after the parties have waited years and spent hundreds of thousands of dollars in preparation for trial.

Perhaps the most unfortunate by-product of these lawsuits is the loss of productivity and destruction of what once were mutually beneficial business relationships. Accountants, like other professionals including architects, attorneys, engineers and physicians, are looking for prompt, fair and economical ways to resolve disputes with clients who, in many instances, have the same desire. Alternative dispute resolution techniques such as mediation and arbitration have been proven to be effective in resolving professional liability disputes. Some liability insurers favor such dispute resolution methods.

In the accounting field, a simple fee dispute may give rise to charges of professional malpractice. In many instances disputes which are based upon a simple misunderstanding can be resolved promptly and economically through mediation, a non-binding settlement process. If the parties are unable to resolve their differences in mediation, they may wish to have them finally determined by an arbitrator. In arbitration, the parties present their dispute to a third party for a binding determination. Many of the lengthy and costly procedures associated with litigation are avoided.As a result, business relationships are preserved.

The American Arbitration Association (AAA) is a not-for profit, public-service organization offering a broad range of dispute resolution services to business executives, attorneys, individuals, trade associations, unions, management, consumers, families, communities, and all levels of government. Services are available through AAA headquarters in New York City and through offices located in 36 major cities throughout the United States. Hearings may be held at locations convenient for the parties and are not limited to cities with AAA offices. In addition, the AAA serves as a center for education and training, issues specialized publications, and conducts research on all forms of out-of-court dispute settlement.

This guide has been prepared by the AAA's Professional Accounting Disputes Resolution Committee which is composed of representatives from accounting firms, national and state professional associations, professional liability insurers, businesses that use accounting services and attorneys practicing in the accounting field. The committee, working with AAA staff, has created the Arbitration Rules for Professional Accounting and Related Services Disputes. In addition, it has established minimum qualifications criteria and training

requirements for members of the National Panel of Mediators and Arbitrators for Professional Accounting and Related Services Disputes.

Members of the Advisory Committee include:

Robert L. May, CPA, *Chair*
Retired Partner Arthur Andersen & Co.

William Aiken, CPA
Chief Financial Officer
The Long Island Railroad

Michael P. Carroll, Esq.
Davis Polk & Wardell

James T. Clarke, CPA
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Vice President, Chief Financial Officer & Secretary
American Arbitration Association

Dan L. Goldwasser, Esq.
Vedder, Price, Kaufman, Kammholz & Day

Michael D. Karson, Esq.
Assistant Vice President
Professional Liability & Reinsurance Claims
CNA

Norman W. Lipshie, CPA
Weber Lipshie & Co.

Vincent J. Love, CPA
Ernst & Young

Michael P. Maloney, Esq.
Vice President, General Counsel & Secretary
Orion Capital Corporation

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Wilson, Elser, Moskowitz, Edelman & Dicker

Patricia A. McGovern, Esq.
Ernst & Young

Robert E. Meade
Vice President-Program Development
American Arbitration Association

Bernard Mintz, CPA
Raich Ende Malter Lerner & Co.

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Arthur Andersen & Co.

Andrew Plunkett, Esq.
Price Waterhouse

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Douglas H. Thompson Jr., CPA
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CPA Mutual Insurance Co. of America

Scott Univer, Esq.
BDO Seidman

What is Mediation?

Mediation is a process by which parties submit their disputes to a neutral third-party (the mediator) who works with the parties to reach a settlement of their dispute. Mediation is an extension of the negotiating process. Mediators do not have the authority to decide issues; they simply assist the parties in reaching an acceptable settlement by probing the motivation and concerns of the parties in an effort to find a basis for resolving the parties' dispute. Instead, it is the mediator's very neutrality that frequently enables him or her to transcend the posturing of the parties so that their true concerns may be addressed.

Submitting your dispute to AAA mediation will not cause delay to any pending lawsuit or arbitration you may have. Mediators who serve on the AAA's panel are experts in successful negotiation. Mediators receive a fee from the parties for their services. They are also rewarded by knowing that their efforts have resulted in an amicable settlement of a dispute that would have cost substantial time and money had it been litigated.

The benefits of successfully mediating a dispute to settlement vary, depending on the needs and interests of the parties. The most common advantages are:

- Parties are directly engaged in negotiating the settlement.
- The mediator, as a neutral third-party, can view the dispute objectively and can assist the parties in exploring alternatives that they might not have considered on their own.
- Because mediation can be scheduled early in the dispute, a settlement can be reached much more quickly than in litigation.

- Parties generally save money through reduced legal costs and less staff time.
- Parties enhance the possibility of continuing their business relationship with each other.
- The AAA experience has been that parties are able to reach a settlement in 80% of the disputes submitted to mediation.
- Creative solutions or accommodations to special needs of the parties may become a part of the settlement.

The parties may wish to attempt mediation before submitting their dispute to arbitration. This can be accomplished by making provision for mediation in the engagement letter or contractual document. To be most effective, the mediation clause may specify the AAA's Mediation Rules. This may be done by using the following language:

- If a dispute arises out of or relates to the engagement described herein, 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 Mediation Rules, before resorting to arbitration, litigation or some other dispute resolution procedure.

For the submission of an existing dispute, the following language may be used:

- The parties hereby submit the following dispute to mediation under the Mediation Rules of the American Arbitration Association. (The clause may also provide for the qualifications of the mediator(s), method of payment, locale of meetings, and any other item of concern to the parties.)

What is Arbitration?

Arbitration is the referral of a dispute to one or more impartial persons for final and binding determination. It is designed to be private and informal, quick, practical and economical. Parties can exercise additional control over the arbitration process by adding specific provisions to their contracts' arbitration clauses, or, when a dispute arises, by modifying certain of the arbitration rules to suit a particular dispute. Stipulations may be made regarding confidentiality of proprietary information, evidence, locale, number of arbitrators and issues subject to arbitration, for example. The parties may also provide for expedited arbitration procedures, including the rendering of the award, if they anticipate the need for hearings to be scheduled on short notice.

An important feature of arbitration is its informality. Under the AAA rules, the procedure is relatively simple; legal rules of evidence are not applicable; there is no motion practice or court conference; there are no requirements for transcripts of the proceedings or for written opinions of the arbitrators. Although there is no formal discovery process, the AAA's rules allow the arbitrator to require the production of relevant documents, the deposition of fact witnesses and the exchange of reports of expert witnesses. The AAA's rules are flexible and can be varied by mutual agreement of the parties.

The fact that the arbitrators are trained and have professional expertise is also important. Arbitrators are selected for specific cases because of their knowledge of the subject matter. Based on that experience, arbitrators can render an award grounded on thoughtful and thorough analysis.

Most parties provide for the arbitration of disputes because they are seeking a final and binding resolution of their business conflicts. Court intervention and review is limited by applicable state or federal arbitration laws; award enforcement is facilitated by these same laws.

Another important advantage of arbitration is that it is designed to be private, having no public record of the dispute or of the facts presented in the resolution of the dispute.

The AAA has prepared a guide to Drafting Dispute Resolution Clauses which sets forth many examples of specific provisions which may be included in a submission or arbitration clause. Copies of this guide may be obtained from any AAA regional office listed in this brochure. In addition, the AAA has available A Guide to Arbitration for Business People which details how to start, and prepare for, the arbitration process. This is also available through any AAA regional office.

What are the Benefits of Arbitration?

- **Confidentiality**—Arbitration is a private process. There is no public record of the proceedings.
- **Limited Discovery**—Extensive discovery is avoided. Arbitrators arrange for limited exchange of documents, witness lists and depositions appropriate to the particular dispute.
- **Speed**—There is no docket or backlog in arbitration. Hearings are scheduled as soon as the parties and the arbitrator have dates available.
- **Expert Neutrals**—The arbitrators have expertise in the subject matter in dispute as well as training in the arbitration process.

- **Cost Saving**—Because of the limited discovery and informal hearing procedures, as well as the expedited nature of the process, the parties save on legal fees and transactional costs.
- **Business Relationships Preserved**—In most instances litigation between professionals and their clients destroys the working relationship. Arbitration is less adversarial and because of its informal nature it is more likely that the parties will be able to continue to have a business relationship.

Parties may agree to arbitrate disputes either by inserting a future disputes clause in an engagement letter or contract, or by submitting an existing dispute to arbitration. Following is the standard arbitration clause:

> Any controversy or claim arising out of or re-lating to this engagement shall be settled by arbitration administered by the American Arbitration Association in accordance with its Arbitration Rules for Professional Accounting and Related Services Disputes and judgment on the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof.

Arbitration of existing disputes may be accomplished by the use of the following:

> We, the undersigned parties, hereby agree to submit to arbitration administered by the American Arbitration Association under its Arbitration Rules for Professional Accounting and Related Services Disputes the following controversy: (cite briefly). We further agree that the above controversy be submitted to (one)(three) arbitrator(s). We further agree that we will faithfully observe this agreement and the rules, and that we will abide by and perform any award rendered by the arbitrator(s) and that a judgment of the court having jurisdiction may be entered on the award.

Accounting firms should consult with their professional liability insurers to ensure that policy provisions permit the use of arbitration clauses to resolve disputes.

Who are the Mediators and Arbitrators?

The National Panel of Professional Accounting and Related Services Disputes neutrals includes corporate financial and accounting officers—practicing and retired—CPA's, lawyers, former judges and business people who have met the qualifications criteria and who have been trained by the AAA in arbitration and/or mediation techniques. Qualifications criteria include:

- A minimum of fifteen years professional or business experience
- Successful completion of AAA mediator/arbitrator training programs
- Relevant academic and business/professional credentials and licenses
- Scholarship and continuing education achievements
- Dispute management and neutral skills
- Reputation in the business/professional community
- Commitment and availability to serve as a neutral arbitrator or mediator

When a case is filed with the AAA for resolution, YOU AND THE OTHER PARTY SELECT the arbitrator or mediator from lists prepared by the AAA for the specific case. The list includes the proposed arbitrators' credentials including: educational institutions attended, degrees earned, employment history, professional licenses or certifications, offices held in professional and trade associations, a description of the nature of the individuals' work experience and participation in neutral training programs.

Mediators and arbitrators must disclose any relationships with the parties, their attorneys and others involved in the case, such as witnesses; and those with disqualifying relationships will not be permitted to serve on the particular case. This assures the parties that the mediators and arbitrators are neutral.

What is the Role of the AAA?

The AAA conducts educational programs; it prepares materials which explain alternative dispute resolution ("ADR") processes; it maintains current data on panel members and it provides extensive administrative services to the parties.

When you are considering using an ADR procedure, the AAA will:

- Provide sample language for the contract clause or the submission agreement.
- Meet with you and the other parties to the dispute to facilitate agreement on an ADR procedure. In this regard the AAA will contact the other party(ies) to gain their agreement to participate in an ADR procedure.
- Provide relevant materials, articles and video tapes to educate the parties in the use of ADR.

When you have a dispute, your initial step is to notify the AAA and the other party(ies). To bring the matter to a prompt, fair con-

clusion the AAA will provide administrative services that will include, but are not limited to:

- Receipt and acknowledgement of claims and counterclaims
- Conduct of an administrative conference with the parties and their counsel
- Preparation of lists of neutral arbitrators or mediators suitable to the specific dispute
- Supervision of the neutral arbitrator or mediator selection process
- Scheduling of meetings or hearings in AAA facilities or at other locations convenient to the parties
- Management and facilitation of all communications between the parties and the neutral, including any arrangements for compensation of the neutral arbitrator or mediator
- Determination if a neutral arbitrator or mediator has a disqualifying relationship
- Ensuring that the mediated settlement or decision of the arbitrator is achieved promptly and fairly

You can obtain informational materials, rules, filing forms and general information on ADR by calling any of the AAA regional offices listed in this brochure or by contacting the AAA's headquarters.

Robert E. Meade
Program Development
American Arbitration Association
140 West 51st Street
New York, NY 10023-1203

TEL 212-484-4060
FAX 212-765-4874

AZ **Phoenix (85012–2365) • Harry Kaminsky**
333 East Osborn Road, Suite 310 • (602) 234–0950/230–2151 (Fax)

CA **Irvine (92714–6220) • Lori S. Markowicz**
2601 Main Street, Suite 240 • (714) 474–5090/474–5087 (Fax)
Los Angeles (90010–1108) • Rocco M. Scanza
3055 Wilshire Boulevard, Floor 7 • (213) 383–6516/386–2251 (Fax)
San Diego (92101–5278) • Dennis Sharp
525 C Street, Suite 400 • (619) 239-3051/239-3807 (Fax)
San Francisco (94104–1113) • Charles A. Cooper
417 Montgomery Street • (415) 981-3901/781-8426 (Fax)

CO **Denver (80264–2101) • Mark Appel**
1660 Lincoln Street, Suite 2150 • (303) 831-0823/832-3626 (Fax)

CT **East Hartford (06108–3240) • Karen M. Jalkut**
111 Founders Plaza, Floor 17 • (203) 289-3993/282-0459 (Fax)

DC **Washington (20036–4104) • Garylee Cox**
1150 Connecticut Avenue, NW, Floor 6 • (202) 296–8510/872-9574 (Fax)
* **Office of National Affairs • Thomas R. Colosi**
1730 Rhode Island Avenue, NW, Suite 512 • (202) 331-7073/331-3356 (Fax)

FL **Miami (33131–2501) • René Grafals**
99 SE Fifth Street, Suite 200 • (305) 358–7777/358–4931 (Fax)
Orlando (32801–2742) • Mark Sholander
201 East Pine Street, Suite 800 • (407) 648-1185/649–8668 (Fax)

GA **Atlanta (30345–3203) • India Johnson**
1975 Century Boulevard, NE, Suite 1 • (404) 325–0101/325–8034 (Fax)

HI **Honolulu (96813–4714) • Keith W. Hunter**
810 Richards Street, Suite 641 • (808) 531–0541/533–2306 (Fax)
In Guam, (671) 477-1845/477-3178 (Fax)

IL **Chicago (60601–7601) • David Scott Carfello**
225 North Michigan Avenue, Suite 2527 • (312) 616–6560/819–0404 (Fax)

LA **New Orleans (70130–6101) • Deann Gladwell**
650 Poydras Street, Suite 1535 • (504) 522–8781/561–8041 (Fax)

MA **Boston (02110–1703) • Richard M. Reilly**
133 Federal Street • (617) 451–6600/451–0763 (Fax)

MI **Southfield (48076–3728) • Mary A. Bedikian**
One Towne Square, Suite 1600 • (313) 352-5500/352-3147 (Fax)

MN **Minneapolis (55402–1092) • James R. Deye**
514 Nicollet Mall, Suite 670 • (612) 332–6545/342-2334 (Fax)

MO **Kansas City (64106–2110) • Lori A. Madden**
1101 Walnut Street, Suite 903 • (816) 221–6401/471-5264 (Fax)
St. Louis (63101–1614) • Neil Moldenhauer
One Mercantile Center, Suite 2512 • (314) 621-7175/621-3730 (Fax)

NV **Las Vegas (89102–8719) • Kelvin Chin**
4425 Spring Mountain Road, Suite 310 • (702) 364–8009/364–8084 (Fax)

NJ **Somerset (08873–4120) • Richard Naimark**
265 Davidson Avenue, Suite 140 • (908) 560–9560/560–8850 (Fax)

NY **Garden City (11530–2004) • Mark A. Resnick**
666 Old Country Road, Suite 603 • (516) 222-1660/745–6447 (Fax)
New York (10020–1203) • Florence M. Peterson
140 West 51st Street • (212) 484–4000/307–4387 (Fax)
Syracuse (13202–1376) • Deborah A. Brown
205 South Salina Street • (315) 472-5483/472-0966 (Fax)
White Plains (10601–4485) • Marion J. Zinman
34 South Broadway • (914) 946-1119/946-2661 (Fax)

NC **Charlotte (28202–2431) • Neil Carmichael**
428 East Fourth Street, Suite 300 • (704) 347-0200/347-2804 (Fax)

OH **Cincinnati (45202–2809) • Philip S. Thompson**
441 Vine Street, Suite 3308 • (513) 241–8434/241–8437 (Fax)
Middleburg Heights (44130–3490) • Eileen B. Vernon
17900 Jefferson Road, Suite 101 • (216) 891–4741/891–4740 (Fax)

PA **Philadelphia (19102–4106) • Kenneth Egger**
230 South Broad Street, Floor 6 • (215) 732-5260/732-5002 (Fax)
Pittsburgh (15222–1207) • John F. Schano
Four Gateway Center, Room 419 • (412) 261-3617/261-6055 (Fax)

RI **Providence (02903–1082) • Mark Bayliss**
115 Cedar Street • (401) 453–3250/453–6194 (Fax)

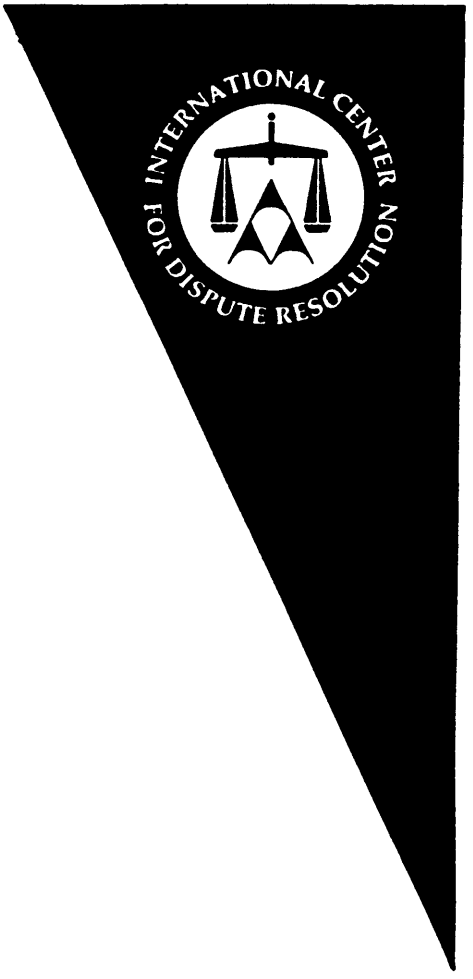
TN **Nashville (37219–2111) • Sheila R. Davy**
221 Fourth Avenue North • (615) 256-5857/244–8570 (Fax)

TX **Dallas (75240–6620) • Helmut O. Wolff**
13455 Noel Road, Suite 1440 • (214) 702–8222/490–9008 (Fax)
Houston (77002–6708) • Therese Tilley
1001 Fannin Street, Suite 1005 • (713) 739-1302/739-1702 (Fax)

UT **Salt Lake City (84111–3834) • Diane Abegglen**
645 South 200 East, Suite 203 • (801) 531–9748/531-0660 (Fax)

WA **Seattle (98101–2511) • Neal M. Blacker**
1325 Fourth Avenue, Suite 1414 • (206) 622–6435/343–5679 (Fax)

* Does not administer cases.



American
Arbitration
Association

DRAFTING DISPUTE RESOLUTION CLAUSES

for Professional Accounting and Related Services Disputes

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INTRODUCTION

Each year thousands of businesses enter into engagements with CPA's and accounting firms. Occasionally disagreements develop over how these services are performed. Many of these disputes may be resolved by arbitration, the voluntary submission of a dispute to a disinterested person or persons for final and binding determination. Arbitration is an effective way to resolve these disputes privately, promptly and economically.

The American Arbitration Association (AAA) is a public-service, not-for-profit organization offering a broad range of dispute resolution services to business executives, attorneys, individuals, trade associations, unions, management, consumers, families, communities and all levels of government. Services are available through AAA headquarters in New York City and through offices located in major cities throughout the United States. Hearings may be held at locations convenient for the parties and are not limited to cities with AAA offices. In addition, the AAA serves as a center for education and training, issues specialized publications and conducts research on all forms of out-of-court dispute settlement.

Typically, the parties' agreement to arbitrate is contained in a future-disputes clause which, when inserted in their engagement letter, provides that any disagreements will be resolved through arbitration under the AAA's Arbitration Rules for Professional Accounting and Related Services Disputes.

During the more than 60 years of its existence, the AAA has refined its standard arbitration clause. This clause, when linked to AAA's administration, offers the parties a simple, time-tested means of resolving disputes. Occasionally, parties or their counsel desire additional provisions. This booklet has been prepared with the assistance of the AAA's National Accounting Dispute Resolution Committee as a guide for drafting dispute resolution clauses. It contains examples of clauses and portions of clauses that have been used by parties in cases filed with the AAA. The readers should feel free to contact the AAA for further information.

MAJOR FEATURES OF ARBITRATION

Arbitration is a private, informal process in which the parties agree, in writing, to submit their disputes to one or more impartial persons authorized to resolve the issues by rendering a final and binding award. It is used for a wide variety of disputes: from commercial disagreements involving construction, securities transactions, computers, or real estate (to name just a few), to insurance claims and labor union grievances.

The major features of arbitration are:

1. **A written agreement to resolve disputes by the use of impartial arbitration.** Such an agreement may be inserted in an agreement letter, or may be an agreement to submit an existing dispute to arbitration.

2. **Informal procedures.** Under the rules, the procedure is relatively simple; strict rules of evidence are not applicable; there is no motion practice or formal discovery; there are no requirements for transcripts of the proceedings or for written opinions of the arbitrators. Although there is no formal discovery, the AAA's Arbitration Rules for Professional Accounting and Related Services Disputes do allow the arbitrator to require the production of relevant documents. Moreover, the AAA's rules are flexible and can be varied by mutual agreement of the parties.

3. **Impartial and knowledgeable neutrals to serve as arbitrators.** Arbitrators are selected for specific cases because of their knowledge of the subject matter. Based on that experience, arbitrators can render an award grounded on thoughtful and thorough analysis.

4. **Final and binding awards which are enforceable in a court.** Court intervention and review is limited by applicable state or federal arbitration laws, and award enforcement is facilitated by these same laws.

STANDARD ARBITRATION AGREEMENTS

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

The standard arbitration clause suggested by the American Arbitration Association addresses those questions. It has proven highly effective in over a million disputes. The parties can provide for the arbitration of future disputes by inserting the following in their contracts:

> • *Any controversy or claim arising out of or relating to this contract or engagement letter, or the breach thereof, shall be settled by arbitration administered by the American Arbitration Association in accordance with its Arbitration Rules for Professional Accounting and Related Services Disputes and judgment upon the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof.*

The arbitration of *existing* disputes may be accomplished by use of the following:

> • *We, the undersigned parties, hereby agree to submit to arbitration administered by the American Arbitration Association under its Arbitration Rules for Professional Accounting and Related Services Disputes the following controversy [cite briefly]. We further agree that we will faithfully observe this agreement and the rules, and that we will abide by and perform any award rendered by the arbitrator(s) and that a judgment of the court having jurisdiction may be entered upon the award.*

The above clauses, which refer to the time-tested rules of the AAA, have consistently received judicial support. The

standard clause is often the best to include in a contract, an engagement letter or other agreement for rendering professional services. By invoking the AAA's rules, these clauses meet the requirements of an effective arbitration clause:

1. **It makes clear that all disputes are arbitrable.** Thus, it minimizes dilatory court actions to avoid the arbitration process.

2. **It is self-enforcing.** Arbitration can continue despite an objection from a party, unless the proceedings are stayed by court order or by agreement of the parties.

3. **It provides for a complete set of rules and regulations.** This feature eliminates the need to spell out rules and regulations in the parties' agreement.

4. **It provides for the appointment of an impartial neutral arbitrator.** Arbitrators are selected by the parties from a large pool of available experts. Under the AAA rules, a procedure is available to disqualify an arbitrator for bias.

5. **It settles disputes over the locale of the proceeding.** When the parties disagree, locale determinations are made by the AAA as administrator, alleviating the need for direction from the courts.

6. **It can provide for administrative conferences.** Under the AAA's Arbitration Rules for Professional Accounting and Related Services Disputes, there is a provision for an administrative conference with the parties' representatives and an AAA staff member to expedite the arbitration proceedings.

7. **It can provide for preliminary hearings.** If the clause provides for the AAA's Arbitration Rules for Professional Accounting and Related Services Disputes, a preliminary hearing can be arranged

with the arbitrator(s) to specify the issues to be resolved, clarify claims and counterclaims, provide for an exchange of information, and consider other matters that will expedite the arbitration proceedings.

8. Mediation is available. If the clause provides for the AAA's Arbitration Rules for Professional Accounting and Related Services Disputes, mediation conferences can be arranged to facilitate a mutual settlement, without additional administrative costs to the parties.

9. It establishes time limits to assure prompt disposition of disputes. An additional feature of the AAA's Arbitration Rules for Professional Accounting and Related Services Disputes are the Expedited Procedures which are used to resolve smaller claims.

10. It insulates the arbitrators from the parties. Under the Arbitration Rules for Professional Accounting and Related Services Disputes, the AAA channels communications between the parties and the arbitrators, which serves to protect the continued neutrality of the arbitrators and the process.

11. It establishes a procedure for the serving of notices. Unless otherwise agreed to, notices can be served by regular mail, addressed to the party or its representative at the last known address. Moreover, the parties may use facsimile transmission, telex, telegram or other written forms of electronic communication to give the notices required by the rules.

12. It gives the arbitrators the power to decide matters equitably and to fashion any appropriate relief. The AAA rules allow the arbitrators to grant any remedy or relief that the arbitrators deem just and equitable and within the scope of the agreement of the parties, except that the arbitrators may

not compel an accounting firm to either complete a professional engagement or to issue a specified form of opinion or report without the consent of the parties.

13. It allows *ex parte* hearings. A hearing can be held in the absence of a party who was given due notice. Thus, a party cannot avoid an adverse award by merely refusing to appear.

14. It provides for enforcement of the award. The award can be enforced in any court having jurisdiction, with only limited grounds for resisting the award.

CUSTOMIZED ARBITRATION AGREEMENTS

The standard clause does not always meet the mutual needs of the parties. Arbitration being a consensual process, the parties are free to design their arbitration agreement in whatever manner they choose.

To assist in drafting arbitration clauses that modify or add to the standard clause, the following examples of arbitration clauses used by parties to accomplish a variety of purposes have been compiled. Although the Association does not specifically recommend these clauses, they illustrate some of the choices made by parties in addressing the various areas described below.

One important "drafting pointer" should be noted here. If, in a domestic transaction, as distinguished from an international transaction, the parties desire that the arbitration clause be final and binding, and subject to enforcement in a court of appropriate jurisdiction, it is essential that the clause contain an "entry of judgment" provision, such as that found in the standard arbitration clause ("...and judgment upon the award rendered by the arbitrator may be entered in any court having jurisdiction thereof").

MINI-TRIAL

The mini-trial is a structured dispute resolution method in which senior executives of the parties involved in a dispute meet in the presence of a neutral advisor and, after hearing presentations of the merits of each side of the dispute, attempt to formulate a voluntary settlement. A clause providing for mini-trial might read:

> • *Any controversy or claim arising out of or relating to this contract or engagement described herein shall be administered by the American Arbitration Association under its Mini-Trial Procedures.*

NEGOTIATION

The parties may wish to attempt to resolve their disputes through negotiation prior to arbitration. A sample of a clause which provides for negotiation follows:

> • *In the event of any dispute, claim, question, or disagreement arising out of or relating to this agreement or engagement described herein, or the obligations of the parties therein, the parties hereto shall use their best efforts to settle such disputes, claims, questions, or disagreement. To this effect, they shall consult and negotiate with each other, in good faith and, recognizing their mutual interests, attempt to reach a just and equitable solution satisfactory to both parties. If they do not reach such solution within a period of sixty (60) days, then upon notice by either party to the other, disputes, claims, questions, or differences shall be finally settled by arbitration administered by the American Arbitration Association in accordance with the provisions of its Arbitration Rules for Professional Accounting and Related Services Disputes.*

MEDIATION

The parties may wish to attempt mediation before submitting their dispute to arbitration. This can be accomplished by making reference to mediation in the arbitration clause. To be most effective, the mediation clause can specify the AAA's Commercial Mediation Rules. Examples of such language follows:

> • *If a dispute arises out of or relates to this contract or engagement letter, or the obligations of the parties therein, and if said 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.*

MEDIATION/ARBITRATION

A clause can be inserted into a contract that first provides for mediation under the AAA's mediation rules. If the mediation is unsuccessful, the dispute would then go to arbitration under the AAA's arbitration rules. This process is sometimes referred to as "Med-Arb." Samples of med-arb clauses follow:

> • *If a dispute arises out of or relates to this contract or engagement letter described herein, and if said dispute cannot be settled through direct discussions, the parties agree to first endeavor to settle the dispute in an amicable manner by mediation administered by the American Arbitration Association under its Commercial Mediation Rules, before resorting to arbitration. Thereafter, any unresolved controversy or claim arising out of or relating to this contract, or the obligations of the parties hereunder, shall be settled by arbitration administered by the American Arbitration Association in accordance with its Arbitration Rules for Professional Accounting and Related*

Services Disputes, and judgment upon the Award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof.

SCOPE MODIFICATIONS

It is not unusual for a CPA firm and its client to wish to limit application of the arbitration provision to disputes involving the CPA firm's fees. In such cases, the standard arbitration clause should be modified to read as follows:

> • *Any controversy over the amount of fees for services rendered hereunder shall be settled by arbitration administered by the American Arbitration Association in accordance with its Arbitration Rules for Professional Accounting and Related Services Disputes and judgment on the award rendered by the arbitrator(s) may be entered in any court having jurisidiction thereof*

If a CPA firm and its client have not previously included an arbitration clause in their agreements or letters of engagements, they may wish to broaden the scope of the standard clause to include all disputes and not merely those arising out of the engagement described in the current engagement letter. In such cases, the standard arbitration clause should be modified as follows:

> • *Any controversy arising among the parties hereto shall be settled by arbitration administered by the American Arbitration Association in accordance with its Arbitration Rules for Professional Accounting and Related Services Disputes and judgment on the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof*

GOVERNING LAW

It is not uncommon for parties to specify the law that will govern the contract and/or the arbitration proceedings. Some examples follow:

> • *In rendering the award, the arbitrators shall determine the rights and obligations of the parties according to the substantive and procedural laws of [state].*

LOCALE PROVISIONS

Parties may want to add language specifying the place of the arbitration. Examples of locale provisions which may appear in an arbitration clause follow:

> • *Any controversy relating to this contract or engagement letter or any modification or extension of it, shall be resolved by arbitration in the city of [specify], administered by the American Arbitration Association under the then prevailing Arbitration Rules for Professional Accounting and Related Services Disputes.*

> • *Any controversy or claim arising out of or relating to this contract or engagement letter or the obligation of the parties therein will be settled by arbitration administered by the American Arbitration Association in accordance with its Arbitration Rules for Professional Accounting and Related Services Disputes then in effect, and judgment upon the award rendered by the arbitrator may be entered in any court having jurisdiction. Any such arbitration will be conducted in the city closest to your principal office.*

> • *The arbitration proceedings shall be conducted in [city], [state].*

> • *The site of the arbitration shall be [city], [state].*

- *The arbitration shall be held in [city], [state], or at such other place as may be selected by mutual agreement.*

In specifying a locale, parties also should consider: (1) the convenience of the location (e.g., availability of local counsel, transportation, hotels, meeting facilities, etc.); (2) the available pool of qualified arbitrators within the geographical area; and, (3) the applicable procedural and substantive law. Of particular importance in international cases is the applicability of a convention providing for the recognition and enforcement of arbitral agreements and awards, and the arbitration regime at the chosen site.

BIFURCATION

Parties can provide in their arbitration clause for a bifurcated proceeding. For instance, the parties can agree that evidence and testimony first be given on the issue of liability. If liability is found, the proceedings would continue on the issue of damages. If liability is not found, the matter might be declared closed and a final award issued against the claimant. Such a clause might read:

- *The parties agree that the arbitrators shall rule as to liability prior to receiving evidence or testimony on any damage claim. In the event liability is found, the arbitration proceeding shall continue before the same arbitrators to resolve any and all damage issues.*

ARBITRATOR SELECTION

Under the Arbitration Rules for Professional Accounting and Related Services Disputes, the AAA provides each party with an identical list of not less than 15 proposed arbitrators selected from the National Panel, for the selection of two neutral arbitrators. These two arbitrators, in turn, select the third from the persons remaining on the list.

The parties may use other arbitrator appointment systems, such as the party-appointed method in which each side

designates one arbitrator, and the two thus selected appoint the chair of the panel. This method is not recommended by the AAA, because use of partisan arbitrators can delay the process and produce compromise awards or deadlocks. One way to address those problems is to agree that party-appointed arbitrators serve in a neutral capacity.

The parties' arbitration clause can also specify by name the individual the parties want as their arbitrator.

All of these issues and others can be dealt with in the arbitration clause. Some illustrative provisions are noted below:

> • *In the event arbitration is necessary, [name of specific arbitrator] shall act as the arbitrator.*
>
> • *The arbitrator selected by the claimant and the arbitrator selected by respondent shall, within ten days of their appointment, select a third neutral arbitrator. In the event that they are unable to do so, the parties or their attorneys may request the American Arbitration Association to appoint the third neutral arbitrator. Prior to the commencement of hearings, each of the arbitrators appointed shall take an oath of impartiality.*
>
> • *Within 15 days after the commencement of arbitration, each party shall select one person to act as arbitrator, and the two selected shall select a third arbitrator within ten days of their appointment. If the arbitrators selected by the parties are unable or fail to agree upon the third arbitrator, the third arbitrator shall be selected by the American Arbitration Association.*

When providing for direct appointment of the arbitrator(s) by the parties, it is best to specify a time frame within which same must be accomplished. Also, in many jurisdictions, the law permits the court to appoint arbitrators where privately agreed means fail. Such a result may be time-consuming, costly and unpredictable. Parties who seek to establish an ad hoc method of arbitrator appointment may be

well advised to provide a fallback, such as, should the particular procedure fail for any reason, "arbitrators shall be appointed as provided in the AAA's Arbitration Rules for Professional Accounting and Related Services Disputes."

NUMBER AND QUALIFICATIONS OF ARBITRATORS

Parties often have very definite ideas about the qualifications of an arbitrator appointed to a dispute. The qualifications requirements may include specific educational, professional or training experience. Parties concerned about the number of arbitrators appointed in a case can pre-determine whether the dispute shall be heard by one arbitrator or by a panel of three arbitrators. Typical additions to an arbitration clause dealing with such matters are:

- *The arbitrator shall be a certified public accountant.*

- *The arbitrator shall be a retired judge of the [specify] Court.*

- *The arbitration proceedings shall be conducted before a panel of three neutral arbitrators, all of whom shall be members of the Bar of the State of [specify], actively engaged in the practice of law for at least ten years.*

- *The panel of three arbitrators shall consist of one certified public accountant, one present or former business executive and one attorney.*

- *Arbitrators must be members of the [specify] State Bar actively engaged in the practice of law with expertise in the process of deciding disputes and interpreting business agreements.*

- *The arbitrators will be selected from a panel of persons having experience with and knowledge of financial accounting, and at least one of the arbitrators selected will be an attorney.*

- *One of the arbitrators shall be a member of the Bar of the State of [specify], actively engaged in the practice of law, or a retired member of the state or federal judiciary.*

- *The arbitration shall be before one neutral arbitrator to be selected in accordance with the Arbitration Rules for Professional Accounting and Related Services Disputes of the American Arbitration Association and shall proceed under the Expedited Procedures of said Rules, irrespective of the amount in dispute.*

- *In the event any party's claim exceeds [specified amount] exclusive of interest and attorneys' fees, the dispute shall be heard and determined by three arbitrators.*

CONSOLIDATION

Where there are multiple parties with disputes arising from the same transaction, complications may often be reduced by the consolidation of all disputes. Parties can provide for the consolidation of two or more separate arbitrations into a single proceeding or permit the intervention of a third party in an arbitration. In a financial dispute, consolidated proceedings may eliminate the need for duplicative presentations of claims and avoid the possibility of conflicting rulings from different panels of arbitrators. Conversely, consolidating claims might be a source of delay and expense. Examples of language which can be included in an arbitration clause follow:

- *Arbitration proceedings under this agreement may be consolidated with arbitration proceedings pending between other parties if the arbitration proceedings arise out of the same transaction or relate to the same subject matter. Consolidation will be by order of the arbitrator, in any of the pending cases, or if the arbitrator fails to make such an order, the parties may apply to any court of competent jurisdiction for such an order.*

DISCOVERY

Discovery frequently is time-consuming and expensive. While full-blown discovery is seldom recommended in arbitration, information exchange can be beneficial in large, complex cases. For such cases, the AAA's rules provide for an administrative conference with the AAA staff, and/or a preliminary hearing with the arbitrators. The purposes of such meetings are to: (1) clarify the issues to be resolved; (2) specify the claims of each party; (3) identify any witnesses to be called; and, at a preliminary hearing, (4) establish the extent of and schedule for the production of relevant documents and other information.

In addition to the information exchanges facilitated by the above provision of the AAA rules, some parties favor traditional discovery. The following language can serve this purpose:

> • *The arbitrators shall have the discretion to order a pre-hearing exchange of information by the parties, including, without limitation, production of requested documents, exchange of summaries of testimony of proposed witnesses, and examination by deposition of parties.*
>
> • *The parties shall allow and participate in discovery in accordance with the Federal Rules of Civil Procedure for a period of ninety (90) [or specify] days after the filing of the Answer or other responsive pleading. Any unresolved discovery disputes may be brought to the attention of the chair of the arbitration panel and may be disposed of by the chair of the panel.*
>
> • *Limited civil discovery shall be permitted for the production of documents and taking of depositions. All discovery shall be governed by the [specify] Rules of Civil Procedure.*
>
> • *All discovery activities shall be completed within [specify] days after the initial meeting with the arbitrator(s).*

- *All issues regarding conformation with discovery requests shall be decided by the arbitrator.*

If the parties do agree to discovery, they might include time limitations as to when all discovery should be completed. The parties also should provide for resolution of outstanding discovery issues by the arbitrator.

REMEDIES

Under a standard arbitration clause invoking AAA's Arbitration Rules for Professional Accounting and Related Services Disputes, the arbitrator may grant "any remedy or relief that the arbitrator deems just and equitable" within the scope of the parties' agreement, except for an order mandating a CPA to perform a specificed engagement or render a specified form of opinion or report. Sometimes, parties want to specifically include or exclude certain remedies. Particular care, however, should be given to this type of arbitration provision, to avoid unnecessary litigation about what issues are arbitrable. Samples of clauses dealing with remedies appear below:

- *The arbitrators will have no authority to award punitive damages or any other damages not measured by the prevailing party's actual damages, and may not, in any event, make any ruling, finding or award that does not conform to the terms and conditions of the Agreement.*

- *The arbitrators shall be empowered to impose sanctions and to take such other actions with regard to the parties as the arbitrators deem necessary to the same extent a judge could, pursuant to the Federal Rules of Civil Procedure, the [state] Rules of Civil Procedure and applicable law.*

CONFIDENTIALITY

While the confidentiality of the hearings is protected by AAA rules, and the arbitrators are expected to adhere to ethical standards concerning confidentiality (see AAA-ABA Code of Ethics for Arbitrators in Commercial Disputes, Canon VI), parties may also wish to impose limits on themselves as to how much information regarding the dispute may be disclosed outside the hearing. The following language may serve this purpose:

> • *Neither party nor the arbitrators may disclose the existence, content, or results of any arbitration hereunder without the prior written consent of both parties.*

The above language could also be modified to restrict the disclosure of only certain information (i.e. "trade secrets").

WRITTEN OPINIONS

With the exception of international and labor relations cases, arbitrators in business disputes customarily render a brief decision without an opinion. The AAA does not encourage commercial arbitrators to write opinions that give reasons for the award in domestic cases. A lengthy written opinion can prolong a proceeding and might open avenues for attack by the losing party. Often, an itemized award can eliminate the need to render an opinion. However, in some situations, parties may desire an award with written findings. In such cases, the following language can be written into their agreement:

> • *The arbitration award shall be in writing and shall specify the factual and legal bases for the award.*
>
> • *The award of the arbitrators shall be accompanied by a reasoned opinion.*
>
> • *Upon the request of a party, the arbitrators' award shall include findings of fact and conclusions of law.*

- *The award shall be in writing and shall be signed by a majority of the arbitrators, and shall include a statement regarding the disposition of any statutory claim.*

FEES AND EXPENSES

The rules generally provide that the administrative fees be borne as incurred and that the arbitrators' compensation be allocated equally between the parties, but this can be modified by agreement of the parties. Fees and expenses of the arbitration, including attorneys' fees, can also be dealt with in the arbitration clause. Some typical language dealing with fees and expenses follow:

- *All fees and expenses of the arbitration shall be borne by the parties equally. However, each party shall bear the expense of its own counsel, experts, witnesses, and preparation and presentation of proofs.*

- *The prevailing party shall be entitled to an award of reasonable attorney's fees.*

- *The arbitrator(s) is authorized to award any parties such sums as shall be deemed proper for the time, expense, and trouble of arbitration, including arbitration fees and attorneys' fees.*

- *The arbitrators shall award to the prevailing party, if any, as determined by the arbitrators, all of its costs and fees. 'Costs and fees' means all reasonable pre-award expenses of the arbitration, including the arbitrators' fees, administrative fees, travel expenses, out-of-pocket expenses such as copying and telephone, court costs, witness fees and attorneys' fees.*

- *Each party shall bear its own costs and expenses and an equal share of the arbitrators' and administrative fees of arbitration.*

- *The arbitrators shall award costs and expenses of the arbitration proceeding in accordance with the provisions of the loan agreement, promissory note and/or other loan documents relating to the credit which is the subject of the arbitrated claim or dispute.*

CONCLUSION

To be of maximum benefit, an arbitration clause should address the special needs of the parties involved. An inadequate arbitration clause may produce as much delay, expense and inconvenience as a traditional lawsuit. When writing an arbitration clause, keep in mind that its purpose is to resolve disputes, not create them. If disagreements arise over the meaning of the arbitration clause, it is often because it failed to address the particular needs of the parties. Drafting an effective arbitration agreement is the first step on the road to successful dispute resolution.

After a dispute arises, parties can request an administrative conference with a senior staff member of the AAA to assist them in establishing appropriate procedures necessary for their unique case. Such conferences can expedite the arbitration proceedings in many cases.

This brochure describes some of the ways in which some parties have modified the AAA's time-tested standard clause to deal with specific concerns. Given that CPA firm engagements vary greatly, its purpose is not so much to urge use of the provisions cited, but rather to suggest the range of possible options. To arrive at the most suitable and effective arbitration clause, parties should consult legal counsel for guidance and advice.

AZ **Phoenix (85012-2365) • Harry Kaminsky**
333 East Osborn Road, Suite 310 • (602) 234-0950/230-2151 (Fax)

CA **Irvine (92714-6220) • Lori S. Markowicz**
2601 Main Street, Suite 240 • (714) 474-5090/474-5087 (Fax)
Los Angeles (90010-1108) • Rocco M. Scanza
3055 Wilshire Boulevard, Floor 7 • (213) 383-6516/386-2251 (Fax)
San Diego (92101-5278) • Dennis Sharp
525 C Street, Suite 400 • (619) 239-3051/239-3807 (Fax)
San Francisco (94104-1113) • Charles A. Cooper
417 Montgomery Street • (415) 981-3901/781-8426 (Fax)

CO **Denver (80264-2101) • Mark Appel**
1660 Lincoln Street, Suite 2150 • (303) 831-0823/832-3626 (Fax)

CT **East Hartford (06108-3240) • Karen M. Jalkut**
111 Founders Plaza, Floor 17 • (203) 289-3993/282-0459 (Fax)

DC **Washington (20036-4104) • Garylee Cox**
1150 Connecticut Avenue, NW, Floor 6 • (202) 296-8510/872-9574 (Fax)
* **Office of National Affairs • Thomas R. Colosi**
1730 Rhode Island Avenue, NW, Suite 512 • (202) 331-7073/331-3356 (Fax)

FL **Miami (33131-2501) • René Grafals**
99 SE Fifth Street, Suite 200 • (305) 358-7777/358-4931 (Fax)
Orlando (32801-2742) • Mark Sholander
201 East Pine Street, Suite 800 • (407) 648-1185/649-8668 (Fax)

GA **Atlanta (30345-3203) • India Johnson**
1975 Century Boulevard, NE, Suite 1 • (404) 325-0101/325-8034 (Fax)

HI **Honolulu (96813-4714) • Keith W. Hunter**
810 Richards Street, Suite 641 • (808) 531-0541/533-2306 (Fax)
In Guam, (671) 477-1845/477-3178 (Fax)

IL **Chicago (60601-7601) • David Scott Carfello**
225 North Michigan Avenue, Suite 2527 • (312) 616-6560/819-0404 (Fax)

LA **New Orleans (70130-6101) • Deann Gladwell**
650 Poydras Street, Suite 1535 • (504) 522-8781/561-8041 (Fax)

MA **Boston (02110-1703) • Richard M. Reilly**
133 Federal Street • (617) 451-6600/451-0763 (Fax)

MI **Southfield (48076-3728) • Mary A. Bedikian**
One Towne Square, Suite 1600 • (313) 352-5500/352-3147 (Fax)

MN **Minneapolis (55402-1092) • James R. Deye**
514 Nicollet Mall, Suite 670 • (612) 332-6545/342-2334 (Fax)

MO **Kansas City (64106-2110) • Lori A. Madden**
1101 Walnut Street, Suite 903 • (816) 221-6401/471-5264 (Fax)
St. Louis (63101-1614) • Neil Moldenhauer
One Mercantile Center, Suite 2512 • (314) 621-7175/621-3730 (Fax)

NV **Las Vegas (89102-8719) • Kelvin Chin**
4425 Spring Mountain Road, Suite 310 • (702) 364-8009/364-8084 (Fax)

NJ **Somerset (08873-4120) • Richard Naimark**
265 Davidson Avenue, Suite 140 • (908) 560-9560/560-8850 (Fax)

NY **Garden City (11530-2004) • Mark A. Resnick**
666 Old Country Road, Suite 603 • (516) 222-1660/745-6447 (Fax)
New York (10020-1203) • Florence M. Peterson
140 West 51st Street • (212) 484-4000/307-4387 (Fax)
Syracuse (13202-1376) • Deborah A. Brown
205 South Salina Street • (315) 472-5483/472-0966 (Fax)
White Plains (10601-4485) • Marion J. Zinman
34 South Broadway • (914) 946-1119/946-2661 (Fax)

NC **Charlotte (28202-2431) • Neil Carmichael**
428 East Fourth Street, Suite 300 • (704) 347-0200/347-2804 (Fax)

OH **Cincinnati (45202-2809) • Philip S. Thompson**
441 Vine Street, Suite 3308 • (513) 241-8434/241-8437 (Fax)
Middleburg Heights (44130-3490) • Eileen B. Vernon
17900 Jefferson Road, Suite 101 • (216) 891-4741/891-4740 (Fax)

PA **Philadelphia (19102-4106) • Kenneth Egger**
230 South Broad Street, Floor 6 • (215) 732-5260/732-5002 (Fax)
Pittsburgh (15222-1207) • John F. Schano
Four Gateway Center, Room 419 • (412) 261-3617/261-6055 (Fax)

RI **Providence (02903-1082) • Mark Bayliss**
115 Cedar Street • (401) 453-3250/453-6194 (Fax)

TN **Nashville (37219-2111) • Sheila R. Davy**
221 Fourth Avenue North • (615) 256-5857/244-8570 (Fax)

TX **Dallas (75240-6620) • Helmut O. Wolff**
13455 Noel Road, Suite 1440 • (214) 702-8222/490-9008 (Fax)
Houston (77002-6708) • Therese Tilley
1001 Fannin Street, Suite 1005 • (713) 739-1302/739-1702 (Fax)

UT **Salt Lake City (84111-3834) • Diane Abegglen**
645 South 200 East, Suite 203 • (801) 531-9748/531-0660 (Fax)

WA **Seattle (98101-2511) • Neal M. Blacker**
1325 Fourth Avenue, Suite 1414 • (206) 622-6435/343-5679 (Fax)

* Does not administer cases.

American
Arbitration
Association

ARBITRATION RULES FOR PROFESSIONAL ACCOUNTING AND RELATED SERVICES DISPUTES

(Including Mediation)

Effective June 1, 1993

Introduction

Each year thousands of businesses enter into engagements with CPA's and accounting firms. Occasionally disagreements develop over how these services are performed. Many of these disputes may be resolved by arbitration, the voluntary submission of a dispute to a disinterested person or persons for final and binding determination. Arbitration is an effective way to resolve these disputes privately, promptly and economically.

The American Arbitration Association (AAA) is a public-service, not-for-profit organization offering a broad range of dispute resolution services to business executives, attorneys, individuals, trade associations, unions, management, consumers, families, communities and all levels of government. Services are available through AAA headquarters in New York City and through offices located in major cities throughout the United States. Hearings may be held at locations convenient for the parties and are not limited to cities with AAA offices. In addition, the AAA serves as a center for education and training, issues specialized publications and conducts research on all forms of out-of-court dispute settlement.

These rules have been designed in cooperation with the AAA's National Accounting Industry Dispute Resolution Committee.

In addition, the committee has established panel qualification criteria and training requirements for arbitrators and mediators. Panelists will be drawn from a variety of business and professional areas,

and will include accountants and CPAs in the industry as well as non-accounting industry members including lawyers, business people and former judges.

The parties can provide for arbitration of future disputes by inserting the following clause into their contracts or engagement letters:

Standard Arbitration Clause
Any controversy or claim arising out of or relating to this contract or engagement letter, or the breach thereof, shall be settled by arbitration administered by the American Arbitration Association in accordance with its Arbitration Rules for Professional Accounting and Related Services Disputes, and judgment upon the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof.

Firms should consult with their professional liability insurers to ensure that policy provisions permit the use of arbitration clauses to resolve disputes.

MEDIATION

The parties may wish to submit their dispute to mediation prior to arbitration. In mediation, the neutral mediator assists the parties in reaching a settlement, but does not have the authority to make a binding decision or award. Mediation is administered by the AAA in accordance with its Mediation Rules. There is no additional administrative fee where parties to a pending arbitration attempt to mediate their dispute under the AAA's auspices.

If the parties want to adopt mediation as a part of their contractual dispute settlement procedure, they can insert the

following mediation clause into their contract or engagement letter in conjunction with a standard arbitration provision:

> If a dispute arises out of or relates to this contract or engagement letter, 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 Mediation Rules, before resorting to arbitration, litigation, or some other dispute resolution procedure.

If the parties want to use a mediator to resolve an existing dispute, they can enter into the following submission:

> The parties hereby submit the following dispute to mediation administered by the American Arbitration Association under its Mediation Rules. (The clause may also provide for the qualifications of the mediator(s), method of payment, locale of meetings, and any other item of concern to the parties.)

Arbitration Rules for Professional Accounting and Related Services Disputes

(Including Mediation)

MEDIATION RULES

1. Agreement of Parties

Whenever, by stipulation or in their contract, the parties have provided for mediation or conciliation of existing or future disputes under the auspices of the American Arbitration Association (AAA) or under these rules, they shall be deemed to have made these rules, as amended and in effect as of the date of the submission of the dispute, a part of their agreement.

2. Initiation of Mediation

Any party or parties to a dispute may initiate mediation by filing with the AAA a submission to mediation or a written request for mediation pursuant to these rules, together with the appropriate administrative fee contained in the Fee Schedule. Where there is no submission to mediation or contract providing for mediation, a party may request the AAA to invite another party to join in a submission to mediation. Upon receipt of such a request, the AAA will contact the other parties involved in the dispute and attempt to obtain a submission to mediation.

3. Request for Mediation

A request for mediation shall contain a brief statement of the nature of the dispute and the names, addresses, and telephone numbers of all parties to the dispute and those who will represent them, if any, in the mediation. The initiating party shall simultaneously file two copies of the request with the AAA and one copy with every other party to the dispute.

4. Appointment of Mediator

Upon receipt of a request for mediation, the AAA will appoint a qualified mediator to serve. Normal-

ly, a single mediator will be appointed unless the parties agree otherwise or the AAA determines otherwise. If the agreement of the parties names a mediator or specifies a method of appointing a mediator, that designation or method shall be followed.

5. Qualifications of Mediator

No person shall serve as a mediator in any dispute in which that person has any financial or personal interest in the result of the mediation, except by the written consent of all parties. Prior to accepting an appointment, the prospective mediator shall disclose any circumstance likely to create a presumption of bias or prevent a prompt meeting with the parties. Upon receipt of such information, the AAA shall either replace the mediator or immediately communicate the information to the parties for their comments. In the event that the parties disagree as to whether the mediator shall serve, the AAA will appoint another mediator. The AAA is authorized to appoint another mediator if the appointed mediator is unable to serve promptly.

6. Vacancies

If any mediator shall become unwilling or unable to serve, the AAA will appoint another mediator, unless the parties agree otherwise.

7. Representation

Any party may be represented by persons of the party's choice. The names and addresses of such persons shall be communicated in writing to all parties and to the AAA.

8. Date, Time and Place of Mediation

The mediator shall fix the date and the time of each mediation session. The mediation shall be held at the appropriate regional office of the AAA, or at any other convenient location agreeable to the mediator and the parties, as the mediator shall determine.

9. Identification of Matters in Dispute

At least ten days prior to the first scheduled mediation session, each party shall provide the mediator with a brief memorandum setting forth its position with regard to the issues that need to be resolved. At the discretion of the mediator, such memoranda may be mutually exchanged by the parties.

At the first session, the parties will be expected to produce all information reasonably required for the mediator to understand the issues presented.

The mediator may require any party to supplement such information.

10. Authority of Mediator

The mediator does not have the authority to impose a settlement on the parties but will attempt to help them reach a satisfactory resolution of their dispute. The mediator is authorized to conduct joint and separate meetings with the parties and to make oral and written recommendations for settlement. Whenever necessary, the mediator may also obtain expert advice concerning technical aspects of the dispute, provided that the parties agree and assume the expenses of obtaining such advice. Arrangements for obtaining such advice shall be made by the mediator or the parties, as the mediator shall determine.

The mediator is authorized to end the mediation whenever, in the judgment of the mediator, further efforts at mediation would not contribute to a resolution of the dispute between the parties.

11. Privacy

Mediation sessions are private. The parties and their representatives may attend mediation sessions. Other persons may attend only with the permission of the parties and with the consent of the mediator.

12. Confidentiality

Confidential information disclosed to a mediator by the parties or by witnesses in the course of the mediation shall not be divulged by the mediator. All records, reports, or other documents received by a mediator while serving in that capacity shall be confidential. The mediator shall not be compelled to divulge such records or to testify in regard to the mediation in any adversary proceeding or judicial forum.

The parties shall maintain the confidentiality of the mediation and shall not rely on, or introduce as evidence in any arbitral, judicial, or other proceeding:

(a) views expressed or suggestions made by another party with respect to a possible settlement of the dispute;

(b) admissions made by another party in the course of the mediation proceedings;

(c) proposals made or views expressed by the mediator; or

(d) the fact that another party had or had not indicated willingness to accept a proposal for settlement made by the mediator.

13. No Stenographic Record

There shall be no stenographic record of the mediation process.

14. Termination of Mediation

The mediation shall be terminated:

(a) by the execution of a settlement agreement by the parties;

(b) by a written declaration of the mediator to the effect that further efforts at mediation are no longer worthwhile; or

(c) by a written declaration of a party or parties to the effect that the mediation proceedings are terminated.

15. Exclusion of Liability

Neither the AAA nor any mediator is a necessary party in judicial proceedings relating to the mediation.

Neither the AAA nor any mediator shall be liable to any party for any act or omission in connection with any mediation conducted under these rules.

16. Interpretation and Application of Rules

The mediator shall interpret and apply these rules insofar as they relate to the mediator's duties and responsibilities. All other rules shall be interpreted and applied by the AAA.

17. Expenses

The expenses of witnesses for either side shall be paid by the party producing such witnesses. All other expenses of the mediation, including required traveling and other expenses of the mediator and representatives of the AAA, and the expenses of any witness and the cost of any proofs or expert advice produced at the direct request of the mediator, shall be borne equally by the parties unless they agree otherwise.

Administrative Fees

The case filing or set-up fee is $300. This fee is to be borne equally or as otherwise agreed by the parties.

Additionally, the parties are charged a fee based on the number of hours of mediator time. The hourly fee is for the compensation of both the mediator and the AAA and varies according to region. Check with your local office for specific availability and rates.

There is no charge to the filing party where the AAA is requested to invite other parties to join in a submission to mediation. However, if a case settles after AAA involvement but prior to dispute resolution, the filing party will be charged a $150 filing fee.

The expenses of the AAA and the mediator, if any, are generally borne equally by the parties. The parties may vary this arrangement by agreement.

Where the parties have attempted mediation under these rules but have failed to reach a settlement, the AAA will apply the administrative fee on the mediation toward subsequent AAA arbitration, which is filed with the AAA within 90 days of the termination of the mediation.

Deposits

Before the commencement of mediation, the parties shall each deposit such portion of the fee covering the cost of mediation as the AAA shall direct and all appropriate additional sums that the AAA deems necessary to defray the expenses of the proceeding. When the mediation has terminated, the AAA shall render an accounting and return any unexpended balance to the parties.

Refunds

Once the parties agree to mediate, no refund of the administrative fee will be made.

ARBITRATION RULES

1. Agreement of Parties

The parties shall be deemed to have made these rules a part of their arbitration agreement whenever they have provided for arbitration by the American Arbitration Association (hereinafter AAA) or under its Arbitration Rules for Professional Accounting and Related Services Disputes. These rules and any amendment of them shall apply in the form in effect at the time the demand for arbitration or submission agreement is received by the AAA. The parties, by written agreement, may vary the procedures set forth in these rules.

2. Name of Tribunal

Any tribunal constituted by the parties for the settlement of their dispute under these rules shall be called the Professional Accounting and Related Services Arbitration Tribunal.

3. Administrator and Delegation of Duties

When parties agree to arbitrate under these rules, or when they provide for arbitration by the AAA and an arbitration is initiated under these rules, they thereby authorize the AAA to administer the arbitration. The authority and duties of the AAA are prescribed in the agreement of the parties and in these rules, and may be carried out through such of the AAA's representatives as it may direct.

4. National Panel of Arbitrators

The AAA shall establish and maintain a National Panel of Accounting and Related Services Arbitrators (hereinafter the National Panel) and shall appoint arbitrators as provided in these rules. The AAA, in consultation with the National Accounting Industry Dispute Resolution Committee, shall establish and maintain eligibility requirements for arbitrators to become and continue as members of the National Panel.

5. Regional Offices

The AAA may, in its discretion, assign the administration of an arbitration to any of its regional offices.

6. Initiation under an Arbitration Provision

Arbitration under an arbitration provision in a contract or engagement letter shall be initiated in the following manner:

(a) The initiating party (hereinafter claimant) shall, within the time period, if any, specified in the contract(s) or engagement letter(s), give written notice to the other party (hereinafter respondent) of its intention to arbitrate (demand), which notice shall contain a statement setting forth the nature of the dispute, the amount involved, if any, the remedy sought, and the hearing locale requested, and

(b) shall file at any regional office at the AAA three copies of the notice and three copies of the arbitration provisions of the contract or engagement letter, together with the appropriate filing fee as provided in the schedule on page 27.

The AAA shall give notice of the filing to the respondent or respondents. A respondent may file an answering statement in duplicate with the AAA within 10 days after notice from the AAA, in which event the respondent shall at the same time send a copy of the answering statement to the claimant. If a counterclaim is asserted, it shall contain a statement setting forth the nature of the counterclaim, the amount involved, if any, and the remedy sought. If a counterclaim is made, the appropriate fee provided in the schedule on page 27 shall be forwarded to the AAA with the answering statement.

If the respondent does not file an answering claim, within the stated time, it will be deemed to have denied the claim. Failure to file an answering statement shall not operate to delay the arbitration.

7. Initiation under a Submission

Parties to any existing dispute may commence an arbitration under these rules by filing at any regional office of the AAA three copies of a written submission to arbitrate under these rules, signed by the parties. It shall contain a statement of the matter in dispute, the amount involved, if any, the remedy sought, and the hearing locale requested together with the appropriate filing fee as provided in the schedule on page 27.

8. Changes of Claim

After filing of a claim, if either party desires to make any new or different claim or counterclaim, it shall be made in writing and filed with the AAA, and a copy shall be mailed to the other party, who shall have a period of 10 days from the date of mailing within which to file an answering claim

with the AAA. After the arbitrator is appointed, however, no new or different claim may be submitted except with the arbitrator's consent.

9. Applicable Procedures

Unless the AAA in its discretion determines otherwise or the parties agree otherwise, the Expedited Procedures shall be applied in any case where no disclosed claim or counterclaim exceeds $250,000, exclusive of interest and arbitration costs. Parties may also agree to use the Expedited Procedures in cases involving claims in excess of $250,000. The Expedited Procedures shall be applied as described in Section 53 through 57 of these rules, in addition to any other portion of these rules that is not in conflict with the Expedited Procedures.

All other cases shall be administered in accordance with Sections 1 through 52 of these rules.

10. Administrative Conference, Preliminary Hearing and Mediation Conference

At the request of any party or at the discretion of the AAA, an administrative conference with the AAA and the parties and/or their representatives will be scheduled in appropriate cases to expedite the arbitration proceedings.

At the request of any party or at the discretion of the arbitrator or the AAA, a preliminary hearing with the parties and/or their representatives and the arbitrator may be scheduled by the arbitrator to specify the issues to be resolved, to stipulate to uncontested facts and to consider any other matters that will expedite the arbitration proceedings. Consistent with the expedited nature of arbitration, the arbitrator may, at the preliminary hearing, establish (i) whether discovery is required and, if so, the extent of production of relevant documents and other information, (ii) the identification of witnesses to be called, and (iii) a schedule for further hearings to resolve the dispute. Any information or material exchanged during the course of discovery, or the arbitration, shall be confidential unless the parties specifically agree otherwise. With the consent of the parties, the AAA at any stage of the proceeding may arrange a mediation conference under the Commercial Mediation Rules, in order to facilitate settlement. The selected mediator shall not be an arbitrator previously appointed to the case. Where the parties to a pending arbitration

agree to mediate under the AAA's Commercial Mediation Rules, no additional administrative fee is required to initiate the mediation.

11. Fixing of Locale

The parties may mutually agree on the locale where the arbitration is to be held. If any party requests that the hearings be held in a specific locale and the other party files no objection thereto, within 10 days after notice of the request has been sent to it by the AAA, the locale shall be the one requested. If a party objects to the locale requested by the other party, the AAA shall have the power to determine the locale and its decision shall be final and binding.

12. Qualifications of an Arbitrator

The term "arbitrator" in these rules refers to the arbitration panel, whether composed of one or more arbitrators and whether the arbitrators are neutral or appointed directly by a party (party-appointed). Unless otherwise agreed, any arbitrator acting under these rules, including party-appointed arbitrators, shall be impartial and independent and shall be subject to disqualification pursuant to Section 19.

Unless the parties agree otherwise or if the arbitration is conducted in accordance with the Expedited Procedures, all arbitrations shall be conducted before a panel of three arbitrators selected from the National Panel in accordance with Section 13. The AAA shall establish and maintain eligibility requirements for arbitrators to become members of the National Panel.

13. Appointment from National Panel

If the parties have not provided for any other method of appointment and the arbitration is not conducted in accordance with the Expedited Procedures, the arbitrator shall be appointed in the following manner: immediately after the filing of the demand or submission, the AAA shall send simultaneously to each party to the dispute an identical list of not less than 15 names of members of the National Panel. Each party to the dispute shall have 10 days from the transmittal date in which to select an arbitrator from that list, and report the selection to the AAA. If a party does not make a selection within the time specified, all persons named therein shall be deemed acceptable, and the AAA shall make the selection on behalf of

that party. If both parties select the same arbitrator, the AAA shall so advise both parties and afford them both the opportunity to make an alternate selection. The AAA shall invite the acceptance of the two arbitrators selected by the parties to serve as arbitrators.

Within 10 days of notice from the AAA that the two arbitrators selected by the parties have agreed to serve, those two arbitrators shall select a third arbitrator from among the remaining persons on the list to serve as the third arbitrator and chairperson. The AAA shall invite the acceptance of the person selected to serve as an arbitrator and chairperson, and shall convene an arbitration panel composed of three arbitrators.

If the arbitrators selected by the parties fail to agree on the selection of the third arbitrator, if acceptable arbitrators are unable to act, or if, for any other reason, the appointment cannot be made from the list submitted to the parties, the AAA shall have the power to make the appointment from other members of the National Panel without the submission of additional lists.

14. Direct Appointment by a Party

If the agreement of the parties names an arbitrator or specifies a method of appointing an arbitrator, that designation or method shall be followed. The notice of appointment, with the name and address of the arbitrator, shall be filed with the AAA by the appointing party. Upon the request of any appointing party, the AAA shall submit a list of members of the National Panel from which the party may, if it so desires, make the appointment.

If the agreement specifies a period of time within which an arbitrator shall be appointed and any party fails to make the appointment within that period, the AAA shall make the appointment.

If no period of time is specified in the agreement, the AAA shall notify the party to make the appointment. If, within 10 days thereafter, an arbitrator has not been appointed by a party, the AAA shall make the appointment.

15. Appointment of Neutral Arbitrator by Party-Appointed Arbitrators or Parties

If the parties have selected party-appointed arbitrators, or if such arbitrators have been appointed as

provided in Section 14, and the parties have authorized them to appoint a neutral arbitrator within a specified time and no appointment is made within that time or any agreed extension, the AAA may appoint a neutral arbitrator from the National Panel, who shall act as chairperson.

If no period of time is specified for appointment of the neutral arbitrator and the party-appointed arbitrators or the parties do not make the appointment within 10 days from the date of the appointment of the last party-appointed arbitrator, the AAA may appoint the neutral arbitrator from the National Panel, who shall act as chairperson.

If the parties have agreed that their party-appointed arbitrators shall appoint the neutral arbitrator from the National Panel, the AAA shall transmit to the party-appointed arbitrators a list of arbitrators selected from the National Panel, and the appointment of the neutral arbitrator shall be made by the party-appointed arbitrators' striking from the list the names objected to, numbering the remaining names in order of preference, and returning the list to the AAA within 10 days from the transmittal date. From the persons who have been approved on both lists and in accordance with the designated order of mutual preference, the AAA shall invite the acceptance of a neutral arbitrator to serve. If the parties fail to agree on any of the persons named, if acceptable arbitrators are unable to act, or if, for any other reason, the appointment cannot be made from the lists submitted to the party-appointed arbitrators, the AAA shall have the power to make the appointment from other members of the National Panel without the submission of additional lists.

16. Nationality of Arbitrator in International Arbitration

Where the parties are nationals or residents of different countries, any neutral arbitrator shall, upon the request of either party, be appointed from the nationals of a country other than that of any of the parties. The request must be made prior to the time set for the appointment of the arbitrator as agreed by the parties or set by these rules.

17. Number of Arbitrators

If the arbitration agreement does not specify the number of arbitrators, the dispute shall be heard and determined by a panel composed of three

arbitrators selected in accordance with Section 13, unless the parties agree otherwise or the AAA, in its discretion, directs that a different number of arbitrators be appointed, or unless the Expedited Procedures are applicable as provided in Section 9.

18. Notice to Arbitrator of Appointment

Notice of the appointment of any arbitrator, whether appointed unilaterally by a party, mutually by the parties or by the AAA, shall be sent to the arbitrator by the AAA, together with a copy of these rules, and the signed acceptance of the arbitrator shall be filed with the AAA prior to the opening of the first hearing.

19. Disclosure and Challenge Procedure

Any person appointed as an arbitrator shall disclose to the AAA any circumstance likely to affect impartiality, including any bias or any financial or personal interest in the result of the arbitration or any past or present relationship with the parties or their representatives. Any party to the arbitration having similar knowledge about an arbitrator shall also disclose such information to the AAA as soon as practicable. Upon receipt of such information from the arbitrator or another source, the AAA shall communicate the information to the parties and, if it deems it appropriate to do so, to the arbitrator and others.

Unless the parties agree otherwise, any arbitrator serving under these rules is subject to disqualification if he or she has any material financial or other personal interest in the result of the arbitration.

Upon objection of a party to the continued service of any arbitrator, the AAA shall determine whether the arbitrator should be disqualified and shall inform the parties of its decision, which shall be conclusive.

20. Vacancies

If, for any reason, an arbitrator is unable to perform the duties of the office, the AAA may, on proof satisfactory to it, declare the office vacant. Vacancies shall be filled in accordance with these rules.

In the event of a vacancy of any arbitrator prior to the commencement of the arbitration hearings, a replacement arbitrator shall be selected in the same manner and in accordance with the rules under which the original arbitrator was selected.

In the event of a vacancy of a neutral arbitrator after the hearings have commenced, the remaining arbitrator or arbitrators may continue with the hearing and determination of the controversy, unless the parties agree otherwise.

In the event of a vacancy of a party-appointed arbitrator after the hearings have commenced, the party that appointed that arbitrator shall select a successor arbitrator in accordance with the rules under which the original arbitrator was selected, and the arbitration shall continue as if the successor had been selected in the first instance.

21. Date, Time and Place of Hearing

The arbitrator shall set the date, time and place for each hearing. The AAA shall send a notice of hearing to the parties at least 10 days in advance of the hearing date, unless otherwise agreed by the parties.

22. Representation

Any party may be represented by counsel or another authorized representative. A party intending to be so represented shall notify the other party and the AAA of the name and address of the representative at least three days prior to the date set for the hearing at which that person is first to appear. When a representative initiates an arbitration or responds for a party, notice is deemed to have been given.

23. Stenographic Record

Any party desiring a stenographic record shall make arrangements directly with a stenographer and shall notify the other parties of these arrangements in advance of the hearing. The requesting party or parties shall pay the costs of the record. If the transcript is agreed by the parties to be, or determined by the arbitrator to be, the official record of the proceeding, it must be made available to the arbitrator and to the other parties for inspection, at a date, time and place determined by the arbitrator.

24. Interpreters

Any party desiring an interpreter shall make all arrangements directly with the interpreter and shall assume the costs of the service.

25. Attendance at Hearings

The arbitrator shall maintain the privacy of the hearings unless the law provides to the contrary.

Any person having a direct interest in the arbitration is entitled to attend hearings. The arbitrator shall otherwise have the power to require the exclusion of any witness, other than a party or other essential person, during the testimony of any other witness. It shall be discretionary with the arbitrator to determine the propriety of the attendance of any other person.

26. Postponements

The arbitrator for good cause shown may postpone any hearing upon the request of a party or upon the arbitrator's own initiative, and shall also grant such postponement when all of the parties agree.

27. Oaths

Before proceeding with the first hearing, each arbitrator may take an oath of office and, if required by law, shall do so. The arbitrator may require witnesses to testify under an oath administered by any duly qualified person and, if it is required by law or requested by any party, shall do so.

28. Majority Decision

All decisions of the arbitrators must be by a majority. The award must also be made by a majority unless the concurrence of all is expressly required by the arbitration agreement or by law.

29. Order of Proceedings and Communication with Arbitrator

A hearing shall be opened by the filing of the oath of the arbitrator, where required; by the recording of the date, time and place of the hearing, and the presence of the arbitrator, the parties and their representatives, if any; and by the receipt by the arbitrator of the statement of the claim and the answering statement, if any.

The arbitrator may, at the beginning of the hearing, ask for statements clarifying the issues involved. In some cases, part or all of the above will have been accomplished at a preliminary hearing conducted by the arbitrator pursuant to Section 10.

The complaining party shall then present evidence to support its claim. The defending party shall then present evidence supporting its defense. Witnesses for each party shall submit to questions or other examination. The arbitrator has the discretion to vary this procedure, but shall afford a full

and equal opportunity to all parties for the presentation of any material and relevant evidence.

Exhibits, when offered by either party, may be received in evidence by the arbitrator.

The names and addresses of all witnesses and a description of the exhibits in the order received shall be made a part of the record.

There shall be no direct communication between the parties and any arbitrator including party-appointed arbitrators, other than at oral hearing, unless the parties and the arbitrator agree otherwise. Any other oral or written communication from the parties to any arbitrator shall be directed to the AAA for transmittal to the arbitrator.

30. Arbitration in the Absence of a Party or Representative

Unless the law provides to the contrary, the arbitration may proceed in the absence of any party or representative who, after due notice, fails to be present or fails to obtain a postponement. An award shall not be made solely on the default of a party. The arbitrator shall determine that proper notice of the hearing was given to the defaulting party. The arbitrator shall require the party who is present to submit evidence that the arbitrator requires for the making of an award.

31. Evidence

The parties may offer evidence that is relevant and material to the dispute and shall produce evidence that the arbitrator may deem necessary to an understanding and determination of the dispute. An arbitrator or other person authorized by law to subpoena witnesses or documents may do so upon the request of any party or independently.

The arbitrator shall be the judge of the relevance, materiality, credibility and weight of the evidence offered, and conformity to legal rules of evidence shall not be necessary. All evidence shall be taken in the presence of all of the arbitrators and all of the parties, except where any of the parties is absent, in default or has waived the right to be present.

The arbitrator may receive and consider the evidence of witnesses by affidavit, giving it such weight as the arbitrator deems it entitled to after

consideration of any objection made to its admission.

32. Post-Hearing Filing of Documents or other Evidence

If the parties agree or the arbitrator directs that documents or other evidence be submitted to the arbitrator after the hearing, the documents or other evidence shall be filed with the AAA for transmission to the arbitrator. All parties shall be afforded an opportunity to examine such documents or other evidence.

33. Inspection or Investigation

An arbitrator finding it necessary to make an inspection or investigation in connection with the arbitration shall direct the AAA to so advise the parties. The arbitrator shall set the date and time and the AAA shall notify the parties. Any party who so desires may be present at such an inspection or investigation. In the event that one or all parties are not present at the inspection or investigation, the arbitrator shall make a verbal or written report to the parties and afford them an opportunity to comment.

34. Interim Measures

The arbitrator may issue such orders for interim relief other than those proscribed in Section 43 as may be deemed necessary to safeguard the property that is the subject matter of the arbitration, without prejudice to the rights of the parties or to the final determination of the dispute.

35. Closing of Hearing

The arbitrator shall specifically inquire of all parties whether they have further proofs to offer or witnesses to be heard. Upon receiving negative replies or if satisfied that the record is complete, the arbitrator shall declare the hearing closed.

If briefs are to be filed, the hearing shall be declared closed as of the final date set by the arbitrator for the receipt of briefs. If documents are to be filed as provided in Section 32 and the date set for their receipt is later than that set for the receipt of briefs, the later date shall be the date of closing the hearing. The time limit within which the arbitrator is required to make the award shall commence to run, in the absence of other agreements by the parties, upon the closing of the hearing.

36. Reopening of Hearing

The hearing may be reopened on the arbitrator's initiative, or upon application of a party, at any time before the award is made. If reopening the hearing would prevent the making of the award within the specific time agreed on by the parties in the contract(s) or engagement letter(s)out of which the controversy has arisen, the matter may not be reopened unless the parties agree on an extension of time. When no specific date is fixed in the contact or engagement letter, the arbitrator may reopen the hearing and shall have thirty days from the closing of the reopened hearing within which to make an award.

37. Waiver of Oral Hearing

The parties may provide, by written agreement, for the waiver of oral hearings in any case. If the parties are unable to agree as to the procedure, the AAA shall specify a fair and equitable procedure.

38. Waiver of Rules

Any party who proceeds with the arbitration after knowledge that any provision or requirement of these rules has not been complied with and who fails to state an objection in writing shall be deemed to have waived the right to object.

39. Extensions of Time

The parties may modify any period of time by mutual agreement. The AAA or the arbitrator may for good cause extend any period of time established by these rules, except the time for making the award. The AAA shall notify the parties of any extension.

40. Serving of Notice

Each party shall be deemed to have consented that any papers, notices, or process necessary or proper for the initiation or continuation of an arbitration under these rules; for any court action in connection therewith; or for the entry of judgment on any award made under these rules may be served on a party by mail or by a commercial delivery service, addressed to the party or its representative at the last known address, or by personal service, in or outside the state where the arbitration is to be held, provided that reasonable opportunity to be heard with regard thereto has been granted to the party.

The AAA and the parties may also use facsimile transmission, telex, telegram or other written forms

of electronic communication to give the notices required by these rules.

41. Time of Award

The award shall be made promptly by the arbitrator and, unless otherwise agreed by the parties or specified by law, no later than thirty days from the date of closing the hearing, or if oral hearings have been waived, from the date of the AAA's transmittal of the final statements and proofs to the arbitrator.

42. Form of Award

The award shall be in writing and shall be signed by a majority of the arbitrators. The award shall be executed in the manner required by law.

43. Scope of Award

The arbitrator may grant any remedy or relief that the arbitrator deems just and equitable and within the scope of the agreement of the parties, except that the arbitrator may not compel an accounting firm to either complete a professional engagement or to issue a specified form of opinion or report without the consent of the parties. The arbitrator shall, in the award, assess arbitration fees, expenses and compensation as provided in Sections 48, 49 and 50 in favor of any party and, in the event that any administrative fees or expenses are due the AAA, in favor of the AAA.

44. Award upon Settlement

If the parties settle their dispute during the course of the arbitration, the arbitrator may set forth the terms of the agreed settlement in an award. Such an award is referred to as a consent award.

45. Delivery of Award to Parties

Parties shall accept as legal delivery of the award the placing of the award or a true copy thereof in the mail addressed to a party or its representative at the last known address, personal service of the award, or the filing of the award in any other manner that is permitted by law.

46. Releases of Documents for Judicial Proceedings

The AAA shall, upon the written request of a party to an arbitration proceeding, furnish to the party, at its expense, certified copies of papers in the AAA's possession that are required in judicial proceedings relating to the arbitration.

47. Applications to Court and Exclusion of Liability

(a) No judicial proceeding by a party relating to the subject matter of the arbitration shall be deemed a waiver of the party's right to arbitrate.

(b) Neither the AAA nor any arbitrator in a proceeding under these rules is a necessary party in judicial proceedings relating to the arbitration.

(c) Parties to these rules shall be deemed to have consented that judgment upon the arbitration award may be entered in any federal or state court having jurisdiction thereof.

(d) Neither the AAA nor any arbitrator shall be liable to any party for any act or omission in connection with any arbitration conducted under these rules.

48. Administrative Fees

As a not-for-profit organization, the AAA shall prescribe filing and other fees. The fees in effect when the demand for arbitration or submission agreement is received shall be applicable.

The filing fee shall be advanced by the claimant, subject to final apportionment by the arbitrator in the award.

49. Expenses

The expenses of witnesses for either side shall be paid by the party producing the witnesses. All other expenses of the arbitration, including required travel and other expenses of the arbitrator, AAA representatives and any witness, and the cost of any proof produced at the direct request of the arbitrator, shall be borne equally by the parties, unless they agree otherwise or unless the arbitrator in the award assesses such expenses or any part thereof against any specified party or parties.

50. Arbitrator's Compensation

Members of the National Panel appointed as arbitrators will be compensated based on the amount of service involved and the number of hearings. An appropriate daily rate and other arrangements will be discussed by the AAA with the parties and the arbitrator. If the parties fail to agree to the terms of compensation, an appropriate rate shall be established by the AAA and communicated in writing to the parties.

Any arrangement for the compensation of a neutral arbitrator shall be made through the AAA and not directly between the parties and the arbitrator.

51. Deposits

The AAA may require the parties to deposit in advance of any hearings such sums of money as it deems necessary to cover the expense of the arbitration, including the arbitrator's fees, if any, and shall render an accounting to the parties and return any unexpended balance at the conclusion of the case.

52. Interpretation and Application of Rules

The arbitrator shall interpret and apply these rules insofar as they relate to the arbitrator's powers and duties. When there is more than one arbitrator and a difference arises among them concerning the meaning or application of these rules, it shall be decided by a majority vote. If that is not possible, any arbitrator may refer the questions to the AAA for a final decision. All other rules shall be interpreted and applied by the AAA.

Expedited Procedures

53. Notice by Telephone

The parties shall accept all notices from the AAA by telephone. Such notices by the AAA shall subsequently by confirmed in writing to the parties. Should there be a failure to confirm in writing any notice hereunder, the proceeding shall nonetheless be valid if notice has, in fact, been given by telephone.

54. Appointment and Qualification of Arbitrator

The AAA shall submit simultaneously to each party an identical list of five proposed arbitrators drawn from the National Panel, from which one arbitrator shall be appointed.

Each party may strike two names from the list on a peremptory basis. The list is returnable to the AAA within seven days from the date of the AAA's mailing to the parties. The AAA shall select one person from the names that have not been stricken by the parties, and that person shall serve as the arbitrator.

If, for any reason, the appointment of an arbitrator cannot be made from the list, the AAA may make the appointment from among other members of the National Panel without the submission of additional lists.

The parties will be given notice by telephone by the AAA of the appointment of the arbitrator, who shall be subject to disqualification for the reasons specified in Section 19. Within seven days, the parties shall notify the AAA, by telephone, of any objection to the arbitrator appointed. Any objection by a party to the arbitrator shall be confirmed in writing to the AAA with a copy to the other party or parties.

55. Date, Time and Place of Hearing

The arbitrator shall set the date, time and place of the hearing. The AAA will notify the parties by telephone, at least seven days in advance of the hearing date. A formal notice of hearing will also be sent by the AAA to the parties.

56. The Hearing

Generally, the hearing shall be completed within one day, unless the dispute is resolved by submission of documents under Section 37. The arbitrator, for good cause shown, may schedule an additional hearing to be held within seven days.

57. Time of Award

Unless otherwise agreed by the parties, the award shall be rendered not later than fourteen days from the date of the closing of the hearing.

Administrative Fees

The AAA's administrative charges are based on filing and service fees. Arbitrator compensation, if any, is not included. Unless the parties agree otherwise, arbitrator compensation and administrative fees are subject to allocation by the arbitrator in the award.

Filing Fees

A nonrefundable filing fee is payable in full by a filing party when a claim, counterclaim, or additional claim is filed, as provided below.

Amount of Claim	Filing Fee
Up to $25,000	$300
Above $25,000 to $50,000	$500
Above $50,000 to $250,000	$1,000
Above $250,000 to $500,000	$2,000
Above $500,000 to $5,000,000	$3,000
Above $5,000,000	$4,000

When no amount can be stated at the time of filing, the filing fee is $1,000, subject to adjustment when the claim or counterclaim is disclosed.

When a claim or counterclaim is not for a monetary amount, an appropriate filing fee will be determined by the AAA.

Hearing Fees

For each day of hearing held before a single arbitrator, an administrative fee of $100 is payable by each party.

For each day of hearing held before a multiarbitrator panel, an administrative fee of $150 is payable by each party.

Postponement Fees

A fee of $100 is payable by a party causing a postponement of any hearing scheduled before a single arbitrator.

A fee of $150 is payable by a party causing a postponement of any hearing scheduled before a multiarbitrator panel.

Processing Fees

No processing fee is payable until 180 days after a case is initiated.

On single-arbitrator cases, a processing fee of $150 per party is payable 180 days after the case is initiated, and every 90 days thereafter, until the case is withdrawn or settled or the hearings are closed by the arbitrator.

On multiarbitrator cases, a processing fee of $200 per party is payable 180 days after the case is initiated, and every 90 days thereafter, until the case is withdrawn or settled or the hearings are closed by the arbitrators.

Suspension for Nonpayment

If arbitrator compensation or administrative charges have not been paid in full, the AAA may so inform the parties in order that one of them may make the required payment. If such payments are not made, the arbitrator may order the suspension or termination of the proceedings. If no arbitrator has yet been appointed, the AAA may suspend the proceedings in such a situation.

Hearing Room Rental

Rooms for hearings are available on a rental basis. Check with our local office for availability and rates.

AAA Offices

AZ **Phoenix (85012-2365) • Harry Kaminsky**
333 East Osborn Road, Suite 310
(602) 234-0950/230-2151 (Fax)

CA **Irvine (92714-6220) • Lori S. Markowicz**
2601 Main Street, Suite 240
(714) 474-5090/474-5087 (Fax)

Los Angeles (90010-1108) • Rocco M. Scanza
3055 Wilshire Boulevard, Floor 7
(213) 383-6516/386-2251 (Fax)

San Diego (92101-5278) • Dennis Sharp
525 C Street, Suite 400
(619) 239-3051/239-3807 (Fax)

San Francisco (94104-1113) • Charles A. Cooper
417 Montgomery Street
(415) 981-3901/781-8426 (Fax)

CO **Denver (80264-2101) • Mark Appel**
1660 Lincoln Street, Suite 2150
(303) 831-0823/832-3626 (Fax)

CT **East Hartford (06108-3240) • Karen M. Jalkut**
111 Founders Plaza, Floor 17
(203) 289-3993/282-0459 (Fax)

DC **Washington (20036-4104) • Garylee Cox**
1150 Connecticut Avenue, NW, Floor 6
(202) 296-8510/872-9574 (Fax)

• **Office of National Affairs • Thomas R. Colosi**
1730 Rhode Island Avenue, NW, Suite 512
(202) 331-7073/331-3356 (Fax)

FL **Miami (33131-2501) • René Grafals**
99 SE Fifth Street, Suite 200
(305) 358-7777/358-4931 (Fax)

Orlando (32801-2742) • Mark Sholander
201 East Pine Street, Suite 800
(407) 648-1185/649-8668 (Fax)

GA **Atlanta (30345-3203) • India Johnson**
1975 Century Boulevard, NE, Suite 1
(404) 325-0101/325-8034 (Fax)

HI **Honolulu (96813-4714) • Keith W. Hunter**
810 Richards Street, Suite 641
(808) 531-0541/533-2306 (Fax)
In Guam, (671) 477-1845/477-3178 (Fax)

IL **Chicago (60601-7601) • David Scott Carfello**
225 North Michigan Avenue, Suite 2527
(312) 616-6560/819-0404 (Fax)

LA **New Orleans (70130-6101) • Deann Gladwell**
650 Poydras Street, Suite 1535
(504) 522-8781/561-8041 (Fax)

MA **Boston (02110-1703) • Richard M. Reilly**
133 Federal Street
(617) 451-6600/451-0763 (Fax)

MI **Southfield (48076-3728) • Mary A. Bedikian**
One Towne Square, Suite 1600
(313) 352-5500/352-3147 (Fax)

MN **Minneapolis (55402-1092) • James R. Deye**
514 Nicollet Mall, Suite 670
(612) 332-6545/342-2334 (Fax)

MO **Kansas City (64106-2110) • Lori A. Madden**
1101 Walnut Street, Suite 903
(816) 221-6401/471-5264 (Fax)

St. Louis (63101-1614) • Neil Moldenhauer
One Mercantile Center, Suite 2512
(314) 621-7175/621-3730 (Fax)

NV Las Vegas (89102-8719) • Kelvin Chin
4425 Spring Mountain Road, Suite 310
(702) 364-8009/364-8084 (Fax)

NJ Somerset (08873-4120) • Richard Naimark
265 Davidson Avenue, Suite 140
(908) 560-9560/560-8850 (Fax)

NY Garden City (11530-2004) • Mark A. Resnick
666 Old Country Road, Suite 603
(516) 222-1660/745-6447 (Fax)

New York (10020-1203) • Florence M. Peterson
140 West 51st Street
(212) 484-4000/307-4387 (Fax)

Syracuse (13202-1376) • Deborah A. Brown
205 South Salina Street
(315) 472-5483/472-0966 (Fax)

White Plains (10601-4485) • Marion J. Zinman
34 South Broadway
(914) 946-1119/946-2661 (Fax)

NC Charlotte (28202-2431) • Neil Carmichael
428 East Fourth Street, Suite 300
(704) 347-0200/347-2804 (Fax)

OH Cincinnati (45202-2809) • Philip S. Thompson
441 Vine Street, Suite 3308
(513) 241-8434/241-8437 (Fax)

Middleburg Heights (44130-3490) • Eileen B. Vernon
17900 Jefferson Road, Suite 101
(216) 891-4741/891-4740 (Fax)

PA Philadelphia (19102-4106) • Kenneth Egger
230 South Broad Street, Floor 6
(215) 732-5260/732-5002 (Fax)

Pittsburgh (15222-1207) • John F. Schano
Four Gateway Center, Room 419
(412) 261-3617/261-6055 (Fax)

RI Providence (02903-1082) • Mark Bayliss
115 Cedar Street
(401) 453-3250/453-6194 (Fax)

TN Nashville (37219-2111) • Sheila R. Davy
221 Fourth Avenue North
(615) 256-5857/244-8570 (Fax)

TX Dallas (75240-6620) • Helmut O. Wolff
13455 Noel Road, Suite 1440
(214) 702-8222/490-9008 (Fax)

Houston (77002-6708) • Therese Tilley
1001 Fannin Street, Suite 1005
(713) 739-1302/739-1702 (Fax)

UT Salt Lake City (84111-3834) • Diane Abegglen
645 South 200 East, Suite 203
(801) 531-9748/531-0660 (Fax)

WA Seattle (98101-2511) • Neal M. Blacker
1325 Fourth Avenue, Suite 1414
(206) 622-6435/343-5679 (Fax)

• Does not administer cases.

Commonly Used Rules Available from the AAA:

Commercial Arbitration Rules
Commercial Mediation Rules
Supplementary Procedures for International Commercial Arbitration
Construction Industry Arbitration Rules
Construction Industry Mediation Rules
Securities Arbitration Rules
Dispute Resolution Procedures for Insurance Claims
Employment Dispute Resolution Rules
Labor Arbitration Rules (Including Expedited Labor Arbitration Procedures)

For specialized industry rules, contact the AAA regional office nearest you.

Services Available from the AAA:

Arbitration
Mediation
Minitrial
Factfinding
Election Services
Education
Training
Insurance ADR
ADR for Business
Court-Referred Mediation

American Arbitration Association
140 West 51st Street, New York, NY 10020-1203
Telephone: (212) 484-4000
Fax: (212) 765-4874

See the inside back cover for a list of AAA regional offices.

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