

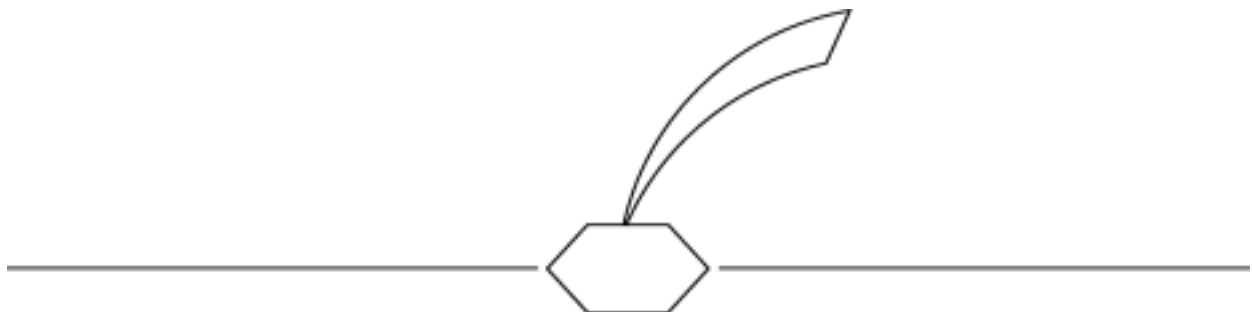
ESSENTIALS OF ALTERNATIVE DISPUTE RESOLUTION

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**Instructor's Manual
& Test Bank**

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Instructor's Guide

This course will introduce students to alternative dispute resolution (ADR) as a means of peacefully resolving disputes. Eight basic methods of ADR, and several hybrids, will be explained in detail. In addition, students will explore seven arenas where disputes often arise and how one or more methods of ADR apply. Finally, students will discuss the role of the paralegal in ADR and look at a case study of how ADR is practiced in one urban jurisdiction.

The course will present ADR against the backdrop of traditional litigation, which offers a more formal and generally more costly method of resolving disputes. Nevertheless, the course avoids an evangelistic endorsement of ADR, and instead asks students to evaluate disputes and disputants to select the most appropriate method for resolving a matter. Throughout, civil justice is viewed as a system that enables disputants to resolve their dispute using less direct, more socially acceptable alternatives than self-help, whether the alternative chosen is trial or ADR.

The course follows the outline of chapters as contained in the Table of Contents to the text. In drafting learning objectives, described below, the authors stressed the information they felt was most important. Nevertheless, instructors are encouraged to require students to read all the sections in each of the chapters in the text, and to complete the exercises provided in the text.

The learning objectives for each chapter also serve as essay test questions. The final section of the Guide contains answers to each of the learning objective/essay test questions. Following these answers are several objective questions and answers for each chapter. Instructors are encouraged to compose exams comprising of both types of questions. For this reason, several of the essay questions are of the "short-answer" type for inclusion in the mid-term exam when quick and easy grading is important. In addition, many of the essay questions can be turned into short answer versions by eliminating one of the requirements from the answer. For example, questions that ask the student to "list six elements of X and explain each" can be simplified to merely listing the elements. This Instructor's Guide is also available on disk.

GENERAL OVERVIEW

I. Chapter One – Introduction to Alternative Dispute Resolution

The purpose of this chapter is to lay the conceptual and definitional groundwork for the course. The first chapter introduces ADR historically and thematically and then explores the nature of disputes. Five traditional ways to resolve disputes are covered, including litigation and trial. Several methods of ADR are briefly discussed. The chapter concludes with a review of the benefits and drawbacks of ADR.

II. Chapter Two – Negotiation

Chapters Two through Six cover the methods of ADR. Emphasis is placed on the roles of the various players within each method, including parties, ADR neutral, and attorneys.

The purpose of Chapter Two is to establish the context for understanding how parties involved in a dispute can resolve the matter themselves without resort to a judge, jury or arbitrator. The premise of this chapter is that all methods of peaceful dispute resolution,

including litigation, involve negotiation in one form or another. This chapter focuses on negotiation as a method of resolving the issues in a lawsuit. Topics include the law supporting negotiation, negotiation styles, and ethics. The phases of a typical negotiation are covered in depth and an extensive case study is presented. Because negotiation is a core component of all dispute resolution, students are encouraged to spend ample time on this chapter to master the concepts and to role-play negotiations. The point is not necessarily to build skills as a negotiator but to experience firsthand the emotions and tension that usually accompanies the task of trying to get something one wants from an opponent.

III. Chapter Three – Mediation

Mediation is covered in two chapters. Chapter Three introduces the topic, and begins with a comparison between negotiation and mediation. The origins of mediation are explored, and a typical mediation session is reviewed, followed by a case study. The roles of mediator, and also attorney/advocate are explored in depth. Because mediation as a profession is growing rapidly, mediator qualifications, training and standards of conduct are covered extensively, with a look at the Model Standards of Conduct for Mediators.

IV. Chapter Four – Mediation Law and Policy

This chapter has been included due to the extensive legislation, both state and federal, supporting the use of mediation. The premise of this chapter is that mediators and advocates need to know the applicable law in order to fully and adequately employ mediation to resolve a dispute. The chapter covers mediation legislation topically, and concludes with some skill development in locating legislation on mediation.

V. Chapter Five – Arbitration

The chapter on arbitration compares this method of ADR to mediation and also to litigation. Arbitration law and policy are covered, including the all-important Federal Arbitration Act. A typical arbitration is reviewed, and the roles of arbitrator, attorney/advocate, and paralegal are explored. The chapter concludes with a discussion of ethics in arbitration with help from the AAA Code of Ethics for Arbitrators in Commercial Disputes.

VI. Chapter Six – Strategies for Settlement

Chapter Six covers four quasi-trial methods used to evaluate possible settlements, plus Early Neutral Evaluation, a pretrial procedure available primarily in the federal courts. Each method is described along with its advantages and disadvantages. The chapter also scans various ADR hybrids including med-arb, art-med and others, and concludes with a review of two ADR programs gaining favor in more and more jurisdictions—multi-door courthouse and settlement week.

VII. Chapter Seven – Application of ADR to Specific Disputes

Over the years, various industries and sections of the bar have embraced ADR more than others, and have been largely responsible for the advancement of ADR methods, skills, and standards. This chapter looks at five of these, including construction, labor and employment, securities, family law, and environmental law. ADR activity in the area of community-based disputes, also a major user, is also considered. Sources of ADR services are covered. Finally, ADR in the criminal justice system is examined as an arena where it is just now emerging as

an alternative to various traditional mechanisms.

VIII. Chapter Eight – The Role of the Paralegal in ADR

The course concludes with an in-depth look at the role of the paralegal in ADR. While this topic is presented throughout the other chapters, this final look provides students the opportunity to summarize and expand on what they have learned. The chapter also covers the ethical responsibilities of paralegals involved in ADR, including the unauthorized practice of law. Because ADR is practiced and regulated jurisdiction by jurisdiction, a case study of ADR within one such jurisdiction is reviewed.

CHAPTER OUTLINE, OBJECTIVES, AND ASSIGNMENTS

I. Chapter One – Introduction to Alternative Dispute Resolution

A. Learning Objectives/Essay Questions

1. Explain how a dispute arises and distinguish a dispute from a grievance, giving examples of both.
2. Identify and describe four alternatives to litigation other than ADR and give examples of each.
3. Define “mediation,” “arbitration,” “minitrial,” “summary jury trial,” and “moderated settlement conference.”
4. Explain the benefits and drawbacks to using ADR over litigation.
5. Explain what is meant by “ADR takes place within the shadow of the law.”

B. Additional Exercise and Assignment

Explore the Internet under topics such as “mediation,” “arbitration,” “ADR,” and other key words found in Chapter One of the text, and compile a list of sites and resources available. Be sure to check out the World Wide Web addresses of the American Arbitration Association and the American Bar Association found in Appendix Thirteen of the text.

II. Chapter Two – Negotiation

(When using the negotiation case study beginning on page 38 of the text, be sure to have students complete the exercises as they progress through the case. In other words, don't peek ahead.)

A. Learning Objectives/Essay Questions

1. Explain how Rules 16 and 68 of the Federal Rules of Civil Procedure, and Rule 408 of the Federal Rules of Evidence promote the voluntary settlement of disputes. (If this is used as a test question, the instructor may have to provide the text of these rules.)
2. Define distributive negotiating.
3. Define interest-based negotiating.
4. Define competitive negotiating.
5. Define cooperative negotiating.
6. Explain the benefits and drawbacks of distributive/competitive negotiation versus interest-based/cooperative negotiating.
7. Identify the six phases of a negotiation. Identify the goals of each phase.
8. Explain how the Model Code of Professional Responsibility applies to attorneys involved in negotiating a settlement for a client, when it declares, “a lawyer shall not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.”

B. Additional Exercises and Assignments

1. Role-play a negotiation between the patent owner and the large manufacturer described in the first paragraph of page 27. Assume that both parties approach the negotiation with a purely distributive mindset. Try again, but this time assume that the parties approach the negotiation with a more interest-based mindset. Allot no more than ten minutes for each negotiation. You are not bound by the outcome

described in the text. Analyze and discuss the differences between the two negotiations, including how close each negotiation got to a resolution, the goals that you and your opponent were trying to attain, and whether those goals were compatible or incompatible.

2. Role-play a negotiation between the building contractor and school district described on page 30. Assume that one party employs competitive tactics, while the other employs cooperative tactics. Try again, but this time assume that both parties employ primarily cooperative techniques. Allot no more than ten minutes for each negotiation. You are not bound by the outcome described in the text. Analyze and discuss the differences between the two negotiations, including how close each negotiation got to a resolution, the goals that you and your opponent were trying to attain, and whether those goals were compatible or incompatible.
3. Answer the questions posed in paragraphs 1–7 on pages 45–47.

III. Chapter Three – Mediation

A. Learning Objectives/Essay Questions

1. Describe at least three ways in which mediation differs from negotiation.
2. Identify the three primary means by which mediation is initiated.
3. Identify the four phases of a typical mediation. Identify the goals of each phase.
4. Identify the three critical matters that every mediator should stress to participants at the beginning of a mediation, and why each is critical.
5. Identify at least five attributes of a successful mediator and explain why each is important.
6. Identify and describe at least four functions of an attorney/advocate prior to a mediation.
7. Describe the role of the attorney/advocate in each phase of a mediation session.
8. Without referring to the 1995 ABA/SPIDR Model Standards of Conduct for Mediators, state the ethical response to various situational dilemmas that encompass the nine canons contained in the Model Standards. (Instructors can use questions/dilemmas contained in the chart beginning on page 80 of the text, or develop new ones.)
9. Identify the most influential factor contributing to success in mediation.

B. Additional Exercises and Assignments

1. On the assumption that the case will be mediated rather than negotiated, outline a position paper for one of the following cases: Aztex/Phelps (page 38); patent owner/large manufacturer (page 27); contractor/school district (page 30). (*See* Appendix 6 for a list of topics that could be covered.)
2. Assume that you are the mediator for the case study that begins on page 63 of the text. Draft an opening statement.
3. With four others, role-play a face-to-face mediation session between Tri-State and Universal (see case study beginning on page 63), where two play the roles of the attorneys, two play the roles of Phillips and Simmons, and one plays the role of the mediator.

4. Attend a mediation and compare what you saw and heard to the material in this chapter about a typical mediation; and the roles of the parties, mediator, and attorney/advocates. In relating your experience to the class, please remember that you are bound to the same standards of confidentiality as the other participants in the mediation.

IV. Chapter Four – Mediation Law and Policy

A. Learning Objectives/Essay Questions

1. Define “negotiated rulemaking,” and explain how it works.
2. Explain the purpose of the federal Administrative Dispute Resolution Act.
3. Explain the purpose of the federal Dispute Resolution Act.
4. Define the meaning of “District Court Expense and Delay Reduction Plan” and state two required components of each district court plan.
5. Define “court-annexed ADR.”
6. Describe the level of confidentiality typically given to mediation sessions and agreements by state law [either typical state or student’s state of residence].
7. Describe the effect of mediation on the statute of limitation.

B. Additional Exercise and Assignment

Obtain and review the expense and delay reduction plan for the federal district court that serves your local area, and summarize its provisions for the use of ADR.

V. Chapter Five – Arbitration

A. Learning Objectives/Essay Questions

1. Describe at least five ways in which arbitration differs from mediation.
2. Identify the type of dispute where arbitration is the most prevalent form of ADR.
3. Identify by name the federal act that renders arbitration clauses in contracts involving interstate commerce enforceable.
4. Identify the six phases of a typical arbitration, and describe the goal(s) of each phase.
5. Identify the three ways in which arbitration can be initiated.
6. Define “demand.”
7. Define “submission.”
8. Identify at least three national organizations that provide arbitration administration services.
9. Identify two ways in which arbitration differs from litigation in terms of preparing for the proceedings/trial.
10. Identify four ways in which arbitration differs from litigation in terms of admissible evidence.
11. Define “award.”
12. Identify at least four ways in which an arbitrator’s power differs from that of a civil trial judge.
13. Describe the role of the attorney in arbitration.
14. Describe the role of the paralegal in support of arbitration.

B. Additional Exercises and Assignments

1. Obtain a demand form from the American Arbitration Association or some other arbitration provider; complete such form using the facts from the mediation case study on page 63–66 of the text, and assuming that the Tri-State/Universal contract contained an arbitration clause similar to the one found on page 121 of the text.
2. Visit a major agency in your local area such as the AAA that provides arbitration services in order to become familiar with the staff, facilities, and services provided. A list of national agencies is contained in Appendix 13, some of which have regional and local offices.

VI. Chapter Six – Strategies for Settlement

When instructing this chapter, begin by reviewing the continuum on page 10 of the text.

A. Learning Objectives/Essay Questions

1. With regard to minitrial, SJT, MSC, and private judging:
 - Define each.
 - Describe who presides over each type of proceedings and their roles.
 - Describe the role of the parties and their attorneys.
 - Discuss the types of situation where each type of proceeding would be most appropriate and why.
 - Discuss the advantages of each type of proceeding over both mediation and arbitration.
2. Define each of the following hybrid forms of ADR:
 - med-arb
 - arb-med
 - med-then-arb
 - concilio-arbitration
 - baseball arbitration.
3. Define “multi-door courthouse.”
4. Define “settlement week.”
5. Given all the forms of ADR studied so far, place each on the Resolution Continuum (on page 10) as to “Private Decision Made by the Parties,” “Advisory Decision,” “Private 3rd Party Decision,” or “Legal/Public 3rd Party Decision.”

VII. Chapter Seven – Application of ADR to Specific Disputes

This chapter is very important in that it provides students with the opportunity to examine in more detail the nature of various types of disputes and how to marry them with the strengths and weaknesses of the forms of ADR discussed in this text.

A. Learning Objectives/Essay Questions

1. State the name of the federal act under which most arbitration clauses in construction contracts are enforceable.
2. Describe at least five characteristics of a construction dispute that make litigation cumbersome and costly.
3. Describe at least four ways in which construction mediation differs from other types

- of business mediation.
4. Define “collective bargaining.”
5. Identify at least five characteristics of a typical employment dispute that bear on why ADR may be the preferable method for resolution. For each characteristic, explain why ADR is preferred over litigation.
6. In a wrongful discharge dispute, explain why ADR is likely to be unsuccessful if the issue of whether employment is “at-will” remains unresolved.
7. Explain the significance of the decision in *Gilmer v. Interstate/Johnson Lane Corp.* as it relates to the enforcement of agreements to arbitrate employment disputes.
8. Describe at least six ways in which family law mediation differs from other types of mediation.
9. Identify the four points in the criminal justice process where mediation can occur and the purpose mediation serves at each point.
10. Define “securities dispute.”
11. Identify the form of ADR used most often to resolve securities disputes, and the source of the authority to employ ADR in the securities context.
12. Identify and explain three reasons why environmental disputes are difficult to resolve. Why are mediation and arbitration effective in resolving these problems?
13. Identify at least five types of disputes that community dispute resolution programs are typically called upon to help resolve.

B. Additional Exercises and Assignments

1. Obtain copies of the AAA’s rules and procedures for construction industry disputes and compare them to the AAA’s commercial industry rules as printed in Appendix 8.
2. Make a list of companies and agencies in your area, both public and private, that provide mediation services to families in crisis. Obtain copies of any printed material provided to families that explain mediation and the law pertaining to divorce and child support, custody, and visitation.

VIII. Chapter Eight – The Role of the Paralegal in ADR

A. Learning Objectives/Essay Questions

1. Describe how a paralegal can be involved in ADR.
2. Identify the most appropriate response of a paralegal to situations that implicate canons 1, 2, 4, 5, 7, and 8 of the NFPA’s Model Code of Ethics and Professional Responsibility. (Instructors can use situations contained in the exercise box beginning on page 200 of the text, or develop new ones.)
3. Distinguish between an ADR neutral providing legal information to a party and giving legal advice, and give an example of each.
4. Indicate whether or not state civil court judges in your jurisdiction refer cases to ADR. Describe the major components of the program.
5. Describe how to obtain a mediation order in your jurisdiction for a filed lawsuit.

B. Additional Exercise and Assignment

Write a brief history of ADR in your jurisdiction, including a description of current activity and future prognosis. Interview judges, ADR professionals, court administrators, ADR agency heads, and others. Review the case study beginning on page 206 for examples of questions and issues to explore.

ESSAY QUESTION/OBJECTIVE TEST QUESTIONS & ANSWERS

I. Chapter One – Introduction to Alternative Dispute Resolution

1. *Explain how a dispute arises and distinguish a dispute from a grievance, giving examples of both.*

A *dispute* occurs when someone, who has the power to grant or deny the wishes of another, rejects that other person's request and the rejected party complains. Disputes are a normal part of human interaction. They may or may not involve legal rights. A *grievance*, on the other hand, is a dispute where someone claims that he or she is being denied a legal or contract right and complains about it, usually in writing, to some authority, such as a grievance committee, union, or a court of law. An example of a dispute is a teenager complaining to his parents that they will not buy him an expensive pair of sneakers that he wants. An example of a grievance is a formal complaint filed by a worker with her employer's grievance committee that she has been discriminated against due to gender.

2. *Identify and describe four alternatives to litigation other than ADR and give examples of each.*

Ignoring the Problem: A person who has a disagreement with another simply decides to disregard the problem and walk away. An example would be a neighbor who decides to ignore the barking dog next door rather than complain to the city's animal control division.

Self-Help: A person tries to solve a dispute through unilateral action outside the normal channels of dispute resolution. For example, a car owner tries to convince a service station to refund payment for faulty repairs rather than file a lawsuit in small claims court; a group of children decides to beat up the playground bully rather than complain to their teacher.

Informal Dispute Resolution: Various methods developed by society to resolve disputes. For example, a married couple seeks out the advice of a minister or marriage counselor when they encounter a serious disagreement in their relationship.

Internal/Administrative Dispute Resolution: Groups not affiliated with the courts who provide dispute resolution services. Examples include neighborhood dispute resolution centers and company grievance committees.

3. *Define "mediation," "arbitration," "minitrial," "summary jury trial," and "moderated settlement conference."*

Mediation is a form of negotiation that is assisted by an impartial third party called a mediator. The mediator helps the parties communicate and to find a solution to their dispute, but has no authority to impose a settlement.

Arbitration is a forum where the parties to a dispute present their case to an impartial arbitrator or panel of arbitrators who render a decision called an award. The award may be binding or nonbinding depending upon the circumstances.

Minitrial is a technique used to facilitate a negotiated settlement where the lawyers for both sides present their best evidence in a trial-like setting which is attended by executives from the companies involved. At the conclusion of the presentations, the lawyers depart, leaving

the executives to work out a settlement, if possible.

Summary Jury Trial is another technique used to facilitate settlement where the lawyers for the parties present a summary of the proofs and arguments to a mock jury that renders a nonbinding advisory verdict. The technique is used to evaluate what a real jury might decide about the facts and evidence of a case.

Moderated Settlement Conference is an abbreviated trial where attorneys for the parties present their respective cases in summary form to a panel of three lawyers who then render an advisory verdict that enables the parties to better understand the legal strengths and weaknesses of their case.

4. *Explain the benefits and drawbacks to using ADR over litigation.*

As compared with litigation, ADR is generally quicker, simpler and less expensive for litigants. ADR, which is especially suited to straightforward cases, tends to free up courts to handle the tougher matters. ADR is suited to defending the rights of the disadvantaged who do not have the resources to litigate. In addition, ADR can fashion remedies that a court of law cannot impose, such as an apology from the offending party. Finally, ADR avoids the win/lose of litigation and allows everyone to get something. Thus, people are more likely to be satisfied with the outcome.

On the other hand, ADR, unlike lawsuits, does not contribute to the development of standards of public justice and fair play, called precedence. In addition, ADR is often inappropriate for cases where severe damages should be imposed in order to deter negligent or illegal behavior in the future.

5. *Explain what is meant by “ADR takes place within the shadow of the law.”*

Most ADR takes place in the context of a lawsuit or a threatened lawsuit. Often, the court with jurisdiction over a lawsuit will order the parties to attempt a settlement using some form of ADR. Even disputes that do not involve a lawsuit have legal underpinnings in that the parties may be trying to enforce rights guaranteed by law. In addition, settlements reached through ADR are usually enforceable as a contract in a court of law. Finally, ADR is often governed and regulated by laws that require its use, set qualification and training standards for ADR practitioners, establish and fund ADR programs, require confidentiality of ADR proceedings and enforce settlement agreements.

Objective Test Questions: Chapter One – Introduction to Alternative Dispute Resolution

1. *Which of the following reasons explains the increasing cost and incidences of lawsuits in the United States? (Answer is G.)*
- A. The growth of the adult population due to the maturing of the post-war baby boom has increased the number of potential litigants.
 - B. Increasing economic competition means that companies are more likely to use lawsuits to protect themselves from unfair competition.
 - C. Inflation, especially in the 1970s and 1980s increased the cost of litigation.
 - D. New laws passed in the last three decades have significantly increased the rights of citizens and, therefore, the types of actions that they can defend in a court of law.

- E. C and D, above
 - F. B, C, and D, above
 - G. A, B, C, and D, above.
2. *Generally speaking, what percentage of lawsuits are settled before trial? (Answer is C.)*
- A. At least one out of three
 - B. At least one out of five
 - C. Less than one in ten
 - D. Less than one in twenty.
3. *When a court of law renders a verdict based on how similar cases have been decided in the past, it is relying on: (Answer is C.)*
- A. Tradition
 - B. Dictum
 - C. Precedence
 - D. Conscience of the Court.
4. *Which of the following types of ADR result in an ultimate decision by the parties to the dispute rather than a third party? (Answer is F.)*
- A. Mediation
 - B. Summary Jury Trial
 - C. Mini-Trial
 - D. Moderated Settlement Conference
 - E. A and C, above
 - F. A, B, C and D, above
 - G. B and D, above.

II. Chapter Two – Negotiation

1. *Explain how Rules 16 and 68 of the Federal Rules of Civil Procedure, and Rule 408 of the Federal Rules of Evidence promote the voluntary settlement of disputes. (If this is used as a test question, the instructor may have to provide the text of these rules.)*

FRCP Rule 16 encourages and permits federal courts to order parties to a lawsuit to participate in court-sponsored, pretrial conferences in order to facilitate settlement of the case, including the use of extra judicial procedures. Rule 16 also provides that parties may consider the advisability of referring matters to a magistrate or master.

FRCP Rule 68 promotes compromise and settlement in that it allows the defendant to make settlement offers up to 10 days before the commencement of trial. If a settlement offer is turned down by the plaintiff and the plaintiff prevails at trial but is awarded less than the defendant's pretrial offer, the plaintiff must pay the defendant's cost incurred from the time of offer.

FRE 408 promotes compromise and settlement by disallowing as evidence at trial any offers of settlement made by the defendant, including the nature or amount of the offer and any statements or behavior of the parties surrounding the offer. The concern is that offers, if

admissible, could be viewed as an admission of liability, and thus could discourage offers.

2. *Define distributive negotiating.*

Distributive negotiating assumes that the parties to a dispute have a fixed amount of resources that they must divide between them. Therefore, the more one side gets, the less will be left for the other. Each party comes to the negotiating table with a predetermined position or result in mind. Negotiating focuses on what each party is willing to give or take in order to settle. The goal is to gain the most concessions from the other party.

3. *Define interest-based negotiating.*

Interest-based negotiating is collaborative and assumes that underneath the issues on the table are other interests that need to be identified and satisfied. It also assumes that the parties may have some interests in common that they can solve together.

4. *Define competitive negotiating.*

Competitive negotiating is viewed as a battle to be won. The goal of the competitive negotiator is to make the greatest possible gains for his or her side, to the detriment of the other. The interests of the parties are seen as antagonistic. The competitive negotiator uses intimidation to raise the level of tension in order to gain concessions, but concedes little. The competitive negotiator tends to see all disputes as distributive in nature. *(Add points for any other attributes from the chart on page 28.)*

5. *Define cooperative negotiating.*

Cooperative negotiating attempts to identify and create several alternative solutions to a dispute so as to leave all the parties at least somewhat satisfied with the outcome. The cooperative negotiator makes reasonable demands and responds positively to well-reasoned arguments from the other side. The cooperative negotiator tends to be an interest-based bargainer. *(Add points for any other attributes from the chart on page 28.)*

6. *Explain the benefits and drawbacks of distributive/competitive negotiation versus interest-based/cooperative negotiating.*

In disputes where issues are clear-cut, the stakes are well defined, where one party is significantly more powerful than the other, and/or the parties have no ongoing relationship, a competitive approach can quickly bring a dispute to its inevitable conclusion. Distributive/competitive negotiation often results in large monetary awards for clients, especially in cases where there is a finite amount of money to be divided up. In addition, a competitive negotiator may be better prepared to deal with the competitive tactics used by the other side and is less likely to be rattled or misled by such tactics. On the other hand, the competitive negotiator relies on tension, fear, and threat that are largely uncontrollable. A competitive negotiator is less likely to thoroughly analyze the merits of the dispute and identify all possible solutions. Therefore, he or she risks obtaining an outcome that is less than what could have been attained with more cooperative tactics. In addition, a competitive style impedes the flow of important information between the parties, which can result in a loss for one or both parties. It also tends to destroy any hope of an amicable ongoing relationship between the parties.

Cooperative negotiating tends to achieve settlements that are satisfying to all the parties. This is especially helpful in disputes that involve several issues, a variety of possible solutions, and where the parties will have an ongoing relationship that they wish to preserve. On the other hand, a cooperative negotiator may be less likely to deal effectively with competitive tactics from the other side and, therefore, give up too much. The cooperative negotiator also risks giving away too much information in the spirit of cooperation, thus inadvertently escalating the dispute and weakening the client's position. Cooperative negotiation requires more skill than competitive negotiating, and also takes more time and money in that the negotiator will thoroughly analyze the case and identify all possible options.

7. *Identify the six phases of a negotiation, and identify the goals of each phase.*
 - A. **Preparation Phase:** research and understand the case, identify goals and develop a strategy and plan for the negotiation.
 - B. **Preliminary Phase:** establish the tone of the negotiation and a working relationship among the attorneys for the parties, and gain a better understanding of the facts and legal issues involved.
 - C. **Information Phase:** Understand the opponent's position, and underlying needs and desires. Gain as much information from the other side as possible while giving up as little as possible.
 - D. **Competitive/Distributive Phase:** Gain as many possible concessions from the other side as possible and influence their perceptions of your side.
 - E. **Closing Phase:** Reach a settlement by closing any gaps that remain.
 - F. **Cooperative/Integrative Phase:** Make any remaining tradeoffs on ancillary issues.

8. *Explain how the Model Code of Professional Responsibility applies to attorneys involved in negotiating a settlement for a client, when it declares, "a lawyer shall not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation."*

Good negotiators are masters at misleading their opponents about their true positions, especially concerning their settlement range. They will insist that the offer on the table is the final one or that their client has not authorized them to go higher (or lower), when in fact, this is not the case. Negotiators will often overstate their client's pain and suffering, feign anger, offer false flattery, withhold facts and information, and intentionally intimidate or harass the opponent. In essence, effective negotiating is the ability to mislead and at the same time not to be misled. The legal profession condones this behavior by claiming that whether a particular statement should be regarded as one of fact depends upon the circumstances, and settlement negotiations are one of those circumstances. Commentators tend to view negotiating as more art than fiction and therefore the rules are made up as one goes along. Because settlement is viewed as more desirable than further litigation, it is a case of the end justifying the means.

Objective Test Questions: Chapter Two – Negotiation

1. What type of negotiating do the following statements characterize?
 - "The negotiator is likely to thoroughly analyze a case and determine possible outcomes."
(*Cooperative/interest based negotiating*)

- “Primary goal is to win as much as possible.” (*Competitive/distributive negotiating*)
 - “Defines the problem as being the other party’s actions and attitudes.” (*Competitive/distributive negotiating*)
 - “Most effective in disputes that involve several issues and a variety of outcomes.” (*Cooperative/interest-based negotiating*)
 - “Most effective in disputes that involve a finite sum of money.” (*Competitive/distributive negotiating*)
 - “Collaborative.” (*Cooperative/interest-based negotiating*)
 - “Adversarial.” (*Competitive/distributive negotiating*)
 - “Problem-solving approach.” (*Cooperative/interest-based negotiating*)
 - “Most effective in disputes where the parties have an ongoing relationship.” (*Cooperative/interest-based negotiating*)
2. *In what way does the law encourage parties to a lawsuit to negotiate a settlement prior to trial? Choose the best answer. (Answer is C.)*
- A. Rules of evidence permit a defendant to inform the jury that the plaintiff rejected the defendant’s offer of settlement.
 - B. Rules of evidence permit a plaintiff to inform the jury that the defendant offered to settle the case.
 - C. Judges and juries are allowed to award interest to the plaintiff from the date of the plaintiff’s loss.
 - D. Rules of civil procedure encourage judges to suggest that the parties try to settle their dispute rather than go to trial.
3. *Why are lawsuits difficult to settle early in the dispute rather than “on the courthouse steps?” Choose the answer that least explains why. (Answer is C.)*
- A. Early settlement sessions require careful planning and litigators often don’t prepare adequately.
 - B. It is hard to prepare for trial and also prepare for settlement at the same time.
 - C. Clients usually want to settle early, but attorneys do not.
 - D. Lawsuits tend to escalate a dispute and make people angry.

III. Chapter Three – Mediation

1. *Describe at least three ways in which mediation differs from negotiation.*
- A. First, the actual parties to a legal dispute almost always participate actively in the mediation session. By comparison, negotiation usually takes place among the representatives of the parties rather than the litigants themselves.
 - B. Second, mediation is presided over by a person who is neutral, has no prior

- involvement in the dispute, and who generally has no authority to decide the case. Negotiation, on the other hand, almost always involves only the parties and/or their advocates who are not impartial and who, for the most part, have been involved in the case from the beginning.
- C. Third, mediation is generally an extra procedure inserted into the process of litigation, whether voluntary or ordered by a court. By comparison, negotiation is an integral part of litigation.
- D. Fourth, mediation is usually a face-to-face structured process that takes place in the space of one day or less. If unsuccessful, it may be repeated, but generally not. Negotiation, on the other hand, is informal and takes places in many episodes and in various ways over the course of a lawsuit.
- E. Finally, mediation is a form of cooperative negotiation designed to neutralize competitiveness between the parties, while negotiation is usually competitive and attempts to take advantage of the other party's weaknesses.
2. *Identify the three primary means by which mediation is initiated.*
- A. The parties agree to mediate at the time that the dispute arises.
- B. The parties have agreed in writing to mediate any disputes that may arise between them in the future, generally concerning a contract.
- C. A court orders the parties to mediate.
3. *Identify the three phases of a typical mediation and the purposes of each phase.*
- A. **Opening session:** introduce the participants, review the process, establish the rules to be followed, permit the parties to tell their version of the dispute, exchange information, allow the parties to express how they feel, and quickly identify areas of agreement and disagreement.
- B. **Private Caucus:** provides the parties the opportunity to share sensitive information with the mediator, vent feelings, reveal hidden interests, discuss settlement options and trade offers back and forth with the other side in a nonconfrontational manner.
- C. **Closure:** point at which the mediator determines if the parties have reached a settlement that satisfies each of them and, if so, to hopefully commit the settlement to writing. If there is no closure, the mediator will declare an impasse.
4. *Identify the three critical matters that every mediator should stress to participants at the beginning of a mediation, and why each is critical.*
- A. **The mediator will not impose a settlement** on the parties or make up their minds for them. Mediation is a process whereby the parties themselves reach agreement rather than ask a court or other outside party to impose a solution.
- B. **The process will be confidential** in that the mediator will not reveal to the parties what the other side has told the mediator during private caucus. Furthermore, the outcome of the mediation will be confidential whether or not a settlement is reached. Finally, the mediator will not testify in court for either side about anything said or done related to the mediation. Without such confidentiality, it would be difficult if not impossible to get the parties to participate meaningfully in the process.
- C. **Decision-makers for the parties must attend** the mediation. Because mediation is a process whereby the parties themselves work out a settlement, only those with the authority to settle can participate meaningfully in mediation.

5. *Identify at least five attributes of a successful mediator and explain why each is important.*
- A. **Neutral:** Enables the mediator to gain the confidence of the parties and, therefore, to facilitate the process.
 - B. **Advocate for the process:** By the mediator believing in and advocating the process, especially when the parties seem to have reached an impasse, the mediation is more likely to be successful.
 - C. **Empathic:** Provides the atmosphere wherein the parties will tell their stories to the mediator and share their feelings, needs, and interests, which often reveals what they really want and leads to a settlement that is more apt to satisfy the parties.
 - D. **Persuasive:** Through persuasion, the mediator exacts a series of small concessions from each of the parties that leads ultimately to a settlement that embodies the essential needs of the parties.
 - E. **Keeps the mediation on track:** Because mediation is usually an intense experience for the parties, the mediator must keep the process moving forward and encourage the parties to keep looking for solutions.
 - F. **Varies the approach:** Because disputes and parties differ, the mediator must use proper techniques to focus on what is important in each matter, e.g., settlement amount and payoff in a personal injury suit involving an insurance company versus a custody matter where the parties must continue to relate to one another in the future.
 - G. **Searches for the parties' agreement:** Rather than imposing a settlement, the mediator will keep pressing the parties to devise their own settlement and/or consider possibilities suggested by the mediator.
 - H. **Declare an impasse:** The mediator must exercise the insight to know when the parties are truly unable to agree, or where a settlement is clearly unfair/illegal or represents an acquiescence by one of the parties.
6. *Identify and describe at least four functions of an attorney/advocate prior to the commencement of a mediation.*
- A. Gather and analyze the facts of a case and the law involved.
 - B. Determine if negotiation or mediation is appropriate prior to filing suit.
 - C. Determine if negotiation or mediation is appropriate early on after filing suit.
 - D. Select a competent mediator.
 - E. Provide the mediator with information about the case.
 - F. Prepare the client for mediation.
7. *Briefly describe the role of the attorney/advocate in each phase of a mediation session.*
- A. **Prepare and give a persuasive opening statement** or assist the client to do so, that will strike a balance between an interest in settlement and a willingness to litigate.
 - B. **Counsel the client in private caucus** by listening to the mediator, analyzing information communicated by the other side through the mediator and formulating a response.
 - C. **Meet privately with the mediator if necessary** to devise a strategy to help the client more realistically assess the strengths and weaknesses of his or her case.
 - D. **Assist the client to settle** including giving an opinion about the adequacy of the proposal and whether it meets the client's expressed needs.

8. *Without referring to the 1995 ABA/SPIDR Model Standards of Conduct for Mediators, state the ethical response to various situational dilemmas that encompass the nine canons contained in the Model Standards. [Instructors can use questions/dilemmas contained in the chart beginning on page 80 of the text, or develop new ones.]*

Please refer to the chart beginning on page 80. For the exam, select several questions/dilemmas. Exam answers appear in the “Ethical Response” column.

9. *Identify the most influential factor contributing to success in mediation.*

Mediation is more likely to succeed where the parties themselves have developed the rules rather than having them imposed or adopted by an outside source.

Objective Test Questions: Chapter Three – Mediation

1. Please indicate whether each of the following statements is true or false. A statement should be marked True if it is more true than false, and vice versa.

A. The defining part or phase of mediation is the private caucus.	False
B. Mediators are not neutral about the process of mediation.	True
C. In most states, mediators are required to be licensed attorneys.	False
D. Mediation occurs after a lawsuit has been filed.	False
E. Mediation embodies the concept of cooperative negotiating.	True
F. As a way of settling a legal dispute, mediation is a relatively recent phenomenon.	False
G. The length of time that mediation lasts is the most influential factor in whether or not settlement is reached.	False
H. Highly complex cases involving many issues and several parties typically are not very appropriate for mediation.	False
I. Mediation usually occurs after the parties have completed most of the discovery in a lawsuit.	False
J. Most states require that a mediator be licensed or certified as a third-party neutral.	False
K. The opening session of a mediation is usually recorded by a court reporter.	False
L. A mediator is under an ethical duty to fully disclose and explain the basis of his or her compensation, fees and charges as a mediator to the parties.	True

2. *What are the three possible outcomes of a mediation?*

A negotiated settlement, an impasse, or an agreement to continue the mediation at a later time.

3. *Mediation attempts to mitigate some of the problems encountered when the parties or their advocates attempt to negotiate a settlement without the help of a third party. Name at least three problems with negotiation that mediation can mitigate.*

- A. No deadlines or sense of urgency in negotiation
- B. Interrupted and distorted communication from advocate to client and back again
- C. No opportunity prior to taking a deposition to hear what the other party is thinking
- D. Personality conflicts between the negotiators are exacerbated by negotiation
- E. Easily influenced by fee arrangements and other self interest of the advocates

4. *Mediation is based on what critical principle?*
Self-determination of the parties.

IV. Chapter Four – Mediation Law and Policy

1. *Define “negotiated rulemaking,” and explain how it works.*

Negotiated rulemaking refers to the process of using a committee of interested parties and those affected by a new law to negotiate the rules and regulations designed to implement the new law. When a rule is proposed, the head of the agency that will enforce the law will publish its intention to establish a committee for rulemaking. Interested people can apply to be on the committee. A facilitator will be selected who will impartially assist the members in conducting negotiations and discussions in order to draft a rule that is both effective and will have the broadest base of support possible.

2. *Explain the purpose of the federal Administrative Dispute Resolution Act.*

Passed in 1990, the ADRA is designed to promote decisions resolving disputes between agencies of government and their private party clients that are faster, less expensive, and less contentious and which can lead to more creative, efficient, and sensible outcomes.

3. *Explain the purpose of the federal Dispute Resolution Act.*

This Act was passed by Congress to help the states provide community-based dispute resolution mechanisms to promote the expeditious settlement of minor disputes. The Act recognizes that while individual disputes may be small, collectively they add up to enormous social and economic consequences.

4. *What is the “District Court Expense and Delay Reduction Plan” and explain a required component of each district court plan.*

These are plans required by the Civil Justice Reform Act of 1990 whereby each federal district court is required to devise a plan to curtail the costs and shorten the time involved in most litigation. Access to ADR is a required part of every plan. Also required is a neutral evaluation program wherein the legal and factual basis of each case is presented to a neutral court representative at a nonbinding conference conducted early in the litigation. The neutral is selected by the court, and the conference must be attended by parties or party representatives with authority to make binding decisions.

5. *Define “court-annexed ADR” and describe its purpose.*

Court-annexed ADR refers to state statutes that require state courts to promote the use of ADR in order to reduce the cost of resolving disputes and to make justice more accessible.

6. *Describe the level of confidentiality typically given to mediation sessions and agreements by state law [either typical state or student’s state of residence], and the purpose of confidentiality.*

State laws typically require that the mediator be neutral and have had nothing to do with the case either before or at the conclusion of mediation. A mediator cannot be forced to testify in court about anything that has transpired in the case or the mediation. Even when a mediator chooses to testify, a party can prevent a mediator from giving testimony. In addition, offers to settle a claim (or refusal to accept an offer) during mediation are not admissible by either party as evidence of anything. The purpose of confidentiality statutes is

to promote the free and unencumbered use of negotiation and ADR to settle disputes prior to a trial on the merits.

7. *What is the statute of limitations, what is its purpose, and describe the effect of mediation on the statute of limitations.*

The statute of limitations is the period of time between the event that gives rise to a legal claim and the date when a court or administrative agency can no longer hear the claim and provide a remedy. The purpose of the statute of limitations is to promote timely resolution of disputes while evidence is still available, and witnesses can still remember what took place. Typically, mediation suspends the running of the statute. This means that in those cases where no lawsuit has been filed, the period devoted to mediation will not count against the statutory period. Although these laws are not uniform from state to state, typically the statutory period is suspended when one party requests mediation or conciliation and the other party agrees.

Objective Test Questions: Chapter Four – Mediation Law and Policy

1. *State two ways in which statutes dealing with mediation attempt to regulate its use and practice.*

- A. Encourage or mandate its use by courts or agencies
- B. Establish standards of professionalism and training for mediators
- C. Define the scope of confidentiality in mediation
- D. Provide for the enforcement of mediated agreements
- E. Address issues of quality and accessibility to mediation services.

2. What are the three areas of law with which most state mediation statutes deal?

- A. Labor and employment matters
- B. Civil rights
- C. Domestic relations.

3. Name at least five types of “common” disputes where mediation is promoted by statute.

- Landlord-tenant disputes
- Small claims
- Automobile warranty claims
- Divorce
- Workers’ compensation
- Land use and environmental concerns
- Funeral and cemetery contracts
- Planning and zoning
- Eminent domain
- Franchise agreements
- Water rights
- Home construction and remodeling
- Debtor/creditor
- Doctor/patient
- Homeowner and condo associations.

4. *What is the single most important factor that will dramatically increase the use of ADR, including mediation, in a jurisdiction?*

Court-annexed ADR.

5. What are the two ways that a party can enforce a mediated settlement agreement in most jurisdictions.

- A. Filing a lawsuit to enforce the agreement as a contract
- B. Filing a contempt of court action where the court has entered the agreement as its judgment in a case.

6. Under what conditions can a mediator be held liable for acts or omissions in his or her role as a mediator?

- A. Wanton or willful misconduct
- B. Conduct that is malicious or in bad faith
- C. Conduct that substantially infringes on the rights, safety or property of others.

V. Chapter Five – Arbitration

1. *Describe at least five ways in which arbitration differs from mediation.*

- A. Arbitration involves a decision by a neutral third party, whereas in mediation the parties decide for themselves.
- B. Arbitration decisions are based on evidence, proof, and legal arguments, whereas mediation relies more on subjective criteria in order to reach a solution.
- C. In arbitration the focus is on the arbitrator whom the parties try to persuade. In mediation the focus is on the parties.
- D. An arbitrator is often selected because he or she is experienced in the industry of the disputants or subject matter of the dispute. By contrast, a mediator is usually chosen for his or her ability to communicate and bring people together.
- E. Arbitrators are generally exempt from civil liability for failure to perform their duties with care or skill, whereas mediators can be held liable in negligence for their conduct.

2. *Identify the type of dispute where arbitration is the most prevalent form of ADR.*

Resolution of labor disputes under the terms of a collective bargaining agreement.

3. *Identify by name the federal act that renders arbitration clauses in contracts involving interstate commerce enforceable.*

Federal Arbitration Act.

4. *Identify the six phases of a typical arbitration, and describe the goal(s) of each phase.*

Initiation – one or both parties to a dispute either make a written demand on the other to arbitrate, or they invoke a contract provision requiring arbitration in the event of a dispute arising under the contract. The parties then either agree to arbitrate or the demanding party

seeks a court order to arbitrate. Where a written demand is made, the other party will answer the demand in writing pursuant to the rules under which the arbitration is to proceed.

Selecting an arbitration sponsor – once the parties agree to arbitrate or a demand has been received and answered, the parties will select an agency to sponsor the arbitration. The agency typically will provide the rules and procedures to follow and will provide administrative assistance to facilitate the arbitration similar to the services provided by a court clerk.

Pre-hearing meetings – these are preliminary hearings before the arbitrator and administrative conferences, including some with the sponsoring agency, to clarify rules and other substantive issues and to iron out procedural issues such as the production of documents, use of expert witnesses, etc.

Preparation – the period of assembling the evidence and conducting discovery, preparing witnesses and in general getting ready to put on the facts and arguments in support of one's case.

Hearing – the evidentiary hearing before the arbitrator at a location of the party's choosing where evidence is presented and oral arguments made. There generally is no written record made of the proceeding nor are oaths typically administered to witnesses. The hearing is usually private and confidential.

Decision making and award – the arbitrator may make the decision at the end of the hearing but generally within 30 days, based on the evidence and arguments and using standards selected by the parties, such as "fairness" or "applicable law." If a panel is used, the decision will be by majority of the arbitrators or an average of their individual awards. The decision of the arbitrator is called an award and is usually written.

5. *Identify the three ways in which arbitration can be initiated.*

- A. Demanding arbitration under a previous agreement to arbitrate
- B. Agreeing to arbitrate at the time a dispute arises
- C. Complying with court-ordered arbitration.

6. *Define "demand."*

Written notice served by one party to a dispute on the other party invoking a contract provision requiring arbitration in the event of a dispute. The demand will identify the contract, and state the nature of the dispute, the relief sought, and the rules that will govern the arbitration process.

7. *Define "submission."*

Written agreement between two disputing parties to arbitrate a current dispute when no previous agreement between them exists to arbitrate disputes arising between them. The submission will state the nature of the dispute, the relief sought, and the rules that will govern the arbitration process, including whether the arbitration will be binding or nonbinding.

8. *Identify at least three national organizations that provide arbitration administration services.*

- A. American Arbitration Association
 - B. Judicial Arbitration & Mediation Service (JAMS/Endispute)
 - C. Center for Public Resources (CPR)
 - D. National Association of Securities Dealers (NASD).
9. *Identify two ways in which arbitration differs from litigation in terms of preparing for the proceedings/trial.*
- A. Preparation for an arbitration hearing generally does not require researching legal precedence. An arbitrator is free to fashion a decision based on what is fair, rather than on how similar cases have been decided in the past.
 - B. Preparation for an arbitration hearing, as compared to preparation for trial, usually is not as extensive for four reasons:
 - (1.) Because the arbitrator is experienced in the subject matter of the dispute there is no need to assemble evidence and aids to educate the tribunal.
 - (2.) There is no need to prepare extensive legal arguments and assemble legal proof because the award is based on factors other than merely precedence.
 - (3.) Only evidence that is absolutely necessary is discoverable in arbitration; therefore, discovery is not the fishing expedition normally associated with litigation.
 - (4.) Parties are encouraged to stipulate to as many facts as possible in order to center the hearing on the facts and issues in dispute.
10. *Identify four ways in which arbitration differs from litigation in terms of admissible evidence.*
- A. Documents are treated as self-authenticating – no testimony is required to authenticate them.
 - B. Testimony will be introduced through depositions and affidavits rather than live testimony, similar to pretrial hearings in litigation.
 - C. Testifying witnesses will be introduced via written biographical information rather than via questions to establish identity and background.
 - D. Charts and graphs can be used to summarize voluminous data rather than submitting the raw data themselves.
 - E. Arbitrator is free to hear any evidence deemed necessary to understand the dispute regardless of its admissibility in a trial; e.g., hearsay is admissible in an arbitration hearing.
 - F. Written briefs are often used in place of oral arguments.
 - G. Straightforward presentation of a case is the norm rather than using exaggeration, concealment, and raising legal technicalities to delay and cover up weaknesses in a case, which is typical of trial.
11. *Define “award.”*
- Decision of the arbitrator committed to writing but generally not with a written opinion. An award may be binding or nonbinding, and in the former case is subject to only limited judicial review based on use of proper and fair procedure in selecting the arbitrator, conducting the hearing, admitting evidence and rendering a decision under the rules adopted by the parties.
12. *Identify at least four ways in which an arbitrator's power differs from that of a civil trial*

judge.

- An arbitrator's decision is not as "appealable" and when appealed, is subject to a less stringent standard than that applied to civil trial verdicts.
- An arbitrator can retain jurisdiction over a dispute after the award, at the request of the parties, whereas a civil trial judge loses jurisdiction once judgment is entered.
- An arbitrator, at least in some states, is restricted in the extent, if any, to which he or she can award punitive damages.
- Despite restrictions on the granting of punitive damages, an arbitrator has a much wider range of remedies available than a civil trial judge or jury in that he or she can fashion an equitable remedy to suit the situation.
- An arbitrator can accept or decline to hear a dispute, whereas a judge must hear cases assigned to his or her court and can be excused only for cause.
- An arbitrator's power comes not from the state but from the agreement of the parties.
- An arbitrator's power is supported by laws favoring settlement rather than resort to the court.
- An arbitrator's power is based in his or her expertise in the subject matter of the dispute which enables the arbitrator to shape how the case is presented. A civil judge can shape a case only through the rules of procedure.
- An arbitrator can render an award tailored to the case whereas a civil judge must always consider precedence or face being overturned on appeal.

13. *Describe the role of the attorney in arbitration.*

The attorney plays a critical role in arbitration, which usually involves parties who are business persons, and a case with complex issues and a significant amount of money and property at stake. An attorney's role begins with making sure that the client's business contracts contain well-drafted, enforceable ADR clauses. When presented with a dispute, an attorney should determine if it is subject to an ADR clause and, if so, to prepare a written demand. If not, the attorney should determine if arbitration is appropriate and, if so, propose it to the other side. If they agree, the attorney should prepare a submission. Conversely, an attorney may want to help a client resist a demand based on legal grounds, such as fraud in the inducement of the contract.

The attorney assists the client to select an arbitrator, prepares statements of the client's case in order to influence the arbitrator, and to persuade the arbitrator to admit favorable evidence and deny admission of unfavorable evidence. The attorney also prepares and transmits discovery, conducts depositions and evaluates evidence from the other side. At the conclusion of discovery, the attorney prepares hearing exhibits, briefs witnesses, drafts an opening statement, and generally prepares for the hearing. At the hearing the attorney will present the evidence, examine and cross-examine witnesses and puts on the client's case. After the award, the attorney will counsel the client regarding whether to appeal and, if so, will prepare the appeal. Conversely, the attorney may counsel the client to ask a court to enter the award as a judgment in order to give the client more power to enforce it and, if so, will facilitate the request.

14. *Describe the role of the paralegal in support of arbitration.*

A paralegal will assist in the preparation of demands, submissions, gathering and assembling documents and other discovery, coordinating transmission of documents to the other side,

evaluating and summarizing documents and items received from the other party, preparing subpoenas, keeping track of schedules, preparing hearing exhibits, and other similar tasks. The paralegal should be aware of the rules to be used in the arbitration. He or she will be responsible for coordinating administrative matters with the arbitration sponsor and attending administrative hearings on behalf of the client. The paralegal may also assist in briefing witnesses and will likely attend the hearing to provide support. A paralegal can also present some or all of the case, because an arbitration is not a “legal” proceeding. Paralegals can hold themselves out as advocates in arbitration and represent clients. They can also serve as arbitrators, especially when they have expertise in the subject matter of the dispute.

Objective Test Questions: Chapter Five – Arbitration

1. *Please indicate whether each of the following statements is true or false. A statement should be marked True if it is more true than false, and vice versa.*

A. A binding award can be reviewed by a civil court judge upon the request of any of the parties.	True
B. An arbitrator can make an award based on legal precedence.	True
C. An arbitration award can be entered as the judgment of a civil court.	True
D. Arbitration is often used to settle family disputes such as divorce and child custody.	False
E. When a dispute arises under a contract containing an arbitration clause, the parties are required to arbitrate rather than use some other forum to resolve the matter.	False
F. When a dispute arises under a contract containing an arbitration clause, the client and/or attorney will prepare a written submission.	False
G. An arbitrator has broader power than a judge or jury to fashion remedies.	True
H. Most states permit arbitrators to award punitive damages.	False
I. An arbitrator's power comes exclusively from the agreement of the parties.	False
J. An arbitrator can base an award on hearsay.	True
K. In arbitration, documents are treated as non-self-authenticating.	False
L. In arbitration, testimony can be presented in the form of affidavits even though the other side has not had the opportunity to cross-examine the affiant.	True
M. Federal law favors the enforceability of arbitration clauses in contracts involving interstate commerce.	True
N. A paralegal can represent a client in arbitration, provided an attorney is also involved.	False
O. An arbitrator can assist settlement negotiations between the parties.	False
P. Unlike a judge, it is proper for an arbitrator to discuss a case with one party without the other party being present.	False
Q. An arbitrator should delve as deeply into a case as necessary regardless of the time	True

and expense it may cause the parties.	
R. Whenever an arbitrator discovers a material conflict, he or she must withdraw from hearing the dispute.	False
S. An arbitrator can charge fees based on the ability of the parties to pay.	True
T. It's okay for an arbitrator who is a member of a panel of three arbitrators to be "predisposed" toward the party who selected him or her.	True
U. A member of an arbitration panel must withdraw if any party requests his or her withdrawal.	False
V. Arbitration is the ADR method used most often to resolve commercial and industrial disputes.	True
W. It is permissible for arbitrators to solicit appointments.	False

VI. Chapter Six – Strategies for Settlement

1. *With regard to minitrial, SJT, MSC, and private judging:*
 - A. *Define each.*
 - B. *Describe who presides over each type of proceedings and their roles.*
 - C. *Describe the role of the parties and their attorneys.*
 - D. *Discuss the types of situation where each type of proceeding would be most appropriate and why.*

(For answers to A–D, above, please refer to the chart beginning on page 13 of the text.)

- E. *Discuss the advantages of each type of proceeding over both mediation and arbitration.*

Advantages of Mini-trial: permits business executives, who are most apt to use mini-trials and who like to be in control, to use the neutral third party involved in any manner they deem appropriate. By comparison, the neutral makes the final decision in arbitration, and exerts considerable influence over the parties in mediation. In addition, minitrial is typically more objective, orderly, and businesslike when compared to mediation, which relies on free-flowing, subjective processes, and even compared to arbitration, which emphasizes persuading the arbitrator. Finally, mini-trial uses attorneys in the capacity of trial advocate, whereas mediation and arbitration tends to discount the role of the attorney.

Advantages of Summary Jury Trial: assesses a case based on its objective merits rather than on subjective factors, which are generally the focus of mediation, or on persuading an arbitrator to see it your way. SJT results in an advisory opinion that enables business executives to assess their chances at trial. By comparison, mediation generally occurs after the parties have developed an opinion about the strength of their case, whether or not that opinion is realistic, while arbitration results in an actual resolution of the dispute by a third party. SJT also has the advantage of providing more insight after mediation has failed but before a trial on the merits. Like mini-trial, SJT uses attorneys in the capacity of trial advocate, whereas mediation and arbitration tend to discount the role the attorney.

Advantages of Moderated Settlement Conference: MSC has all the advantages of SJT, plus it is even more abbreviated than mediation, arbitration or any of the trial-like forms of ADR. It also enables new litigators to obtain an evaluation of a case from more experienced attorneys, whereas the same litigator may settle for too little (or conversely fail to settle) in mediation due to an unrealistic assessment of the merits of the case. Likewise, in arbitration, the new litigator is playing for keeps and could lose the case due to inexperience.

Advantages of Private Judging: Private judging provides disputants with the opportunity of taking a case to trial on the merits. This may be preferable where one side has a really strong case, or where one of the parties refuses to mediate. It can also be preferable to arbitration where the arbitrator has considerable control over what and how the parties present their cases. Finally, private judging is preferable to arbitration when precedence is on your side. By comparison, precedence is largely immaterial in arbitration and mediation.

2. *Define each of the following hybrid forms of ADR:*

- A. **Med-Arb:** Mediator serves as arbitrator if mediation breaks down and becomes deadlocked on any or all of the issues.
- B. **Arb-Med:** Method that begins with arbitration, but before reaching a final decision, the arbitrator attempts to mediate the dispute, or at least those issues where a negotiated settlement seems most likely.
- C. **Med-then-Arb:** Mediation followed by arbitration that uses a different neutral third party as arbitrator to decide issues not resolved in mediation.
- D. **Concilio-Arbitration:** Method that involves mediation, after which the mediator issues a draft award on any matters left unresolved. The award can be rejected by any or all of the parties and, if so, litigation or arbitration ensues, with the rejecting party responsible for the other party's costs if he or she is unable to improve results as compared with the award.
- E. **Baseball Arbitration:** Variation on standard arbitration where the arbitrator receives an offer submitted by each of the parties after presentation of each party's case, and decides on which offer should constitute the award.

3. *Define "multi-door courthouse."*

Court-created dispute resolution system that encompasses a variety of ADR processes and recommends the method most appropriate to each case after evaluation of a case by a case intake specialist. Usually involves a central intake office or department at a court or dispute resolution center.

4. *Define "settlement week."*

Court-created dispute resolution system in which the civil courts in a jurisdiction will suspend normal operation for one week and make the courthouse building and personnel available to litigants who desire to have their cases considered by a neutral third party who is generally a volunteer. Often, a jurisdiction will identify those cases that have been pending the longest and will strongly urge the parties to try ADR during settlement week.

5. Given all the forms of ADR studied so far, classify each as to whether they result in which of the following: "Private Decision Made by the Parties," "Advisory Decision," "Private 3rd Party Decision," or "Legal/Public 3rd Party Decision."

(Please refer to continuum on page 10 for the answer to this question.)

Objective Test Questions: Chapter Six – Strategies for Settlement

1. For each of the situations listed below, circle the most appropriate form of ADR of the two choices offered. (Answers are in bold type.)

A. Case involves a dispute over the terms of a pre-nuptial agreement	Mediation	Arbitration
B. Party wants to avoid negotiating with the other side	Arbitration	Summary Jury Trial
C. You suspect that the other side has unrealistically high expectations about the amount of damages they will receive	Arb-then-Med	Baseball Arbitration
D. Your opponent makes a pit bull look like a pussy cat	Private Judging	Mediation
E. You want to avoid publicity	Summary Jury Trial	Minitrial
F. Legal precedence is strongly against you	Mediation	Arbitration
G. Your client wants to have an integral role in strategic decisions about how the case proceeds	Moderated Settlement Conference	Litigation
H. Highly complex business case between two large corporations	Minitrial	Private Judging
I. You aren't sure how the facts will come across in a courtroom	Arbitration	Summary Jury Trial
J. Legal remedies are limited	Private Judging	Mediation
K. You aren't sure how strongly the law supports your client's position	Moderated Settlement Conference	Minitrial
L. Negotiations are at an impasse	Med-Arb	Moderated Settlement Conference
M. Case involves highly complex and technical environmental claims	Arbitration	Adjudication
N. You're having trouble deciding how to distill a complicated case down to the essential issues and facts	Summary Jury Trial	Arbitration
O. Domestic case involving a highly contested custody claim	Mediation	Concilio-Arb
P. You want maximum control over choosing the third party who gets to decide the case	Arbitration (3-person panel)	Private Judging

Q. Case involving several parties	Mediation	Arbitration
R. Insurance company is at least partially liable to pay damages	Minitrial	Arbitration
S. Critical that the proceeding be attended by senior-level executives with the authority to settle the case	Summary Jury Trial	Minitrial

2. *What is the name of the program devised by federal courts to help motivate litigants to pursue settlement of their cases earlier rather than later in the life of their lawsuits?*

Early Neutral Evaluation (ENE).

VII. Chapter Seven – Application of ADR to Specific Disputes

1. *State the name of the federal act under which most arbitration clauses in construction contracts are enforceable.*

Federal Arbitration Act.

2. *Describe at least five characteristics of a construction dispute that make litigation cumbersome and costly.*
- A. Construction disputes usually concern many events, transactions, and episodes that span an extended period of time. It takes time and expense to assemble the facts and relate them to a jury.
 - B. They involve many different people, all of whom are potential witnesses.
 - C. They generate masses of paperwork that is subject to discovery when a dispute erupts into litigation.
 - D. They involve countless oral exchanges between parties that materially affect the project but which have not been reduced to writing.
 - E. They involve many issues that are highly technical and concern engineering principles not easily understood by lay people making up a typical jury. This increases the chances of appealable error and heightens the requirement of using expensive expert witnesses to explain matters to a jury and authenticate practices. In addition, the complexity means more pretrial hearings and evidentiary disputes, which adds to the time and cost of litigation.
 - F. They are highly time-sensitive in that any delays in construction caused by litigation can result in more disputes later, such as breaches of lease contracts.
3. *Describe at least four ways in which construction mediation differs from other types of business mediation.*
- A. Mediator is likely to be an expert in and have substantial experience in the construction industry. Most mediators are not experts in the subject matter of the dispute.
 - B. Construction mediation is document-intensive, and the mediator will likely be called upon to facilitate the amicable exchange of discovery.
 - C. Presentations in the opening joint session can often last several hours due to the complexity of the issues.
 - D. Private caucuses are apt to involve shuttling between several different parties.
 - E. The mediator is likely to be called on to render an advisory opinion on the matter.
4. *Define “collective bargaining.”*
- The negotiation process that results in a written agreement between employers and labor. These agreements usually cover several years and deal with the conditions of employment.
5. *Identify at least five characteristics of a typical employment dispute that bear on why ADR may be the preferable method for resolution. For each characteristic, explain why ADR is preferred over litigation.*
- A. Most employers want employment disputes to be kept confidential so as to avoid

public exposure. Therefore, ADR, which is generally a confidential forum, is preferred.

- B. Because the incidence of employment disputes is high but only a fraction are ever considered litigable by plaintiff's attorneys, employers want a forum to resolve these disputes in order to avoid inadvertently undermining employee morale and productivity.
 - C. Employment disputes are costly to litigate and often hinge on circumstantial evidence that is expensive to assemble and results in the loss of significant executive time. For this reason, any ADR method that minimizes discovery is preferable.
 - D. Employment lawsuits frequently involve large jury verdicts because jurors identify with employee/plaintiffs. Consequently, ADR that results in a negotiated settlement is preferable.
 - E. Employment disputes usually do not involve written agreements between the parties to arbitrate or mediate conflicts, especially in the case of smaller employers. Thus the only way for an employee to obtain a hearing is to file a lawsuit. Offering to participate in ADR short circuits this process.
 - F. Many employers have internal procedures for resolving disputes which employees are required by the courts to exhaust before bringing suit, and which preserve goodwill in the workplace.
6. *In a wrongful discharge dispute, explain why ADR is likely to be unsuccessful if the issue of whether employment is "at-will" remains unresolved.*

The ability of an employee to recover in a wrongful discharge suit often hinges on the issue of whether the employer had the right to fire the employee for any reason or no reason at all. This is a legal issue which ADR is not designed to resolve, yet if not resolved prevents ADR from going forward in a meaningful way.

7. *Explain the significance of the decision in Gilmer v. Interstate/Johnson Lane Corp. as it relates to the enforcement of agreements to arbitrate employment disputes.*

Under *Gilmer*, the United States Supreme Court ruled that arbitration was a valid forum for the resolution of a discrimination claim brought under the Age Discrimination in Employment Act (ADEA), which is a statutory claim. The concern was that agreeing to arbitration would force the employee to forgo substantive rights afforded by the statute in question. The Court said this was not the case but, rather, by agreeing to arbitrate a statutory claim the party was merely submitting to resolution in an alternative forum. The Court also said that arbitration of a statutory claim is appropriate unless the statute itself said otherwise. Because federal policy favors ADR, *Gilmer* means that agreements to arbitrate statutory claims are more likely to be enforceable.

8. *Describe at least six ways in which family law mediation differs from other types of mediation.*

- Mediation in the family law context has therapeutic dimensions and helps clients deal with their emotions in order to move toward agreement.
- Family mediation is often not attended by attorneys for the parties, and sometimes such attendance is actually prohibited by law. This raises issues of fairness, especially when there is already an imbalance of power between the spouses.
- Parties are often not well informed about their legal rights, especially if they are acting *pro se*, which is increasingly the case in family disputes, often putting the mediator in the role of explaining the law.
- Because most mediated family law settlements are entered as the judgment of a court, family law mediators must be sensitive to the trading of property rights for child custody concessions, in that judges are reluctant to accept custody terms that have been “bought.”
- Family law mediation is often highly time sensitive and urgent where the well being of children is involved and/or the parties cannot afford a trial.
- Party representatives in family law disputes are likely to keep a lower profile than normal during joint sessions due to the hostility that the other party is naturally going to feel for his or her spouse’s advocate.
- Because family law disputes are almost always highly charged with emotion, mediation is often characterized by displays of emotion and must provide an outlet for these feelings in order to reach a resolution.
- Divorcing parties are likely to be sensitive to the gender of the mediator, which often means that a male-female team will mediate divorce disputes.

9. *Identify the four points in the criminal justice process where mediation can occur and the purpose mediation serves at each point.*

- A. **Before a crime occurs.** Community-based ADR can resolve disputes before they erupt into violence. Thus ADR can actually prevent crime.
- B. After a crime has occurred, but before trial, the following can take place:
 - Mediation can facilitate bargaining between the prosecutor and counsel for the offender and will involve the offender. This means that any punishment exacted is more likely to be accepted by the offender who participated in the decision process.
 - Likewise, if victims participate, mediation can lead to a dropping of or reduction in the charges if the victim is satisfied that the offender is truly remorseful and understands the gravity of his or her actions and also agrees to repay the victim in some appropriate manner. Therefore, mediation facilitates victim recovery and can actually be a substitute for trial.
 - Mediation can also be used effectively to renegotiate probation where the offender has not complied with its terms, thus leading to greater compliance in the future because the offender has participated in the process.
- C. At **sentencing**, mediation can include the victims, who have the chance to tell the judge how they feel. Mediation can also be used by the victim and the offender to negotiate at least part of the sentence, which the judge can take under advisement before pronouncing sentence. Thus, mediation can lead to reduced sentences and help mitigate the feelings and concerns of victims.
- D. During **post-sentencing**, mediation in prisons facilitates meetings between violent offenders and their victims. In this context mediation helps victims heal from the

emotional wounds of the crime and also provides the offender the opportunity to apologize and make peace with the victim and his or her family.

10. Define "securities dispute."

A security dispute is any dispute arising between investors and brokers, between member firms in a stock exchange and their employees, and between member firms. Most of these disputes arise under the terms of a written agreement that contains an arbitration clause.

11. Identify the form of ADR used most often to resolve securities disputes, and the source of the authority to employ ADR in the securities context.

Arbitration is the ADR method used most often to resolve securities disputes. The source of authority is the New York Stock Exchange and the National Association of Securities Dealers, which favor arbitration and which require that industry agreements between brokers and their customers, between employees and member firms and between the industry organizations and its members contain an arbitration clause. Also, insofar as many securities transactions involve interstate commerce, the Federal Arbitration Act also provides authority.

12. Identify and explain three reasons why environmental disputes are difficult to resolve. Why are mediation and arbitration effective in resolving these problems?

- A. **Many and varied parties to the dispute:** The parties to an environmental dispute involve the polluter and a host of aggrieved parties including federal, state and local governments; citizen groups; insurance carriers; healthcare providers; employees and stockholders of the polluter; etc. Yet, only a few of these parties actually sit down at the bargaining table, leaving the others feeling unrepresented, which in turn can delay resolution and create problems with enforcing any agreement reached. Because ADR is more flexible than litigation and trial, it is more adaptable and therefore effective at involving diverse parties in the decision process.
- B. **Public policy issues:** Because pollution affects the health and well-being of people often over a wide area now and into the future, an act of pollution can result in dozens of divergent actions in many forums. ADR can consolidate many actions into one joint endeavor and fashion relief in ways that a court cannot.
- C. **Complexity:** In addition to the above, environmental disputes almost always involve complex scientific and technical matters beyond the understanding of the typical judge and jury. Unlike the civil courts, ADR offers the use of neutral third parties who are trained in the subject matter of the dispute.

13. Identify at least five types of disputes that community dispute resolution programs are typically called upon to help resolve.

(Refer to the list on page 193 of the text for possible answers.)

Objective Test Questions: Chapter Seven – Application of ADR to Specific Disputes

1. State five possible characteristics of any dispute that would lead the parties to choose ADR over litigation and trial to reach resolution.

- Many and diverse parties
- Masses of paperwork
- Many undocumented oral exchanges between the parties that are material to the case
- Time is of the essence
- Innocent, outside parties will be damaged if no resolution is reached
- Highly technical matters
- Confidentiality is crucial
- The parties cannot afford litigation and trial
- Significant exposure of defendant to high damage awards
- There is a contractual agreement in place to use ADR
- In order to be effective, the remedy must be creative and fashioned to fit the situation
- The dispute is purely factual and does not involve unresolved legal issues
- The dispute involves highly charged and unresolved emotions
- It is important for the defendant to participate in shaping relief in order to enhance his/her/its compliance with the terms.

2. *What is the primary difference between sexual harassment claims on the one hand and discrimination and wrongful discharge claims on the other that makes sexual harassment claims especially amenable to ADR?*

The victim wants to keep his or her job and not be penalized for bringing a claim, which unlike litigation can be raised in an ADR proceeding and factored into the remedy. With discrimination and wrongful discharge claims, the victim is often gone or at least constructively discharged.

3. *Name at least three federal statutes that give rise to employment claims.*

(Refer to the list on page 175 of the text for possible answers.)

VIII. Chapter Eight – The Role of the Paralegal in ADR

1. *Describe how a paralegal can be involved in ADR.*

Paralegals provide staff support services to attorneys who use ADR to help clients resolve disputes. They also provide staff support to professional mediators, arbitrators, and private judges. Paralegals accompany clients to administrative hearings and ADR proceedings where nonattorney advocates are allowed and in some cases they may serve as advocates in ADR proceedings before government and employer dispute resolution forums. They can also serve as mediators, arbitrators, and private judges.

2. *Identify the most appropriate response of a paralegal to situations that implicate canons 1, 2, 4, 5, 7, and 8 of the NFPA's Model Code of Ethics and Professional Responsibility.*

(Instructors may want to provide students with the text of the Model Code, although this is not a requirement. The following are responses to the situations posed in the exercise box beginning on page 200 of the text.)

Situation 1: Per Canon 1, the paralegal should gain training in ADR and how it is used and

- supported.
- Situation 2: Per Canon 2, EC-2.1, the paralegal should not engage in any *ex parte* communication designed to influence the outcome of a case. Here the paralegal should inform the attorney of the mistake and the names of the recommended mediators so that the attorney can determine an appropriate response if the court recommends them.
- Situation 3: Per Canon 4, the paralegal should not participate in any activities designed to avoid a court order to use ADR and, if asked to do so, should at least voice his or her objections. If asked to participate, the paralegal should resign.
- Situation 4: Per Canon 4, if the paralegal is already trained as a neutral, he or she should volunteer, and if not trained should consider obtaining the skills and then volunteering.
- Situation 5: Per Canon 4, the paralegal should support the effort by recommending open cases that could benefit from settlement week, and also by asking the employer to permit the paralegal to volunteer his or her services to the settlement week coordinators.
- Situation 6: Per Canon 5, the paralegal should preserve all confidential information about the client. Here, the paralegal should inform the attorney involved with the case of the remarks made to the other side so that the attorney can assess and mitigate any damage.
- Situation 7: Per Canon 8, the paralegal should inform the attorney in charge of the case about the conflict so that it can be revealed to the client and to the other side.

3. *Distinguish between an ADR neutral providing legal information to a party and giving legal advice, and give an example of each.*

An ADR neutral may recommend or provide legal information that has been published in some form or another and is available to the public. He or she may also recommend attorneys and other individuals who can legally provide advice. He or she may even be able to quote the text of laws that apply. But the neutral may not offer legal opinions or advice on how to proceed in a legal matter. For example, a neutral learns that a *pro se* party to divorce is unaware of her marital property rights under state law. In response, the neutral offers a brochure on the topic prepared by the a local association of family law attorneys, and recommends the names of three competent family law attorneys who take low income clients. The neutral may even quote and explain the provisions of the applicable statute. But the neutral may not counsel the party on what items of the party's property constitute the marital estate or how to obtain them in the negotiations to follow.

4. *Indicate whether or not state civil court judges in your jurisdiction refer cases to ADR. Describe the major components of the program.*

(Because this question is specific to the jurisdiction of the student, the instructor will have to devise an appropriate response to this question.)

5. *Describe how to obtain a mediation order in your jurisdiction for a filed lawsuit.*

(Because this question is specific to the jurisdiction of the student, the instructor will have to devise an appropriate response to this question.)

Objective Test Questions: Chapter Eight – The Role of the Paralegal in ADR

1. *What is the name of the issue wherein paralegals are not permitted to represent clients or offer legal advice?*

Unauthorized practice of law.

2. *Define the term, "Settlement Brochure."*

A document prepared by an attorney that outlines the strengths of a client's case and sets forth a realistic and supportable rationale for what the client wants, and which is shared with the other side to facilitate and influence the process of negotiation or mediation.

3. *Why is it important for a paralegal to understand the ADR technique being used in a particular case?*

In order to more effectively lend support to the client, the attorney and the process.

4. *Name at least one code of rules [not already mentioned in this exam] that provides guidance to paralegals who support ADR and the group that has promulgated the code.*

- A. *Model Standards and Guidelines for Utilization of Legal Assistants* promulgated by The National Association of Legal Assistants (NALA)
- B. *Code of Ethics and Responsibility* promulgated by The National Association of Legal Assistants (NALA)
- C. *Model Code of Ethics and Professional Responsibility*, promulgated by The National Federation of Paralegal Associations (NFPA)

5. *More and more legislators, courts, and even lawyers agree that mediators should be allowed to prepare written settlement agreements. Why?*

Because the mediator has been an integral part of the settlement process and is more apt to have a clear understanding of what the parties want.

6. *Rules governing the professional responsibility of mediators generally prohibit mediators from giving legal advice to participants for which of the following reasons? (Answer is H.)*
- A. The mediator may not be licensed to practice law.
 - B. Mediators may take business away from lawyers.
 - C. Mediators are likely to have a distorted view of the facts of a case because that view is based on hearsay and other unsubstantiated claims made by the parties.
 - D. Advocates should not represent both sides to a dispute.
 - E. Mediators are paid for their services.
 - F. All of the above.
 - G. A, B, and D, above.
 - H. A, C, and D, above.
 - I. B, C, and E, above.