Alternative Dispute Resolution In the Entertainment Industry

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Brien Wassner, Editor-in-Chief, Cardozo Journal of Conflict Resolution : On behalf of the Cardozo Journal of Conflict Resolution, we are honored to have such a distinguished panel before us today. I hope that today's events will add to the discourse on alternative dispute resolution ("ADR") in the entertainment industry. Before we begin, I would like to thank those who worked hard and have been essential in putting this event together. First, I would like to thank the American Bar Association ("ABA") Entertainment Committee and The AIMAC Center for Dispute Resolution. Second, I would like to thank Professor Lela Love, and the Kukins for all their support. Third, I would like to give a special thanks to Amoy Chambers, without whom this event would not have been possible. Thank you, Amoy. We are very lucky to have you on the journal. I would also like to thank the members of the Journal for the time and effort they put into this event. Thank you to our co-sponsors: the Cardozo Dispute Resolution Society, the Sports and Entertainment Law Students' Association and the Center for Professional Development. Most of all, we would like to acknowledge the efforts of Louise E. Dembeck, who went above and beyond in helping to organize this event. I thank everyone for attending.

With that, I would like to turn the floor over to Louise Dembeck, founder and CEO of The AIMAC Center for Dispute Resolution, a provider of arbitrators and mediators for ADR proceedings. Ms. Dembeck is a full-time arbitrator and mediator, handling complex business, entertainment, intellectual property, international, e-commerce, and Uniform Domain Name Dispute Resolution Policy ("UDRP") disputes. She is a member of the Distinguished Panels of the American Arbitration Association, the CPR Institute for Dispute Resolution (formerly, the Center for Public Resources), the National Arbitration Forum, the World Intellectual Property Organization, and the U.S. District Court panels for the Southern and Eastern Districts of New York. She is

President of the Greater New York Chapter of the Association for Conflict Resolution, Vice Chair of the Entertainment ADR Committee of the ABA Section on Dispute Resolution, and a member of the Association of the Bar of the City of New York's ADR Committee.

Louise E. Dembeck, Esq., President, The American International Mediation and Arbitration Conciliation (AIMAC) Center for Dispute Resolution : Thank you very much. I am pleased to welcome you this morning, for myself and on behalf of the Entertainment ADR Committee of the ABA Section on Dispute Resolution, of which I am a Vice Chair. To put today's program in context, I want to tell you a story I remember from when I was a young, first-year associate at a Wall Street law firm. The story is about a partner who, together with six or eight other lawyers in the firm, had worked many, many months, tirelessly, on what was then a very large antitrust litigation. Eventually, the day came when the firm presented its argument before the court following which everyone knew that it would be several weeks before the court was likely to render its decision. So, the partner announced to the firm's lawyers on his team that he would be taking a very well—deserved, long vacation on an island in the South Seas. The partner explained that he did not want to be disturbed for any reason, except to be notified by telegram when the court issued a decision. After a period of time, the decision was issued, and a dutiful young associate sent a telegram saying, "Justice prevailed." Very shortly thereafter, the associate received a telegram back from the partner, which said, "Appeal immediately." [laughter].

Conflict is inevitable, but fair and efficient resolution is not. Therefore, the Entertainment ADR Committee of the ABA Section on Dispute Resolution has a mission to educate lawyers, would-be lawyers and business professionals in the entertainment and allied industries on dispute resolution processes alternative to litigation.

Alternative dispute resolution is a very broad term encompassing many different procedures to resolve disputes outside traditional litigation channels. It basically falls into two categories. The first category is consensual, non-binding procedures, such as meditation, with a goal to achieve agreement between the parties and possibly preserve relationships in the process. The second category is binding adjudication, such as arbitration, intended to be faster and cheaper than litigation while still essentially giving parties their day in court.

Today, we will be presenting an interactive program in which you will become the participants. The program will attempt to clarify and demonstrate two of these ADR processes: arbitration and mediation.

This program is not intended to compare the relative merits of arbitration versus mediation. They are not alternatives to each other. They are both alternatives to litigation.

Studies have revealed that, surprisingly, a substantial number of lawyers and business professionals are unaware of the differences between arbitration and mediation. Indeed, in the early development of the English language, the two words were used interchangeably. Today, there is an Oxford English Language Dictionary definition of arbitration that reads: "to act as a formal arbiter or umpire; to mediate, as in a dispute between contending parties." The Federal Mediation and Conciliation Service (note the absence of the word arbitration in the title) performs a basic arbitration function by maintaining a roster from which the service can nominate arbitrators. The National Mediation Board performs important functions in the promotion of arbitration and the selection of arbitrators for the railroad and airline industries. As a result, there is more than just a historical justification for the confusion. Nevertheless, with courts, not only in this country, but all over the world, sending cases out for mediation, it is essential for clients and their lawyers to understand exactly what these processes are, and what they are not. [SEP]Arbitration is a contractual process. Parties agree, either pre-dispute in a contract arbitration clause, or post-dispute, if the disputants decide after the dispute arises, that instead of going to court, they will submit their dispute to an arbitration tribunal. The tribunal can consist of be one arbitrator or three arbitrators. In effect, it is an informal, non-jury trial before the tribunal chosen by the parties and in whom the parties vest authority to hear the evidence and the arguments, and to decide the case by rendering an award based upon the law, the facts and generally recognized principles of equity. Arbitration is intended to avoid most of the discovery games and motion practice that is common to litigation. Although some discovery is permitted, strict rules of evidence do not apply and the arbitrators do not give

much credibility to unsworn or hearsay testimony. At the end of the proceeding, the tribunal renders a final and binding award, generally with no right of appeal.

Arbitration is faster and should be cheaper than litigation. It suits parties in many instances because, at the end of the day, win or lose, they have a decision and have had their “day in court.” They get to take their best shot, and then can put it behind them and move on with their lives.

Now, I am going to introduce to you my Co-Vice Chair, Alida Camp, who will talk to you about mediation.

Alida Camp, Esq., Mediator : I will just tell you a brief story you may have already heard, especially all of the students who are taking mediation classes, about an orange and two children fighting over the orange. They are squabbling, yelling and screaming, “I had it first,” “No, I had it first,” “No, I had it first.” The mother comes frantically rushing over to the children and makes a decision, just as a judge would, and says, “You found it first, it’s yours and that is it.” While one child has the orange, the other child is left screaming and crying and hating the mother for at least five minutes. In mediation, the mother would go over and talk to the children and say, “Why do you want the orange?” And one child might say, “Well, I need the peel. I am baking a cake.” The other child might say, “I have a sore throat and I really would like to have the juice.” The mother cuts the orange and gives the peel to one child and the juice to the other, and they are both happy. This story is the difference between litigation and mediation. Mediation allows parties to reach a result of their own choice based upon what is important to them and their own interests. It is done with the help of a mediator. A mediator is a neutral person who has no connection to the parties and no interest in the outcome of the dispute. The mediator tries to work with the parties to fashion, to craft, and to create a remedy of their own choosing.

The mediator has no decision-making authority, meaning no power to impose anything at all upon the parties. The mediator has no obligation, right or interest in telling the parties who is right or wrong, or what happened or did not happen. It is a forward-looking process based on the parties’ interest at the time, and what they perceive they would like to have in the future. Instead of delving into the past, what happened to whom, they talk about what is important to the parties and what makes sense for them. Mediation has many other types of applications in addition to the commercial. Mediation works in employment, in family law and in many places to help the parties create their own remedies. In addition to keeping control over the outcome, instead of throwing up their hands and saying, “I will let a judge or a jury make a decision for me,” mediation allows the parties to maintain control. Sometimes it helps parties to ask for a mediator with substantive experience or expertise not just in the process of mediation, but also in the substance of the dispute in the specific area.

Another factor that distinguishes mediation from litigation is that you are stuck to what you asked for in your litigation complaint. In mediation, you can create any type of remedy that makes sense for you, as long as it is lawful. As you may see later, the remedies that have occurred in our mediations here can be very creative indeed. The parties are not limited. Again, as long as it is lawful, you can work out any possible solution the parties would like. Walter Gans, who is here as one of our neutrals, is going to speak a little further about the ADR continuum. But before he does, let me just end with a couple of movie examples. Hollywood can weave a good yarn when it chooses to do so, but it is not always accurate in the details. For instance, the movie Disclosure , with Michael Douglas and Demi Moore, purports to have a mediation scene. Moore’s character has accused Douglas’ character of harassment and they go before a woman who is supposed to be a mediator. The scene opens in a gorgeous Seattle building with wide-open windows overlooking the sound. The office is just beautiful and lawyers are there next to a stack of F. Supps and Federal Reporters on the table and appropriate statutes. The parties are really sitting in a deposition because the lawyers are cross-examining. There is no mediation going on at all. All the mediator says at the end is, “Well, I think it is time for a break now,” and then everyone goes away. The film calls this scene a mediation. At one point, Donald Sutherland says to Michael Douglas, “I thought you were at the mediation?” Douglas responds, “We are actually in a break.” The mediator is back at her office, but that is beside the point.

Another movie, the one with Cary Grant called Operation Petty Coat , has no mediation scene at all. But it does have a mediated solution. One of Cary Grant’s sailors, in the South Pacific during WWII, goes up a

farmer on the island and steals his pig. This is a grave and serious offense. The farmer runs back to the ship, along with several of other islanders and MPs, and they try to get some sort of compensation for this theft. Cary Grant says, “Would you like money, would you like money?” However, no amount of money is enough. Finally, the guy who stole the pig is getting a little frantic and runs to his bunk. Cary Grant and the farmer follow. The farmer’s eyes light up when he sees the sailor’s bag of golf clubs. Cary Grant notices and gives him the bag of clubs. The farmer goes away happy. Cary Grant is happy. The sailor, I suppose gets in a little bit of trouble, but all parties avert a major international incident. In my opinion, this depicts a mediated solution. So, let me turn it over to Walter Gans, who will talk a little more about ADR.

Walter Gans, Kaye Scholer LLP : Thank you, Alida. I will be very brief because I think the purpose of this whole exercise is the role-play, where you get a feel of the distinction between two rather different processes. If you can imagine a continuum, on one side there is an adjudicatory process and on the other side a negotiation between two parties who have a dispute. There are a variety of alternative means of resolving the dispute between these alternatives. Of course there is always also litigation. Behind Tab 3 of the materials, I have set out some instances where litigation is inevitable. In fact, those of you who read the ABA Law Journal will see there is an article in front called “The Vanishing Trial.” The thesis of this article is that ADR has gone too far, in the sense that it has taken disputes away from public scrutiny. Of course this criticism is the beauty of ADR: they are confidential processes. That is not to say that all disputes should be decided by mediation, arbitration, or a variety of other dispute resolution forms that I have mentioned in my outline. What it is to say, however, is that ADR has now been recognized as an effective way of resolving disputes, such that many of us in the field like to think of ADR as the principle form of dispute resolution. When we talk about ADR, litigation is the alternative. I am encouraged that there are so many students at Cardozo attending this program. I think the future of the ADR field lies in educating people who enter the legal profession. The two prior speakers have explained some of the differences between these processes.

Over the years, statistics have shown that mediation results in a win-win settlement 85% of the time. And 95% of the cases that are on the trial calendar are settled before any evidence is taken. Why is it that we have to wait so long before we can achieve a settlement under the gun, when there is the opportunity much earlier in the game? What we should think about in the community, in the commercial world, is getting to disputes at the outset. That is the best time to resolve them, so the resources can be put to resolving the disputes in early stages before the time and money has been expended. This has become the bane of our legal system, and one of the reasons litigation in the U.S. has been so deplored, not only here, but around the world.

Louise Dembeck : As we said, this is an interactive program. We are fortunate today to have a number of trained and experienced arbitrators and mediators, members of the ABA Entertainment ADR Committee who have volunteered to serve as neutrals in the arbitration and mediation proceedings in which you will soon become participants.

Biographies of the various neutrals appear in your materials in Section 12, but I would like to introduce them to you now. I would l ask each to stand as I give your name so everyone will know who you are: Laverne Berry; Alida Camp; whom you have already met me; Robert Freedman, a partner at Cowan, DeBaets, Abrahams & Sheppard; Walter G. Gans, with, Kaye Scholer LLP, whom you have just heard speak; Andrew J. Gerber, former Senior Vice President and General Counsel, Columbia House Company; Christine Lepera, partner, Sonnenschein Nath & Roth; James B. Koback, Jr., partner, Hughes, Hubbard & Reed; Ruth G. Kurtz, partner, Stapper & Van Doren; Charles H. Miller, partner, Loeb & Loeb, LLP; Carroll E. Neesemann, partner, Morrison & Foerster LLP; Miriam Stern, Law Offices of Miriam Stern; Karen J. Van Ingen, Law Offices of Karen J. Van Ingen, and Faith Wu, attorney-mediator.

Also in your booklet, at Section 3, after the Walter Gans presentation, is a description of the dispute. Go to the pink page and right behind it you will find a statement of facts and applicable law in the case of Bag O’Loot, Inc., Claimant, against Ted Sharkey, Respondent. The dispute involves motion picture distribution rights. Each of you will be assigned a role-play and provided with a set of private facts unknown to the other side and unknown to the neutral. Bag O’Loot and Ted Sharkey have agreed to ADR. We are going to divide the room. Some of you will be sent to arbitrate the dispute and others will be sent to mediate the dispute.

Before we tell you whether you will be arbitrating or mediating today, we are going to ask Andy Gerber to give us a “model mediator opening statement” and Jim Koback will then give us a “model arbitrator opening statement”—this will be instead of asking each neutral in each group to do that. You have to listen carefully to both statements because, at this point, you don’t know whether you will be arbitrating or mediating the dispute. While you are listening to the opening statements, we are going to distribute the role plays.

Alida Camp : Let me ask that if you do go into the arbitration group, use the law that is in the book and I also have separate sheets. You would be arguing the law that we have decided applies or may apply to the facts in case to the arbiter. It is an important part of your timely arbitration. I am just going to quickly read the names of the neutrals who will be mediating and arbitrating. The mediators will be: Laverne Berry, Charlie Miller, Miriam Stern, Karen Van Ingen, Faith Wu, me, and Walter Gans. The arbiters are: Ruth Kurtz, Carroll Neesemann, Jim Koback, Bob Freedman and Christine Lepera. At the end, I have reporting forms that I have given to the neutrals. I will ask the neutrals to bring them back to either Louise or me. We will post the results of the arbitrations. We will talk about the mediations and at the end, about what happened, how you feel and how you perceived it all. I would like to ask Andy Gerber on behalf of the mediators to give a brief mediation opening statement. Jim Koback, on behalf of the arbiters, will give a brief mediation opening statement. But, I would like to bring your attention to Section 4 of the book where there is a sample of written lists of things that the arbiters look for and speak to the parties about prior to the arbitration. There is a typographical error, and that was prepared by Carroll Neesemann. I wanted to let you know of that error; give credit to where credit is due. Anyway, Andy if you could.

Andrew Gerber, former Senior Vice President and General Counsel, Columbia House Company : As Alida just explained, we are going to pretend that this is a statement that would ordinarily be made in a small group: just the mediator, the parties and their counsel.

My name is Andrew Gerber. I’m a practicing lawyer, and was employed most recently as General Counsel to The Columbia House Company.

You have asked me to act as the mediator in this proceeding. Before we begin, I would like to make some introductory comments about the mediation process. The practicing lawyers in this session will understand all of this; it could be useful for the principals themselves.

A few words about the function of the mediator: I am not a judge or an arbitrator. Judges and arbitrators listen to arguments and then decide who is right and who should win and lose, based on the facts and the law. I am not here to make a decision or to issue any orders. The mediator’s job is to help you try to resolve your dispute yourselves without the formal structure of a trial or arbitration, regardless of who is right.

This process is informal. There are no rules of evidence and no procedural requirements except common courtesy. And our talks will be different than your lawsuit in another important way: We will try to get away from concentrating on the positions you have taken and the arguments that you have made. Instead, we will try to explore your real interests and what you really want to get out of this dispute — ways toward a settlement that could serve you better than the costs and the risks of continuing your lawsuit.

I am impartial. To my knowledge, I have had no prior connection with any of the parties or the attorneys involved in this case.

These proceedings are also confidential. The mediation agreements that you have signed provide that nothing you learn here can be used in your lawsuit or disclosed anywhere else. I cannot be called to testify in your suit, I cannot testify in my own volition and I cannot communicate with the court about what happens here, with the limited exception of a violation of the Court’s mediation rules. What happens in this room stays in this room.

We will begin by asking each side to give its idea of what the case is about so that we can compare your views face to face, and we will go on from there. At some time after that, we will break for separate caucus

sessions with the separate sides, and I will speak to each of you separately; then we will resume as a group and split up again as it seems to be worthwhile. If you tell me anything in those separate sessions that you do not want the other side to know, please tell me that and I will respect your confidence, but I do need to know if you want that confidence maintained about any particular information that you give me.

Finally, please try not to interrupt the other side. Of course you will disagree with some things that they say, but write your comments down and hold them until the other side is finished speaking.

I will ask the claimant to speak first.

James B. Koback, Jr., Hughes, Hubbard & Reed : Good morning, and again I am Jim Koback, not Carol Neesemann. But that does not stop me from slavishly following her outline, which is in Tab 3 of the book. I want to say at the outset that a lot of the things that are covered here in most arbitrations would be covered at a prior time. There would probably be a pre-trial or pre-hearing conference either in person or telephonically and there might be disputes during whatever discovery process is involved about access to witnesses and so forth. So, some of this material in all probability would have been covered before the arbitration actually begins.

I would begin by thanking the parties for their presence and for their preparation; hoping indeed that they are well prepared for the arbitration. I would emphasize that the panel and I are here to try and ensure a fair, orderly and expeditious proceeding to determine the matter.

We would start by having introductions of everyone present in the room, determining who the parties are, whom the experts are, who the witnesses are, and who the lawyers are and so forth. At this point, we might talk about sequestration. Generally the rule would be that a party would be entitled to have one party as well as counsel present, along with any experts involved. Of course this might be varied if there is no objection to having future witnesses present while other witnesses testify.

Witnesses testify under oath, administered either by the arbitrator or the court reporter (assuming a court reporter has been engaged, a matter for the parties to decide). Some arbitrators may swear in everyone present at the beginning of the proceeding. I prefer to do so witness-by-witness as each witness testifies. Among other considerations, I feel this procedure better brings home to the witness that he or she is being sworn and must tell the truth.

I would explain the order of proceeding, which would typically be similar to that of a trial: opening statements if desired, followed by claimant's case-in-chief, respondent's case, claimant's rebuttal, presentation of any counterclaims and closing statements if desired. This order might occasionally be varied slightly by taking a witness out of the normal sequence to accommodate scheduling issues. Often the parties will have submitted pre-hearing briefs in advance of the hearing following a schedule established at a prehearing conference so that the opening statements need not be lengthy.

It is important to emphasize that there should be no ex parte communication and a minimum of chit chat with the arbitrator or panel. I would also ask confirmation, now that everyone is together and in sight of one another, that no one knows of any past relationship that would prevent the panel from proceeding.

In most arbitrations, documents to be introduced at the hearings have been exchanged pursuant to a schedule established at a prehearing conference. The documents are premarked and typically presented in tabbed binders. The parties are asked and expected to stipulate as far as possible to the authenticity and admissibility of documents. If issues of admissibility with respect to some documents or testimony are anticipated, I would attempt to resolve them before the hearing begins; sometimes, however, these questions can only be decided in the context of the actual testimony.

I would describe counsel's right to object where appropriate but emphasize that counsel should do so only when necessary, just as counsel should refrain from presenting cumulative or repetitive testimony. I might

note that hearsay is admissible in arbitration but should not be presented routinely and should be avoided if possible. In considering hearsay objections, I generally try to apply standards similar to those of the residual hearsay exception in the Federal Rules of Evidence though in cases of doubt, when no unfair prejudice will result, I err on the side of inclusion (but would probably give the evidence relatively little weight). Similarly, I am empowered under the AAA and other arbitral rules to take affidavits if there is a reason a witness cannot be present; again, however, on any matter of significance, I would generally give evidence presented in this manner much less weight than live testimony. I should note that these days the parties may be able to present testimony through video or telephone conferences although adversaries must be given ample notice and logistical arrangements may have to be made in advance.

Louise Dembeck : Thank you Jim and Andy. Basically, we are going to break into groups of four now and, as I said earlier, we are going to have a neutral assigned to each group. There will be two on the claimant's side and two on the respondent's side. We are going to give you fifteen minutes to read your private facts. You will then have thirty minutes to conduct the proceedings. . When we call time, at the end, the Neutral in each group will be asked to complete the Neutral's Reporting Form referred to by Alida. On the form, the Neutrals will indicate whether it was an arbitration or a mediation; if an award was rendered and what the award was; if a settlement was reached and what were the terms of the settlement; if settlement was not reached, whether it was probable– whether the parties were close enough they likely would arrive at a settlement; or whether the parties were so far apart, there was no point in continuing further. Then we will have a debriefing and discuss what happened in each of your proceedings. I am going to ask you now to move to your groups. There should be four attendees and a neutral in each group.

Alida Camp : You do not have to do the arbitrating and mediating at the table for noise reason and privacy. There are places out in the hall and the in the back. But just for purposes of our getting organized and making sure you have neutrals with you and have the appropriate facts, just divide up in tables of four participants per neutral; we will make sure the neutrals are disbursed. Thank you.

[Mediation and arbitration role-play and review of respective outcomes]

Louise Dembeck : Questions?

Audience Member : How would you advise a client going into a mediation?

Alida Camp : I talk to lawyers when I have mediations about what they should do and what and who they should bring and how they should approach mediation. I always suggest that they bring as much information as possible- that they let their clients speak as much as possible, that they bring documents, and that they be prepared to talk about it. And I understand that there are issues with discovery. I have seen it happen where one party, during a mediation, hears information or sees a document that just changes their entire perspective. The information is not enough to cave in and walk away, giving the other side everything, but enough to change it out of a position into an interest, or from even one position to another position that is closer to ultimately where they are going to settle. The change is based on the availability—not just the availability but actually the disclosure of that information that otherwise before had not been disclosed.

I also ask them to think about what information they might need from the other side to make the dispute resolvable. Sometimes we break up, they go away, and come back with information that is necessary. They do some homework or some research. But it is a very different kind of process. I try to discourage them from keeping information close to the chest or up their sleeve, whatever term you want to use, with the hopes that the revelation of information and availability of information to each side will make a resolution possible, then they will not have to go to litigation, which they were holding all of the information in secret for.

Louise Dembeck : Although, as mediators, we ask that parties cooperate and speak opening and encourage them to do so on the basis that everything they say in the mediation is confidential, of course that is not entirely true. As a practical matter, even though you might not be able to go into court and use information you have learned in the mediation session, you do learn things about your adversary while your

adversary learns things about you. To a certain extent, that does erode you're the structure of secrecy or confidentiality but you do get something in return.

While your adversary is learning things about your position that you might not have disclosed in a more structured setting, you are learning things about your adversary that can also help you. This exchange of information often results in getting the parties to an agreed resolution sooner, and less expensively, than resort to litigation. So, ultimately, it is generally a good thing and a more desirable thing even than being able to keep all your cards concealed until the last minute. Anyone else?

David Yurkofsky : Hi, my name is David Yurkofsky. I am just curious how many people here are actually full time litigators? Almost no one…a few people. I mean this as no offense to litigators and I am not a litigator. I am an immigration lawyer who does some entertainment immigration. But it seems to me the way the system is set up, firms (I do not bill by the hour, but my understanding is that firms, litigators, bill by the hour) have retainer agreements with big corporations. If mediation came into practice it would be against their interest to start offering the cheaper, wiser, more efficient option of mediation. I just do not understand how mediation is going to become widespread unless it becomes – I do not know how it will happen. It just seems totally unrealistic with our tort system as it is.

Louise Dembeck : Well, there will always be cases that cannot, and even some that should not, be settled. After all, our body of law is based on precedent and we need to have some decisions that establish that precedent. But those cases are really few and far between. I would like to ask one of our litigators who is both a mediator and an arbitrator with the American Arbitration Association, Christine Lepera, what is your answer to this question?

Christine Lepera, Sonnenschein, Nath & Rosenthal : Well, you are not the first one who has said that. That is obviously an issue that has been discussed before. But I think there is a place for all of the various procedures. In fact, most cases settle in litigation and very few go to trial. The question is: when are they going to settle? Are they going to settle after the pleading stage, are they going to settle during the middle of discovery, is it going to settle on the evening on the courthouse steps. There is no exact science, but most of them settle. From my perspective as a litigator and looking at my cases, I think some of them cry out for mediation and I look with the client to get them to mediation. Sometimes I am faced with a case where there is an arbitration clause in the contract that I did not draft and then we are in an arbitration process that I did not necessarily devise. Arbitration clauses have their place because it is becoming more and more prevalent in certain disciplines to put arbitration clauses and/or mediation clauses into contracts. So I think that there is a place and Alida is making the point that there is room to use mediation and/or arbitration in this society and it is going to grow. I do not think it is going to take over the process of litigation but it is going to grow, and it should grow.

Think of it this way—when a litigator allows his client to settle the case early in mediation he can take the next client's case to litigation because it frees up his time.

David Yurkofsky : I know law is also a noble profession, but more and more it is a business. Again, I am not a litigator and I do not bill by the hour. But, I just do not see people switching to a system where they are going to quickly mediate when they are going to make a ton more money [if the case were litigated] and possibly they are going to have to fire half their associates. And, I do not see how there is going to be this endless supply of lawsuits to mediate. I wish it were not true but it just seems clear that our system is so set upon billable hours, it just seems like a long road. But I hope it happens.

Alida Camp : I just wanted to respond. I think that the parties in Texas will not use those lawyers again because they know that there are alternatives. I think that something that a lawyer needs to think about is whether a happy client who will continue to bring fees over a period of time is worth satisfying as opposed to an angry client who feels like he has been over-billed and has gone to litigation and the case settled anyway. But I do not think there are any real easy answers, and I certainly think there are issues. But with the knowledge of mediation filtering through to parties at all different levels, that it is certainly going to be

something that is up for discussion among lawyers and lawyers have to have a better answer than, “I’m just billing you.”

Karen Van Ingen, Law Offices of Karen J. Van Ingen : I just wanted to second what Alida said. I think that parties are more and more sophisticated these days. What they are interested in doing is finding a resolution so that they can go on with their business lives, which is what they are supposed to be doing. They are not supposed to be in litigation full time. The lawyer who helps the client find a resolution quickly and less painfully than litigation tends to be a lawyer who is going to broaden his or her client base. I think we really should not underestimate the sophistication of our clients as lawyers out there. They stay with counsel who helps them look after their interests in the most economical way and I think those are the attorneys they go back to.

Louise Dembeck : Thank you Karen. Karen is an arbitrator and a mediator with the American Arbitration Association. Bob Freedman had a comment. I see we are running into lunch.

Robert Freedman, Cowan, DeBeats, Abrahams & Sheppard LLP : There is an assumption made that everyone is going to be able to afford to pay for litigation. If only that were the truth. Very often it is not in the client’s interest but it is in the lawyer’s interest [to litigate] [However, it is preferable for the lawyer to be paid] for the amount of time spent, rather than be in the situation where a lot of lawyers find themselves, with cases going on where the ability of the client to pay has long since stopped.

Louise Dembeck : Charlie Miller and Walter Gans, and then we have to stop for lunch or we will start hearing stomach rumblings.

Charlie Miller, Loeb & Loeb LLP : There is obviously a tension between billable hours and the litigator who works in a big firm, and ADR that can be done much faster. However, it is not unrealistic to think that ADR is here, and that it is expanding – that it is the wave of the future. For one thing, the federal courts now have compulsory mediation. I am talking about New York. The Southern District and the Eastern District have compulsory mediation in a large number of cases. Now, they are not going to send out an anti-trust class action for mediation, but they will handle individual disputes. And most of those, whether the people are there voluntarily or mandatorily for mediation, end up settling; all within that 85% figure. The one other thing that I want to mention is maybe it is a generational thing. When I started practicing, every so often I would call my adversary and we would talk for ten minutes and we would settle the case. Every so often my adversary would call me and the same thing would happen. As time has gone by, I get the feeling for some reason the parties, the litigators and the litigants whether they are a big firm or not, or whether they are clients of a big firm need a third party, need somebody independent to sit down and talk to them about what is involved. They need what they think is somebody who is neutral and who is experienced and who knows why the case should settle. That is why it is so important that the clients are at the mediation and every so often the mediator can separate, not physically, but mentally, the clients from the lawyers and bring about a resolution.

Walter Gans : I will be very brief. Along the same lines, there are three reasons why ADR is progressing and advancing to the extent that it is. One is that the client has demanded it and the corporate client, the big corporations have gotten together and they are demanding that their outside lawyers in the big firms have ADR programs within the firms. However, they pay attention to mediation and arbitration. The second thing that has just been mentioned—there is court annexed mediation and arbitration, which is a result of legislation. The courts are required to consider these processes. We are talking about federal courts, state courts and local courts. And the third thing is that the Supreme Court of the United States has even sanctioned arbitration for disputes that have a strong public policy interest such as those in antitrust, RICO, and securities law. Where typically ADR had no part of those, is has now been sanctioned by the supreme court.

Panel Discussion: The Practicality of ADR

Sarah Edelman, Assistant Director, Cardozo School of Law, Center for Professional Development : I want to introduce our moderator, Professor Rosalind Lichter, who is a professor here at Cardozo. I thank her

very much for coming and participating in this panel. Here at Cardozo, she teaches Entertainment Law, and she actually works with our office because she is a teacher for our Summer Institute Class over the summer. She also supervises students for our Intellectual Property externship. In addition to having her own practice in entertainment law, where she handles matters involving film, television and theater, she is also a professor at NYU where she teaches graduate film students

Rosalind Lichter, Adjunct Professor, Cardozo School of Law and Law Office of Rosalind Lichter : I think my mother wrote that introduction. (Laughter) It is a pleasure to be here as always at Cardozo. Being at the school in the forefront of intellectual property and entertainment law, it is a pleasure to have some of the finest practitioners join us this afternoon. To begin, Louise Dembeck is probably one of the premier mediators/arbiters in the country. Most of you, if not all of you have the resumes of our panelists in the booklet. I could spend a half hour introducing everybody but I think that their presentations will serve as a way for you to understand how knowledgeable and professional they all are.

Louise Dembeck : There is obviously no question that Roz is not my mother, but thank you. I am going to talk a little bit about why negotiations fail, and just about some of the ethical questions that were raised this morning in the interactive presentation. In the entertainment industry, perhaps more than any other single industry, lawyers tend to steer, if not actually conduct, many negotiations for their clients. As a result, entertainment lawyers develop what some might consider “attitude.” They come to believe that they are the best negotiators in the world. So, it is not all that surprising that the entertainment industry has been very slow to embrace mediation–despite the evidence that mediation consistently results in positive outcomes, within a range of 85 to 90% of the time, wherever it is tried, whether in the United States, in England, in France, or in China, and regardless of the circumstances. And these statistics seem to hold even where the parties really do not want to go to mediation (but are mandated by a Court) and even when the partiers begin by not wanting to be in the same room together. There seems to be something almost magical in the process.

I had an example a few years ago, I was asked by the U.S. District Court, for in the Eastern District of New York, to serve as a mediator in four pending cases, each having a common party. When I arrived at the courthouse, a well known, talented, and highly regarded entertainment lawyer was there. He was representing the common party and this is what he said to me: “Sweetie, this case can’t be settled. I’ve been doing this since before you were born. If this case could have settled, I would have settled it. This is a waste of time.” Well, of course, my first thought was to punch him in the nose for calling me Sweetie. (Laughter) But, if I had given into that temptation, I really would have compromised my neutrality. So, I decided, instead, to value my responsibility to the process, and to the Court which designated me, and ignored his comment. Instead, I said to him, “Well, we’re here, the Court has asked us to do this, let’s give it a try.”

The mediation took one full day and another morning about a week later. Final execution of the settlement documents took nearly two months while they got signatures from a whole host of parties which I will explain in a minute. During this period, the four cases remained on the calendar so that no one would be disadvantaged in the event that the settlement fell apart.

Now, what’s interesting here is, during the mediation, I learned that out there somewhere, there were more than 250 other potential cases involving some of the same parties and many of the same issues just awaiting the outcome of these four cases; these were like test cases. Once I became aware of that, by helping the parties focus on their interests rather than on their positions and not limiting our considerations solely to the issues in the four cases in front of us—we call that “enlarging the pie”—once we found common ground upon which to settle, we were able to settle not only the four cases before the court, but the other 250 plus as well

In effect, since there were similar parties and similar issues, the one party saw that he could take less from each if he knew he was getting rid of all of the lawsuits in his future. That never could have been happened in the context of litigation. (I’m not saying that parties cannot arrive at global settlements on their own—without the intervention of a mediator. In this case, however, it could not have happened because of the attitude of the well-known entertainment attorney – the same attitude he took with me when he called me “Sweetie,” he took with counsel for the defendants, calling them “young man” and “fella,” so there was no field of trust

enabling the attorneys to do anything but take positions.) So, this was a really good settlement and the reluctant entertainment lawyer apologized when the agreement was signed. (I wish I could say that he became a fan of mediation but I suspect he either thinks that I am a great mediator, which would be okay I suppose, or more likely, that I just got lucky.)

So, why couldn't he settle that case? He really was a good lawyer. Why do unassisted lawyer-led negotiations fail? Well, of course, they do not always fail but the ones that wind up on the courtroom steps cannot be considered true "success stories." Those of you who were here this morning heard Walter Gans tell us that 95% of all cases that go to court settle on the courtroom steps. Christine Lepera also confirmed that most of them settle–but they settle after most of the time, energy, and expensive legal fees involved in litigation have already been incurred!. Why is late settlement so common?

Professor Robert Mnookin, of Harvard University, in an article entitled Why Negotiations Fail: An Exploration of Barriers to the Resolution of Conflict 8 Ohio State Journal 225, 1993 (and if anyone wants that citation again, see me afterward.) He has identified four key barriers to resolution of conflict. One of which is designated "The Principal Agent Problem." This is when the principals do not negotiate in their own behalf but, instead, act through agents who may have somewhat different incentives than their principals. Take civil litigation, as was pointed out this morning, where lawyers on both sides are paid by the hour. Professor Mnookin notes that there would appear to be very little incentive for the opposing lawyers to cooperate, particularly if the clients have the capacity for trench warfare and are angry to boot. The suggestion here is that a late settlement does not interfere with the lawyer (agent) maximizing income from substantial legal fees while, at the same time, the settlement helps the lawyer (agent) avoid the possible embarrassment of an extreme adverse outcome. Now this may sound a little cynical, but it provides the backdrop for the ethical considerations that I am going to propose next.

Do lawyers have, or should they be given, an ethical obligation to advise their clients at the outset of a representation that there are ADR options to litigation? I will come back to that question because I want to be clear here that I do not think Professor Mnookin is suggesting that lawyers are basically unethical. The point is that the interests of the lawyers (agents) are not identical with those of their principals. There are other factors also that inhibit successful conflict resolution merely through negotiations by counsel. Lawyers sometimes fear that clients will misconstrue an early suggestion that they discuss settlement as an indication that the lawyer is weak, or worse yet, that the lawyer may be perceived as being weak by the other side. Another reason is fear that the client may infer, from a suggestion of settlement talk, that the lawyer does not believe in the case which may, perhaps, motivate the client to find another lawyer–one who does believe in the case.

We have seen that by being locked into narrow, adversarial positions, counsel generally cannot focus on the parties' interests and generate that additional value–what I called before "enlarging the pie." But, there is an even more interesting phenomenon: a second of the four barriers identified by Professor Mnookin and it is called "Reactive Evaluation." This is an example of a social psychological barrier reflected when one side diminishes the attractiveness of an offer simply because it originated with a perceived opponent. Prof. Mnookin describes it like this: Your client says, "If only we could settle this case for $7,000, I would love to put this whole matter behind me." Low and behold, the next morning the other side's attorney calls you and says his client has authorized him to offer $7,000 to settle the case. You excitedly call your client and say, "Guess what, the other side has just offered to settle the case for $7,000." You expect to hear jubilation from the other end of the phone, but instead—silence. Finally, your client says: "Obviously they must know something we don't know. If $7,000 is good for them, then it can't be good for us."

Now, imagine, instead, the $7,000 proposal were to come through the neutral third party–the mediator. It absolutely meets the expectations and the issues of both parties. Presto! Like magic, you have an agreement.

Now, getting back to the ethical question, let me put it in context. You are all familiar, I hope, with the Model Code of Professional Responsibility. There are parts of it in your materials following a very good article by Professor Robert Cochran of Pepperdine University Which is also included in your materials. This is an

article I highly recommend you should read because there is no one else I have seen who has completely discussed this issue in quite the way that he has. Basically, the ABA Model Rules do not specifically mention ADR and that's probably because they were written in 1983 and ADR was not particularly popular at that point. When the states are adopting or revising their own versions of the rules of professional conduct, questions are being posed: Whether to leave it as is and say nothing and assume that it is part of the overall ethical responsibilities of the lawyer; Whether to put some language in that will encourage lawyers to inform clients of ADR options, as Colorado has done, or whether to be more specific and require, as the Michigan model does, that lawyers have an affirmative obligation to advise their clients of ADR options.

Silence, should or shall —those are the options, and bear in mind as well that if you decide it ought to be "shall," then you must recognize that a violation would then subject violating lawyers to disciplinary actions. Pretty stiff consequences!

In the meantime, the issue is surfacing from yet another perspective–albeit a more practical perspective: We heard Alida Camp refer, this morning, to a case in Texas, in which the parties sued their own lawyers because they had not been advised about the possibility of trying mediation.

Thank you very much.

Rosalind Lichter : Our next speaker is Lisa Davis who is a partner at Frankfurt, Garbus, Kurnit, Klein & Selz, P.C. You know how you always value or estimate what you think of a lawyer by saying if I needed [I would get…If I needed] a lawyer, I would hire Lisa Davis. She is a great colleague, a wonderful lawyer, and she will talk about transactional entertainment law in the context of ADR.

Lisa E. Davis, Frankfurt, Garbus, Kurnit, Klein & Selz, P.C. : At the risk of piggybacking on Roslyn's comment—I do not think she is my mom, but wow, that was an introduction a mother would give. Thank you. One thing I wanted to do is just briefly pick up on the ethical considerations that Louise just talked about and just talk about them in the transactional context, the kinds of disputes that I think would be ripe for mediation or other ADR solutions.

I have been on the Disciplinary Committee for the first department for six years and see the kind of cases that come before the DEC. I think that the reality is and an obstacle to putting a "shall," an absolute obligation on attorneys to tell their clients ADR options, would be that if it automatically becomes a disciplinary violation, if you do not do that you are going to see a flood of more cases before the DEC. It already has an incredible backlog of cases to handle and things that are arguably much more severe in terms of the harm to the client, such as severe neglect of cases or escrow fund violations, those kind of things. So I think that, practically speaking, to have language that imposes an obligation in the code, at least in New York, I can see as being a real problem.

I think in the entertainment transactional context, the kinds of disputes that really are ripe for mediation are in intimate business relationships, such as among members of a musical group, manager-client relationships, and artist and production company relationships. Those three relationships probably give rise to a great percentage of the litigation on the entertainment side. And because the relationships are so intimate among group members—you know these are people that are sleeping in the back of a van one day and the next day they have got a platinum album and they are all passing around the bottles of Cristal and then somebody who is the backup singer will say, "Well, you know what, now that I look at this recording contract, why am I not yet getting as big of a percentage?" Or perhaps the lead signer, who is also the songwriter, is saying "why am I only getting an even share with the backup singer who is only back there just shaking the tambourine?"

Those are the kinds of situations where these people who may have been childhood friends, may have been in a garage band together or in somebody's home studio laying down beats. Those are the kinds of situations where—particularly if these are people that are going to have musical careers going forward — it is much more productive to have an ADR provision, in the agreement that you structure among the band members. There should be a provision requiring that disputes go to mediation initially because the issues are so emotional and people will be so emotional that they will not look rationally at the situation.

Well, is it really fair for the person who is the lead singer and the songwriter to get the same thing as the person who is the backup singer who is not writing. On the other hand, is it fair if they alternate lead or if they are both writing rhymes, whatever it is, that one person, because they have the contact with the manager or they have the contact with the production company, gets a bigger piece of the pie? That seems to me to be a kind of context where transactional attorneys should really think about putting in the agreements a clause that imposes the obligation to go to mediation and to explore ADR before there is litigation.

Similarly, with respect to management-artist relationships, at the outset of a career— they say that success has many fathers, and failure is an orphan. In the beginning of somebody's career a manager may be bankrolling that person, paying their rent, paying their subway or cab fare, and then when they become a multi-platinum artist or twenty-million dollar actor, they suddenly say, "well you had nothing to do with my success." So that is a kind of situation again, particularly if it is a manager who is not just your mother's brother's best friend, but somebody who actually has some skill and relationships in the entertainment industry, you do not necessarily want to burn a bridge on both sides.

Most management agreements will have what is called a sunset clause. This means that when [the relationship] ends there is a declining participation that gets paid to the manager so that there is a financial incentive for the manager to keep that from being abruptly cut off and causing their income stream to cease. There is a financial incentive for the artist to say, "You have breached your contract. I do not have to pay you the sunset clause."

Again, a neutral mediator might say, "Look, this is what is common and customary in the industry, look at what this manager has actually done, look at what this artist has done, look at what this manager maybe has failed to do and try to craft a solution that is not a slash and burn where you get nothing and you get everything, but is something that allows people to keep their dignity, which is a point that is continually raised in the materials, and continue to have a career."

This is the stuff that is on Page 6 of the Post and really damages people's reputations. So they want to dig in once it gets into the litigation context because there is the whole public relation aspect to any litigation. The entertainment industry has a whole public relations dimension that will make people stick to their positions much more strongly than if it is just IBM suing a software supplier and saying "well, you didn't correct bugs in your software, and now it has caused this problem." The Post does not care about that and it is not going to be on E!, Extra, or whatever. But when you are talking about people in the public eye, litigation is just going to make them adhere to those positions much more strongly.

A third area that I think lends itself to mediation is in the production company-artist context. We have all seen —those of us who are devotees of "Behind the Music," —what has happened with a group like TLC, which signed to a production company that then signed to a major label, and then during the negotiations, the artist gets left out, and in a sense they have no choice but to litigate. I am curious to know, if there were an ADR provision in that agreement that would force Pebbles to say, "don't try to get back at your soon-to-be-ex-husband by holding this group hostage." Let us figure out a solution that gets these artists, who are the ones with the talent, paid, that gets this production company, who did find and develop them some kind of income stream, and gets the label in a position where they do not have to pay through the nose or pay a middle person who no longer has a relationship. Those are situations where mediation would be much more productive and much less costly, allowing everybody to spend their time making music or making films while continuing to make money from their talent as opposed to being diverted.

We have all seen, whether it is George Michael or Toni Braxton, people's careers get completely sidetracked when they are embroiled in litigation. This is a reason to force the parties to sit down with a neutral party who will, like Cher in Moonstruck, say "Snap out of it!" This would reveal the strength or weakness of your case and it is a solution that makes sense for both sides. It makes economic sense and makes sense in terms of the customs and the practice of the business. These are the situations where I really think it makes sense to try to impose ADR provisions, and as practitioners we should try to say to our clients at the outset, "let us try to put ADR and mediation provisions in the agreements," particularly if you are talking about a production agreement or management agreement. Whether there is success or failure, there will be a dispute. When

that happens, this is what is going to happen: We are not going down to New York State Supreme. We are going to have a mediation where we will sit down with a neutral and try to figure out what makes sense for everybody. I think your clients will love you for it in the end.

Again, I am a transactional attorney. I have litigation partners, but we all recognize that litigation is the way that you lose a client. Yes, you may have a huge score at the outset because the legal fees attached to litigation are tremendous. But I have lost clients because after they finish paying that they look at you and all they see is the drain on their bank balance. Instead, if you are able to help them craft a solution, they say this person really cares; they really are a fiduciary and they really do have my best interest at heart. I would rather have a transactional client for ten years and maybe defend him/her in litigation, than to push him/her to be a plaintiff in a litigation and then lose him/her after two years.

Rosalind Lichter : Christine Lepera is a litigator and trained at one of the best entertainment litigation firms in the country, Rueben Baum, which merged with a company called Sonnenschein, Nath and Rosenthal. All you have to do is note that there are really good lawyers in the framework of these giant firms Christine is one of them.

Christine Lepera : I guess I should just start by telling you a little bit about my background and experience to put this in context, since we are here to talk about ADR and dispute resolution procedures in the entertainment industry. I have been a litigator for over twenty years and my practice has grown primarily in the music business and litigation in the music business. Through that experience, I have also become an arbitrator and a mediator. I have been an arbitrator since 1987 with the AAA (American Arbitration Association). I have been a mediator appointed by the courts in New York, and served primarily as an arbitrator and a mediator in entertainment or IP disputes.

In terms of where ADR stands today in the entertainment industry, Lisa talked about some of the areas where there is a growing trend to use mediation clauses in certain entertainment contracts and she was speaking primarily about the music industry, I think, although I do not know about exclusively. There is still, today, a great hesitation about using ADR clauses in a number of entertainment transactional deals, particularly with respect to record companies and publishing companies. You are not going to see major labels quickly deciding that they are going to put in mediation or arbitration clauses, certainly not arbitration clauses, in their deals. They would rather, if a dispute arises, have the leverage of litigation because they have more power.

There is, however, a growing trend, in contracts and in deals in the industry, to put in mediation clauses. I do not think I can state fairly that the arbitration clause trend is growing. I think there are a lot of contracts in the entertainment industry that cross my desk, older contracts quite frankly, that have arbitration clauses and end up in litigations, well, arbitrations because of an arbitration clause. I call them litigations because, to a great extent, they parallel very closely the litigation process in the sense of it being adversarial, in the sense that it can be expensive even though the effort is to keep it less costly, you do have witnesses, you do have documents, you have a more limited discovery process, but you have a binding decision by a fact finder. In any event, there are arbitration clauses in certain entertainment related contracts. I see arbitration clauses in artist-management contracts. There are arbitration clauses in internal band agreements. I think that to the extent that there are recent developments in ADR, such as transactional use of ADR clauses, there is more willingness, and I think smartly so, to put a mediation clause in. Even if you are going to have an arbitration clause, put a mediation clause in first and have it be applicable first so that the parties can attempt to resolve their dispute amicably without any adversarial process.

On the mediation side, in terms of the courts appointing mediators to resolve, or attempt to resolve, cases, I see a lot of cases in the Southern District and the New York Supreme Court of an entertainment related nature or copyright or trademark related nature being passed through the mediation programs and I think that there is a great success rate of those cases being settled. I think the Southern District even reports about an 80% overall success rate in terms of the mediation that is done there.

From my perspective, there are cases that really can be done in any of the three areas: litigation, mediation or arbitration. I think it really ultimately depends on the nature of the dispute; it depends on the principles involved to some extent, although you will hear that that should not hold up having a mediation. In some instances, and I will give you an example, it does as a matter of practice. We had a case where we represented a famous songwriter, who was sued for copyright infringement. The plaintiff had an agenda that could not be resolved. Basically, the numbers that were being requested and the relief that was being requested were out of the ballpark. The principle for our client as a songwriter — never having been accused of copyright infringement before was — am I going to be a target for these types of things if I settle because of the press?

As Lisa points out, there is always press in these types of cases. If I settle, even though the number might never get out, there will clearly be a precedent set. So, for famous songwriters and artists who are accused of copyright infringement, often times there is a desire to be vindicated. We have seen what happened when Michael Bolton attempted that course. It did not work to his favor but the principle still remains.

On the other side, I had an experience where I represented a band. Co-counsel was a major record label. The band was sued by a leaving band member who claimed that the label could not put out the album because the band name was owned jointly, and use constituted trademark infringement — there were a myriad of legal claims. With artists, particularly young groups starting out, they may have a successful first album. There is not a huge pot of money there to expend all of their resources on a litigation. So with respect to that case, it was perfect for mediation. But, the other side did not want to mediate. A judge ordered the mediation over their opposition, at my request.

We went to the mediation. As the Southern District's program allows a mediator to require the parties' presence, everyone had to be in the room. So the band members had to be face-to-face and it was a truly arduous process. But it settled after a full day of mediation. Fortunately, we had a very good mediator and that case just cried out to be settled and I could not do it with my adversary. Even the judge and magistrate could not do it. It had to be a situation where the parties were in the room together. The only way to do that was to invoke the mediation process, where the mediator has the power to order the parties to be present. That is one situation where, in my view, the case is perfect for mediation.

In arbitration, again, if you have a situation where you want to try to keep the resources of the parties down and not expend them on litigation that goes on for ten years you can try to put the dispute into arbitration even after it arises and even if you do not already have an arbitration clause. In that kind of a situation, I can see the benefit to doing that in certain cases as well, potentially a band dispute or an artist-manager dispute where you want to try to get an expeditious result and you want to try to have some of the litigation tools at your disposal but you do not want to go the full nine yards.

Overall, I would say that there is, in my experience and in my view, a growing (although it is slow on the East Coast and more advanced on the West Coast) trend in the entertainment industries to use mediation, and to some extent, arbitration. But there is more growth on the mediation side — and that makes sense because the goal is to try and settle your dispute because it is going to likely settle 85-90% of the time. If one is going to settle a dispute, why not use a process that is based upon a paradigm? Try to use mediation maybe before the pleadings. If it did not work, maybe try it after the pleadings, or try it in discovery. In other words, use some sort of conscious process rather than an arbitrary one to promote settlement. So to the extent you see a growing use of mediation in the entertainment industry, I think it makes sense and it parallels what happens. That is my experience.

Rosalind Lichter : Thank you very much. Actually, the skills that you use as a transaction lawyer in negotiating contracts are similar to what you would use as a mediator. I mean, you are dealing with the other side all the time, and you are dealing with the clients and each other; those skills are very much mediation skills. Robert Friedman wrote the book on television and it is part of the vendors' series, and we are fortunate to have Robert, who is a transactional lawyer and a partner at Cowan Debates, Abrams & Sheppard. The names are growing and I do not have all of them. Robert is an expert on television co-production and international co-production and he is going to talk about the transactional nature of ADR. [inaudible].

Robert Freedman : I was asked to give the “what if?” speech. The “what if?” speech is what if alternative dispute resolution was widely used in the entertainment industry as we discussed to some extent as a concept and as a methodology. But it also has to be brought down to earth in terms of which disputes lend themselves to alternative dispute resolution. So I gave some thought to it. The first one that popped to mind was credit disputes. As an attorney, very often, well not very often, but from time to time you will have a client who was promised a credit, but did not get a credit. Well the answer is go to court, sue to get your credit. The problem is that very often getting your credit is not a monetary reward. If you try to make a claim that your client was monetarily damaged by failure to get a credit, try and prove the damages. They’re incredibly—they’re very, very highly speculative. So you have got to be kind of wacko to go to court and spend huge amounts of money over a dispute that will likely not result in a monetary reward to either party. It seems to me, therefore, that credit disputes really call out for an ADR kind of settlement.

As a matter of fact, in writing disputes in television and the film industry, disputes over credit for writers are settled under the collective bargaining agreement with the Writers’ Guild by a credit arbitration committee that is set up by the Writers’ Guild. All the parties who believe they should get credit submit their work, what they have written, to the committee. The committee is comprised of writers, people with experience and knowledge as to what it should be, and they make the ultimate determination as to what those credits will be on screen, thereby absolving both the writer and in most cases the producer from being totally at odds with each other. It is out of their hands.

A second area that I think should pay more attention to ADR is the area of profit participation. Very often in film and television, which are the areas that I work most in, parties that participate, parties that fund, as part of their compensation particularly on lower budget things, which there is very little money for compensation, receive profit participation. In larger situations, companies that can afford it may go in and audit the books and records of the producer or the studio, whoever is keeping the records. At the end of the day, invariably there are differences between the studio and the profit participant over what that profit should be. Usually accountants will go in, do the audit, and report back to the attorneys saying “we have done this audit, here are the discrepancies that we find.” I am involved in an audit right now in television where I am positive the discrepancies will be north of $3,000,000. In many cases they are not that large. Nevertheless, once that report comes back to the attorney, one makes a claim with the studio and often, in most cases, there is a negotiation, a middle figure is arrived at, and that is what is paid. However in certain situations, where there cannot be a negotiated settlement, it seems to me that the parties are served by going before either mediators or arbiters with some experience, some knowledge in accounting and in profit accounting and let them take a look at it and make the determination as to what is reasonable. Again, this is a much quicker resolution and a much less expensive resolution.

Very often entertainment contracts will almost invariably provide for termination provisions. If A breaches the contract, B has a right to terminate or there may be terminations other than for actual breach. There may be an anticipatory breach termination. It may be that party A has run out of money on the project and can no longer continue, and party B is saying, “Yes, but you have a contract with me that says you have to pay me more money.” In a lot of these instances, it is amazing how often practitioners will write a contract that will provide for breach and termination, but very often will not provide for the remedy in the event of termination. So the parties, even though they have a right to terminate, do not know what are my rights in terms of what do you have to do to me at that point. Again, that seems to me to be the kind of dispute to go before mediation or arbitration. It’s a situation in which both parties are anxious to get a quick resolution because two years from now or three years from now the project is long since gone and no longer viable, and so any kind of resolution in litigation might prove to be totally moot.

I guess a fourth area that has always concerned me is when you represent producers going to networks. The networks in television will always put in a “time is of the essence” clause. Television operates on schedules, requiring deliveries by certain dates, but not invariably. From time to time, there will be a dispute where a producer will deliver a program after the date. Now, in some cases it really results in losses to the network. In other cases it might not matter, but the network might point to a “time of the essence” clause and say, “you are in breach, we are terminating,” or “we have a penalty provision, and since you are late in delivering, we are going to assess a penalty against you.” Again, it seems to me that is the kind of dispute, also, that can more easily be resolved in alternative dispute resolution.

So I just gave some thought to some of the provisions you are likely to find in entertainment contracts. Apply them towards the options you have in representing your client to try and resolve these, and I think it will be interesting to see how these come out.

Rosalind Lichter : Thank you very much. Don Farber wrote another part of the book, and is the editor of the Bender series which all of you know – those blue volumes that are really wonderful particularly for the entertainment practitioner. Don is an expert in theater law. Not only did he edit all the volumes, but he wrote the volume on theater law. He is going to discuss how wonderful ADR is in the business that he does.

Donald C. Farber, Jacob, Medinger & Finnegan LLP : They made a mistake. They called me up and invited me down here, and I have the same problem that Dorothy Parker referred to that woman who speaks eight languages fluently and cannot say “no” in any of them. I cannot say no. They invited me so I said, “Yes, I will come.” But I am against disputes, I do not believe in disputes. Everybody here is going to tell you what to do in a dispute and I have spent my life trying to avoid them—in my personal life and in my business. In fact, I wrote a whole book—the last book I wrote, not counting those ten volumes we do not talk about because they’re somewhat overwhelming—but the last book I wrote called Common Sense Negotiation: How to Win Gracefully. In one sentence the book says: there is no such thing in our business as the contract good for one party. I spend a lot of my time trying to convince my clients that they should be giving the other side something that they are entitled to because, it is not only the moral thing to do and the right thing to do, but it is what should be done; the way it ought to be done and it is in your interest. If you make a contract that is so good it is bad, the play does not get produced. If you make a contract where you insist your name be above the title you just lost Hal Prince as the director. You have got to make contracts in our business that are good for both parties, so that is why I say I do not know why I am here, I do not believe in disputes.

In answer to the question, this panel is supposed to discuss the practicability of ADR in entertainment law. Now, it is cheaper, it is faster, you get someone who knows what there are doing instead of a judge who knows all the rules of evidence. What is not to like? I do it all the time. I not only put it into my agreements, and encourage my clients to arbitrate, I try to spend as much time as I can making sure there is nothing left to arbitrate. Now, how do I do that? We hate to acknowledge it, but it has sort of been hinted at in some of the discussions that there are certain characteristics of our business that if you are aware of them, it makes it a little bit easier to avoid disputes, which I do not believe in and do not encourage.

One of the things that we acknowledge is that we are dealing with, and I am not talking about the lawyers – they have nothing to do with ego, I am talking about the entertainment business, we are dealing with egos constantly and when we mention billing credits, that is what the fight is about.

The other thing we have to acknowledge, (I make some of my clients angry, but we are all paranoid in our business; and why should we not be, because those sons of bitches are out to get us), so what I try to do in addition to—someone else mentioned the fact that, as attorneys, we are mediating all the time, we do a collaboration agreement between a book writer, the composer and the lyricist, and we are mediating. We do a co-production agreement between two producers, and we are mediating. We are going to make them see what the compromise is that makes it work.

So much of this business causes disputes—it is the principle of the thing. Well, you have got to convince your clients that principles cost money. They will soon discover the fact that if you want to fight for your principles you have got to lay out some dough. The other thing you have got to do is bear in mind that timing is everything. I get wild, wild yells from some of my clients and I quote Mark Twain—in fact I quote Mark Twain all the time, “Do not put off until tomorrow, anything you can put off until the day after tomorrow.” You would be astonished when you try to convince them what it is going to cost and you wait two or three days then all of a sudden the principles disappear and you do not need to arbitrate or mediate. Of course, if you do have to arbitrate and mediate, it is cheaper, it is faster, you have got someone who knows about the business —what is not to like?

Rosalind Lichter : Thank you. Hillary Burt is with Volunteer Lawyers for the Arts, which runs a very interesting mediation program between artists and among artists. She is going to address and talk about

what she does.

Hillary Burt, Volunteer Lawyers for the Arts and MediateArt : Thank you very much. It is a real pleasure to be here today. I coordinate the Mediate Art program at Volunteer Lawyers for the Arts. It is a program that has been in existence since 1999. Volunteer Lawyers for the Arts is an organization that has been in existence in New York since 1969. We are part of a whole national network of Volunteer Lawyers for the Arts. We spend most of our time at VLA educating clients on what mediation is and educating attorneys on what mediation is. More time is spent on that end of things than getting people to a mediation session. I spend all day every day talking to artists and arts organizations trying to get them to the table. The pinnacle point of all this is when they actually do come to the table to mediate.

I will just walk you through kind of process that we go through. We get clients from around New York State. We have a new statewide service initiative that brings in artists from all across the state, but most of our clients are from New York City. They come to us through out art law line, which is manned and womaned by art students and law students, mostly law students from Cardozo, NYU, and Columbia. All art students and law students are told about mediation and educated as to what that is. It is run from 9:00 a.m. to 5:00 p.m. everyday. In September we had over 400 cases and phone calls successfully resolved. This is just people phoning in to ask anything from “you know I have this contract clause, or what should I do about this, or I have a copyright infringement, I think, but I am not quite sure what that is.” That is where most of my calls come from.

There is an intake and the students go to our in-house attorneys and have debriefing sessions. Either the attorneys on staff or the student decides that it might be a case for mediation and they are put through to me. We also have bi-monthly clinics on Wednesday afternoons. I think one is happening this evening. We have pro bono attorneys from all the top law firms in New York that come and help us out. The sessions last about a half hour to forty-five minutes. There are a couple of people here [today] that help out with that. It is nice to see them. Sometimes I am called into these consultations to talk about what mediation is, whether it is applicable to them, and whether or not they would like to find out more.

We also have in-house consultations that happen by appointment for artists and arts organizations. From there, I take down details and contact the second party. Usually one party comes in, I have had instances where an arts organization would come in and both parties would be present and say we are just having a dispute and I could talk to both of them right then and there. But usually I have to contact the second party and this can be by a formal letter that I send out or I can just contact them directly. They either get back to me or they do not. This is sort of the “time is of the essence” period, theirs is a lot of back and forth, a lot of education, and a lot of “I am not sure if I want to mediate with this person,” “I do not know if I even want to sit down on the same table as this person.” I found that when it happens, it happens when two parties are interested in working together in the future. In the entertainment business you are always dealing within the same circle. It is a big industry but it is quite small in terms of who you are going to run across. So when they find out that they can keep it confidential, that the chances of them resolving in three hours or six hours is 80 to 85%, and it is really going to be cost-effective, they walk away with a resolution that they are both happy with, that is when you actually get people to the table, that is when your success rate really rises.

When there is a power difference and a bit of a hierarchy, it does not work. In my personal experience, it does not work because if one party feels like the other has more power, they are scared. Why would they want to sit down at a table and feel as though they might be bullied into something? I think this point is the most important if I am going to raise one important point in this whole talk, I have been trying with the help of Alida Camp and some others, to educate the attorney community. We found if we have cases that come in, we have about upwards of 400 plus cases placed each month and we have about 700 volunteer attorneys that pick up cases off the case list on a pro bono basis.

I e-mail to over 1000 attorneys in the arts community and the legal community. If artists and arts organizations are placed on this case list, and attorneys are educated in the mediation process, this is when it becomes a win-win situation. Artists come in and they are interested in mediating but they still want to know what their legal rights are. Walking into a mediation, they do not feel empowered unless they know where

they are, what issues are the most important and where they can go in the future with this. We found out that the most awesome combination is to have a pro bono attorney work with an artist and then go to mediation. They have the education, they get the empowerment but they also sit down and resolve things amicably. That is it. Thank you.

Rosalind Lichter : I am going to open this for questions in a minute. One of the issues that comes up in a transaction point of view is how do you get a mediation or an arbitration clause in a contract when one of the parties is a record label or a deep-pockets party. How do you negotiate to negotiate?

Christine Lepera : Since I do not do transactional, we are going to turn that to Lisa Davis. We get the contract, there is no clause in it, and that is what I have come to expect.

Lisa Davis : I think it is impossible.

Donald C. Farber : Why do you not just say please?

Christine Lepera : No, not with a major record label or film studio.

Donald C. Farber : It depends upon what your history is. I had CBS give back one of my clients a short story that they gave him lots of money for. And I got to tell you, that for years after, I did things for them that more than paid for it. It is a little business that you mentioned before. It depends on who is coming to the table and how much they owe you.

Robert Freedman : Well, that is true.

Donald C. Farber : So, you cannot make generalizations. I have even tried pretty please. It sometimes works.

Rosalind Lichter : Well sometimes, in the context of when there is a dispute between clients, lawyers do get on the phone and try to resolve it if the lawyers want to keep the clients like what you addressed and avoid litigation. But Andrew Gerber is here. He used to be with CBS. He may want to address that issue—formerly known as the deep pocket attorneys CBS.

Andrew Gerber : Ok, I like feeling like deep pocket. There are serious answers to your questions. First of all you are right. large organizations tend to be more resistant to mediation.

Christine Lepera : Just a quick aside to that… yes, I have seen in some limited instances after a dispute has arisen, probably even after the complaint stage and you are into the process, some of the major companies agreeing to mediate, but there is no clause. It is only after the fact when a dispute has arisen in a particular context after they have thought out all of these considerations and they feel that it is safe enough to try the mediation route, which is not even binding in any event, that is happening gradually.

Louise Dembeck : I would say also they may be getting experience in other areas in the workplace and employment issues which are going to mediation and there is a benefit there to companies in that there is confidentiality. So, gradually, with education that may spill over.

Rosalind Lichter : Do you think Jack Welch would be better served by going to mediation in his divorce dispute? (Laughter)

Louise Dembeck : Well, would that not be a fun topic to have?

Rosalind Lichter : Mike Nadler Mike Nadler (he's in the audience). Does that not really go to the questions Lisa raised at the very beginning and what are your ethical responsibilities ….. and sometimes, I mean look, unfortunately or fortunately depending upon (inaudible) litigation is based upon that. And sometimes it may not be in a client's interest for you to advise them to put in an arbitration clause. Mediation, I see as really a no-brainer, but certainly arbitration can be strategically advantageous for one side or the other and you may have an ethical, you know they could say later, "what did you do that for?". That is why that question is very, very tricky as to whether or not you have an ethical responsibility to urge a client to….

Rosalind Lichter : That raises another question: do you have to include in your files that you have explained to your client why or why not to use an arbitration clause?

Louise Dembeck : Well, let me say that if advising clients about ADR becomes part of the model rules or professional code of ethics, then it would alleviate some of the concerns reflected by the barriers to settlement that I cited from Prof. Mnookin's book. For example, where there now might exist a fear that the other side will think you are weak, or your client might think you are weak if you suggest mediation, if you are obligated to tell your clients, then lawyers will do it as a matter of course and there will no longer be a fear of being perceived as "weak.". It will be done as a matter of course. It will probably be like a retainer agreement. It will become automatic and will be in the file.

Andrew Gerber : In the last couple of minutes we have been talking about two different things: One question we have raised here is getting the other side to (inaudible) that is a very different issue than (inaudible)

Christine Lepera : Just a quick comment. With respect to arbitration clauses in a contract, it is important that they are to be drafted carefully if they are going to be put in. I see so many contracts coming across my desk where there is sloppiness in the provisions in the agreement. The arbitration clause, to the extent that it is in there, has problems as well. So if you are going to have, and that is what I really think we are talking about with respect to the ethical obligation, if you made a conscious and careful decision with respect to a transaction that you want to contain a mediation or arbitration clause, it is not just one boiler plate clause. There are very different ways you can structure it. You can reserve rights. You can have certain rules apply, certain rules not apply; who is the mediator; how do you pick the mediator; are there any kind of limited subsequent rights to challenge the award? All of these things need to be carefully thought through, and so I think that is a really important issue to be thought through in terms of drafting.

Robert Freedman : I am a little troubled by the notion that large companies would prefer to take their chances in court. I think the paradigm almost shifts. You have a choice whether you want to go before a judge, who may not know anything about your industry and who may not be at all familiar with custom and usage, or what is common in your industry, and have that judge make a decision. Or do you want to go before an arbiter who knows all about your industry and who knows about the custom and usage. If I am with a big company chances are that I know more about my industry than maybe an individual who I am dealing with who has come into the industry and it seems to me that I can possibly maximize that knowledge I have before a knowledgeable arbiter than a non-knowledgeable judge.

Rosalind Lichter : As practitioners, I think it would be important to educate us about the nuances of arbitration clauses and mediation clauses because otherwise we go into this realm and we don't know as much as you do.

Christine Lepera : Right, right. This is what we hear often as a group in terms of educators. Arbitration is binding. There is no such thing as non-binding arbitration. If you are talking about non-binding ADR alternatives, mediation is the most common one. There a whole different panicle of other non-binding ADR devices, but when you are talking about arbitration and you are talking about the laws of the state and there is a federal arbitration act, you end up bringing your dispute, either by a pre-existing agreement or after the dispute arises, to a person, whether it be a lawyer, an ex-judge, or retired judge, who is going to decide the case or dispute, and it is binding. Now you may be able to craft in your arbitration clause, if you are doing it in advance of the dispute arising, certain protections, whether you want the arbiter to utilize certain rules of evidence, whether you want the arbiter to only be someone who knows the industry because sometimes you

can just throw in a clause and end up in a proceeding. This happened to me, where I don't have an arbiter necessarily who is knowledgeable about the topic of the dispute, so when you craft the arbitration clause you have to consider all the variables because it is binding and there is no right of appeal. That is the typical scenario, how do you want to craft that? There are a lot of different ways.

Rosalind Lichter : Are there several clauses in our packet?

Louise Dembeck : Yes there are sample clauses at Tab 5 of your packet, after the listing of characteristics of arbitration and mediation. There are samples from the American Arbitration Association, the CPR Institute, JAMS and the AIMAC center. But, I just have to add one more thing. There is a relatively new development. You know how there is the general rule of law applicable in most states, and then there is the California Rule. (laughing). In California, there is a hybrid process becoming popular now that they is called "non-binding" arbitration (uh-oh). The fact of the matter is, these are processes that the parties can construct and it can be called anything, but once you have "non-binding" arbitration, it is not really arbitration anymore. You cannot, for example, take advantage of the federal arbitration act or the international treaties and multi-lateral agreements, like the New York Convention, that permit enforcement of arbitral awards, at the end of the day, almost everywhere. So, what they have, in "nonbonding" arbitration, is just another hybrid ADR process. Christine said that, by definition, arbitration is binding, final, non-appealable, and that is the good news. Of course, that is also the bad news.

Audience Member : What about mistakes of law or can you not appeal at all?

Louise Dembeck : No. No. You can appeal. Well, you don't appeal, but the prevailing party goes to a court of law to enforce the award and the other side objects to enforcement of the award on the basis of one of a number of things: bias would be one, manifest disregard for the law and/or the facts (knowing the law and the facts but not applying or intentionally ignoring them.) I mean it gets hairy.

Christine Lepera : It is not the same kind of appellate process that you would get. It is instead Manifest disregard of the law. It is not just an error in the law; it has to be really over the top.

Audience Member : But you could still go to court for somebody to determine whether it was material to the decision.

Christine Lepera : Of course

Audience Member : The same question, but when speaking about mediation and arbitration and mediation and arbitration clauses, and some reluctance about going to mediation. From what I understand, arbitration is actually an alternative to litigation. Whereas if you mediate it is a bit of a preliminary effort, but then afterwards you still have the right for your client to …… but the experts can correct me, they are really very different

Christine Lepera : Very different. That's right.

Rosalind Lichter : Just a question. Mediation is automatically confidential or you put that into an agreement?

Christine Lepera : Well, mediation is not automatically confidential, It is if you go to the court processes of mediation, then you are required to keep it confidential pursuant to an agreement you sign with the mediator in the court process. But, if you just have a mediation clause in your contract and then you go to a mediation with an individual that you select as a mediator and you don't have an agreement, then you ca not restrict the other side.

Louise Dembeck : But practically speaking, every mediator that you go to will have an agreement that he or she asks you to sign that says not only that everything is and will be confidential but also that you cannot sue them or call them into court to be a witness. Yes, sir?

Rosalind Lichter : Lisa, would you like to?

Lisa Davis : Sure I will take a stab

Rosalind Lichter : Repeat the question

Lisa Davis : He wanted to know how the use of ADR methods differs in the different disciplines within the entertainment industry: theater, music, film, and television. I guess I would say that there is a common resistance to ADR in any of the deep pocket or institutional entities in any across media. So whether it is a record company or a film studio, there is resistance and discomfort. I think what I was just trying to speak to is the areas I thought would be fruitful to push for the application of ADR methods based on the kinds of relationships and the kinds of contractual interactions the parties have. If you are talking about, you know Robert talked about, certain kinds of disputes that it would be fruitful to have mediation rather than litigation, and I talked about in the music area some of those same kinds of things. I think that generally, you know lawyers are inherently conservative and risk-averse, we are all trained to read cases in law school, and we are all trained in litigation paradigm. So I think resistance is probably common across disciplines.

Audience Member : One thing that is common that is applicable to all industries is that once a case is filed, basically in virtually every court now across the country, federal or state, there is going to be a big push by the docket clerk, the court, whatever, to try to get that case into its mediation, court-annexed mediation program. So virtually every attorney who is representing a client in the industry who is actually in a litigation will start becoming more and more familiar through this process with mediation

Rosalind Lichter : Well you also have judges trying to mediate disputes by calling in the parties to chambers, to try and figure out whether there is resolution for a case to get it off of the docket as much as anything else.

Audience Member : Well that has been going on forever.

Louise Dembeck : That is a settlement conference and I would not confuse settlement conferences with what we are talking about here: mediation. The settlement conference is really where the judge uses his or her power to force the parties to agree to settle, and mediation is not always about settling, it is sometimes about preserving relationships, so what we are talking about is a process in which the parties remain in control but get help from the mediator in structuring something they themselves want.

End.

COMMENTARY: ADR AND THE ENTERTAINMENT INDUSTRY by Robert I. Freedman *

If entertainment attorneys become familiar with the processes of mediation and arbitration, the issue then arises as to when it is appropriate to apply these ADR procedures to disputes. Following are some areas of entertainment industry disputes that cross media-specific boundaries in the application of ADR to those disputes.

CREDIT

The resolution of credit disputes lend themselves to mediation or arbitration because often there is little or no monetary reward and the cost of litigation is usually prohibitive. Issues as to whether a credit is in accordance with custom and usage in the entertainment industry is better settled by a knowledgeable attorney in the entertainment industry than a judge or jury that would need to be fully educated as to that custom and usage. Furthermore, credit issues are often time-sensitive and both parties are better served through a fast-track resolution.

The Writer's Guild of America settles certain credit disputes through an internal arbitration process. The WGA has a standing committee to settle writer disputes in television and motion pictures that involve a WGA member. In such disputes, all parties claiming credit are required to submit the material they wrote for the disputed program or film, and the WGA Credit Arbitration Committee reviews the material and awards credits such as "Written By," "Story By," and "Teleplay By."

PROFIT PARTICIPATION

Many entertainment contracts provide for profit participation to funders and creative participants. Agreements further provide for regular accountings and a right of the profit participant to examine the books and records of the party collecting the revenues. Invariably, there are disagreements between the revenue collector (e.g. a studio, recording company, publisher or production company) and the profit participant. (e.g. an author, director co-producer or talent) The cost of going to court to resolve these disputes might consume most of the monies in dispute. A less expensive method is called for.

While mediation might resolve the issue, arbitration will give finality to the dispute in an affordable and timely manner. The arbiter(s) selected should be accountants or attorneys familiar with auditing and royalty/profits reports. Their experience in resolving disputes on the same issues would be an invaluable resource in this form of dispute resolution. Issues such as contract interpretation and the presence, or lack of, or documentation can best be evaluated through experienced and trained professionals.

CONTRACT TERMINATION

When one party terminates a contract, at least one other party is damaged. Contracts may be terminated for breach, but there are other reasons as well. A contract may be terminated for anticipatory breach where the issue often turns on the reasonableness of the terminating party. A contract may be terminated because the terminating party has exhausted its available funding for a project. Or, the terminating party may have made a creative judgment call that the project was not of sufficient quality or content to warrant continuing the investment in it. While many entertainment contracts provide for a right of termination under certain circumstances, not all agreements provide a definition of the rights or remedies of the party being terminated. What does the terminated party do?

In the event of termination, the status quo unwinds quickly. A terminated party might be replaced. The terminating party may close down business. In either event, the litigation process is not likely to produce the kind of result that can provide any remedy other than monetary compensation long after the fact. A more speedy mediation or arbitration procedure might allow the parties, under certain circumstances, to pursue equitable, as well as monetary, resolutions of their dispute.

By way of example: Studio X engages Production Company Y to produce a television program. Several weeks into the project Company Y is far enough over-budget that Studio X exercises its right of termination in anticipation that Company Y will not complete the project on budget. Company Y argues that it can make up the deficit in postproduction. This resolution of this dispute would benefit tremendously from a timely resolution that could reinstate Company Y if the facts warrant such a conclusion; it would benefit from a neutral who has knowledge of the television production process; and it would further benefit the parties if the amount of money they had to spend on the dispute resolution was reduced. This clearly points to ADR as an appropriate route to follow.

TIME IS OF THE ESSENCE DISPUTES

Many contracts provide that the time to deliver the completed product, be it film, video, book or audio recording, is of the essence of the agreement and failure to deliver by a set date is a material breach of the agreement, giving rise to termination or other draconian penalties. But is a late delivery date, particularly a date that is just a little bit late, really fatal to the project? Does it really cause substantial damages to the receiving party? These questions could be answered in a lengthy court proceeding or might even be answered in a summary proceeding giving little or no consideration to the reality of the situation?

By way of example, a contract provides that a master recording be delivered by November 1 st . Failure to deliver by that date would result in a penalty of $5,000 per day. The master is delivered on November 15 th . The company receiving the master holds back the final payment of $75,000. Does the $75,000 penalty make any sense in this situation? Is a courtroom the appropriate place to decide this issue or might mediation be a far better choice in that the parties are likely to come to some compromise with the assistance of a trained and knowledgeable neutral.

Entertainment attorneys generally pride themselves on their negotiation skills. Often this does lead to a compromise and settlement of the dispute. However, whether it is the issue or pride that impedes settlement, alternative dispute resolution is a faster, more cost-savings route. And, the parties are often able to have the assistance of an expert in their field rather than going before a judge with far less familiarity and expertise in the entertainment industry.

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