

# THE CPA MANAGEMENT CONSULTANT

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## BULLETIN BOARD

### BUSINESS VALUATION SPECIALIST ACCREDITATION UPDATE

By a recent action of the Institute's Board of Directors, the Business Valuation Specialist (BVS) examination scheduled for September 10, 1993 has been postponed. The accreditation requirements are still being evaluated, and a report on specialization, including requirements for the BVS accreditation, is expected to be presented at the Council meeting in the Fall. We will keep you informed of any decisions made or actions taken.

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## ALTERNATE DISPUTE RESOLUTION: OPPORTUNITIES FOR THE CPA

DARRELL V ARNE, CPA, ALBUQUERQUE, NEW MEXICO

Alternative Dispute Resolution (ADR) provides a way to settle disputes without expensive and prolonged litigation. ADR processes require people with technical expertise, and accordingly, present an opportunity to CPA practitioners to expand their practices by providing related services. Even practitioners who do not wish to offer new services should learn about ADR so that they can advise clients about this alternative to litigation. CPAs themselves can also use ADR to settle their firm's disputes with clients and other parties.

ADR has many forms. The most appropriate form for resolving a dispute will depend on the nature of the issues and the parties involved. The three forms in which CPAs most often are involved are mediation, arbitration, and neutral evaluation.

#### MEDIATION

In mediation, the disputants, with or without their attorneys, meet with a neutral third party, which may be one person or a panel. The third party helps the disputants to identify the issues of the dispute, determine and consider ways to resolve the issues, and negotiate a settlement. Mediation can be either voluntary or court ordered. Usually, the mediator conducts separate and joint meetings with the disputants. The mediator does not have the power to render a binding decision. Consequently, the resolution is binding only if the disputants agree that it is enforceable.

Mediation is frequently used in domestic relations cases involving disputants whose resources are limited and in commercial disputes between parties who have an ongoing working relationship that they would like to

preserve. Mediation will not postpone a pending lawsuit, and if the disputants cannot reach an agreement, they can still try the matter through other litigation channels. Mediation can be used when the dispute first occurs or after a lawsuit is filed.

In mediation, the CPA acts as a sole mediator or a co-mediator with an attorney, psychologist, or other specialist. Another role for the CPA is to act as a neutral consultant to help the disputants and mediators to understand technical matters.

#### ARBITRATION

Arbitration is a more formal process than mediation. In arbitration, the disputants engage a neutral third party

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(again a person or a panel) to hear arguments, consider evidence, and make a decision about (adjudicate) the dispute. The third party renders a decision as does a civil court judge, but without the formalities of a court of law that often are expensive and time consuming. Arbitration can be mandatory or voluntary, court-ordered or privately agreed upon. In arbitration, the decision by the arbitrator can be either binding or nonbinding. For the decision to be binding, however, the disputants must agree to this arrangement beforehand.

Arbitration is another ADR process that helps disputants preserve ongoing relationships, such as those between a customer and a supplier, an owner and a builder, an employee and an employer, a shareholder and a company,

or a business purchaser and a business seller. Often contracts and other business documents contain clauses that identify arbitration as the method to settle disputes concerning the business relationship. Business executives favor arbitration because the process is "businesslike," simple, and private.

In arbitration, there are generally three roles for the CPA: sole arbitrator, expert, or panelist. As a sole arbitrator, the CPA listens to both sides of a dispute, then renders a decision after weighing the merits of each argument. As an expert, the CPA is engaged by one side in the dispute and may assist in the discovery process, develop opinions, and testify at the arbitration hearing. As a panelist, the CPA arbitrates the dispute with co-arbitrators.

**NEUTRAL EVALUATION**

Neutral evaluation is used in complete business litigation and in cases in which the parties have widely different assessments of how the issue will be decided at trial (for example, a business valuation). Neutral experts' opinions can be used in other ADR processes, such as mediation, arbitration, and ongoing pretrial settlement discussions. Neutral evaluators may be appointed by the court or privately agreed upon by the parties in a dispute to render opinions on factual issues. Neutral evaluators must have the respect of the disputants and their attorneys, so that their expert evaluations and opinions will be taken seriously.

A neutral evaluator used at the inception of a dispute is called an Early Neutral Evaluator (ENE). The ENE can help predict the cost and complexities of a case for litigation, as well as offer preliminary opinions on specific issues. Early settlement is often achieved when the ENE's opinion convinces one or both of the parties to relinquish unrealistic positions.

As a neutral evaluator, the CPA works directly with the disputants and their attorneys. If court appointed, the CPA is not obliged to follow a particular client's or attorney's instructions on how to proceed because the court is the client. As an ENE, the CPA may be asked to review the factual issues and report findings to the court and the disputants. This report is a "reality check" that provides the disputants an opportunity to reconsider unrealistic expectations. If the disputants cannot reach a settlement after this preliminary evaluation, the court may then direct the CPA to evaluate the dispute in more depth.

**CPAs ARE SUITED TO THE ROLES PLAYED IN ADR**

Opportunities for CPAs to participate in the ADR process should continue to grow as governments seek to relieve the congestion in their courts. In Colorado, for example, the Rules of Professional Conduct require that attorneys advise their clients of the forms of ADR.

The benefits of ADR include the saving of time and money for disputants, the preservation of important

SOURCES OF INFORMATION ABOUT ALTERNATIVE DISPUTE RESOLUTION	
ASSOCIATIONS	BOOKS
Academy of Family Mediators P.O. Box 10501 Eugene, OR 97440 (503) 345-1205	Faulkner and Gray. <i>Arbitration and Mediation Directory</i> . New York: Faulkner and Gray, 1992.
American Arbitration Association 140 West 51st St. New York, NY 10020-1203 (212) 484-4041	Fisher, R., and W. Ury. <i>Getting to Yes</i> . 2nd ed. New York: Penguin Books, 1991.
Arbitration Forums, Inc. 3350 West Bush Boulevard Suite 295 Tampa, FL 33618 (813) 931-4004	Goldberg, S., E. Green, and F. Sanders. <i>Dispute Resolution</i> . Boston: Little, Brown and Company, 1985.
National Institute for Dispute Resolution 1901 L St. NW, Suite 600 Washington, DC 20036 (202) 466-4764	Murray, J., A. Rau, and E. Sherman. <i>Processes of Dispute Resolution</i> . Westbury, NY: The Foundation Press, 1989.
Society of Professionals in Dispute Resolution 1730 Rhode Island Ave. NW, Suite 512 Washington, DC 20036 (202) 783-7277	Singer, L. <i>Settling Disputes</i> . Boulder, Colo.: Westview Press, 1990.
	Ury, W., J. Brett, & S. Goldberg. <i>Getting Disputes Resolved: Designing Systems to Cut the Costs of Conflict</i> . San Francisco: Jossey-Bass, 1989.
	Wildnson, J. <i>Donovan, Leisure, Newton &amp; Levine Advanced Practice Book</i> . New York: John Wiley & Sons, Inc., 1990.

## THE CPA'S INDEPENDENCE IN ADR

On May 19, 1993, the AICPA Professional Ethics Executive Committee issued an exposure draft of proposed ethics rulings under rule 101 of the Code of Professional Conduct that address the issue of independence when 1) a member and an attest client enter into an agreement to use ADR techniques and 2) an ADR proceeding is begun. The proposed rulings take the position that 1) a predispute agreement to use ADR techniques would not impair independence, and 2) the commencement of an ADR proceeding would not affect independence unless binding arbitration is used. When binding arbitration is used, the member and the client would be in positions of material adverse interests because arbitration proceedings are considered sufficiently similar to litigation for ethics interpretation 101-6 (ET section 101.08) to be applied.

relationships, and the use of procedures that are responsive to participants' needs. In addition, the decisions that come out of the process are generally complied with more frequently than the decisions of formal **litigation** because they are usually broader and more flexible.

CPAs are well suited to play a role in the ADR process. Many forms of ADR require a facilitator with independence (see sidebar) and objectivity, standards with which CPAs are accustomed to complying. Furthermore, CPAs have the technical, financial, and business expertise needed to identify and communicate the issues and possible alternative solutions to the disputants. For example, the CPA might provide services in disputes involving

- Divorce
- Business losses, damages, or interruption
- Contracts
- Shareholders
- Estate and probate
- Malpractice
- Insurance claims

Some of the activities in which the CPA might be involved in these and other types of disputes include:

- Valuation of a closely held business or professional practice
- Compensation assessments
- Forensic procedures, such as estimating unrecorded revenues or uncovering hidden assets or **liabilities**
- Tracing of funds
- Analysis of pre- and post-divorce cash flow
- Determination of financial implications of settlement options, including tax consequences
- Personal injury assessments
- Analysis of pension and other plan benefits

### GETTING STARTED IN ADR

Training and practice are necessary to develop competency in the ADR process. Courses on mediation and arbitration are available through many

CPAs are permitted to mediate. Practitioners should also know the Rules of Conduct for attorneys in their state. State bar associations and the court system can provide information about state guidelines for ADR.

One way for a CPA practitioner to get started in providing ADR services is to volunteer as a facilitator during the settlement weeks that many judicial districts sponsor to relieve overcrowded court dockets. This activity is well suited for sponsorship by state CPA societies. The practitioner also should check to see if local or state bar associations sponsor ADR committees. Some bar associations permit nonattorneys to be members of these committees.

To obtain information about becoming an arbitrator or mediator, practitioners can contact the associations listed in the box on page 2. Of these associations, the American Arbitration Association and Arbitration Forums, Inc., are the largest. In addition, local court systems may have a listing of local arbitration forums. New York based Faulkner and Gray provides a detailed discussion of ADR and a list of ADR providers in its Arbitration and Mediation Directory.

ADR is still evolving as a means to

***"Traditional litigation is a mistake that must be corrected. . . . For some disputes, trials will be the only means, but for many claims, trials by adversarial contest must in time go the way of the ancient trial by battle and blood. Our system is too costly, too painful, too destructive, too inefficient for a truly civilized people."***

—Chief Justice Warren E. Burger (February 28, 1984)

law schools, the American Arbitration Association, and other private providers of dispute resolution services.

Practitioners interested in providing ADR services should become familiar with the arbitration statutes in their state. Some states (for example, Florida) have statutes describing the qualifications necessary to become a certified mediator and the types of cases

settle disputes outside the courtroom. Increased use of ADR has been encouraged by many jurisdictions and by the President's Council on Competitiveness and the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States. CPAs have a tremendous opportunity to become involved in ADR processes on the ground floor.

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MCS