IN SEARCH OF CONTROL: THE CORPORATE EMBRACE OF ADR

David B. Lipsky & Ronald L. Seeber†

*That night, Schlichtmann went home and lay in bed trying to sleep*.... He thought about his reputation and career, about the lawyers who'd said he was foolish to reject a million-dollar offer, about Paul Carney in his wheelchair awaiting the verdict. *... At six o'clock, as he watched the sun rise over Boston harbor, he called Rikki Klieman.... Should he take the million dollars? ... Or should he wait for the jury's verdict? “You've made your choice,” Rikki said.... The jurors returned their verdict that afternoon. They found the doctor and hospital negligent and they awarded Paul Carney $4.7 million.1*

The courtrooms and hearing rooms of the United States are filled with Schlichtmanns, Carneys, and corporations, all seeking justice in the milieu of American civil action. There is fundamental change underway in that system, however, a change driven in part by the dilemma described above.

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The outcome of any civil action is often as much a roll of the dice as it is a reasoned decision. Therefore, many corporations believe the American system of civil justice in the 1990s is out of control. One of the foremost trends in corporate America in recent years has been the shift from traditional litigation and agency resolution of disputes toward the use of alternative dispute resolution (ADR). By using ADR, U.S. corporations believe that they can overcome many of the negative aspects of our civil justice system.

Although no one definition is universally accepted, we shall define ADR as the use of any form of mediation or arbitration as a substitute for the public judicial or administrative process available to resolve a dispute. One need only scan the business and legal press to see that, as compared to a few years ago, many more disputes are being resolved through negotiation, mediation, and arbitration. From the Attorney General of the United States to agency rule-makers in many areas of government regulation, policy makers at all levels of government have encouraged this trend. Accompanying this public policy movement, increasing numbers of law firms and corporate legal departments are establishing ADR practice sections or hiring experts where none existed before.

The employment field is illustrative of this trend. In the field of union-management relations, the established pattern has been for the parties themselves to resolve nearly all disputes, rather than rely on the courts. During the past thirty-five years, however, most individual employees have been granted a long list of statutory rights, ranging from protection from discrimination to pension protections to safer and healthier workplaces. Each of these laws has been accompanied by a dispute resolution process, often involving a federal or state government agency and, ultimately, the court system. Over time, increasing frustration has arisen because of the long delays to resolve disputes, the associated expenses, and the outcomes produced. Thus, over the past few years the trend has been toward the use of ADR in individual employment cases.

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2. For purposes of this discussion, mediation is defined as any form of dispute resolution where one or more impartial persons assist the parties in reaching a settlement but do not make a binding determination. Arbitration is defined as any form of dispute resolution that involves the submission of a dispute to one or more impartial persons for a final and binding determination. Thus, the critical distinction between mediation and arbitration is whether the third-party neutral can or cannot make a binding determination in the case. Arguably, every ADR technique can be categorized as either mediation or arbitration, depending on whether it is nonbinding or binding.


4. Using the key words "alternative dispute resolution" in the World Wide Web search engine Alta Vista resulted in a list of over 1.3 million Web sites! Sampling some of the sites suggests that many are maintained by law firms engaged in an ADR practice.

5. The Commission on the Future of Worker Management Relations (hereafter the
The courts have approved this trend, most notably in the Supreme Court's decision in *Gilmer v. Interstate/Johnson Lane Corp.* In *Gilmer*, the Court sanctioned mandatory arbitration of an age discrimination claim as a substitute for resolving the complaint in the courts. Gilmer had registered as a securities representative when he was initially hired and, in that registration, had agreed to arbitrate any controversy arising over his employment or its termination. Asserting that his employer had terminated him because of his age, Gilmer sought to stay his agreement to arbitrate and to have his claim resolved by the Equal Employment Opportunity Commission (EEOC) and the courts. The Supreme Court rejected his claim, saying that the Federal Arbitration Act allowed the agreement to arbitrate to stand. The Court maintained that arbitration was an appropriate forum for the resolution of his dispute, thus denying him access to the procedures of the EEOC. In fact, the EEOC itself is now among a wide-ranging group of federal and state agencies encouraging the use of ADR as a substitute for statutorily devised dispute resolution processes.

Critical actors in this changing milieu are the corporations themselves. Many corporations are now promoting the use of ADR in a wide range of conflicts between the corporation and other businesses, clients and customers, and their own employees. In each of these areas, it

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Dunlop Commission), appointed by Secretary of Commerce Ronald H. Brown and Secretary of Labor Robert B. Reich in 1993, in both its *FACT FINDING REPORT* (1994) and its *FINAL REPORT* (1994) documented the explosion of litigation in the employment area:

As the Fact Finding Report discussed in detail, employment litigation has spiraled in the last two decades . . . . In the federal courts alone, the number of suits filed concerning employment grievances grew over 400% in the last two decades. Complaints lodged with administrative agencies have risen at a similar rate . . . .


7. *See id.* at 26-27.
appears that the time and cost associated with traditional litigation have been important factors pushing corporations toward their growing use of ADR processes.

The apparent trend of corporations to increase reliance on ADR motivated our desire to conduct a survey of the general counsel of the Fortune 1000 corporations. During the first four months of 1997, the Computer-Assisted Survey Team (CAST) at Cornell University conducted a mail and phone survey of the corporate counsel of the 1,000 largest U.S.-based corporations for the Cornell/PERC Institute on Conflict Resolution. The objective of the survey was to obtain comprehensive information about each corporation's use of ADR from the person in the organization responsible for, or most knowledgeable about, ADR. Interviews were completed with 606 respondents. In roughly half the cases, the respondent was the general counsel of the corporation; in the other half, the respondent was either a deputy counsel or chief litigator. The survey yielded a rich harvest of information about the use of ADR by major U.S. corporations. In addition to the fixed-choice questions contained in the survey instrument, CAST interviewers asked open-ended questions, resulting in the gathering of valuable anecdotal material as well. The survey findings discussed in this article are only a portion of our full analysis of the survey results.9

Prior to this study, there had been only a handful of limited surveys of how many corporations use ADR, what forms of ADR they use, what kinds of disputes are resolved by ADR, and, perhaps most important, what corporations believe about the future of ADR in American business.10 We believe that ADR has been in place long enough to permit judgments to be made about some of the critical issues surrounding its use, including whether ADR has resulted in significant changes in how disputes are resolved between organizations.


I. EXPERIENCE WITH ADR PROCESSES

Our survey asked respondents about their experiences with not only the commonly applied forms of ADR, i.e., mediation and arbitration, but also with other processes and techniques that we suspected were less widely used. Figure 1 shows respondents' experiences with the eight forms of ADR about which we inquired. As the figure indicates, nearly all our respondents reported some experience with ADR. They overwhelmingly reported having used mediation (88%) and arbitration (80%) at least once in the past three years.

Respondents had a significant range of experience with other forms of ADR. More than 20% said they had used mediation-arbitration, mini-trials, fact-finding, or employee in-house grievance procedures in the past three years. Further, more than 10% of respondents, representing about sixty corporations, had experience with even the least used forms of ADR, ombudspersons and peer reviews. Thus, the breadth of penetration of ADR into American business is substantial, even surprisingly so. When asked to name their preferred form of ADR process, counsel overwhelmingly reported mediation (63%); arbitration was a distant second (18%).

Figure 1

Experience with Forms of ADR among Fortune 1000 Companies

11. Many sources give definitions of the ADR methods discussed here. See, e.g., ADR STUDIES, supra note 5.
II. WHY DO CORPORATIONS USE ADR?

Although it is clear that there is now widespread experience with ADR in American business, the reasons for its popularity need further explanation. Fundamentally, there are three situations that lead to the use of ADR by corporations. First, corporate decision making in this area is often ad hoc in nature because a particular dispute may arise in the course of doing business for which opting for an alternative to litigation may be desirable. Such case-by-case decision making may characterize much of the use of ADR. Second, an important variation occurs, however, when corporations agree in advance to use mediation or arbitration to resolve disputes that will arise in the future. Our survey results suggest that a growing number of corporations are incorporating ADR provisions in their contracts, warranties, and other agreements. Third, corporations use ADR when a court or an administrative agency orders the disputing parties to attempt to resolve it themselves through mediation or arbitration. Such court-ordered ADR has become prevalent in some jurisdictions in recent years and plays a significant role in encouraging corporations to negotiate when they might not otherwise do so.  

Our survey asked respondents to explain why their corporations used mediation and arbitration, allowing them to choose any of fourteen possible reasons for doing so. These responses provide us with a reasonably complete understanding of the forces that cause a company to decide to mediate or arbitrate a particular dispute. Two of the more significant forces that appear to be driving corporations to use ADR are the cost of litigation and the length of time needed to reach resolution of the dispute. Almost all of our respondents believe it is cheaper and more time efficient to use ADR rather than rely on the courts. More than 80% of the respondents told us that mediation saves time and money, while just under 70% told us that arbitration did so.

Saving time and money may be the most widely cited reasons for using ADR, but corporations cite many other reasons as well. Our survey results suggest that some corporations use ADR without first obtaining adequate evidence that it will actually save their organizations money. Indeed, a few corporations choose to use ADR even if doing so might cost more money than litigation. However, in most cases, corporations use ADR for a combination of reasons: to save time and money as well as to achieve other objectives. Table 1 shows the percentage of respondents who told us the factor listed in the table was a reason their corporation

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used either mediation or arbitration.

TABLE 1: REASONS COMPANIES USE MEDIATION AND ARBITRATION
(Percentage of respondents reporting each reason)

<table>
<thead>
<tr>
<th>Reasons</th>
<th>Mediation</th>
<th>Arbitration</th>
</tr>
</thead>
<tbody>
<tr>
<td>Uses expertise of neutral</td>
<td>53.2</td>
<td>49.9</td>
</tr>
<tr>
<td>Preserves good relationships</td>
<td>58.7</td>
<td>41.3</td>
</tr>
<tr>
<td>Required by contract</td>
<td>43.4</td>
<td>91.6</td>
</tr>
<tr>
<td>Provides more durable resolution</td>
<td>31.7</td>
<td>28.3</td>
</tr>
<tr>
<td>Preserves confidentiality</td>
<td>44.9</td>
<td>43.2</td>
</tr>
<tr>
<td>Avoids legal precedents</td>
<td>44.4</td>
<td>36.9</td>
</tr>
<tr>
<td>More satisfactory settlements</td>
<td>67.1</td>
<td>34.8</td>
</tr>
<tr>
<td>More satisfactory process</td>
<td>81.1</td>
<td>60.5</td>
</tr>
<tr>
<td>Court mandated</td>
<td>63.1</td>
<td>41.9</td>
</tr>
<tr>
<td>Dispute involves international parties</td>
<td>15.3</td>
<td>31.9</td>
</tr>
<tr>
<td>Allows parties to resolve disputes themselves</td>
<td>82.9</td>
<td>—</td>
</tr>
<tr>
<td>Has limited discovery</td>
<td>—</td>
<td>59.3</td>
</tr>
<tr>
<td>Standard industry practice</td>
<td>—</td>
<td>33.7</td>
</tr>
</tbody>
</table>

The most often cited reason for using mediation was that the process allows parties to resolve the dispute themselves; no settlement can be reached unless both sides agree to it. Approximately 83% of the respondents said that this was one of the reasons they use mediation. In contrast, of course, the use of both arbitration and the court system may lead to decisions imposed on the parties with which they disagree.

The next three most cited reasons for using mediation are also linked to the same theme, namely, that it offers the corporation greater control over the dispute resolution process and its outcome. Eighty-one percent of those surveyed said that mediation provided parties with a more satisfactory process than litigation, 67% said it provided more satisfactory settlements, and 59% reported that it preserves good relationships. In sum, these responses indicate that mediation provides not just an alternative means to conventional dispute resolution, but also a superior process for reaching a resolution.

The remaining reasons for using mediation were not as widely supported by our respondents. More than half the respondents saw the mediator's expertise as an advantage of the process. For example, the general counsel of a Midwest financial services corporation expressed this
opinion: "Mediators are sometimes good and sometimes bad, but they are generally better than arbitrators." Later in this article, we will discuss the apparent ambivalence about the qualifications of mediators and arbitrators. Finally, some parties engage in mediation because it is required by contract (43%) or is court mandated (63%).

In the open-ended portion of our interviews, our respondents elaborated on their reasons for choosing to mediate, as the following comments illustrate:

One reason we use mediation is because we have a lot of environmental disputes involving complicated scientific issues, and we can select a mediator who knows more about such issues than a judge would.

Mediation creates an environment in which the parties can speak freely about their perspective on the merits of the claim. There doesn’t seem to be the filtering that occurs in the courtroom.

Mediation allows each side to understand what's really important to the other side. It’s not always simply a matter of money. Sometimes a simple apology can go a long way to resolving a dispute.

In employment law disputes, mediation provides a catharsis for people who think they've been wrongly injured. It helps them get over their problem.

Turning to the results presented in Table 1, the overwhelming reason that respondents gave for using arbitration was that the arbitration was required by contract; in other words, the corporation had, in effect, agreed to pursue this route before the dispute arose.

In general, the support for arbitration among corporations is not as strong as the support for mediation. For example, just over 60% of respondents said they believed arbitration provides a more satisfactory process than litigation. This suggests that while "satisfactory process" is a powerful motive for using arbitration, it is clearly a much stronger motive for using mediation. Likewise, respondents supported the other process-control reasons for using arbitration in smaller, albeit significant, numbers. As one respondent representing the view of a large insurance company stated, "Arbitration is cheaper [than litigation], faster, confidential, final, and binding. What more can I say?"

In addition to these differences, some other variations emerged in respondents' views of mediation and arbitration. Although two-thirds thought that mediation produces more satisfactory settlements than

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litigation, only about one-third held that view of arbitration. Nearly 60% believed mediation preserves good relationships, while 41% believed this to be true of arbitration. In sum, although there is strong support for the belief that arbitration saves time and money, there is much less support for the notion that arbitration has value as a means of controlling the process of dispute resolution.

III. EXPLAINING THE GROWTH OF ADR

Why has the use of ADR increased so dramatically in recent years? After all, arbitration, mediation, and other ADR techniques have been around for a century, if not longer. Some observers trace their use to biblical times. In labor-management relations, arbitration and mediation were first used in the nineteenth century. Commercial arbitration dates to an even earlier period. In the previous section of this paper, we showed that corporations use ADR because they believe it is cheaper and quicker than litigation. However, complaints about the excessive costs and delays associated with litigation are certainly not new; one has only to consider, for example, Charles Dickens's vivid depiction of the never-ending civil suit Jarndyce v. Jarndyce in Bleak House. Why, then, is the ADR "revolution" so recent in origin?

Our study suggests that the rapid spread of ADR techniques in the United States is a consequence of a unique convergence of several important societal factors. These factors include the growing competitive pressures faced by American businesses, their increasing frustration with the legal system, and a consequent trend toward the use of court and contractual mandates that require the use of ADR.

A. Competitive Pressure

The key factor that explains the increased use of ADR is the competitive market pressure faced by American corporations. Through most of the post–World War II period, many American corporations were insulated from international competition. Eventually, however, this insulation diminished, and by the 1980s, most American corporations felt the full effects of global competitive pressures. To compete effectively in global and domestic markets, American corporations went through a wave of mergers, acquisitions, and takeovers. They also engaged in downsizing, reengineering, and restructuring. All of these factors combined, we
suggest, provide a motive for corporations to use ADR.

In other words, the corporate quest in the 1980s to be more efficient and more cost effective led corporations, in time, to examine the costs associated with their legal affairs. Many of our survey respondents identified these corporate cost pressures as a major factor motivating them to adopt ADR. Some of them told us that the "transaction" costs associated with settling a dispute, including the costs of inside and outside legal counsel, the costs associated with expert witnesses, and so forth, were often two to three times the amounts of the settlements themselves. The corporation would often invest considerable money and energy from the time of the initial filings in a court suit, through interrogatories and depositions, to the time of the trial itself, and then, in 90% of all cases, settle "on the courthouse steps" or in the judge's chambers. It was in this context that many corporations began to assess the possibility of using mediation or arbitration to save the time and money associated with litigation.

Corporate efforts to find more efficient and effective ways of doing business often resulted in the corporation focusing on its legal department. Some of our respondents told us that their departments had been downsized and restructured. Top management, we were told, had required the corporate counsel to cut his or her budget. Relationships with outside law firms were redefined. The corporate counsel, often at the urging of the company's CEO, carefully assessed the use of ADR as a cost-saving measure.

B. Frustration with the Legal System

Another set of factors, largely independent of competitive forces, was also driving corporations to use ADR. These factors can be summed up with the term "frustration with the legal system." It is, of course, well known that federal and state regulation of corporate behavior multiplied in the post–World War II period. In the area of employment law alone, Congress passed at least two dozen major statutes regulating employment conditions in the period from 1960 to 1990, including the Civil Rights Act of 1964, the Occupational Safety and Health Act in 1970, Employee Retirement Income Security Act in 1974, the Americans with Disabilities Act in 1990, the Civil Rights Act of 1991, and the Family and Medical Leave Act of 1993. More and more dimensions of corporate behavior were brought under the scrutiny, not only of the court system, but also of a multitude of regulatory agencies. In the employment area alone, corporate counsel had to cope with new areas of litigation ranging from sexual

15. See also FINAL REPORT, supra note 5, at 25.
harassment and accommodation of the disabled, to age discrimination and wrongful termination. Many of the courts and administrative agencies became burdened with backlogs of cases, and, as many of our respondents commented, the delays in settling these disputes became intolerable. The frustration brought on by these problems was another motivating factor for corporations to adopt alternative dispute resolution.

C. Court and Contract Mandates

Legislators and policy makers were not oblivious to the stresses of our legal system. In many situations, they responded by encouraging the use of ADR. In 1990, for example, Congress passed the Civil Justice Reform Act, which required each federal district court "to assess its dockets and to develop a plan for civil-case management to reduce costs and delays." In many jurisdictions this requirement led the district court to institute an ADR program. The court systems in more than half the states now encourage, or even mandate, the use of ADR to reduce state backlogs and to expedite the resolution of disputes. A growing number of administrative agencies, such as the federal EEOC and state-level workers' compensation boards, have begun to encourage the use of ADR to resolve complaints that would otherwise need to be handled by the agency itself. In addition, companies are increasingly incorporating mandatory ADR provisions in contracts they negotiate with their vendors, suppliers, customers, and employees.

The U.S. Supreme Court has also been inclined to favor the use of ADR, especially in employment disputes. As noted earlier, the Court in Gilmer held that an employment contract provision requiring an employee to use arbitration to resolve a claim arising under the Age Discrimination in Employment Act was enforceable by the courts. The initial application of the Gilmer principle to age discrimination suits in the securities industry has subsequently been broadened to apply to other statutes in other industries. In this context, the significance of the Gilmer decision is that it allows employers to require their employees to agree to employment contracts that substitute the use of arbitration for litigation in disputes where, arguably, a statutory violation has occurred. Subsequent court decisions, however, have made it clear that there are limitations on the


17. The RAND Corporation conducted an evaluation of ten "pilot" courts and found that "some case management procedures—for example, certain types of alternative dispute resolution—have no major effects on cost and delay." Id. Some ADR proponents have been critical of the RAND study, however, arguing in part that several of the ADR pilot programs evaluated in the study had design deficiencies.
applications of *Gilmer*. For our purposes, it is significant to note that the courts' support of ADR has spurred its use in major corporations.

IV. BARRIERS TO THE GROWTH OF ADR

In our interviews with corporate counsel, we discovered that there were several key reasons why corporations chose not to use ADR. Some lawyers told us, for example, that they would use ADR only if and when senior management supported it. Although the counsel's office can usually exercise broad discretion in its choice to use or not to use ADR in routine disputes, the use of ADR in disputes involving important legal principles or potentially large settlements ordinarily requires the support of top managers. In a majority of disputes, counsel's office may have the authority to decide to use ADR; but the bigger the case and the higher the stakes, the more likely it is that the CEO or the chairman of the board will be involved in the decision to use ADR. Also, adopting the routine use of ADR as a matter of corporate policy usually requires the involvement of both the counsel's office and other top managers. In our survey, we identified approximately seventy three corporations (12% of our sample) that have strong pro-ADR policies and claim that they try to use ADR in all disputes. Most of these corporations told us they have conflict management systems (discussed below), an emerging phenomenon in American corporations. The adoption of a conflict management system is often a strategic decision and is likely to involve the CEO and other top managers in addition to the general counsel.

Our interviews also suggested that the use of ADR was sometimes viewed as threatening by middle managers, who, on the one hand, make many decisions that are the source of corporate disputes yet, on the other hand, want their decisions to be supported by the corporation. If top management uses ADR to arrive at negotiated agreements that compromise these decisions, middle managers may feel that their authority is undermined. A representative from a leading pharmaceutical company told us that while it had estimated that the use of ADR would save the

18. Circuit courts have disagreed on the extent of the application of *Gilmer*. The Tenth Circuit has, for example, applied *Gilmer* to Title VII claims. See *Metz v. Merrill*, 39 F.3d 1482 (10th Cir. 1994). However, the Fifth Circuit has held that *Gilmer* does not apply to Title VII claims. See *Alford v. Dean Witter Reynolds, Inc.*, 975 F.2d 1161 (5th Cir. 1992). The Third Circuit, applying *Gilmer*, held that claims arising under ERISA are arbitrable. See *Pritzker v. Merrill Lynch, Inc.*, 7 F.3d 1110 (3d Cir. 1993). Various other courts have upheld the use of the *Gilmer* principle in cases involving antitrust, malpractice, RICO, disability, trademark, and several federal and state discrimination statutes, and in the communications, electronics, utility, and automobile industries. A comprehensive and annotated list of court cases is contained in KAYE, SCHOLER, FIERMAN, HAYS & HANDLER, LLP, *IS THE BRAVE NEW WORLD OF EMPLOYMENT ADR RIGHT FOR MY COMPANY?* (1997).
company millions of dollars in litigation costs, it had not instituted such a policy because its middle managers thought using ADR would undercut their authority.

Some of our respondents also told us they did not use ADR because, as compared to litigation, it was still too difficult to initiate. That is, in some respects it was still easier to initiate a court suit than to pursue mediation or arbitration. Why is this? Quite simply, because using ADR usually requires the agreement of the opposing party in a dispute and reaching such an agreement through negotiations with an adversary can be difficult. A negotiator may feel that his or her willingness to consider ADR will be interpreted as a sign of weakness by his or her adversary.

Even if one party understands the potential gains to both disputants from opting for ADR, there is clearly no guarantee that the adversary party will have the same assessment. The use of ADR requires a level of sophistication that one of the parties may not have. The opposing party in a lawsuit brought against a corporation may have an emotional investment in the dispute that prevents it from understanding the potential benefits of ADR. Moreover, the use of ADR to resolve disputes tends to blur, if not eliminate, the distinction between winners and losers. Corporate counsel may not care about this, but it may be important to an opposing lawyer. If an opposing counsel, and his client, believe there is a chance for a big "victory" in a suit against a major corporation, their inclination to use ADR may be seriously limited.

Therefore, because the use of ADR generally requires a negotiated agreement between the disputants, and because there are numerous barriers to achieving such agreements, there may be a tendency to resort to litigation even when the benefits of using ADR are apparent. Indeed, several survey respondents emphasized that using ADR requires a change in the disputants' mind-sets—that is, in the culture of handling disputes—and not merely the ad hoc consideration of alternative methods for resolving them.

V. ASPECTS OF THE ADR PROCESS COMPANIES FIND UNDESIRABLE

Some companies do not use ADR because they find aspects of the mediation or arbitration process undesirable, including some of the very same characteristics that other companies find advantageous. For example, ADR processes are not usually confined to legal rules, such as those governing the admissibility of evidence and the examination of witnesses. Arbitrators may consider hearsay evidence, and advocates may lead their witnesses. Discovery is seldom a part of the mediation process and is used only slightly more often in arbitration, particularly when the parties request it. There are very few procedural constraints on the
behavior of mediators.\textsuperscript{19} A general counsel from a public utility told us, "Cost isn’t the issue—it’s the lack of rules. Litigation may be expensive, but it does have rules. Unless we see a fair and quick resolution, we don’t use mediation." In some disputes, the lack of legal rules and constraints helps to expedite settlement. In other disputes, corporate lawyers may prefer the procedural safeguards provided by conventional litigation. This especially appears to be the case in disputes involving important legal principles.

For decades, federal courts have been inclined to defer to decisions made by arbitrators. Most state courts also have developed comparable policies. The courts have consistently supported the enforceability of agreements to arbitrate entered into by the disputants. At the same time, they have granted arbitrators broad discretion to decide issues of arbitrability—that is, what matters are or are not arbitrable under arbitration agreements. The courts also have allowed arbitrators considerable latitude in fashioning appropriate remedies. As long as an arbitrator holds a full and fair hearing, allows each party to make a full and complete presentation of its case, and arrives at a decision that is neither arbitrary nor capricious nor "repugnant" to public policy, the courts will normally refuse to consider an appeal.\textsuperscript{20} The broad discretion the courts have granted arbitrators and the virtual finality of arbitrators’ decisions have made arbitration a desirable alternative to litigation in many cases. In other cases, however, as our respondents noted, these characteristics of arbitration are precisely why corporations may opt not to use it.

Several of our respondents noted that the arbitration process is beginning to match litigation in costliness and complexity. The counsel from a large energy company stated that "arbitration is proving to be just as burdensome as litigation. The opposition can use arbitration to elongate the process. It can take over six months simply to agree on an arbitration panel. You can be constantly running back to arbitrators for decisions on discovery. It is a process fraught with potential abuse." This view was echoed in the comments of a respondent from a major paper products


\textsuperscript{20} The landmark Supreme Court cases in this area are usually referred to as the Steelworkers Trilogy: United Steelworkers of America v. American Mfg. Co., 363 U.S. 564 (1960); United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960); United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960). These cases involve agreements to arbitrate contained in collective bargaining agreements. They should be distinguished from cases like Gilmer and others cited herein, which do not involve collective bargaining agreements. In the collective bargaining arena, the Court continues to give great deference to agreements to arbitrate, unless the complaint involves an alleged violation of Title VII. See Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974).
corporation: "Arbitration oftentimes includes the worst characteristics of litigation without any of the benefits. The arbitrator can let anything into the record, and the process can be every bit as expensive and burdensome as civil litigation."

For many corporations, the decision to use ADR (or to adopt pro-ADR policies) is apparently a pragmatic one, based largely on an analysis of the costs and benefits of using ADR as compared to the costs and benefits of resorting to litigation. As one respondent told us:

In some cases it's simply not appropriate to use mediation, and in other cases it is. In some cases the dollar amount of the claim isn't high enough to waste your time on mediation. We believe the benefit from mediation comes in cases involving multiple claimants and more than a million dollars in claims.

It is widely recognized that the use of either mediation or arbitration tends to result in compromise settlements. Mediators attempt to persuade negotiators to make offers and counteroffers until a compromise agreement is reached. Arbitrators, it has been observed, consider the positions the parties have presented at the hearing and then make an award that "splits the difference" between the parties' positions.21 The perceived tendency of ADR to produce compromise settlements can serve as a barrier to the use of mediation and arbitration, according to a significant number of our respondents. As the counsel for a food products corporation told us:

We're reluctant to use binding arbitration. If the matter in dispute is very serious or involves great amounts of money, then we don't use arbitration because arbitrators have a strong tendency to compromise, rather than do what may be right. Minor matters may be arbitrated but not major ones. We may be more likely to use mediation in both major and minor cases, but we don't have a set policy.

21. To counter the tendency of arbitrators to split the difference in conventional interest arbitration, one author proposed the use of "final-offer arbitration" (FOA), which requires the arbitrator to choose either the final position of one party in an arbitration proceeding or the final position of the other. See Carl M. Stevens, Is Compulsory Arbitration Compatible with Bargaining? INDUS. REL., Feb. 1996, at 38-52. Subsequently, several states included FOA in their public-sector bargaining statutes as a means of resolving impasses in contract negotiations. Major league baseball wrote the procedure into its basic collective bargaining agreement as a means of resolving salary disputes between individual players and their owners. See Henry S. Farber, An Analysis of Final-OffeArbitration, J. CONFLICT RESOL., Dec. 1980, at 683-705 (analyzing interest arbitration in public-sector collective bargaining); Henry S. Farber, Splitting-the-Difference in Interest Arbitration, INDUS. REL. REV., Oct. 1981, at 70-78 (same); RICHARD A. LESTER, LABOR ARBITRATION IN STATE AND LOCAL GOVERNMENT (1984) (same). However, FOA is rarely, if ever, used outside public-sector bargaining and baseball.
Again, when a corporation believes that a dispute involves an important matter of principle, it is less willing to consider a process in which concession and compromise are inherent characteristics. A lawyer from a prominent Midwestern manufacturing company told us that it avoided the use of ADR because it wanted to establish a reputation as a company that would never compromise in critical disputes. This company maintained that, in the long run, a reputation for fighting in every major dispute would serve as a deterrent to lawsuits and save it money. Another respondent from a corporation based in California stated: “Sometimes we want a total victory in a lawsuit. We want to inflict some pain and suffering on our adversary. In those cases we’re not likely to use mediation.”

Finally, a surprising number of respondents told us they did not use ADR because they lacked trust and confidence in ADR neutrals, especially arbitrators. Although there is no shortage of individuals available to serve as mediators and arbitrators, many of our respondents believe that there is a shortage of truly qualified neutrals. For example, a company in the maritime business had trouble finding an arbitrator with special knowledge of both maritime law and the international law of the sea. Under these circumstances, it preferred to litigate the dispute rather than take a chance on an arbitrator lacking the necessary expertise.

The various factors impeding the use of ADR are summarized in Table 2. In our survey, we asked the respondents to tell us whether or not these factors were important in their companies’ decision not to use ADR. Table 2 summarizes these results. Overwhelmingly, our respondents indicated that the principal reason they did not use either mediation or arbitration was because the opposing party in the dispute was unwilling to agree to it. In the case of mediation, three-quarters of the respondents said they did not use it because the opposing party was unwilling; the figure for arbitration was 63%. Approximately 40% of our respondents said they did not use mediation because it was a nonbinding procedure and resulted in compromise outcomes. In the case of arbitration, 54% said they did not use it because arbitrators’ decisions were difficult to appeal. About 49% did not like the fact that arbitration hearings are not confined to legal rules. As previously noted, these features are often viewed as advantages of the arbitration process, and yet many of our respondents view them as barriers to its use. Approximately half of our respondents indicated that when they did not use arbitration, it was because it resulted in compromise outcomes.
TABLE 2: BARRIERS TO ADR USE
(in percent)

<table>
<thead>
<tr>
<th>BARRIER</th>
<th>MEDIATION</th>
<th>ARBITRATION</th>
</tr>
</thead>
<tbody>
<tr>
<td>No desire from senior management</td>
<td>28.6</td>
<td>35.0</td>
</tr>
<tr>
<td>Too costly</td>
<td>3.9</td>
<td>14.8</td>
</tr>
<tr>
<td>Too complicated</td>
<td>4.6</td>
<td>9.9</td>
</tr>
<tr>
<td>Nonbinding</td>
<td>40.9</td>
<td>—</td>
</tr>
<tr>
<td>Difficult to appeal</td>
<td>—</td>
<td>54.3</td>
</tr>
<tr>
<td>Not confined to legal rules</td>
<td>28.1</td>
<td>48.6</td>
</tr>
<tr>
<td>Lack of corporate experience</td>
<td>24.7</td>
<td>25.9</td>
</tr>
<tr>
<td>Unwillingness of opposing party</td>
<td>75.7</td>
<td>62.8</td>
</tr>
<tr>
<td>Results in compromised outcomes</td>
<td>39.8</td>
<td>49.7</td>
</tr>
<tr>
<td>Lack of confidence in neutrals</td>
<td>29.0</td>
<td>48.3</td>
</tr>
<tr>
<td>Lack of qualified neutrals</td>
<td>20.2</td>
<td>28.4</td>
</tr>
<tr>
<td>Risk of exposing strategy</td>
<td>28.6</td>
<td>—</td>
</tr>
</tbody>
</table>

A significant proportion of our respondents (29% in the case of mediation and 35% in the case of arbitration) said they did not use ADR techniques because senior management had no desire to use them. As we noted above, the active involvement and support of senior management is especially necessary when important matters of strategy, policy, or principle are involved.

Very few respondents indicated that they did not use mediation because it was “too costly” or “too complicated.” As Table 2 shows, these considerations were somewhat more important in the decision not to use arbitration, but much less important than the other barriers listed in the table. One respondent representing a corporation headquartered in Indiana had a negative view of mediation: “We’ve decided as a company we don’t want to use mediation. We feel in nonbinding situations it’s just an added step. It costs us time and money, and it just leads into other steps in the litigation process. We don’t think we’re achieving anything when we use mediation.”

The following negative views reflect the opinions of a small minority of the respondents in our study. Nonetheless, they provide some understanding of why other companies do not use mediation:

Generally mediation is only used at the end of the long drawn-out part of the discovery process and you’re pretty much into trial by then. It really doesn’t save time.
Using mediation can be more complicated than litigation. When it works it avoids costs, but when it doesn’t work it is basically going to trial twice.

We don’t use mediation anymore. I can’t think of any circumstance where we found mediation to be productive.

Not a lot of people are familiar with mediation, and it’s always a battle to get people to agree to it unless they’ve been through it before. And lawyers are more afraid of it than the parties.

VI. CONCERNS ABOUT NEUTRALS’ QUALIFICATIONS

The respondents’ concerns about the qualifications of neutrals requires further elaboration. We asked our respondents where their companies obtained their mediators and arbitrators. Figure 2 summarizes their responses. As shown, well over half the respondents said they obtained their arbitrators from a “private ADR provider,” primarily the American Arbitration Association (AAA) and JAMS/Endispute. Other providers that were mentioned included the Center for Public Resources, the Chamber of Commerce, and, in the case of corporations in financial services, the National Association of Securities Dealers. In contrast to arbitration, major corporations appear to use several different sources to obtain mediators. Approximately 20% of the respondents said their mediators were assigned by the courts, reflecting the growth of court-annexed mediation. The AAA and JAMS/Endispute are also important providers of mediators, but our respondents said word-of-mouth was equally important.

**Figure 2**

Sources of ADR neutrals

---

Percent

<table>
<thead>
<tr>
<th>Source</th>
<th>Mediators</th>
<th>Arbitrators</th>
</tr>
</thead>
<tbody>
<tr>
<td>The court</td>
<td>0%</td>
<td>0%</td>
</tr>
<tr>
<td>Private provider</td>
<td>20%</td>
<td>80%</td>
</tr>
<tr>
<td>Prev. experience</td>
<td>10%</td>
<td>90%</td>
</tr>
<tr>
<td>State/Fed agency</td>
<td>5%</td>
<td>95%</td>
</tr>
<tr>
<td>Within the corp.</td>
<td>20%</td>
<td>80%</td>
</tr>
<tr>
<td>Other method</td>
<td>5%</td>
<td>95%</td>
</tr>
</tbody>
</table>
Our respondents' views regarding the qualifications of ADR neutrals are summarized in Table 3. The level of satisfaction is generally high. More than 93% of the respondents told us they thought the mediators and arbitrators they used were either somewhat qualified or very qualified. These results should be interpreted carefully, however. As Table 3 shows, only 27% of the respondents thought the arbitrators they used were very qualified, whereas two-thirds thought they were only somewhat qualified. We cannot say with certainty what each respondent actually meant by the term "somewhat qualified," although a comment made by one respondent may provide some guidance. He told us that his corporation had been involved in quite a few arbitration cases and that the qualifications of the arbitrators in these cases varied significantly. Some were very qualified and others were not. In our survey, he answered "somewhat qualified" as a way of suggesting the average quality of the arbitrators his company had used.

**Table 3: Satisfaction with Qualifications of ADR Neutrals**

<table>
<thead>
<tr>
<th>OPINION</th>
<th>MEDIATORS</th>
<th>ARBITRATORS</th>
</tr>
</thead>
<tbody>
<tr>
<td>Very qualified</td>
<td>41.2</td>
<td>26.8</td>
</tr>
<tr>
<td>Somewhat qualified</td>
<td>53.3</td>
<td>66.1</td>
</tr>
<tr>
<td>Not qualified</td>
<td>1.0</td>
<td>1.7</td>
</tr>
<tr>
<td>Don't know</td>
<td>4.6</td>
<td>5.4</td>
</tr>
<tr>
<td>percentage who have a lack of confidence in mediators/arbitrators</td>
<td>29.0</td>
<td>48.3</td>
</tr>
<tr>
<td>percentage who say there is a lack of qualified mediators/arbitrators</td>
<td>20.2</td>
<td>28.4</td>
</tr>
</tbody>
</table>

It may be disturbing that so many respondents believed that arbitrators were only somewhat qualified, especially given that, as Table 3 shows, nearly half the respondents said they lacked confidence in arbitrators. Overall, it appears that our respondents' evaluations of mediators and arbitrators are mixed. In general, they are satisfied with the qualifications of the neutrals they have used, but they have reservations about some of them. This especially appears to be the case where specialized expertise is required. As one respondent noted: "We have a lot of intellectual property disputes, but we don’t think arbitrators do a good job with them. There simply aren’t any qualified arbitrators in this area." Several of our respondents believed that better training programs for neutrals is needed, while others recommended improving the means of
certifying neutrals' expertise.

VII. THE DEVELOPMENT OF CONFLICT MANAGEMENT SYSTEMS

As we proceeded with the analysis of our survey data, an unanticipated finding emerged. A significant number of respondents told us that their companies had developed, or planned to develop, what can best be described as a conflict management system. Such a system incorporates the use of ADR, but also emphasizes dispute prevention. Front-line managers and supervisors are explicitly given responsibility for preventing conflicts from arising. If disputes do occur, the manager is given considerable authority to resolve them, consistent, of course, with the company's interests. The manager's accountability for the prevention and resolution of disputes is accompanied by a change in the corporation's reward and recognition system. Conflict management is assessed during the manager's performance reviews, and pay adjustments and promotions depend in part on the manager's success in this area. In some companies, albeit a minority, a formula for charging back the costs of disputes (or at least a portion of them) to the responsible manager's budget may be instituted.22

Corporations engaged in conflict management tend to use a variety of procedural devices for handling disputes. Many combine an in-house grievance procedure with other prevention measures. Some corporations have invested in various training programs. These programs use a variety of formats, including traditional classroom training as well as role playing and interactive exercises that focus on making sure that employees understand the application of statutes and policies that are associated with their responsibilities. Corporations that have adopted conflict management systems tend to have training programs for various groups of employees ranging from top-level managers to rank-and-file workers. Some corporations also engage in ongoing compliance reviews with their employees.

Our survey instrument did not ask respondents directly whether their companies had a conflict management system. After the fact, however, we realized we had asked about various components of such a system. For example, we asked respondents whether their companies offered conflict resolution training. Figure 3 shows that a strong relationship exists between a corporation's ADR policy and the training it provides in conflict resolution. Eighty percent of the companies where the policy is to pursue

"ADR always" also make conflict resolution training available, whereas only 20% of the companies that "litigate always" do so. Indeed, we found a strong association between companies that have a strong pro-ADR policy and those that have an in-house grievance procedure, use peer review, use ADR broadly in many kinds of disputes, and provide training in conflict resolution. Our findings suggest that in many companies with strong ADR policies, ADR is not simply a set of techniques added to others the company uses, but represents a change in the company’s mind-set about how it needs to manage conflict.

**FIGURE 3**

Relationship between Corporate Training in Conflict Resolution and Corporate ADR Policy

VIII. THE FUTURE OF ADR IN U.S. CORPORATIONS

Is it reasonable to expect that the use of ADR by U.S. corporations will continue to grow in the future? We asked the respondents in our survey a series of questions designed to determine their views on this issue. In general, a large majority of the respondents in our survey believe they are "likely" or "very likely" to use mediation in the future: 46% said they are very likely and 38% said they were likely to use it. However, they were more cautious about the use of arbitration. Only 24% said they were very likely to use arbitration in the future, while 47% said they were likely to do so. More than 29% said they were "unlikely" or "very unlikely" to use arbitration in the future, whereas only 16% answered similarly in the case of mediation. Nevertheless, if these projections are accurate, the use of ADR by U.S. corporations will grow significantly. It may also be the case, however, that our respondents’ views simply reflect their current levels of satisfaction with these ADR processes. On balance, they are
more satisfied with mediation than with arbitration and, accordingly, believe that their companies will use mediation more than arbitration in the future.

Further projections about future trends can be obtained by examining the respondents' views about the likelihood that their companies will use ADR to resolve specific types of disputes. Figure 4 shows that our respondents believe their companies will use mediation much more frequently in some kinds of disputes than in others. They predict, for example, that the use of mediation will grow significantly in employment and commercial disputes. On balance, they also expect the use of mediation to grow significantly in disputes involving environmental, intellectual property, personal injury, real estate, and construction issues. They predict more modest growth in the use of mediation in disputes involving consumer rights and product liability. By contrast, they do not anticipate that mediation will be used extensively in disputes involving corporate finance and financial reorganization.

As shown in Figure 4, our respondents' predictions about the future use of arbitration differ markedly from their predictions regarding mediation. Our respondents believe that the use of arbitration will grow significantly in only two areas: commercial disputes and employment disputes. Many of our respondents (approximately 40%) believe that in a variety of disputes, arbitration will be used to the same extent as it is now. Significant proportions (approximately 20 to 25%), however, believe that in most types of disputes arbitration will not be used at all. If these predictions are taken at face value, then we can expect the use of arbitration actually to decline significantly in many types of disputes: corporate finance, financial reorganization, consumer rights, environmental, and so forth. Again, these "predictions" may simply be proxies for the attitudes of corporate counsel about the current practice of arbitration.
**Figure 4**

**SUMMARY OF RESPONDENTS’ VIEWS ON FUTURE USE OF ARBITRATION AND MEDIATION IN VARIOUS DISPUTES**

<table>
<thead>
<tr>
<th>Predictions</th>
<th>Dispute</th>
</tr>
</thead>
<tbody>
<tr>
<td>Use of both mediation and arbitration will increase</td>
<td>Commercial/contract</td>
</tr>
<tr>
<td></td>
<td>Employment</td>
</tr>
<tr>
<td>Use of mediation will increase; use of arbitration will decline</td>
<td>Personal injury</td>
</tr>
<tr>
<td></td>
<td>Environmental</td>
</tr>
<tr>
<td></td>
<td>Construction</td>
</tr>
<tr>
<td></td>
<td>Product liability</td>
</tr>
<tr>
<td></td>
<td>Intellectual property</td>
</tr>
<tr>
<td></td>
<td>Real estate</td>
</tr>
<tr>
<td></td>
<td>Consumer rights</td>
</tr>
<tr>
<td>Use of both mediation and arbitration will decline</td>
<td>Corporate finance</td>
</tr>
<tr>
<td></td>
<td>Financial reorganization/workout</td>
</tr>
</tbody>
</table>

In summary, Figure 4 underscores our respondents’ predictions that the use of both mediation and arbitration will grow substantially in only employment and commercial/contract disputes. The figure also indicates that our respondents believe that, in the future, both mediation and arbitration will be used less frequently in corporate finance and financial reorganization disputes. Finally, our results suggest that, in all other kinds of disputes, our respondents project net growth in the use of mediation and net decline in the use of arbitration.

The significance of these findings is worth considering further. Financial matters are the core responsibility of corporate management. The corporation’s survival is more likely to be linked to this area of its business than to other areas in which disputes may arise. We believe that our results suggest that where the stakes are very high, corporations prefer to fight their battles in front of judges rather than in front of mediators or arbitrators.

In contrast, the use of mediation and arbitration in employment and commercial disputes has a long, well-established history. Admittedly, potential damages can be in the multimillion dollar range, but generally, the stakes are much lower and the survival of the corporation is not usually an issue. Employment and commercial disputes are further removed from the core of managerial responsibility; they often involve matters handled by the human resource, purchasing, or sales function. In these types of disputes, according to the majority of our respondents, ADR is an attractive alternative to litigation, and nonbinding forms of third-party intervention, such as mediation, are used readily. In addition, the
corporation is often willing to delegate decision-making authority to impartial arbitrators.

In most types of disputes, however, as Figure 4 shows, mediation is a popular alternative to litigation, but arbitration is not. Our respondents seem to be saying that they are willing to use nonbinding, third-party techniques to assist them in negotiating personal injury, product liability, environmental, and certain other kinds of disputes, but are unwilling to delegate decision-making authority to third parties. We speculate that these attitudes may change as major U.S. corporations become more familiar with the use of ADR.

IX. CONCLUSION

Our survey results suggest that there are important differences in the use of mediation and arbitration and in managers’ perceptions of these techniques. For example, the decision to use mediation is predominantly made on a case-by-case basis by the parties involved in the dispute, whereas arbitration is typically invoked by a contractual requirement negotiated by the parties at some point in the past. The choice to use mediation tends to be more ad hoc in nature, and its use depends on mutual agreement by the disputants on a case-by-case basis. The choice to use arbitration is less ad hoc in nature. Parties in a relationship generally incorporate its use into their contracts because they want to use it to resolve all future disputes arising under those contracts.

It can be said that mediation is more tactical in nature, whereas arbitration is more strategic. Mediation is more flexible, whereas arbitration is more rigid. Mediation is more like assisted negotiation, whereas arbitration is more like a legal proceeding. Corporate counsel in major U.S. corporations have had very widespread experience in the use of mediation. Familiarity, in this case, has bred affection. They have used the process, and they think it works. They have had slightly less experience with arbitration, and a significant number have never had the occasion to use it. Of those who have used it, many like it and plan to use it again. But, some do not like it and do not plan to use it again.

Mediation has been used to resolve all types of disputes in corporate America, whereas the use of arbitration has tended to be confined to certain types of disputes, particularly those involving employment and commercial matters. Our respondents, as noted above, expect the use of mediation to grow significantly across the board. By contrast, they predict that the use of arbitration will be limited to a narrow range of disputes in the future. Our respondents like mediation because they believe it increases their control over the management and resolution of disputes. They are uneasy about arbitration, in part because they believe they are
less able to control the process.

Our survey results suggest that corporations turn to a variety of sources to obtain mediators. They often rely on word-of-mouth and like to use mediators they have worked with in the past. In contrast, the channels used to obtain arbitrators are more developed and more limited in number. The AAA, for example, continues to be a major source of arbitrators in a variety of disputes. Although our respondents are generally satisfied with the level of competence among mediators and arbitrators, they express concerns about the availability of truly qualified neutrals. They especially seem to be concerned about the qualifications of arbitrators. Finally, mediation is being used in virtually every industry, whereas the use of arbitration is more concentrated in industries such as construction, transportation, and utilities.

An accurate understanding of the use of ADR in corporate America is not possible unless one recognizes the critical ways in which the use of, and perceptions of, arbitration and mediation differ. Our corporate respondents, in general, have more favorable views of mediation than of arbitration, believe mediation has more widespread applicability, and believe it is more likely to save time and money. Although they have greater reservations about arbitration than about mediation, they nevertheless believe arbitration may be a very useful tool in targeted situations.

We believe our survey results provide important new insights into the use of ADR by major U.S. corporations. At the same time, we recognize the limitations of our survey. There are other views of the ADR movement, including important critiques of this trend. We recognize that we provide an important look at ADR, but by no means the only lens through which it should be examined. We have obtained the views of a significant segment of the corporate community—corporate counsel, deputy counsel, and chief litigators—but it would be interesting to know the views of other key segments of the corporation—senior managers, middle managers, employees, and so forth. Because of the growing importance of ADR in employment and workplace disputes, it would be especially interesting to obtain the views of human resource managers. To conduct a truly comprehensive assessment of the use of ADR in U.S. corporations, it would be essential to obtain the views of other parties involved in corporate disputes, such as those who bring suit against, or are sued by, the corporation and the lawyers who represent them. The view from the corporate counsel’s office is very clearly an important one, but it is through a narrow window.