Legal Representation and
Alternative Dispute Resolution

Roles of an Attorney

- **Adviser** - advises a client on steps to take to avoid possible legal problems.
- **Drafter** - writes contracts and other documents for clients.

Attorney-Client Relationship

- A client **must disclose all relevant information** to his or her attorney so the attorney can determine the best course of action.
- The attorney **must keep the information confidential**--the attorney-client privilege prevents a court and other government bodies from compelling disclosure of the information.
Decision to File a Lawsuit

- Factors include:
  - whether the law provides a remedy,
  - whether the person can expect to prevail, and

Decision to Defend Against a Lawsuit

- Factors include:
  - Whether the relationship with the plaintiff is too valuable to risk.
  - Whether the publicity surrounding a trial would damage the defendant’s reputation or image.

THE SEARCH FOR ALTERNATIVES TO LITIGATION

- Alternative Dispute Resolution (ADR) is less costly, less time-consuming, and increasingly attractive alternative to litigation in the courts.
NEGOTIATION AND MEDIATION

Negotiation
• The parties come together, with or without attorneys to represent them, and try to reach a settlement without the involvement of a third party.

Mediation
• The parties themselves reach an agreement with the help of a third party, called a mediator, who proposes solutions.

ARBITRATION

• A more formal method of ADR in which the parties submit their dispute to a neutral third party, the arbitrator, who renders a decision, which may or may not be legally binding, depending on the circumstances.

The Federal Arbitration Act
• The Federal Arbitration Act (FAA) (1925) does not establish a set arbitration procedure.
• The FAA provides the means for enforcing the arbitration procedure that the parties have established for themselves.
State Arbitration Statutes

- Thirty-four states and the District of Columbia have adopted the Uniform Arbitration Act, under which courts generally give full effect to voluntary agreements to arbitrate disputes between private parties.
- Those states that have not adopted the uniform act nonetheless follow many of the practices specified in it.

The Arbitration Process

- The three steps of arbitration are:
  1. Submission
     Act of referring a dispute to an arbitrator
  2. Hearing
     Evidence & arguments are presented to the arbitrator
  3. Award
     Decision of the arbitrator

Enforcement of Agreements to Submit to Arbitration

- When a dispute arises as to whether or not the parties have agreed to submit a particular matter to arbitration, one party may file suit in court to compel arbitration.
- The courts role is essentially interpreting a contract.
Setting Aside an Arbitration Award

• No award will be enforced if compliance with the award would result in commission of a crime or would violate public policy.
• An arbitration award may also be set aside because of defects in the arbitration process.

Court-Mandated ADR v. Court-Annexed Arbitration

Court-Mandated ADR
• Most states (and about half the federal courts) have adopted programs to encourage the parties to settle their disputes through ADR.
• Some courts require parties to submit to ADR before proceeding to trial.

Court-Annexed Arbitration
• Some states require the parties undergo non-binding arbitration before proceeding to trial.
• Note that in court-annexed arbitration, either party may reject the award.

Court-Related Mediation

• Today, courts are increasingly turning to mediation rather than arbitration as an alternative to litigation.
• One reason for its popularity is that its goal, unlike litigation, is for opponents to work out a resolution that benefits both sides, resulting in a high rate of satisfaction with the outcome.
Summary Jury Trials

- A kind of trial in which litigants present their arguments and evidence and the jury renders a nonbinding verdict.

Other Forms of ADR

Mini-Trial
- A private proceeding in which each party’s attorney argues the party’s case before the other party.
- Often, a neutral third party acts as an adviser and renders an opinion on how a court would likely decide the issue.

Rent-A-Judge
- The parties rent a judge to hear their case and render a verdict to which the parties agree to be bound.
- Several firms now provide for this kind of private justice.

ADR FORUMS AND SERVICES

- Services facilitating dispute resolution outside the courtroom are provided by both government agencies and private organizations.
- Sources of private arbitration services include:
  - American Arbitration Association (AAA).
  - State and local arbitration organizations
  - Better Business Bureau
  - Industry-wide programs
Principled Negotiation

- **Negotiation** based on the **merits**. Don’t bargain over position!
- **Straightforward** method of negotiation based of these four points:
  - People
  - Interests
  - Options
  - Criteria

**DON’T BARGAIN OVER POSITION!**

1. SEPARATE THE **PEOPLE** FROM THE **PROBLEM**.
2. FOCUS ON **INTERESTS, NOT POSITION**.
3. INVENT **OPTIONS** FOR MUTUAL GAIN.
4. INSIST ON USING **OBJECTIVE CRITERIA**.

* DEVELOP YOUR **BATNA** - BEST ALTERNATIVE TO A NEGOTIATED AGREEMENT.

* PARADOXICALLY, YOU STRENGTHEN YOUR BARGAINING POSITION BY WEAKENING YOUR CONTROL OVER THE SITUATION!!

**LEARN FROM DOING !!** (PRACTICE THE SKILL)