THE ETHICS AND PRACTICE OF DRAFTING PRE-DISPUTE RESOLUTION CLAUSES

KRISTEN M. BLANKLEY†

Fitting the forum to the fuss is the concept of trying to ensure that individual disputes can be resolved in the most appropriate way, whether that be through negotiation, mediation, arbitration, litigation, or other hybrid procedure. Many dispute resolution professionals aim to resolve disputes in the most appropriate manner under the circumstances, meeting the process and the substantive needs of the parties, and much scholarship exists regarding the idea of matching situations with the ideal dispute resolution process.¹

Of course, in practice, many disputes are funneled into broad types of dispute resolution, notably litigation and negotiation. Litigation, of course, is the default method of resolving disputes if the parties have not agreed to a different method. The litigation process, however, is often not the best process of dispute resolution. Litigation is costly and may last for years before a final resolution after all appeals have been exhausted.² Over time, the parties in litigation become entrenched in their positions, and relationships become strained or ruined.³ Court systems are imperfect tribunals because of the limited remedies that can be awarded—notably monetary and injunctive relief.⁴

† Associate Professor and Director of the Robert J. Kutak Center for the Teaching and Study of Applied Ethics at the Nebraska College of Law.

¹. See, e.g., Timothy Hadeen, Remodeling the Multi-Door Courthouse to “Fit the Forum to the Folks”: How Screening and Preparation Will Advance ADR, 95 Marq. L. Rev. 941, 941-43 (2012) (discussing the work of Frank Sander and the idea of the multi-door courthouse).

². See, e.g., Katherine H. Flynn, Not Open For Business: A Review of South Carolina’s Arbitration Venue Statute, and a Proposal for Reform, 66 S.C. L. Rev. 727, 729 (2015) (“Litigation can be lengthy, costly, hard to control, and both the litigation process and result can easily become public.”).

³. See, e.g., Eid Walny & Kelly Dancy, Family Feuds: Mediating Estate and Probate Disputes, Wis. Law., Sep. 2015, at 24, 24-25 (discussing relational harm on families in protracted litigation).

Certainly, only a handful of cases are ultimately resolved by the courts. Many of the cases that never go to trial are resolved through unassisted (and often unprincipled) negotiations. Post-dispute negotiations may involve solely the clients, or attorneys may be involved. In some cases, both attorneys and clients may be involved in the resolution of the dispute. Negotiated agreements may address many of the problems of the litigation system, but typically negotiation and litigation proceed along parallel tracks, with little incentive to settle sometime sooner than on the eve of trial on the courtroom steps.

By contrast, the parties may be better served in other alternative processes that have the potential to save time and money, maintain relationships, and open up infinite possibilities of redress and settlement. From a psychological standpoint, after a dispute arises, parties may be less likely to try alternative forms of dispute resolution. The fact that the dispute changes the relationship between the parties often results in distrust of the counterpart. Following a dispute, many parties seek the vindication of being “right” in a court of law after an opportunity to be heard.

In many instances, if parties were to contemplate dispute resolution before a dispute arises regarding how a hypothetical dispute could be resolved, they might not imagine that court is the best option. In fact, they may be drawn to the benefits of cost-saving, time-saving, relationship-saving, and flexibility of alternative processes.

Transactional lawyers have the opportunity to have these discussions with their clients before disputes arise. Any time that parties enter a contractual agreement, they have the opportunity to determine, with cool heads, how hypothetical disputes could be resolved. The parties have the ability to craft procedures that meet their particular needs as they anticipate them at the beginning of the relationship. This ability exists with nearly every contractual relationship, including business contracts with other businesses, consumer contracts, employment contracts, rental agreements, supply contracts, financial agreements, and any number of other types of contracts.

Although many transactional lawyers do include dispute resolution provisions in their contracts, those provisions are often boiler

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5. Less than three percent of civil cases receive resolution by trial, and that number may be high. A larger percentage of cases, up to 25%, are resolved by a court by dispositive motion practice, including motions to dismiss and for summary judgment.

6. People have a tendency to overestimate their chances of success in court, and this phenomenon is called the “overconfidence” bias. After a dispute arises, both parties usually have an unrealistic view of their success in court. See Russell Korobkin, *Psychological Biases That Become Mediation Impediments Can Be Overcome With Interventions That Minimize Blockages*, 24 ALTERNATIVES TO HIGH COST LITIG. 67, 67-68 (April 2006). Because of this post-dispute bias, people may be able to make more realistic decisions before a dispute even comes into existence.
plate and fail to take advantage of the goals of the parties at the commencement of the relationship. Some contracts simply have a mediation or arbitration clause stating that the parties will participate in those procedures, without any detail about what the participation can and should look like. In a worst-case scenario, transactional lawyers draft unconscionable dispute resolution agreements, particularly in the area of arbitration clauses.

This Article challenges transactional lawyers to consider more fully the potential for dispute resolution at the outset of a contractual relationship and counsel their clients on ways to resolve disputes well before they arise. Part I considers the lawyer's ethical obligations as a counselor and to advise clients on alternative dispute resolution ("ADR") options. Part II deals with practical considerations that may dictate counseling clients on ADR clauses based on their specific needs. Part III gives practical guidance in drafting process-specific clauses, such as negotiation clauses, mediation clauses, arbitration clauses, and multi-step clauses. Part IV concludes with final thoughts and advice on drafting pre-dispute resolution agreements, including a proposed comment to Model Rule 2.1 recommending that transactional lawyers consider counseling clients on pre-dispute ADR options in contract drafting.

I. ETHICAL CONSIDERATIONS

Imagine a handful of examples to illustrate the points in this Article. First, consider a corporate client, such as a food manufacturer, walks into your office in order to have you work on a long-term supply contract with a grain supplier. You understand from your client that the food manufacturer would like to enter into a long-term arrangement in order to achieve a competitive price for the grain supply as well as a predictable supply of product.

Second, consider a client who is a general contractor on numerous construction projects in the lawyer’s locality. The general contractor works with a large number of sub-contractors, such as plumbers, electricians, drywallers, carpenters, painters, roofers, and flooring specialists. Many of the projects have tight timelines and budgets, and the general contractor prefers to have an identical contract with as many subcontractors as possible.

In the employment context, a large employer may work with outside counsel in order to define the terms of employment. Those employment agreements may be explicit contracts (particularly for executive level employees) or in the form of employee handbooks. The employer may be concerned about equal treatment within various classes of employees, such as hourly workers compared to manage-
ment-level and executive employees. Further, the employer may have a particular interest in hiring and retaining top talent, especially for higher earning employees.

Finally, consider a large bank or telecommunications company. These types of companies have thousands (or hundreds of thousands) of consumer contracts for services such as consumer credit or mobile phone usage. Consistent contracts across a wide variety of customers or subscribers may be a priority for this client. The client may also be interested in keeping certain market shares in these types of competitive industries.

Each of these situations involves contractual relationships that may deteriorate over time. The transactional attorney has the opportunity to consider how to deal with the resolution of contractual breach before the breach occurs. In the first example, both parties have an opportunity to negotiate a dispute resolution clause to meet everyone’s interests and expectations. In the second, third, and fourth examples, one party will likely take the lead in creating a dispute resolution provision that will likely be presented to the parties on a take-it-or-leave-it basis. Pre-dispute planning is appropriate and a best practice in any of these situations. The remainder of this section considers the ethical implications of dispute resolution counseling.

II. LAWYER AS COUNSELOR, ADVISOR, AND COMMUNICATOR

The role of the lawyer is more than merely that of an advocate. Equally important, however, is the role of lawyer as counselor. Chapter Two of the Model Rules of Professional Responsibility covers the role of lawyer as counselor. Regarding the role of counselor and advisor, Rule 2.1 states: “In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client’s situation.”7

The purpose of this rule is to be clear that lawyering is not all about the law. Lawyering also involves non-legal advice, depending on the client's circumstances.

The comments to Rule 2.1 expound on the lawyer's role as counselor and advisor. Comment two recognizes that “[a]dvice couched in narrow legal terms may be of little value to a client, especially where practical considerations, such as cost or effects on other people, are predominant. Purely technical legal advice, therefore, can sometimes

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7. Model Rules of Prof'l Conduct r. 2.1 (Am. Bar Ass’n 2016).
be inadequate.”\(^8\) Further, the lawyer may “refer to relevant moral and ethical considerations in giving advice.”\(^9\) In other words, advising clients of the practical consequences of the advice is well within the scope of a lawyer’s duties, as well as a best practice.

Lawyers have the right and the ability to advise about many of these non-legal considerations even if the client does not directly ask for such advice. Comment five notes that:

a lawyer is not expected to give advice until asked by the client. However, when a lawyer knows that a client proposes a course of action that is likely to result in substantial adverse legal consequences to the client, the lawyer’s duty to the client under Rule 1.4 may require that the lawyer offer advice if the client’s course of action is related to the representation.\(^10\)

Rule 1.4 (referenced above) is the lawyer’s general duty of communication and ensuring that the client is informed.\(^11\) Under Rule 1.4, the lawyer is also responsible for “reasonably consult[ing] with the client about the means by which the client’s objectives are to be accomplished” and “explain[ing] a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the matter.”\(^12\) In other words, the lawyer may have a duty to broach the idea of dispute resolution and explain the options.

Some ethical opinions have dealt with issues that lawyers can and should address with their clients, even if the client does not ask for an opinion on a particular issue. For example, in many states, a lawyer has a duty under Rule 2.1 to explain how litigation financing companies operate – both legally and economically – for clients who are considering such an option.\(^13\) The Connecticut Bar Association Committee on Professional Ethics stated that if a lawyer suspects a client of alcoholism or other medical problems, the lawyer is free to recommend (on his or her own initiative) that the client seek medical or psychological help.\(^14\)

\(^8\) Model Rules of Prof’l Conduct r. 2.1 cmt. 2 (Am. Bar Ass’n 2016).
\(^9\) Id.
\(^10\) Model Rules of Prof’l Conduct r. 2.1 cmt. 5 (Am. Bar Ass’n 2016).
\(^11\) Model Rules of Prof’l Conduct r. 1.4 (Am. Bar Ass’n 2016).
\(^12\) Model Rules of Prof’l Conduct r. 1.4(a)(2), (b) (Am. Bar Ass’n 2016).
\(^14\) Conn. Bar Ass’n Standing Comm. on Prof’l Ethics, Informal Op. 98-17 (1998). An earlier Connecticut ethics opinion stated that a lawyer who represents a minor child should counsel the father as “next friend” to “provide suitable instructions for the disbursement of the settlement funds which would adequately safeguard the child’s interests.” Conn. Bar Ass’n Comm. on Prof’l Ethics, Informal Op. 97-8 (1997).
As the text of the rule and the comments make clear, the duty of the lawyer extends to the ability to give counsel. Legal aspects are merely one part of what is usually a complex problem. If a lawyer could only give legal advice, the lawyer would jeopardize the client with incomplete information and a limited perspective. Conflict is complex, and it has long-ranging consequences. Conflict may have implications ranging from legal and financial to psychological and relational. Of course, the lawyer cannot give professional advice in areas in which the lawyer is not licensed—such as medical or psychological advice—but the lawyer certainly can recommend that the client seek out such services.¹⁵

For the transactional lawyer, the lawyer should be anticipating the potential types of breaches that may occur during the pendency of the contractual relationship. Depending on the types of breaches and the interests of the client, the lawyer can and should advise the client regarding the possibilities of breach and resulting harm. These situations are described in more detail below.

A. DUTY TO ADVISE ABOUT ALTERNATIVE DISPUTE RESOLUTION OPTIONS?

In the realm of litigation options, the Model Rules suggest that lawyers may need to inform clients of alternate dispute resolution (“ADR”) options compared to the traditional litigation option. Comment five to Rule 2.1 states that “when a matter is likely to involve litigation, it may be necessary under Rule 1.4 to inform the client of the available forms of dispute resolution that might constitute reasonable alternatives to litigation.”¹⁶ The Model Rule does not create a requirement of discussion of ADR options with litigation clients, but some other jurisdictions make such a requirement mandatory.

In Michigan, for example, the State Bar of Michigan Standing Committee on Professional and Judicial Ethics (“Michigan State Bar”) stated in 1996 that a lawyer has such an obligation.¹⁷ The Michigan State Bar stated that the lawyer generally has “an ethical duty to inform the client of any options or alternative which are reasonable in pursuing the client’s lawful interests,” and while not all available options “need be discussed, any doubt about whether a possible option is reasonably likely to promote the client’s interests . . . should be . . . resolved in favor of providing the information to the client and al-

¹⁵. See supra note 14 and accompanying text.
¹⁶. MODEL RULES OF PROF’L CONDUCT r. 2.1 cmt. 5 (AM. BAR ASS’N 2016).
following the client to render a decision.” This duty stems from the lawyer’s duty to attend to the client’s “subjective desires and objectives” and to “communicate any and all information necessary to allow the lawyer to be confident that these goals and objectives are those which the lawyer seeks to accomplish.” The Michigan State Bar recommends that the lawyer communicate the “costs of any available option [of dispute resolution] as well as the likely benefits of such processes.”

In a separate opinion, the Michigan State Bar also stated that if opposing counsel suggests using an ADR option, the lawyer receiving that option must take the offer to the client for consideration. This opinion’s holding that a lawyer has a duty to report ADR proposals from the other side to the client is particularly interesting. This opinion introduces the idea that ADR options are particular client “ends” to which the client decides—as opposed to the lawyer. The question of whether ADR options are a client “ends” or a decision regarding lawyer “means” is analyzed below.

The Model Rule and the Michigan opinions suggest that when a lawyer is involved in litigation matters, the lawyer may have the duty to suggest alternative options. Similar duties exist for lawyers in Ontario. Scholars, too, have also encouraged stronger requirements for lawyers to advise litigation clients of their ADR options. These requirements, however, are not very controversial. Litigation attorneys today are more familiar with ADR options than even a few decades ago.

18. Id.
19. Id.
20. Id.
22. See id.; MODEL RULES OF PROF'L CONDUCT r. 1.2, 1.4 (AM. BAR ASS'N 2016).
23. See infra Section I(C).
24. Under the Law Soc’y Rules of Prof'l Conduct, lawyers in Ontario, a lawyer “shall advise and encourage the client to compromise or settle a dispute whenever it is possible to do so on a reasonable basis,” and “should inform the client of ADR options.” Law Soc’y of Upper Can. Rules of Prof'l Conduct r. 3.2-4 cmt. 1 (2015).
25. See, e.g., Gerald F. Phillips, The Obligation of Attorneys to Inform Clients About ADR, 31 W. St. U.L. Rev. 239 (2004) (discussing ethics opinions and generally advising for a stronger rule than Model Rule 2.1); Ariel M. Kiefer & Stanley A. Leasure, Arkansas Lawyers: An Ethical Obligation to Give ADR Advice, Ark. Law., Sept. 2015, at 32 (2015) (encouraging Arkansas to consider an ethical rule requiring lawyers to suggest ADR options); see also Thomas D. Vu, Going to Court as a Last Resort: Establishing a Duty for Attorneys in Divorce Proceedings to Discuss Alternative Dispute Resolution With Their Clients, 47 Fam. Ct. Rev. 586 (2009) (encouraging stronger requirements to advise ADR options in family law cases); see also Katerina P. Lewinbuk, First, Do No Harm: The Consequences of Advising Clients About Litigation Alternatives in Medical Malpractice Cases, 2 St. Mary’s J. LEGAL MALPRACTICE & ETHICS 416 (2012) (recommending that lawyers consider the clients’ interests and recommend a process that best meets the parties’ interests after a dispute arises).
ago, and mediation, arbitration, hybrid, and other processes are more popular than ever.

On the other hand, no rules or scholarly articles have yet passed on the question of whether the transactional lawyer has a duty—or even an aspiration—to mention ADR options when working with clients to draft contracts. The Article suggests adding a comment to Rule 2.1 to encourage transactional lawyers to consider ADR options in drafting contracts so that parties can decide before a dispute what type of process will be best for them.

B. TAKING A CUE FROM PRE-DISPUTE CLAUSES IN ATTORNEY ENGAGEMENT LETTERS

A number of states have considered the question of whether an attorney can include an ADR clause in his or her engagement letter—notably a pre-dispute arbitration agreement. Generally, these opinions are positive and allow lawyers to contract with their clients for pre-dispute ADR procedures. The states, however, differ on two main points. The first point is whether the provision of the ADR clause in the engagement letter constitutes a transaction with the client, thus triggering the requirements of Rule 1.8. The second, and related, point on which the states disagree is whether the clients are required to consult independent counsel prior to the execution of the engagement letter.

The Oklahoma Ethics Commission (“Oklahoma Commission”) considered this question in 2000.26 The Oklahoma Commission began its discussion with the general idea that arbitration agreements are valid and that Oklahoma has a strong policy in favor of enforcing such contracts.27 The Oklahoma Commission also generally stated that fee disputes benefit from mediation or arbitration, provided that all attorney ethics are met.28 That said, the Oklahoma Commission cautioned that a lawyer owes a duty of loyalty to the client, and that the lawyer may not overreach or “otherwise exploit[] the lawyer’s superior knowledge of the legal system to the client’s detriment.”29 Under Rule 1.8, all transactions with a client (including an engagement letter) must be “fair and reasonable to the client.”30 Mandatory fee arbitration also must meet this requirement, and the Oklahoma Commission interpreted this to mean that consent to arbitration needs a “knowing” disclosure of the “material differences between arbitration and litiga-

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27. Id. (citing Rollings v. Thermodyne Indus., Inc., 1996 OK 6 (1996)).
28. Id. (citing MODEL RULES OF PROF’L CONDUCT r. 1.5 (AM. BAR ASS’N 2016)).
29. Id. (citing MODEL RULES OF PROF’L CONDUCT r. 1.7 (AM. BAR ASS’N 2016)).
30. Id. (citing MODEL RULES OF PROF’L CONDUCT r. 1.8 (AM. BAR ASS’N 2016)).
The lawyer must ensure that the client knowingly waives the right to a jury trial and the major differences with the arbitral forum—such as the costs of arbitration and discovery rights. Rule 1.8 generally includes a requirement that a client be able to seek independent legal counsel. Because the Oklahoma Commission classifies a pre-dispute agreement to arbitrate a contract falling under Rule 1.8 (as opposed to Rule 1.5 dealing with fees), the Oklahoma Commission also recommends (but does not require) that the client have an opportunity to consult with independent legal counsel regarding the wisdom of signing the agreement. Importantly, the Oklahoma Commission held that the arbitration forum does not limit a lawyer’s liability, but simply shifts the “determination of the malpractice claim to a different forum.” Thus, the lawyer may include such an agreement if the client has the ability to seek independent legal counsel before so signing.

Pennsylvania also addressed this matter in a Formal Opinion in 1996. The Pennsylvania Bar Association also recognized the comment in Rule 1.5 regarding the use of ADR processes to resolve fee disputes, including mediation and arbitration. The Pennsylvania Bar Association recognized that an attorney and client can always agree post-dispute to mediate or arbitrate disagreements between the parties, whether they consider issues of the lawyer’s fees, issues surrounding the lawyer’s performance, or both. The Pennsylvania Bar Association did not answer the question (unlike Oklahoma) of whether this agreement would fall under Rule 1.8(a). Instead, the Pennsylvania Bar Association counseled that the best practice for the lawyer who wants to include an ADR agreement in an engagement letter is to simply advise the client of the right to seek independent legal counsel, whether or not such consultation actually occurs. Unlike the Oklahoma Commission, which had some reservation about using pre-dispute resolution arbitration agreements with unsophisticated clients, the Pennsylvania Bar Association stated that “an ADR clause would be permissible not only as to sophisticated clients, usually businesses, but also as to unsophisticated clients, usually individuals.”

31. Id.
32. See id. The Commission suggests that some clients may not be sophisticated enough to comprehend the differences in the forums, and that the lawyer should not include a pre-dispute arbitration agreement with those clients. Id.
33. Model Rules of Prof’l Conduct r. 1.8 (Am. Bar Ass’n 2016).
35. Id.
37. Id. (citing Model Rules of Prof’l Conduct r. 1.5 (Am. Bar Ass’n 2016)).
38. See id.
39. Id.
40. Id.
As to the scope of the ADR clauses, the Pennsylvania Bar Association suggested that those clauses include not only fee disputes but also malpractice actions.\footnote{Id.} In Michigan, a lawyer may enter into a pre-dispute alternative dispute resolution program, provided that the client “obtains independent counsel concerning the advisability of entering into the agreement[,]” but that alternative forum cannot resolve disputes “pertaining to the lawyer’s ethical conduct . . . .”\footnote{State Bar of Mich. Standing Comm. on Prof'l & Judicial Ethics, Op. RI-257 (1996).} Michigan was one of the earlier states to address the issue, and it found that the inclusion of the ADR provision must meet Rule 1.8(h), which is the rule prohibiting a prospective limitation of liability unless “permitted by law and the client is independently represented in making the agreement.”\footnote{Id. at Op. 1.} Essentially, the Michigan Standing Committee equated the use of ADR to a prospective limitation of an attorney’s liability, although it stated that such a provision “only address[es] the forum in which liability will be determined . . . .”\footnote{Id.} As to disciplinary matters, Michigan was concerned about attorneys including language in engagement letters that would prohibit a client from bringing a complaint against a lawyer to the bar. The Michigan opinion is interesting in that it does not single out pre-dispute arbitration agreements. The opinion is unclear whether mediation or negotiation clauses would also be problematic, even though mediation and negotiation (as consensual processes) do not pose nearly the same risks that arbitration clauses pose. The intricacies of these processes are discussed below in Section III.

The Michigan opinion cited but departed from a much more permissive North Carolina opinion rendered in 1991.\footnote{See N.C. State Bar, Ethics Op. RPC 107 (1991).} The North Carolina Bar generally held that “lawyers should avoid litigation to collect fees wherever possible. In that regard lawyers are encouraged to employ reasonably available alternative forms of dispute resolution.”\footnote{Id.} To this end, lawyers may also include a pre-dispute ADR clause in the engagement letter.\footnote{Id. at Op. 1.} The opinion contemplated that the Private Adjudication Center, an affiliate of Duke Law School, would administer the ADR process, and the agreement would not divest the North Carolina Bar of its disciplinary authority. Similar to the Michigan opinion, the North Carolina opinion does not specify the utilization of a certain
type of ADR procedure. The opinion suggests—that through the use of the
term “binding”—that the type of dispute resolution contemplated is
arbitration, but it does not denote whether the use of mediation or
negotiation could also be specified in an engagement letter.

California was also an early adopter of the ability of lawyers to
use pre-dispute arbitration agreements in engagement letters. Al-
though the California Bar determined in the 1970s that pre-dispute
arbitration clauses would not meet lawyer ethical standards, the Cali-
ifornia Bar changed its opinion in 1989 to allow the practice.48 The
California Bar noted that the public policy regarding arbitration
changed from its earlier opinion to its reconsideration, and that a
“standard arbitration provision does not detract from or limit an attor-
ney’s duty to use reasonable care nor limit liability for breach of this
duty. It merely selects the forum in which liability will be deter-
moved.”49 As to whether the client needs independent legal consulta-
tion, the California Bar stated that because the attorney-client
relationship does not commence before the signing of the engagement
letter, the lawyer is not engaging in a business deal with the client
that would require such outside consultation.50 Although California’s
ethical rules are numbered differently, the California Bar generally
found that the requirements found in Rule 1.8(a)—regarding making
a business deal with a client—would not apply.

What do these cases mean for the transactional lawyer? State
ethics commissions support ADR options as a valuable way to resolve
disputes, even for disputes with their own clients. Although no ethics
opinions have so held, ethical practice should encompass transactional
lawyers advising their clients about ADR options for those clients (and
their negotiation counterparts). If it is ethical practice for lawyers to
have such agreements with their own clients, then certainly, it must
be ethical practice for lawyers to counsel their clients to use similar
clauses in contracts that they negotiate with others, including other
businesses and other individuals.

C. ARE ADR OPTIONS A “MEANS” OR AN “ENDS”?

As a general matter, clients choose the goals, or “ends” of the rep-
resentation, while lawyers have greater flexibility over choosing the
“means,” or the specific way in which those goals may be met.51 The
dichotomy, while appearing clear, is actually quite murky and has

49. Id.
50. Id.
51. MODEL RULES OF PROF’L CONDUCT r. 1.2 (AM. BAR ASS’N 2016).
caused courts and scholars to disagree on what aspects constitute representation goals and which constitute representation means.\textsuperscript{52} Because the “ends” are used synonymously with goals, “ends” are generally things that are important for the client to achieve.

In some instances, process issues are client ends. For example, consider a divorcing wife whose husband is having an affair.\textsuperscript{53} The wife knows of the affair, but the husband does not realize that she knows. She hires a lawyer to help her get a divorce in a “no fault” divorce state. She discloses the fact of the affair to her lawyer, and the lawyer believes that this evidence will be particularly useful and helpful to establish that she should have primary custody. She then surprises the lawyer and tells the lawyer not to use any evidence of the affair during the course of the litigation. She tells the lawyer that she is utterly embarrassed and that the affair—so far—has been discrete. She worries that if her knowledge of the affair is disclosed, the information will be detrimental to the children’s mental wellbeing, and she is worried about her standing in society if her friends were to learn this secret. She is even willing to be more generous with certain terms of the divorce if the information can remain confidential. Can the lawyer use the evidence of the infidelity? Setting aside the ethical issues surrounding confidentiality,\textsuperscript{54} the answer in this case appears to be “no.”

Comment two of Rule 1.2 is rather unhelpful on determining when questions regarding “means” might actually be an “ends.” The comment recognizes that sometimes:

a lawyer and a client may disagree about the means to be used to accomplish the client’s objectives . . . . Because of the varied nature of the matters about which a lawyer and client might disagree and because the actions in question may implicate the interests of a tribunal or other persons, this Rule does not prescribe how such disagreements are to be resolved . . . . The lawyer should also consult with the client and seek a mutually acceptable resolution of the disagreement.\textsuperscript{55}

\textsuperscript{52} See, e.g., Scott A. Fredricks, The Irresponsible Lawyer: Why We Have an Amoral Profession, 11 Tex. Rev. L. & Pol’y 133, 152-54 (2006) (noting how the means/ends division can hurt the morality of the profession of law); Robert P. Burns & Steven Lubet, Division of Authority Between Attorney and Client: The Case of the Benevolent Otolaryngologist, 2003 U. Ill. L. Rev. 1275 (2003) (discussing throughout problems with the traditional means/ends division in the roles of attorney and client); Jonathan R. Cohen, When People are the Means: Negotiating With Respect, 14 Geo. J. Legal Ethics 738, 800-802 (2001) (discussing how the means/ends dichotomy is problematic in negotiations)


\textsuperscript{54} See Model Rules of Prof’l Conduct r. 1.6 (Am. Bar Ass’n 2016).

\textsuperscript{55} Model Rules of Prof’l Conduct r. 1.2 cmt 2 (Am. Bar Ass’n 2016).
The comment further states that the lawyer may seek to withdraw based on such a disagreement, or that the client could terminate the representation by the lawyer.\textsuperscript{56}

Perhaps determining the “ends” or the goals of the representation should be considered in terms of interests. In the world of negotiation, interests are the underlying needs of parties, compared to the “positions,” which are the statements of what a negotiating party wants.\textsuperscript{57} For the divorcing wife, she has an interest in confidentiality, secrecy, and privacy. In particular, she has an interest in not allowing the evidence of the affair to come to light—even if that would otherwise give her a legal advantage. Given that interest, the lawyer should not disclose the affair and the secrecy itself is considered an “ends” of the representation.

This particular divorcing wife is likely an anomaly in practice. In many other instances, the wife with the cheating husband would want to use evidence of infidelity as a means in order to secure a different “end”—notably a greater share of the parenting time. The lawyer, of course, determines the goals and objectives of the representation through client counseling and open communication with the client.

The litigation illustration of the divorcing wife shows how process issues, such as the introduction of evidence, may serve as a client “ends,” even when the exact same issue is often viewed as a “means” in another representation. ADR processes, then, can also be “ends,” even though they appear to be means. The Michigan Ethics Opinion requiring the communication of ADR options to a client treats ADR options as if they were “ends.”\textsuperscript{58} Clients may have interests in ADR options because ADR may be able to achieve certain benefits that the litigation process simply cannot offer.

In a long-term contract between businesses, the clients may have an interest in continuing the relationship even in difficult times in order to ensure that production matters are met. Parties to a construction contract may have a priority of speedy resolution of problems in order for the general contractor and the subcontractors to meet deadlines imposed by the customer. An employer may want equal treatment of employment disputes across certain classes of employees. Large companies, such as banks or consumer product companies, may be most concerned about secrecy and not allowing disputes to be aired in court documents. All of these “ends” can be achieved better (or solely) through ADR processes.

\textsuperscript{56} Id.
\textsuperscript{58} See supra notes 42 to 44 and accompanying text.
Lawyers will only learn about these types of process ends through careful consultation and counseling with their clients. When lawyers are engaged to work on transactions, they should be inquiring as to the client’s goals and objectives if disputes were to arise between the parties at a later date. After the lawyer understands these process ends, the parties can negotiate not only the merits of the contract, but also the process used in the event of a future dispute.

III. PRACTICAL CONSIDERATIONS AND CLIENT COUNSELING

Because good, ethical lawyers give well-rounded advice based on the specific needs of their clients, this Article also considers many of the common factors facing clients that make pre-dispute resolution agreements not only ethical conduct, but also a best practice. This Section considers potential advantages and disadvantages of including pre-dispute resolution clauses in contracts with other businesses and individuals.

A. ADVANTAGES OF PRE-DISPUTE ADR CLAUSES

Many advantages exist for clients who opt for negotiated (or non-negotiated) alternate dispute resolution (“ADR”) clauses in their contracts. The benefits span across many different areas, including financial, relational, psychological, and others. This Section covers many of the most prominent advantages of including ADR clauses in business contracts.

1. Creativity, Framing, and Lessons from Psychology and Neuroscience

Theoretically, clients will be able to design better dispute resolution processes if they thoughtfully consider potential breaches of contract in advance, as well as how those conflicts could be resolved. Dealing with these contingencies before a breach occurs gives parties the opportunity to make decisions with clear heads.

Neuroscience and communications teach that people do not make good decisions when they are under stress. Sharon Strand Ellison, author of Taking the War Out of Our Words,\(^59\) reports that when people are under stress and feel defensive, our brains release chemicals that surge through our bodies preparing us to engage in “fight or flight” activities.\(^60\) In addition, our blood flows toward our extremities

\(^59\) Sharon Strand Ellison, Taking the War Out of Our Words (4th ed. 2009).
\(^60\) Id.
and toward the more primitive parts of our brains.\textsuperscript{61} Because of this human reaction, the creative portions of our brain are among the first to lose blood flow and shut down.\textsuperscript{62} This reaction occurs rapidly—in far less than a nanosecond.\textsuperscript{63} Our bodies generally take between twenty minutes to two hours for those chemicals to dissipate, provided that we do not again feel defensive and retrigger the chemicals.

When parties are in the middle of a dispute, their defense mechanisms become triggered, which jeopardizes creative thought. When the conflict involves a breach of a contract, the defensiveness associated with conflict will likely funnel the disputants toward litigation as the default rights-based option. Parties will be less likely to try alternative processes, perhaps out of distrust. Despite the acceptance of alternative processes throughout the decades, many disputants will still mistake a request to negotiate or mediate as a sign of weakness.\textsuperscript{64}

Instead of relying on attorneys to suggest ADR options after a dispute arises, the transactional lawyers should suggest these types of options at the beginning of the parties’ relationship. When the parties are negotiating their contract, they can, and should, also consider what types of disputes might arise and how those disputes can be resolved. Returning to the examples above, in the case of the long-term supply contract, the buyer might perceive a potential breach in the event of a drought, and the seller might perceive a potential breach in the event of non-payment. The parties should also consider their interests in the event of the breach, such as continuous supply for the buyer and stable payment for the seller. Perhaps the situation involves unique characteristics and interests—such as organic farming, preference for family-owned agribusiness, or gluten-free manufacturing facilities. These additional factors may play a role in the type of dispute resolution that the parties would find optimal in the event of a breach.

When parties have the ability to consider all of these types of options without the specter of a broken relationship, they will have the creativity to consider all of these options and create a dispute resolution system to best meet their needs. At the time of contract formation, the parties will likely not be suffering from the same type of defensiveness and negative reactions, which would free them to make a clear and creative decision regarding dispute resolution.

\textsuperscript{61} Id.
\textsuperscript{62} Id.
\textsuperscript{63} Id.
\textsuperscript{64} See, e.g., Stewart I. Edelstein, \textit{Mediation in Commercial Disputes}, 43 Trial 22, 43 (June 2007) (“Clients sometimes perceive the suggestion of mediation as a sign of weakness.”).
2. **Continuing Business and Other Relationships**

One of the advantages of ADR processes is the ability to preserve relationships even in the face of conflict.\(^{65}\) Consensual processes, such as mediation and negotiation, especially if they are conducted early, can preserve — or even strengthen — relationships.\(^{66}\) Consensual processes, by definition, require parties to reach agreement together. By working on joint-problem-solving, the parties have the ability to reach mutually beneficial decisions. By contrast, adjudicative processes, such as litigation and arbitration, have the tendency to entrench the parties in their positions and cause relationships to deteriorate over time.

This Article uses the term “relationship” broadly. Concern for relationships falls beyond disputes involving families and neighbors. Parties often have an interest in maintaining relationships in a wide variety of circumstances, including the working relationships among business partners; relationships between businesses for products or services; relationships between employers and their employees; and relationships among employees. At its core, the world of business is a world of relationships, and ignoring that component does a disservice to the business community.

Transactional lawyers should consider discussing the importance of the relationships that are at issue in a given situation because every contract begins a relationship. They should consider how important the particular relationship is for the situation, or whether the contracting partners are, essentially, replaceable. The more important the relationship is to the contracting parties, the more the transactional lawyer should consider writing into the contract some type of ADR clause requiring a consensual process, such as good-faith negotiation or mediation. Early dispute resolution, too, may be particularly important to preserve relationships and resolve conflict before the parties become too entrenched in their positions.

All contracting parties may be different, and the transactional lawyer should consider the individual needs of the clients. In the long-term contract situation, the importance of the relationship may depend on a variety of factors. For instance, the grain supplier may follow a particular type of farming practice that the supplier needs in order to advertise products as “organic” or “family farm friendly” or

\(^{65}\) See Michael E. Weinzierl, *Wisconsin’s New Court-Ordered ADR Law: Why It Is Needed and Its Potential For Success*, 78 Marq. L. Rev. 583, 584 (1995). “Additionally, other advocates argue ADR reduces court backlogs, reduces the depletion of court resources, saves litigants time and money, offers litigants more settlement options, preserves relationships, and produces better results.”

\(^{66}\) Id.
the like. If that is the case, the need to maintain the relationship might be particularly strong if few other options exist for the buyer. For a large employer, the relationship between a company and the chief executive officer or other person on the management team might be significantly different than the relationship between the company and hourly workers, such as sales clerks, line cooks, or machinists. In these kinds of situations, the transactional lawyers should recommend dispute-resolution processes to preserve the relationship, such as mediation.

In other situations, the relationships between the parties might be minimal at best. Large businesses that enter contractual relationships with a large number of consumers likely have no interest in the relationships forged with the individual consumers (outside of public relations issues). For example, a bank may not have a particular relationship interest in the individual contracts for credit cards. In these cases, the transactional lawyer could consider other interests to determine the best method of resolving disputes and write those processes into the contracts.

3. **Process Time and Costs**

Conflict involves a significant amount of costs. The costs of conflict are exacerbated when the parties manage the conflict poorly. In addition to litigation costs, the costs of conflict include loss of time and focus on business matters, organizational dysfunction, consumer confidence, as well as financial impact on the value of stock for the company amid conflict. Relationship strains and emotional costs (including entrenchment) may also have an impact on business parties.

Two of the biggest costs of conflict are time and money. Obviously, litigated cases are expensive in terms of lawyer costs, expert witness costs, and potential damages. The National Center for State Courts estimates that the average cost of a litigated contract case costs nearly $100,000 in attorney fees alone, before calculating in any expert witness fees. In addition, conflict takes time away from actual business activities. In addition to taking time out of a workday for conflict resolution, conflict is distracting. Management and employees may lose focus, resulting in lower productivity. In workplace

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disputes, conflict may affect an entire department, causing decreased productivity from other employees who learn of the conflict, but are not involved in the conflict directly.

ADR processes promise to reduce the time and costs of conflict. Negotiation, mediation, and even arbitration boast time and costs savings for parties. Although all of these processes require some attorney time, the amount of time needed to prepare a case for ADR processes is generally significantly less than the time needed to prepare a case for trial. Neither negotiation nor mediation require witnesses (and usually not experts), so the time sacrifices and costs associated with these types of witnesses are eliminated. Further, ADR processes generally yield results faster than the litigation process, which has the ability to reduce relationship costs, emotional burdens, and psychological costs associated with protracted conflict.

Business clients should be receptive to having a discussion about reducing the costs of conflict before the conflict even occurs. Business clients currently seek to keep the costs of litigation low through budgeting, careful staffing, and other types of control measures. Presumably, they would also be interested in working on these issues during the contract-drafting stage to ensure that conflict will be resolved in a way that is reasonable and affordable. In addition, putting measures in place at the beginning of the relationship that will hopefully shorten the timeline of conflict resolution (through mediation, for example) should also be an attractive option for a business client.

The construction hypothetical demonstrates these process time and cost issues, and construction contracts often include pre-dispute ADR clauses, including mediation agreements, arbitration agreements, and multi-step dispute resolution procedures. Construction projects are complicated endeavors involving a large number of players on tight timelines and strict budgets. The use of negotiation, mediation, and arbitration in the industry help resolve the disputes so that projects can be completed on time. Speedy dispute resolution also reduces the overall cost of conflict, so that the projects can be completed within the applicable budget. These benefits could extend to many other industries, and not just construction.

4. Consistency Across Contracts

Business clients often have a large portfolio of contractual obligations. Depending on the position of strength of the contracting parties and the standards within the industry, the client may or may not be in control of the terms of the contract. Clients who have a significant amount of control over contract terms may be interested in having a consistent manner of dispute resolution. Just as corporate clients may
want consistency across contracts for items such as interest rates, grace periods, and the like, they might also be interested in consistency in dispute resolution.

Consistency across contracts may be particularly beneficial for client contracts between businesses and individuals. Business clients often have a considerable amount of control over employment and consumer contracts. Those clients may want to have a consistent manner of resolving those disputes. Perhaps, the business client would like to use a particular provider organization to resolve all of those disputes under certain types of rules. Many of these rules will be discussed below regarding the options available with different forms of dispute resolution.

5. Confidentiality

Court proceedings are open proceedings. Many business clients do not want their conflicts appearing in the public records, the newspapers, or otherwise becoming gossip around town. ADR processes, on the other hand, are usually confidential. Some of these processes are confidential by state law, while many others are confidential by agreement of the parties.

When parties design their dispute resolution protocol at the commencement of the business relationship, they can require that the parties utilize confidential ADR processes before either side files litigation. Utilizing a pre-litigation ADR process or an arbitration procedure would help ensure that conflicts between the parties will not be aired publicly in court. Although an ADR clause does not guarantee that parties to the clause will not file litigation, when the parties are educated on the requirements of the clause, the chances of parties filing litigation should go down.

The ADR clause can include an express confidentiality agreement in that contract so the expectation of a confidential process is clear. Confidentiality clauses are already commonplace in mediation and negotiation agreements. Negotiations are generally considered to be confidential, but including an express confidentiality clause would be fitting, especially if the parties have an interest in privacy.

70. See, e.g., Cal. Evid. Code § 1119(c) (West 2016) (“All communications, negotiations, or settlement discussions by and between participants in the course of a mediation or a mediation consultation shall remain confidential.”); see also Richard C. Reuben, Confidentiality in Arbitration: Beyond the Myth, 52 Kan. L. Rev. 1255, 1261-65 (2006) (discussing arbitration confidentiality statutes).

71. See Unif. Mediation Act § 8 (Nat’l Conference of Com’rs on Unif. State Laws 2003) (allowing mediation communication to be confidential to the extent provided by law or contract).
6. Repeat Player Benefits

In the world of dispute resolution, sometimes “repeat players” get a bad reputation. Historically, some large businesses sought to take advantage of individual consumers and employees through the use of unfair arbitration agreements.72 Provided that the ADR agreements are conscionable,73 significant advantages do exist for repeat players, such as large businesses. Repeat players go to ADR processes not only with “one shot” players, such as individuals, but also with other businesses, which may also be repeat players.

Parties who regularly use certain types of ADR do have a series of advantages. First, the parties who are frequent ADR users are going to be more comfortable with the forum and know what to expect. The same can also be said for frequent users of the litigation process. Experience breeds familiarity. For some business people, they may prefer to use mediation or arbitration as their go-to type of dispute resolution mechanism because – in addition to other process benefits – the forum is comfortable and familiar. Some business entities like to use the same provider organization, such as the American Arbitration Association (“AAA”) or Judicial Arbitration and Mediation Services (“JAMS”), because they are comfortable with the rules of the organization and like the way that those organizations administer cases. In some cases, clients may prefer a certain mediator or arbitrator. As a matter of ethics for the neutral party, such a mediator or arbitrator should disclose working for a party on multiple occasions,74 but if all parties agree, then there should be no problem with a repeat customer, provided that the neutral party can remain fair and unbiased.75

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72. See, e.g., Hooters of Am. v. Phillips, 173 F.3d 933 (4th Cir. 1999) (finding unconscionable an employer’s arbitration agreement under which the employer could choose the arbitration panel and under which the employee was required to follow strict rules that did not otherwise bind the employer); Floss v. Ryan’s Family Steak Houses Inc., 211 F.3d 306 (6th Cir. 2000) (refusing to enforce an arbitration agreement in an employment setting where the forum lacked sufficient rules to safeguard the statutory rights of employees); see also Jean R. Sternlight, Creeping Mandatory Arbitration: Is It Just?, 57 STAN. L. REV. 1631 (2005) (critical of the use of mandatory arbitration in consumer and employment contracts).

73. See infra Section III(C) (discussing conscionability).

74. MODEL STANDARDS OF CONDUCT FOR MEDIATORS, STANDARD II & III (AM. BAR ASS’N, 2005) (regarding impartiality and conflict of interest for mediators); 9 U.S.C.A. § 10(a)(2) (West 2002) (allowing arbitration awards to be overturned in the event of arbitrator bias).

75. Id.
B. DISADVANTAGES OF PRE-DISPUTE ADR CLAUSES

This Article suggests that transactional lawyers should simply discuss including ADR clauses in contracts drafted for corporate clients. This Article does not necessarily argue that ADR clauses are actually appropriate in all circumstances. There is little downside for lawyers in broaching the subject. Whether the client’s interests actually support using an ADR clause in a business contract is something that will depend on a case-by-case basis. Just as not all litigated disputes have to try ADR options, all lawyers are encouraged to discuss those options with their clients.76

This section discusses reasons why clients may not want to include ADR clauses in their contracts. That said, lawyers should still have the conversation about ADR options and make an informed decision on how future disputes should be resolved.

1. Few Negotiators Consider Breach in Advance

Just as the first reason discussed above regarding reasons to include an ADR clause in a contract considers psychological factors,77 other psychological factors may warrant parties not to bargain for ADR clauses. In particular, the optimistic overconfidence bias may be hindering negotiating parties from even considering the potential for breach.

The optimistic overconfidence bias is the phenomenon that individuals rate their future chance of success as better than average.78 In many ways, the fictional town of Lake Wobegon typifies the overconfidence bias when it describes all of its children as “above average.” The overconfidence bias is best demonstrated in the aggregate. Certainly, not all of Lake Wobegon’s children can be “above average,” because only half of them can mathematically be higher than the middle.

For negotiators, the overconfidence bias may mean that the parties are not correctly calculating the risk of breach at the time of contract formation. The beginning of a new relationship is often filled with excitement, commitment, and anticipation. Parties are concerned primarily about the new relationship and moving forward on a joint adventure – whether that is a new business relationship, employment relationship, sales transaction, or new project. The excitement and anticipation likely causes parties to underestimate the actual likelihood of future problems.

76. Model Rules of Prof’l Conduct r. 1.2 cmt 5 (Am. Bar Ass’n 2016).
77. See supra Section II(A)(1).
Lawyers may be hesitant to discuss potential breach and how to remedy breach out of fear that broaching the topic sets the wrong tone for the negotiation or displays distrust of the other side. Breach and remedy may be a sensitive topic because they promote negativity, while negotiators otherwise try to build on positive information. Timing may also be an issue. When is a good time to discuss potential breach? Parties who leave this topic for the end may not want to discuss the psychologically negative issues of breach after having just come to terms with a deal.

Given these psychological factors, ADR clauses may not be negotiated as regularly in arms-length transactions, compared to take-it-or-leave it deals. There should be fewer psychological barriers for lawyers who are advising companies with contracts of adhesion, such as employers and businesses contracting for consumer goods and services. These clients carefully craft all of the terms of their contract, and lawyers should feel more comfortable discussing issues of breach and remedy in the abstract and without the threat of a deal falling apart. Of course, the lawyers cannot advise clients to engage in illegal conduct – including unenforceable ADR agreements.79

In arms-length transactions, lawyers should still counsel their clients on ADR options. Staying away from hard topics just because they are difficult conversations is no reason to ignore the subject. Dealing with conflict is an important consideration for contracting parties, and lawyers should be giving advice under Rule 1.2 that encompasses issues other than strict legal advice, including the practical consequences in the case of breach.80

2. Buyer’s Remorse and Waiver Issues

Some corporate clients may not want to negotiate an ADR clause prior to a breach because they do not want to unduly restrict their options for conflict resolution. Negotiating for an ADR clause prior to a breach is potentially risky. Although the parties may have some idea about potential breaches, they are working on incomplete information because they do not know with certainty what problems will occur in the future. Incomplete information is a well-established barrier to reaching a negotiated agreement.81 Some clients may not want to box themselves into a certain type of dispute resolution.

79. See Model Rules of Prof’l Conduct r. 1.2(d), r. 8.4 (Am. Bar Ass’n 2016) (prohibiting lawyers from engaging in illegal conduct or counseling clients into illegal conduct).

80. Model Rules of Prof’l Conduct r. 1.2 (Am. Bar Ass’n 2016).

Again, this type of concern is one that lawyers may be able to alleviate with thoughtful client counseling. If the lawyer and the client can consider the types of potential breaches, they can have a conversation about how to structure a dispute resolution design system that will suit that breach. The clients can even agree to have different types of disputes resolved in different ways. In many consumer arbitration contracts, large telecommunication companies and banks require arbitration of large dollar cases, while they allow either party to resort to the courts for small claims actions. In other cases, the parties may want to resort to courts to issue remedies such as injunctive or temporary relief.

Lawyers can also counsel their clients so that the parties ultimately have the ability to waive any type of otherwise mandatory dispute resolution that is present in a contract. The obligation to abide by the dispute resolution is contractual, and parties may waive such obligation as they wish. In the arbitration context, the courts have developed a large body of law regarding when the parties are no longer required to arbitrate because they voluntarily engaged in litigation activities. Although waiver is a possibility, a lawyer should be clear to counsel the client that a waiver will only be effective if both parties waive the ADR obligation. Because the obligations are contractual, one party can enforce the forum requirement unilaterally. Post-dispute, the parties may be able to choose a different forum, but waiver would require agreement by both parties.

3. Added Expenses

Another potential downside to required ADR options in contracts is the possibility for added expense, instead of reduced expenses. Consensual processes are never guaranteed to produce finality because the decision-making authority rests in the hands of the parties. Even when parties are required to engage in negotiation or mediation, those processes may not result in settlement because the parties may ultimately not agree to settle their disputes. If parties are required to spend a significant amount of time and money preparing for a consensual process and the process does not settle the case, then the parties

83. See, e.g., Republic Ins. Co. v. PAICO Receivables, LLC, 383 F.3d 341 (5th Cir. 2004) (discussing factors to determine if waiver occurred); Grumhaus v. Comerica Sec., Inc., 223 F.3d 648 (7th Cir. 2000) (same).
will have added a step to the dispute resolution process and increased the expenses. Of course, if the consensual processes do resolve the dispute, the parties may save money and time resolving their process.

One way to curb expenses is to include an adjudicatory process as part of the system design. Arbitration is intended to be a lower cost alternative that also results in finality because the arbitrator will ultimately decide the case. The parties can also agree to a dispute resolution design that includes elements of either a multi-step plan or a hybrid process. Those options are discussed in more detail below.84

Ultimately, lawyers and clients should engage in discussions to determine the interests of the client both in the contractual relationship and in how disputes resulting from the relationship should be resolved. Once the lawyer understands these interests, the lawyer can then work with the client on proposing or negotiating a process that would meet those needs. In some instances, the attorney may recommend using courts as the best recourse for breach, but in other instances, other processes may be a better fit for the client’s individual needs.

C. PROCESS-SPECIFIC CONSIDERATIONS

This section considers specific processes that parties may consider in advance and then include in their pre-dispute resolution clauses. Specifically, this Section covers negotiation, mediation, arbitration, multi-step, and hybrid processes. This Article gives suggestions on items that could be covered in the agreement, proposes suggested language, and covers ethical issues that may arise.

1. Negotiation Clauses and Planned Early Negotiation

Perhaps the simplest way to include a dispute resolution clause is to include an obligation that the parties agree to negotiate and resolve their differences on their own prior to invoking some other type of dispute resolution, such as litigation or arbitration. Negotiation may or may not require the involvement of lawyers. Unlike other dispute resolution processes, negotiation does not require any third parties or other types of specialists.

A negotiation clause could be an attractive option for parties that are interested in low cost, flexible options that also have the ability to preserve relationships. Although negotiations involving legal disputes often involve lawyer preparation and attendance, the amount of lawyer fees for negotiation pale in comparison to fees accrued during discovery and trial practice. Because negotiation is a consensual pro-

84. See infra Section III(E).
cess, the parties can agree to any outcome that they want, and they are not limited to monetary payments. Parties with business relationships may prefer a consensual process so that they can restructure business deals and consider other non-monetary outcomes to the problem. Consensual processes such as negotiation also have the greatest potential for salvaging relationships, including business and employment relationships. If the relationship is particularly important to the client, then this may be a good option.

Law Professor John Lande recently authored the book Planned Early Negotiation,85 advising lawyers and clients to engage in more robust negotiation than they currently use to resolve disputes. Lande advises that lawyers and clients should engage in client counseling and creative fee structures to put more emphasis on client interests and early dispute resolution.86 Lande’s suggestions are good, and this Article considers not waiting until a dispute arises to first talk about planned early negotiation (“PEN”), but to consider writing in a clause to the original contract that would require the parties to engage in this type of early, cost-effective, interest-based negotiation. Early settlement can preserve relationships by resolving the dispute before the parties become too entrenched in the conflict.

Drafting a negotiation clause should be relatively easy and straightforward. The parties could simply include a clause such as: The parties agree to engage in good faith negotiations to resolve any dispute arising under or in connection with this contract prior to filing [litigation in court or a claim for arbitration]. Unlike the recommendations below regarding mediation and arbitration clauses, a negotiation clause does not need to be robust or detailed. The use of the words “good faith” imposes an obligation on the parties, which may be more of a psychological advantage than a legally binding obligation.

Nearly any type of dispute can be resolved effectively through negotiation. Commercial contracts, employment contracts, and consumer contracts could conceivably all utilize negotiation clauses with little downside. A failed negotiation generally does not harm the parties, other than perhaps through the cost of time and legal expenses.

2. Mediation Clauses

Although many contracts include mediation agreements, few mediation agreements appear to be drafted thoughtfully in consideration

of the specific terms under which the parties may wish to mediate. A clause in a contract stating: the parties agree to mediate any and all disputes arising out of or relating to this contract, will require the parties to mediate, but this type of clause is a wasted opportunity. Mediation is a good option for many different types of cases, but the practice of mediation varies widely and involves many variables that can be considered in advance.

Mediation’s benefits are well-documented. Like negotiation, the mediation process is relatively cost effective, informal, party-driven, and creative. The addition of the mediator can help the parties with communication, manage expectation, remove psychological biases,87 and even exert pressure on the parties to settle outside of court. Because the mediator is a neutral party,88 the mediator typically garners trust with the parties and moves settlement discussions in a positive way. Mediators can also help the parties generate settlement ideas if the parties are interested in creative options, but are struggling to create settlement options. For example, mediators can help the parties evaluate non-monetary options, such as apologies, reinstatements, continuing business relationships, or buy-outs, depending on the type of dispute. Mediators can also identify informational barriers and work to ensure that the parties have all of the information that they need to make a decision on whether to settle. Often, mediated settlements are made in the “shadow of the law,”89 but the agreements may also be informed by non-legal considerations, such as time pressures, comfort with risk, preserving relationships, confidentiality, or other important principles.

The mediation process has some downsides that must also be considered. Mediators are generally paid for their efforts,90 and scheduling becomes more difficult the more people are involved. Lawyers typically attend mediations with their clients (although not always),

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87. In particular, the mediator can help remove the sting of “reactive devaluation,” which is the psychological phenomenon that a person will devalue a message based on the identity of the person who makes the statement. See, e.g., SPENCER PUNNETT, REPRESENTING CLIENTS IN MEDIATION: A GUIDE TO OPTIMAL RESULTS BASED ON INSIGHTS FROM COUNSEL, MEDIATORS, AND PROGRAM ADMINISTRATORS, 399-400 (Am. Bar Ass’n eds., 2016) (discussing reactive devaluation and its effects in mediation).
88. MODEL STANDARDS OF CONDUCT FOR MEDIATORS, STANDARD II & III (Am. Bar Ass’n, 2005).
89. This phrase first appeared in Robert H. Mnookin & Lewis Kornhausert, Bargaining in the Shadow of the Law: The Case of Divorce, 88 Yale L. J. 950 (1979), and now it is commonly used to describe how case assessment and the contours of the legal system influence party offers and responses.
so clients will be spending their own time as well as paying for their
teacher’s time at the mediation. Because mediations involve bar-
gaining in the shadow of the law, the lawyers and clients should be
well-prepared for the mediation session, which is an additional ex-
 pense. Mediation and negotiation are consensual processes, mean-
ing that the parties may not resolve their dispute, and mediation
becomes an additional step in the process. On the other hand, because
the process is consensual, the parties are under less pressure to settle,
and the costs of an unsuccessful mediation are relatively low.

In addition to counseling the business clients on the pros and cons
of mediation, the transactional lawyer can also counsel the client on
the various aspects of mediation that can be agreed upon in advance.
For instance, the parties may want to use a specific neutral party or
use a neutral party from a trusted organization using a clause such as:
the parties agree to mediate any and all disputes arising under or con-
 nected with this contract using [NAME] as the mediator or using a
mediator from [the American Arbitration Association or other provider
organization].

If the parties would like a specific type of mediator, by trade or
mediation practice, the parties could specify that the mediator must
employ the principles of transformative mediation, be a lawyer with
more than ten years of experience in the area of employment law, or
have at least five years experience in human resources. Many conflict-
resolution providing organizations, such as the American Arbitration
Association or the Judicial Arbitration and Mediation Service, have
their own sets of mediation rules. If the parties are satisfied with a
specific set of mediation rules, the parties could include a clause stating
that the mediation will be conducted under the rules of [the AAA or
JAMS or other provider organization].

The parties should also consider who will pay the mediator’s fees
and spell those fees out in advance. Typically, parties evenly split me-
diation fees, and the contract could specifically state that the parties
shall each be responsible for half of the mediator’s fees, to be billed by
the mediator to each party separately. In cases involving employees
and consumers, the business entity may offer to pay those fees in or-
der to make the process less costly to the individual. The contract may
also want to specify the location of the mediation. If the parties are
business entities that live at a distance, they may want to consider
where the mediation will occur, whether that be at one party’s home
court or at a neutral location. In consumer and employee contracts,
the business entity should consider mediation at a location convenient

91. Of course, the preparation that lawyers do prior to mediation will certainly be
useful for later litigation activities if the case does not settle.
to the individual. In those instances, the mediation could occur “at the closest federal courthouse” to the individual.

These examples are a few types of issues that business clients can and should consider for dispute resolution. The parties have considerable amount of flexibility, and business lawyers should be familiar with how these processes work in order to help their clients design the best dispute resolution process in advance. The ideal mediation process for two large businesses contracting for supplies may be different than mediation within the construction industry. Mediation within the employment and consumer contexts may require different considerations than mediations with parties of relatively equal bargaining power. The type of relationship between the parties, the industry standards, and the potential type of breach should all inform the ideal type of mediation process.

3. Arbitration Clauses

Compared to negotiation and mediation clauses, pre-dispute arbitration agreements in practice are already relatively detailed. Although some contracts still opt for language such as, *the parties agree to arbitrate any and all disputes arising under or in connection with the contract,* the use of arbitration agreements in the consumer and employment contexts (and resulting unconscionability litigation) have forced large businesses to spell out the terms of arbitration in more detail than other types of dispute resolution processes.

Arbitration has many attractive features for business clients. Arbitration is a private method of dispute resolution, where the parties can choose their decision-maker, and the arbitrator makes a binding decision on the merits of the dispute. Compared to litigation, arbitration generally takes less time, which can result in substantial savings. Arbitration practice can have less discovery than litigation, which also cuts down on the time and expense of the process. Because arbitration is an adjudicatory process, the arbitrator will make a decision for the parties, and the dispute will be concluded. Arbitration is commonly used in areas such as construction because the decision-maker can be an expert in the field. Large banks and telecommunications companies use arbitration in order to keep disputes out of the public.

Despite these advantages, arbitration has some serious disadvantages to consider. Decision-making power is vested in the arbitrator, and the parties lose the ability to decide the outcome of the dispute on their own. Arbitrators generally award money damages and some

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limited types of non-monetary options (such as reinstatement in employment cases), but they generally do not have the same type of creativity to resolve disputes like parties do in consensual processes. In the last few decades, businesses have tried to take advantage of consumers, asking them to give up important process rights. Courts have struck down those agreements as unconscionable, and lawyers have an ethical duty to not advise their clients to put forth such agreements.

In terms of drafting pre-dispute arbitration agreements, the parties should begin with a statement regarding intent to arbitrate, such as: *the parties agree to arbitrate any and all disputes arising out of or relating to this contract*. Then, the parties should consider what type of rules should govern the arbitration proceeding. Most contracts include a statement incorporating the rules of one of the major arbitration providers, such as the AAA or JAMS.

Just as with mediation clauses, the parties should give careful consideration to the choice of the arbitrator. As with mediators, the parties could simply appoint a person to be the arbitrator. The parties could also use the arbitrator selection process that is already in place for the arbitrator providers, and many parties may be confident with those organizations and trust the criteria in place to become an arbitrator on the organization’s roster. Another option would be for the parties to put in place criteria that the arbitrator must meet, such as training as a lawyer or association within a certain type of industry.

The issue of arbitration fees is also similar to the issue of mediator fees. In the usual case and between business parties, the parties can generally expect to pay their respective share of the fees. In cases involving consumers and employees, the employer should strongly consider paying all forum costs (including administrative fees and arbitrator fees) that would exceed the amount of money that the individual would pay in court. Despite this recommendation, the lawyer should also be aware of the fact that arbitrators may feel compelled to rule in favor of the party that is paying them, thus creating one of the most difficult Catch-22 situations in the realm of consumer arbitration.

The parties should also consider the arbitration location. For contracts between businesses, that location could be convenient to one of the parties, or it could be a completely neutral location, depending on the interests of the parties. Lawyers advising business entities including pre-dispute arbitration agreements in contracts with consum-

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93. See Green Tree Fin. Corp.-Ala. v. Randolph, 531 U.S. 79, 91-92 (2000) (stating that an individual may demonstrate that the arbitration forum is unfair if the individual cannot afford to participate in the process).
ers and employees should suggest that the arbitration procedure take place in a location convenient to the individual. Contracts requiring arbitration in an inconvenient location have been invalidated as unconscionable.\textsuperscript{94} Instead, the contract should have a clause requiring arbitration in the county of the customer's billing address or in the city with the closest federal courthouse to the residence of the customer. Lawyers should advise that consumers and employees should not have to travel any farther than they ordinarily would have to if they were to file litigation.

In today's legal landscape, the question of class action arbitration is the hottest topic in consumer and employment arbitration. After many lawsuits on the question of whether class action waivers in arbitration agreements are unconscionable, the Supreme Court has upheld such waivers.\textsuperscript{95} For companies who are interested in trying to eliminate class actions, recommending this type of clause would be well within the bounds of effective and ethical advocacy. On the other hand, lawyers may counsel against such otherwise legal contracts because of public perception concerns. In 2015, the New York Times ran a series of articles critical of arbitration, particularly consumer arbitration, and critical of companies requiring arbitration in consumer and employment contracts.\textsuperscript{96} This is the type of extra-legal counseling contemplated by Rule 2.1 of the Model Rules of Professional Conduct, and it is a fact that might make a difference to a client.

In sum, lawyers have significant room to work with and counsel clients on arbitration issues. The counseling includes both legal and non-legal matters that all have an effect on how companies would like to resolve their disputes.


\textsuperscript{95} DirecTV v. Imburgia, 136 S. Ct. 463, 471 (2015) (upholding arbitration agreement containing a class action waiver despite challenges from consumers); AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 364 (2011) (striking down a California law that applied a special state rule to class action waivers).

4. Multi-Step Clauses and Hybrid Processes

Lawyers drafting ADR clauses do not have to choose one option. Instead, lawyers can counsel and negotiate either multi-step clauses or hybrid procedures. Clients who are interested in both flexibility and finality may want to design a dispute resolution process that involves both consensual and adjudicative processes. A typical multi-step clause starts with negotiation, moves into mediation, and uses arbitration as a last resort. If the early steps are successful, then the parties will not need to resort to the later, adjudicatory options. Multi-step clauses are commonplace in collective bargaining agreements in unionized workplaces, but the benefits of using multiple processes could work in any number of situations.

Multi-step processes assume that the parties will try one process, stop, and then move onto a different process. In processes dealing with a neutral party, multi-step processes contemplate that a different neutral will act as arbitrator if the mediation is unsuccessful. Parties may also consider drafting a clause that combines mediation and arbitration into a single procedure with a single neutral. The pros and cons of hybrid procedures are beyond the scope of this Article, but I have discussed them elsewhere.\(^97\) These types of processes are yet another option for parties willing to consider creative options for dispute resolution.

IV. CONCLUSION

This Article urges transactional lawyers to counsel clients on their expectations for contracts and anticipated breaches. Based on this information, the lawyer and client can create a strategy for creating a pre-dispute resolution procedure to meet the needs of the clients. In addition to being good practice, pre-dispute planning is also preferred ethical behavior. To encourage additional attention on this issue, this Article recommends that Model Rule 2.1 should revise comment 5:

[5] In general, a lawyer is not expected to give advice until asked by the client. However, when a lawyer knows that a client proposes a course of action that is likely to result in substantial adverse legal consequences to the client, the lawyer’s duty to the client under Rule 1.4 may require that the lawyer offer advice if the client’s course of action is related to the representation. Similarly, when a matter is likely to involve litigation, it may be necessary under Rule 1.4 to inform

\(^{97}\) See Kristen M. Blankley, Keeping a Secret from Yourself? Confidentiality When the Same Neutral Serves Both as Mediator and as Arbitrator in the Same Case, 63 BAYLOR L. REV. 317 (2011) (analyzing the ethics and practicalities of the med-arb process).
the client of forms of dispute resolution that might constitute reasonable alternatives to litigation. Transactional lawyers may also counsel clients regarding including pre-dispute ADR clauses to meet the clients' interests. A lawyer ordinarily has no duty to initiate investigation of a client's affairs or to give advice that the client has indicated is unwanted, but a lawyer may initiate advice to a client when doing so appears to be in the client's interest.98

Adding this sentence would encourage more transactional lawyers to appreciate the importance of counseling on ADR before disputes arise.

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98. Model Rules of Prof'l Conduct r. 2.1 cmt. 5 (Am. Bar Ass'n 2016).