



## THE AMERICAN BAR ASSOCIATION AND ADR

*(updated 2/1/18)*

The following is a brief history of the American Bar Association's increasing involvement in the field of alternative dispute resolution (ADR), as well as a short summary of the various ADR policies adopted by the ABA over the years.

In February 1969, the House of Delegates approved a resolution recommending that state and local governments consider establishing an ombudsman authorized to inquire into administrative action and to make public criticism. The resolution also recommended that each statute or ordinance establishing an ombudsman include twelve essential characteristics. Subsequently, the House of Delegates adopted a related resolution in August 1971 recommending several amendments to the 1969 resolution.

In April, 1971, the Board of Governors adopted a resolution approving in principle the provisions of the Emergency Public Interest Protection Act of 1971 (S. 560) and recommended the adoption of a number of amendments, including a proposal giving the President the power to resolve a dispute using binding arbitration. This policy was archived at the ABA's 1997 Annual Meeting.

In February 1974, the House of Delegates approved a resolution that "calls upon all appropriate organizations of lawyers of the countries of the world which have not acceded to or ratified the 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards to convey to their respective Governments their expression of support for this Convention and to encourage their respective Governments to take whatever actions are necessary and appropriate to secure the accession or ratification of this Convention by their respective countries."

The House of Delegates also adopted a separate resolution in February 1974 that "recognizes the need for prompt development of a uniform set of international rules of procedure to supplement the Arbitration Rules of the United Nations Economic Commission for Europe." The resolution also encouraged the efforts of the American Arbitration Association "to develop said supplementary international rules to be compatible with standards of arbitral due process in this country, with the understanding that no final action approving the rules can be taken before the rules are submitted to the Association."

In August, 1974, the House of Delegates approved a resolution supporting legislation providing for voluntary arbitration of patent disputes including questions of infringement and validity of patents. This policy was archived at the ABA's 1997 Annual Meeting.

In 1976, the ABA co-sponsored the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice (the Pound Conference), which signaled the growing interest in court-sponsored dispute resolution programs designed to reduce cost and delay in civil litigation.

In August 1976, with the approval of the ABA Board of Governors, President Justin Stanley created the Special Committee on Resolution of Minor Disputes.

At the 1976 Annual Meeting, the House of Delegates approved a resolution ([Report 126](#)) regarding the arbitration of medical malpractice disputes. This resolution stated generally that (1) arbitration should be entered into, if at all, on a voluntary basis with full knowledge that the panel's decision is final and binding (although the ABA reserved until later any opinion regarding the time at which an arbitration agreement should be entered into); (2) all states should enact laws making arbitration agreements and awards enforceable in the courts under the Uniform Arbitration Act; (3) arbitration panels in "small claims cases" (the term was left undefined) should consist of one impartial arbitrator only, and for claims above the small claims level, there should be three arbitrators--an attorney, a physician, and a layman--and all arbitrators should be impartial and acceptable to both parties. This policy was archived at the ABA's 1997 Annual Meeting.

In August 1977, the House of Delegates approved a resolution ([Report 118](#)) endorsing the use of arbitration to resolve medical malpractice disputes, but only when the arbitration agreement is entered into after the dispute has arisen. During the 1977 Annual Meeting, the House of Delegates also approved a resolution adopting the Code of Ethics for Arbitrators in Commercial Disputes, dated June 1, 1977.

In 1977, the Board of Governors adopted a resolution supporting the enactment of federal legislation such as the "Consumer Controversies Resolution Act" (S. 957 and H.R. 2482, 95th Congress), or similar legislation that would provide federal financial assistance to the states to create or improve small claims courts and such other means of dispute resolution as mediation and arbitration to resolve minor disputes. A similar Act eventually passed in 1980 under a different name, but was never funded.

In February 1978, the House of Delegates approved a resolution recommending that "the Inter-American Convention of International Commercial Arbitration (1975) should be signed and ratified by the United States; provided that implementing legislation, or an appropriate resolution of advice and consent, or both, are prepared which are designed: (a) to avoid conflicts with the Convention on Enforcement of Foreign Arbitral Awards (1958); and (b) to provide appropriate safeguards with respect to future amendments in the IACAC Arbitration Rules."

In August 1979, the ABA Board of Governors approved a resolution generally supporting certain principles within the draft treaty on third party settlement of disputes relating to the interpretation, application or operation of any treaty between the United States and Canada contained within the March 20, 1979 report of the American and Canadian Bar Associations' Joint Working Group on the Settlement of International Disputes.

The ABA Board of Governors approved the first model three-year plan of the Special Committee on Alternative Means of Dispute Resolution in November 1981, with the aim of developing sound alternative methods of dispute resolution complementary to the court system.

In August 1984, the ABA House of Delegates approved a resolution adopting the Standards of Practice for Lawyer Mediators in Family Disputes and urging their adoption by the highest court or, where necessary, the legislature in each of the states and in the District of Columbia.

In February 1986, the House of Delegates approved a resolution ([Report 109C](#)) urging Congress "...to amend Title 9 of the United States Code (Arbitration) to add a new Section relating to Appeals, or,

alternatively, to enact other comparable legislation which would provide in pertinent part for appeals from interlocutory orders of a trial court either refusing a stay of litigation pending arbitration, or denying an application to compel arbitration, or granting, continuing, or modifying an injunction against an arbitration.”

In February 1986, the House of Delegates also approved a resolution (Report 115A) opposing H.R. 3084, the “Medical Offer and Recovery Act,” or similar legislation “...which would provide for an alternative liability system for medical malpractice in the case of injuries under federally funded health care programs if states fail to provide for comparable alternative liability systems.”

In August 1986, the ABA Board of Governors and House of Delegates reconstituted and elevated the dispute resolution committee to Standing Committee status (Report 11-6) to ensure continuity and "demonstrate the Association's continued dedication to serving the professional needs of its members and in upholding its public service responsibility.”

In August 1988, the House of Delegates approved a policy ([Report 103A](#)) supporting the increased use of alternative means of dispute resolution by federal administrative agencies consistent with a number of specific principles (including support for arbitration, whether agreed to before or after the dispute arises). The resolution endorsed the use of various ADR techniques by federal agencies, including arbitration, fact-finding, minitrials, and mediation.

The next year, in August 1989, the House of Delegates approved a policy ([Report 114](#)) supporting continued use of and experimentation with alternative dispute resolution techniques, both before and after suit is filed, “...as necessary and welcome components of the justice system in the United States...so long as every disputant’s constitutional and other legal rights and remedies are protected.”

In August 1989, the House of Delegates also approved a resolution ([Report 104C](#)) favoring the recognition of freedom of parties to international commercial arbitration proceedings to choose as their representatives in those proceedings lawyers who need not be admitted to practice law in the jurisdiction where the arbitration proceedings take place.

At the 1990 Midyear Meeting, the House of Delegates approved a resolution urging “...the government of the United States to start negotiations with other governments in order to implement the principles contained in the Draft General Treaty on the Peaceful Settlement of International Disputes to accept arbitration for the resolution of international disputes.” In February 1990, the House of Delegates also approved a resolution ([Report 113A](#)) recommending that the Code of Ethics for Arbitrators in Commercial Disputes--approved jointly by the ABA and the American Arbitration Association--be amended to provide that unless otherwise agreed, party-appointed arbitrators in international commercial arbitrations should, to the extent practicable in the circumstances, serve as neutrals.

In February 1992, the House of Delegates approved a resolution ([Report 119](#)) recommending, among other things, that individual courts “...establish a system of regulation of the legal profession...” involving such topics as mandatory arbitration of fee disputes, voluntary arbitration of lawyer malpractice claims and other disputes, and mediation. The resolution also recommended that courts adopt a rule for fee arbitration proceedings that would shift the burden of proof to the lawyer in certain circumstances. In February 1992, the ABA Board of Governors also adopted a resolution

recommending that in the context of NAFTA, the governments of the United States, Canada, and Mexico adopt adequate and sound dispute resolution procedures embodying certain shared legal values.

The ABA created the Section of Dispute Resolution in February 1993.

In February 1994, the House of Delegates approved a resolution (Report 108) recommending that CERCLA (the Superfund statute) be amended based on certain specific principles, including the use of ADR, not litigation, to allocate liability among the various parties.

In August 1994, the House of Delegates approved a policy ([Report 10F](#)) opposing any federal legislation authorizing the installation of any mandatory arbitration program in federal courts as a condition precedent to the right of litigants in civil cases to a trial before a jury or a federal judge. At the same time, the House also approved a policy (Report 10C) endorsing the use of alternative dispute resolution—including mediation—to resolve family issues in unified children and family courts.

At the 1995 Midyear Meeting, the House of Delegates approved several ADR resolutions. The House approved a policy ([Report 8](#)) adopting the Model Rules for Fee Arbitration dated November 1994 as well as a resolution ([Report 8H](#)) supporting various reforms to the litigation system, including the promotion of voluntary non-binding ADR procedures. In addition, the House approved a policy (Report 102) that encourages schools to incorporate dispute resolution criteria into their curricula and to develop peer mediation programs. The House also adopted policy (Report 108) that encouraged the federal agencies to use more fully the Administrative Dispute Resolution Act and the Negotiated Rulemaking Act in environmental decision-making and that called upon the Congress to reauthorize both statutes on a permanent basis, with certain revisions and clarifications, including better enforcement of arbitration awards and greater confidentiality.

In addition to these policies, the ABA House of Delegates also approved a resolution (Report 116) at the 1995 Midyear Meeting which encouraged cooperation between the military services and state, territorial and local bar associations to prevent wrongful withholding of military members' leasehold security deposits by assisting service members through educational programs, ADR, and effective representation. Finally, the House approved another resolution (Report 117C) which recommended "...that the Council of the Commission for Environmental Cooperation consider the Model Rules of Procedure for Dispute Resolution under the North American Agreement on Environmental Cooperation dated February 1995, with a view to their adoption."

In August 1995, the House of Delegates approved a resolution ([Report 305](#)) supporting efforts by the Judicial Conference of the United States to plan for the future of the Federal Courts and adopted the policy positions set forth in the Proposed Long Range Plan for the Federal Courts, which was submitted to the Judicial Conference in March 1995. One of the principles endorsed by the ABA in the Long Range Plan was Plan Recommendation 41, which stated that "District courts should be encouraged to make available a variety of alternative dispute resolution techniques, procedures, and resources to assist in achieving a just, speedy, and inexpensive determination of civil litigation," but the ABA's support was made subject to the ABA's previous ADR policies.

In February 1996, the House of Delegates approved a policy (Report 103) supporting amendments to the Individuals with Disabilities Education Act--or the passage of similar legislation--that would permit individuals to pursue education claims arising under the statute through mediation.

At the 1997 Midyear Meeting, the ABA House of Delegates approved several additional resolutions dealing with ADR. One far reaching resolution ([Report 112](#)) called for the expansion of court-annexed ADR programs and provided as follows:

“RESOLVED, That the American Bar Association supports legislation and programs that authorize any federal, state, territorial or tribal court including Courts of Indian Offenses, in its discretion, to utilize systems of alternative dispute resolution such as early neutral evaluation, mediation, settlement conferences and voluntary, but not mandatory, arbitration.”

The other ADR resolution ([Report 101](#)) approved the Due Process Protocol for Mediation and Arbitration of Statutory Disputes Arising Out of Employment Relationships, dated May 9, 1995. The Protocol was designed as a means of providing due process in the resolution by mediation and binding arbitration of employment disputes involving statutory rights.

In August, 1998, the ABA House of Delegates adopted a new ADR-related policy calling for giving patients enhanced rights vis a vis their managed health care plans. In particular, the House adopted a resolution ([Report 103](#)) supporting the right of all consumers to a fair and efficient process for resolving differences with managed health care plans, health care providers, and the institutions that serve such plans and providers, including (1) timely written notification and explanation of a decision to deny, reduce, or terminate services or deny payment for services; (2) a rigorous system of internal review; and (3) an independent system of external review.

At the August, 1998 Annual Meeting, the ABA also approved a resolution (Report 101) adopting the black letter of the Model Rules for Mediation of Client-Lawyer Disputes, which recommends that jurisdictions establish a mediation program by providing a model for such programs.

Subsequently, in February 1999, the ABA adopted a new policy ([Report 114](#)) that reiterated and expanded upon the previous Report 103. The new resolution called for enactment of federal, state, and territorial legislation establishing ADR procedures as one remedy for resolving disputes between patients and group health plans, as part of a process that includes a rigorous system of internal review and an independent system of external review of benefit payment requests, adverse coverage determinations, and medical necessity determinations. Report 114 also endorsed the due process principles contained in the *Health Care Due Process Protocol: A Due Process Protocol for Mediation and Arbitration of Health Care Disputes* prepared by the AAA/ABA/AMA Commission on Health Care Dispute Resolution (including no-predispute agreements to arbitrate HMO coverage decisions), and stated that any system of internal or external review should be consistent with these due process principles.

At the February 1999 Midyear Meeting, the ABA House of Delegates also adopted a related policy (Report 106) supporting enactment of federal legislation amending ERISA to allow patients to bring state court actions against managed health care plans. In that resolution, the ABA also supported and encouraged utilization of ADR mechanisms prior to the filing of such causes of action.

The House of Delegates adopted an additional resolution at the 1999 Midyear Meeting (Report 113) urging all contracting parties to adhere to six fundamental principles for resolving controversies in public procurements at the federal, state, local and territorial levels, including the principle that the parties should attempt to resolve such controversies through the use of ADR at the appropriate time.

At the July 2000 Annual Meeting in New York, the ABA House of Delegates adopted a policy (Report 109B) recommending that court-mandated mediation include an opt-out prerogative in any action in which one party has perpetrated domestic violence upon the other party.

The American Bar Association has long viewed ADR as a critical component of the nation's civil justice system. Accordingly, at the 1998 Midyear Meeting, the ABA Board of Governors added ADR to the ABA's list of ten Legislative and Governmental Priorities for 1998.

Subsequently, at both the 1999 and 2000 Midyear Meetings, the Board voted to retain priority status for ADR through the year 2000. This status was temporarily removed by the Board at its 2001 Midyear Meeting, however, in order to make room for other pressing issues then pending in Congress.

At the 2001 Midyear Meeting in San Diego, California, the ABA House of Delegates also adopted a resolution (Report 109B) approving the black letter of the Model Standards of Practice for Family and Divorce Mediation dated February 2001, which superceded the Standards of Practice for Lawyer Mediators in Family Law Disputes.

During the 2001 Annual Meeting in Chicago, Illinois, the ABA House of Delegates adopted a resolution ([Report 107D](#)) supporting the greater use of "ombuds" to receive, review and resolve complaints involving public or private entities and endorsing the *Standards for the Establishment and Operation of Ombuds Offices* dated August 2001.

In February, 2002, the ABA House of Delegates adopted a resolution (Report 106G) approving the Uniform Mediation Act promulgated by the National Conference of Commissioners on Uniform State Laws in 2001 as an appropriate Act for those states desiring to adopt the specific substantive law suggested therein.

During the 2002 Annual Meeting in Washington, D.C., the ABA House of Delegates approved a resolution (Report 105) recommending the Ethical Guidelines for Settlement Negotiations dated August 2002, as a resource designed to facilitate and promote ethical guidelines for settlement negotiations. In that resolution, the ABA clarified that the Guidelines are not intended to replace existing law or rules of professional conduct or to constitute an interpretation by the ABA of any of the Model Rules of Professional Conduct, and should not serve as a basis for liability, sanctions, or disciplinary action.

In February 2004, the ABA House of Delegates adopted a resolution ([Report 107](#)) endorsing the Code of Ethics for Arbitrators in Commercial Disputes—2004 Revision. In addition, the House of Delegates approved a resolution ([Report 115](#)) endorsing revised Standards for the Establishment and Operation of Ombuds Offices.

In August 2004, the ABA House of Delegates approved a resolution ([Report 116](#)) amending the Code of Ethics for Arbitrators in Commercial Disputes—2004 Revision to clarify that Canon IV, Paragraph G (stating that “Co-arbitrators should afford each other full opportunity to participate in all aspects of the proceedings”) does not preclude ex parte requests for interim relief.

During the 2005 Annual Meeting in Chicago, Illinois, the ABA House of Delegates approved a resolution (Report 104A) adopting the Model Standards of Conduct for Mediators dated August 2005.

In February 2006, the ABA House of Delegates adopted a resolution (Report 109) supporting the use of consent decrees as an important tool for resolving litigation, and opposing legislation—such as S. 489 and H.R. 1229, introduced in the 109<sup>th</sup> Congress—that constrains the efficacy of consent decrees to which state, local or territorial governments are parties, consistent with several stated principles.

In February 2009, the ABA House of Delegates adopted a resolution ([Report 111B](#)) opposing the use of mandatory, binding, pre-dispute arbitration agreements between nursing homes and residents or their agents and supporting legislation and regulations invalidating such arbitration agreements. The resolution also supports additional refinements to such legislation and regulations that would accomplish these objectives through a method other than amendment to Chapter 1 of Title 9 of the U.S. Code (i.e., the Federal Arbitration Act).

The ABA House of Delegates also adopted a resolution in February 2009 (Report 101B) urging federal, state, territorial, and local governments to initiate, continue and expand the use of mediation as a means to resolve criminal matters, specifically at a time prior to actual case filing, thereby providing a means for diversion from the criminal system. The resolution also encouraged these governments to use only those individuals who have received appropriate mediation training, to adhere to proper mediation protocols that recognize the rights of the participants, and to follow certain other principles.

In February 2009, the House of Delegates also adopted a resolution (Report 107G) recommending that state and territorial governments adopt certain standards for handling residential and small business insurance claims for property damages resulting from hurricanes or storms, including the creation and maintenance of mediation programs in advance of a particular disaster and the adoption of several basic mediation procedural protections listed in the resolution. The resolution also urged Congress to enact legislation that authorizes and directs the National Flood Insurance Program to participate in the mediation programs established by the states and territories so there is a single mediation venue for resolving all disputes for insurance claims resulting from hurricanes or storms.

During the 2009 Annual Meeting in Chicago, Illinois, the ABA House of Delegates adopted a resolution ([Report 114](#)) supporting (1) the use of commercial arbitration to resolve disputes involving international business transactions; and (2) federal, state and territorial legislation or regulations that recognize and aid in the enforcement of international commercial arbitration agreements and awards. The resolution also opposes legislation or regulations that would (1) reduce or discourage the use of international commercial arbitration or that would be inconsistent with established international commercial arbitration standards and practice; (2) invalidate pre-dispute agreements to arbitrate international commercial disputes; (3) alter the current law as to the allocation of authority between the

court and arbitrators to determine the jurisdiction of arbitrators in international commercial disputes or regarding the timing of these determinations; or (4) protect discrete classes as an amendment to the Federal Arbitration Act.

The House of Delegates also adopted a separate resolution at the 2009 Annual Meeting (Report 300) supporting federal, state or territorial legislation, regulations, or court rules that (1) promote the use of mediation to assist in resolving disputes that could lead to foreclosures of mortgages on residential real property and foreclosure cases already pending in courts; and (2) promote access to pro bono or low cost counsel or other advocates for parties who would otherwise be unrepresented in the mediation process.

The ABA House of Delegates adopted a policy in August 2011 ([Resolution 120](#)) supporting various amendments to the Uniformed Services Employment and Reemployment Rights Act of 1994, including making unenforceable any clause of any agreement between an employer and an employee that requires arbitration of a dispute under the Act.

At the 2012 Midyear Meeting, the House of Delegates approved a policy ([Resolution 105](#)) amending the ABA Model Rules for Fee Arbitration, dated February 2012. The resolution updated and refined the previous model rules originally adopted by the House of Delegates in February 1995.

During the 2013 Annual Meeting, the House of Delegates approved a resolution ([Resolution 107C](#)) affirming that the U.S. common law doctrine of *forum non conveniens* is not an appropriate basis for refusing to confirm or enforce arbitral awards that are subject to the provisions of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards or the Inter-American Convention on International Commercial Arbitration. The resolution also affirmed that refusal on that basis is not consistent with U.S. treaty obligations under these Conventions and U.S. implementing legislation.

At the 2016 Midyear Meeting, the ABA House of Delegates approved a policy ([Resolution 100](#)) urging lawyers and all interested parties to increase the use of ADR processes to resolve health care disputes.

During the 2017 Midyear Meeting, the House of Delegates approved a resolution ([Resolution 117A](#)) approving the Uniform Family Law Arbitration Act, promulgated by the National Conference of Commissioners on Uniform State Laws, as an appropriate Act for those states desiring to adopt the specific substantive law suggested therein.

At the 2017 Annual Meeting, the House of Delegates adopted a resolution ([Resolution 103](#)), sponsored by the Section of Dispute Resolution, which encourages the greater use and development of ombuds programs that comply with generally recognized standards of practice.

Copies of the various ABA policies referenced above can be obtained by contacting Larson Frisby in the American Bar Association's Governmental Affairs Office at (202) 662-1098 or [larson.frisby@americanbar.org](mailto:larson.frisby@americanbar.org).