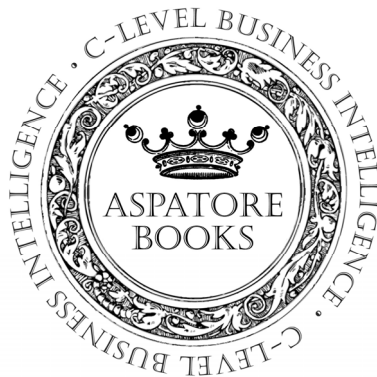


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Mediation and Arbitration Best Practices

*Leading Lawyers on Successfully Resolving Disputes
through Alternative Dispute Resolution*



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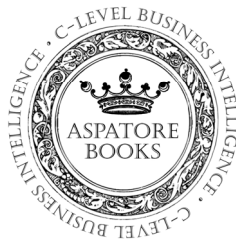
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Understanding the Benefits and Risks of Alternative Dispute Resolution

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What Is ADR?

Alternative dispute resolution (ADR) is the use of alternative methods to resolve disputes that are typically resolved by litigation in either the state or federal court systems. The two most popular ADR methods are mediation and arbitration.

Mediation is a process whereby the parties to a dispute use the services of a neutral third party to assist them in trying to settle that dispute, not to resolve it on the merits. Mediations are most often consensual in nature by virtue of a dispute resolution provision in a contract between the parties that requires resorting to mediation in the event of post-agreement disputes, or because the parties later agree—after a dispute has arisen either prior to or during litigation—that they would like to try to settle their dispute with the assistance of a neutral third party. The mediator does not rule on the case or decide the factual or legal issues. Rather, he or she is a facilitator whose role is to communicate and meet with the parties together and/or separately to assist them in reaching a settlement. If they are unable to do so, the mediator’s work is over. To encourage open and frank discussions, the mediation process is “off the record” and is not admissible in court proceedings.

Arbitration is an alternative to the litigation process whereby a neutral third-party arbitrator (without a jury) rather than a judge (often with a jury) will resolve the dispute presented by the parties. Like mediations, arbitrations are generally consensual in nature and most often occur because a dispute resolution clause in a contract between the parties compels the use of arbitration as the means of resolving any disputes arising under the contract.

Almost all disputes can be mediated and arbitrated, but certain cases do not lend themselves best to arbitration or mediation. Typically, those cases would involve constitutional issues or other issues affecting public policy or the public interest. Business disputes lend themselves best to mediation and arbitration, because both parties generally have business reasons for wanting to resolve the matter quickly, inexpensively, and confidentially. Also, business executives may prefer to have an arbitrator with particular experience or expertise decide the merits of the case rather than leaving it to a jury.

When to Use Mediation or Arbitration

The main reason for using mediation is to determine, relatively quickly and inexpensively, whether the parties can resolve their dispute amicably without resorting to the arbitration or judicial process. The parties may agree, as part of a dispute resolution clause in a contract, to mediate any dispute that arises under the contract before proceeding to arbitration or court litigation. These dispute resolution clauses generally provide that if the parties cannot resolve the dispute by mediation (sometimes within a specific period of time), they may proceed to the next step: arbitration or traditional litigation.

Mediations can also occur in the context of an ongoing arbitration or court proceeding. In fact, one of the true benefits of mediation is that it can be used at any step of the dispute resolution process—from the commencement of litigation or arbitration through the conclusion of a final and unappealable judgment. The parties may advise the arbitrator or the judge that they would like to suspend the arbitration or judicial process for a period of time to see if they can resolve the matter amicably with the assistance of a mediator. Most courts have established mediation programs for this purpose.

The timing for mediation can be very important. Mediation may not be successful at an early stage when the parties are unable to assess the merits of their case or the strengths and weaknesses of their adversary's case. Some cases may not be successfully mediated until later in the dispute resolution process when there has been an adequate exchange of information in discovery. Mediation is most successful in contract disputes when there is a monetary dispute or when the parties have a mutual interest in continuing their relationship.

The most significant reasons for using arbitration are: (1) a quicker and cheaper dispute resolution process with limited judicial review, (2) the ability to craft a dispute resolution process tailored specifically to meet the needs of the parties, (3) confidentiality of the arbitration proceedings, (4) the avoidance of jury trials, (5) the ability to select an arbitrator who has expertise and experience in the area of the dispute, (6) the ability of the parties to establish the pace of the arbitration in conjunction with the

arbitrator, (7) the avoidance of delays created by a judicial calendar, and (8) the applicability of less rigid rules.

Arbitration is a good alternative to litigation when the parties are in agreement that the matter can be resolved quickly with limited discovery. Arbitration may also be the right alternative when a party wants to avoid publicity and the public's access to court filings. Parties also propose arbitration when they believe a jury trial is not in their best interests. Arbitration can be an excellent alternative to litigation if the parties can agree, either in a dispute resolution clause in their contract or once a dispute has arisen, about the selection of an arbitrator and the entire arbitration process. However, a party must always consider the fact that arbitration statutes and case law generally limit judicial review of arbitration awards, even if the arbitrator makes factual or legal errors.

The Benefits and Risks of Arbitration and Mediation

The benefits of arbitration are that if it works as intended, the parties will have an opportunity to select the arbitrator, they will have a greater ability to control the process, it will be confidential and without a jury, and resolution will occur more quickly with less expense and business disruption. The most significant risk in using arbitration is that the arbitrator may not decide the matter correctly and the losing party might not have a basis for an appeal because of the limited right to appeal arbitration awards.¹ The limited right of judicial review is both a benefit and a risk. On one hand, there is less likelihood of multiple court appeals that could add substantial time and expense to the dispute resolution process. On the other hand, even if the arbitrator is wrong (in the view of one party), there are only limited grounds on which to appeal an award.

The benefit of mediation is that if successful, the uncertainty of arbitration or court litigation will be avoided. Another benefit of mediation is that

¹ In some states, parties can only appeal an arbitration award if there was fraud or corruption in the arbitration process or by the arbitrator, or if the arbitrator exceeded his or her powers by, for example, deciding an issue that was not presented by the parties or was not included in or covered by the agreement to arbitrate. In those states, a party cannot appeal an award for mistakes of fact or law. There may be a greater opportunity to appeal an arbitration award under the Federal Arbitration Act than under certain state arbitration acts.

parties are often more willing and able to settle their disputes if a neutral third party is there to facilitate their discussions, especially in those situations where there has been or is substantial hostility between the parties.

The only true risk of mediation is that the process does involve time and expense that may delay the ultimate resolution of the case. If one party has agreed to mediate a dispute solely to delay matters and fails to make a good faith attempt to settle the matter, the mediation process will add time and expense to the dispute resolution process.

Arbitration: Step by Step

There are a number of steps in the arbitration process. The following is generally the process used by the American Arbitration Association (AAA), a major facilitator of private, commercial arbitrations.

Assuming the parties have agreed to arbitrate a dispute under the auspices of the AAA, the first step in the process is for the claimant to prepare a demand for arbitration that will contain a statement of the claim. The demand for arbitration will be submitted to the AAA and will formally commence the arbitration process. The claimant must pay a fee to the AAA based upon the amount in controversy. The demand for arbitration will then be presented to the adversary party, who has an opportunity to respond and submit a counter-demand, if appropriate.

The next step is for the AAA to communicate with the parties or their counsel regarding the selection of an arbitrator to arbitrate the dispute. Unless their agreement provides otherwise, the parties will participate in the selection of an arbitrator from a list of potential arbitrators prepared by the AAA from its panel of arbitrators. Individuals who seek to be listed on the panel of arbitrators must be selected by the AAA and have certain experience and training. The AAA will select an appropriate number of arbitrators from the panel for the parties to consider. In making these selections, the AAA will consider the subject matter of the dispute and the amount in controversy. After the parties advise the AAA of which arbitrators on the list are acceptable, the AAA will select an arbitrator to

which neither party has objected. The parties are responsible for their share of the arbitrator's fees and expenses.

The next step is for the AAA to contact the arbitrator to determine whether he or she has any conflicts of interest and is willing to handle the case. Assuming the arbitrator is willing to proceed and has no conflicts, the AAA will advise the parties of the selection of the arbitrator. The arbitrator will then conduct a preliminary conference with the assistance of the AAA. During that conference, the arbitrator and the parties will discuss various procedural matters including discovery and scheduling. The arbitrator will then prepare a scheduling order. (See Appendix H for a form report of preliminary hearing and scheduling order.)

The parties will then proceed to conduct the discovery permitted by the arbitrator and will have additional conferences as required, depending on the complexity of the dispute. The parties will also have additional contact with the arbitrator through the AAA if there are any disputes during the pre-hearing process or based upon the arbitrator's interim rulings. During this process, the arbitrator may direct that the parties submit pre-hearing briefs and exchange information about witnesses and exhibits for the arbitration hearing. The arbitrator will then conduct the hearing, during which he or she will hear the testimony of witnesses and consider the exhibits introduced by the parties. The arbitrator may then schedule the submission of post-hearing briefs. When this process is completed, the arbitrator will close the hearing and issue an award within thirty days. The award may include provisions regarding the responsibility for payment of the arbitration filing fees and the arbitrator's fees and expenses.

Mediation: The Process

There are different ways parties may agree to mediate a dispute. The first way is when the parties have included a dispute resolution clause in their business contract that requires the parties to mediate any dispute that may arise under the contract. They may have agreed to mediate the dispute in a particular manner or to conduct a mediation under the auspices of a mediation service such as the AAA. The parties may also include in the dispute resolution clause that if the mediation is unsuccessful after a specific time period, the parties may proceed to either arbitration or a court

proceeding. The parties can also agree to mediation once a dispute has arisen, even if they had not previously agreed to mediate. This may occur either prior to or during an arbitration proceeding or court proceeding.

Once the parties have agreed to mediate their dispute, they will select a mediator. If the parties utilize the mediation services offered by the AAA, the AAA will propose a number of mediators to the parties. The parties may also include in a dispute resolution clause the procedure whereby a mediator will be appointed if a dispute arises under the contract. The parties may agree that the mediator will be a person with particular expertise or experience. If the parties are already engaged in a court proceeding, the court may propose a mediator from the court's mediation program.

Once a mediator has been selected and assuming there are no conflicts of interest, he or she will contact the parties and discuss the ground rules for mediation. That discussion may include scheduling a conference call first with counsel only, followed by a mediation session attended by both counsel and clients. The mediator will request information about the dispute and schedule the submission of position statements that may be submitted for the mediator's eyes only or exchanged by the parties, depending on the preferences of the parties or the mediator.

If the case is already in arbitration or in a court proceeding, the mediator may request the filed pleadings or other information and documents exchanged by the parties. If there has been no or limited discovery at the time the mediator is appointed, he or she may discuss with the parties or their counsel the need for certain additional discovery before a mediation session is to occur.

At the mediation session, the mediator generally will meet with all parties and their counsel first and provide each party or their counsel (or both) with an opportunity to make a statement or respond to the statement of the adversary. The mediator may then meet with one party and counsel separately to discuss the strengths or weaknesses of that party's case and request settlement proposals the mediator can take back to the other party. Mediators often engage in "shuttle diplomacy" to narrow the issues and get feedback on various settlement proposals. If the parties appear deadlocked, a good mediator will propose creative ways to settle the dispute and keep

the parties talking. Mediation sessions typically take several hours to a full day. If the parties are continuing to make any progress, most mediators are willing to extend the mediation session for additional days depending upon the circumstances. In complex multi-party litigation, the mediation process may extend over months, during which the mediator may meet with different groups of parties.

If the mediator and the parties are successful, the parties will often reduce the agreement to writing, with or without the assistance of the mediator. If the mediation occurs in the context of an ongoing arbitration or litigation matter, the parties will immediately advise the arbitrator or the judge that the case has been settled.

Pleading the Case

Clients and their counsel are always trying to obtain an advantage during the dispute resolution process. While they do not generally have the opportunity to participate in the selection of a judge, they often do have an opportunity to participate in the selection of an arbitrator or mediator. Parties often have different views on who would be an appropriate arbitrator or mediator, because they want someone they believe may be sympathetic to their case.

There is no one best way to plead a case before an arbitrator or mediator. One must first take into account the differences between arbitration and mediation. Because the mediator is more interested in settling the case and less concerned about the merits, an advocate should tailor his or her presentation to the mediator with that in mind. A good advocate will not only try to make a convincing presentation about the merits of the client's case, but he or she will also try to convince both the mediator and the adversary of the weaknesses of the adversary's case and why settlement is in the adversary's best interests.

There may be certain situations during mediation when counsel should not go for "the jugular" in pleading his or her case in the interest of trying to amicably resolve the dispute. While an advocate certainly would want to present his or her client's case in the best possible light, he or she may not want to take any action that would cause the adversary to walk away from

the bargaining table at a time when the negotiations are proceeding in a positive fashion and the parties are making progress in narrowing the issues in dispute.

Parties often have disputes regarding the scope of permissible discovery in ADR matters. Discovery is generally more limited in arbitration matters than in court litigation. It is not uncommon for one party to seek a substantial amount of discovery including interrogatories, document requests, and depositions, while the other party will seek to limit discovery to the exchange of exhibits and witness lists. Parties may differ as to the appropriate time for mediation because of discovery issues. If the mediation occurs at an early stage of the dispute, the parties may not have any discovery to assist them in their presentations or their evaluations of the case. The benefit is that the parties may be able to avoid costly discovery. The risk is that the absence of discovery may work to the advantage of one party and the disadvantage of the other. In addition to discovery disputes, the parties may also have disputes regarding other procedural aspects of the arbitration process concerning, for example, application of state or federal court evidence rules or the submission of testimony by affidavit rather than live testimony at the arbitration hearing.

Judge and Jury Considerations

Pleading a case to an arbitrator or mediator may not be that different from pleading the case to a judge, but that is dependent upon the specific arbitrator, mediator, or judge. While the arbitrator and the judge must resolve the merits of the dispute, the mediator's goal is to settle it. That does not mean an arbitrator or judge has no interest in settling disputes. To the contrary, they are often very interested in settlement, especially if the parties hint that they would like to discuss settlement or propose mediation.

A judge who is sitting without a jury may not want to conduct a settlement conference because he or she will also be the fact finder in the case. For the same reason, arbitrators prefer not to mediate a case they are arbitrating. In fact, the general policy of the AAA is to preclude arbitrators from becoming mediators once the arbitration process has begun. One reason for this policy is that parties and their counsel are often uncomfortable talking about settlement with an arbitrator wearing a mediator's hat,

knowing the arbitrator/mediator will go back to wearing his or her arbitrator's hat if the case cannot settle. The AAA advises parties that if they want to mediate their dispute once the arbitration process has commenced, it will provide a mediator for that purpose. Then, if the mediation is unsuccessful, the arbitration will continue with the appointed arbitrator.

Pleading a case to a jury is often completely different from pleading a case to an arbitrator, mediator, or judge. Most (but not all) arbitrators and mediators are lawyers by training. Generally, they understand the language of the law. Jurors are lay people, often with little experience in the language of the law or the legal process.

ADR Alternatives

In addition to mediation and arbitration, there are other ADR methods to resolve disputes. These include “med-arb,” mini-trial, and summary jury trial. Med-arb combines the benefits of mediation and arbitration before a neutral who serves initially as a mediator and then as an arbitrator to resolve any open issues the parties are not able to resolve during the mediation process.

In a mini-trial, attorneys for the parties make presentations before a neutral. Either the parties or representatives of the parties with settlement authority are present to hear these presentations and then attempt to settle the case with the assistance of the neutral third party. The neutral may also give opinions as to what he or she believes the result would be if the case were to proceed to arbitration or a court trial. A summary jury trial is a mini-trial, but the case is presented to a “jury” that will “decide” the case. The verdict is not binding or enforceable but is intended to assist the lawyers in evaluating the strengths and weaknesses of their case and assist the parties in settling the dispute.

Generally speaking, mediation is considered to be the best way to resolve a dispute, because it is amicable in nature and may result in the avoidance of substantial legal fees and business disruption. The parties can often be creative in resolving their dispute in ways that are mutually beneficial, while arbitrators and judges are more limited in how they can resolve disputes.

There are certain situations in which the use of ADR may not be appropriate and would slow the dispute resolution process down rather than speed it up. In situations where parties need extraordinary and immediate relief, courts are in a better position to order the parties to take or refrain from taking certain action. The arbitration process is not designed to provide immediate and extraordinary relief to a party who is facing irreparable harm if that relief is not obtained immediately. Parties may seek extraordinary relief through temporary restraining orders or preliminary injunctions from a judge who will then direct the parties to proceed to arbitration if that is what the parties' agreement provides.

Representing a Client in Mediation and Arbitration

It is very important to evaluate the dispute scenario. Competent counsel will walk the client through the entire process so it has an understanding of the timing and sequence of events and possible outcomes. Counsel should also discuss with the client the type of person best suited to mediate the dispute or resolve the dispute as an arbitrator and whether that person should have particular experience or expertise. Arbitration and mediation are only difficult or confusing when the parties or their counsel do not understand the distinctions between these dispute resolution methods or fail to cooperate or participate in the process in good faith.

Parties often pay little attention to the dispute resolution clause when negotiating a business transaction and do not adequately consider the ramifications of a dispute arising under the contract or the best way to resolve the type of dispute most likely to occur. The parties may include in the dispute resolution clause of their contract details regarding the ADR process. A competent lawyer will spend time advising the client with respect to the dispute resolution clauses in its contracts and can help determine what ADR method would be most advantageous in the context of the particular business transaction and how detailed and specific it should be. (See Appendix I for an example of a dispute resolution clause of a business contract.)

There are a number of important issues in ADR matters, including: (1) the timing, (2) the selection of an appropriate mediator or arbitrator, (3) the critical discovery that should be obtained before ADR, (4) consideration of

the client's business interests in participating in an ADR process, and (5) the presentation of a case to the mediator or arbitrator.

Mediation

In those situations where an agreement of the parties provides that the parties can propose a mediator, or a court permits the parties to propose a mediator, counsel may want to propose a mediator who has relevant experience or expertise. In proposing a mediator, counsel should take into account the client he or she is representing, the particular dispute in issue, the current context of the dispute or litigation, the adversary's counsel, and the adversary party. Counsel should propose a mediator who has the ability, through expertise or experience, to help facilitate resolution of the dispute.

Counsel should also confer with his or her client regarding the preparation of a mediation statement. That statement generally will consist of the party's factual and legal contentions and, possibly, an opening settlement position. Counsel will then represent the client at the mediation session and, depending upon the mediator's style, make an oral presentation to the mediator with or without input from the client. Mediators often want to hear directly from the client or a representative of the client and want the adversary party to participate in the process. Many mediators believe parties need to hear directly from their adversaries because they often rely solely on the advice of their own counsel when evaluating the merits of a dispute. The competent counsel will know the mediator's style before the mediation session so he or she can prepare the client for what can be expected at the session.

Although counsel's role is to present his or her client's case in the best possible light, he or she does not want to overstate the client's case, and he or she wants the mediator to trust that what they say and write are true and accurate. When appropriate, creative or unorthodox methods for settling a case may be necessary. One method might involve restoring or enhancing a business relationship that soured because of a dispute. Sometimes it is easier to settle a dispute in that fashion rather than in the traditional payment of money from one party to the other.

At the mediation session, counsel's goal is to convince his or her adversary, the adversary's client, and the mediator of the strengths of the case and the

weaknesses of the adversary's case. Yet, counsel might not present all of the factual and legal arguments if, as a matter of strategy, they would prefer to raise them in the litigation or a later stage of pending litigation, or because they do not want to give "free" discovery to their adversary.

The goal of the mediator is to settle the case, not to determine who is right and wrong. As part of his or her representation, counsel must consider alternative and creative ways to settle the dispute and make proposals to the mediator, as appropriate, during individual party caucus sessions with the mediator. Counsel must also consider when to make "take it or leave it" proposals as opposed to negotiable proposals.

Arbitration

Representing a client in arbitration is generally similar to representing a client before a court because, like a judge, the arbitrator's job is to decide the merits of the dispute. However, insofar as the parties have an opportunity to select an arbitrator, the same process in selecting a mediator applies to the selection of an arbitrator unless the parties have agreed on a specific selection process.

Typically, there is limited discovery in an arbitration proceeding. As a result, one must very quickly determine what discovery is really necessary to proceed to the arbitration hearing. The arbitration hearing will generally occur more quickly than it would take to get to trial in a court proceeding. The arbitration proceeding is a bit less formal than a court proceeding, typically taking place in a conference room in an office, and most often without a court reporter. The rules of evidence generally do not apply or are relaxed, and there is no jury. Because arbitration is mostly consensual in nature, arbitrators will generally accept agreements between the parties with respect to the arbitration process, including discovery and scheduling.

While a mediator's role is to facilitate settlement, the arbitrator's role is to resolve the dispute in an adversarial proceeding. Counsel's role in the selection of an arbitrator is even more important than in the selection of a mediator because of this difference.

A competent counsel involved in ADR must keep aware of trends to be effective and competitive. This can be accomplished by (1) keeping abreast

of ADR statutes, both state and federal, (2) keeping abreast of case law involving mediation, arbitration, or other ADR methods or issues, (3) developing a knowledge bank about mediators and arbitrators, and (4) acting as a mediator and arbitrator in other cases.

Financial Implications

One of the benefits of ADR is that these alternative ways of resolving disputes may eliminate the need for a long and drawn out court proceeding with possible appeals that will not only be expensive but require a substantial time commitment by the client over an extended period of time. The cost of an unsuccessful mediation is generally not significant compared to the cost of litigation. The cost of mediation involves attorney time associated with getting the parties to agree to mediate, the selection of a mediator, communications with the mediator, preparation of a position paper, preparation for and attendance at mediation sessions, and sharing the cost of the mediator. Arbitration is more expensive than mediation, but it is generally less expensive than traditional litigation.

Trends

The biggest change in arbitration proceedings during the last five to ten years is that they are beginning to look more and more like court litigation. Parties are seeking and agreeing to more discovery. That, in turn, leads to a longer and more expensive process. In addition, transactional lawyers are becoming more sophisticated in the drafting of dispute resolution clauses. These clauses now often contain a two- or three-tier dispute resolution process with details as to how each tier will be conducted and how neutrals will be appointed.

Mediation has become commonplace in the context of both court litigation and other dispute resolution methods. As a result, the pool of available mediators has become diluted somewhat and mediators are no longer limited to senior lawyers with substantial experience and expertise or retired judges, but also include individuals with less experience or training. At the same time, lawyers are trying to establish standards for mediation and mediators that would, among other things, permit a party to file a complaint if a mediator fails to follow basic standards or ethical obligations.

During the next five to ten years, parties and their counsel will become even more sophisticated in using arbitration and mediation. Although arbitration will continue to look more and more like court litigation, it is possible that there will be a backlash when parties realize they really want a simple, quick, and inexpensive way to resolve most business disputes on the merits. This may lead to the increased use of limited-time mediation followed quickly by arbitration or other dispute resolution methods.

Challenges

The most challenging aspect of an advocate's job is to present his or her client's case in the best possible light so it yields a result the client feels satisfied with in all respects regarding matters of substance and procedure. Another challenging aspect of an advocate's job is to assist the client in fully understanding the ADR process and selecting the appropriate method for resolving a dispute. It is sometimes challenging to convince the client that the benefits of ADR outweigh the risks in certain situations.

It is important to understand and appreciate the alternative methods of dispute resolution and how to best prepare for and take advantage of those differences while being aware of the associated risks. Three golden rules of arbitration and mediation are:

1. Give full consideration to the dispute resolution clause of the contract, including the best method or methods to resolve disputes likely to occur under the contract, bearing in mind the risks as well as the benefits of ADR methods.
2. Understand and appreciate the differences among different ADR methods, and become totally familiar with each step in each process in order to take full advantage of the benefits and minimize the risks associated with these alternatives.
3. When selecting an arbitrator or mediator, either pre- or post-dispute, give full consideration to the experience or expertise the neutral should have to assist the parties in reaching a fair and just result quickly and expeditiously.

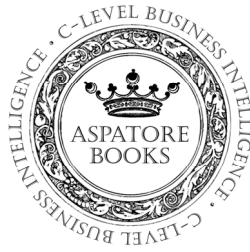
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Mr. Naar has also been involved in major product liability litigation in both the federal and state courts in New Jersey. He has acted as New Jersey counsel for a number of international clients. He has also been retained by a number of New York City and Washington, D.C., law firms to be New Jersey counsel for their clients because of his expertise in New Jersey federal and state court practice. Mr. Naar is also listed in The Best Lawyers in America in the commercial litigation category.

Mr. Naar is a summa cum laude graduate of Rutgers College (1973), where he was a Henry Rutgers Scholar. He received his law degree from Columbia Law School (1976), where he was an associate editor of the Columbia Journal of Transnational Law. He joined the firm in 1982.

Mr. Naar has lectured on various litigation-related topics. He was appointed to the first panel of certified mediators for the U.S. District Court for the District of New Jersey. He is also on the panel of certified arbitrators of the American Arbitration Association and the U.S. District Court for the District of New Jersey. In addition, he has served as vice chair of the product liability law section of the Essex County Bar Association and has been a member of the executive committee of the federal practice and procedure committee of the New Jersey State Bar Association. He has had a variety of articles published in professional journals on litigation practice. He is presently a trustee of the Association of the Federal Bar of the State of New Jersey and a director of the Columbia Law School Alumni Association.

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