



# Alternative Dispute Resolution

Alternative Dispute Resolution (ADR) refers to procedures for settling disputes by means other than litigation. These methods—negotiation, arbitration, and mediation—are usually less costly and more expeditious than traditional court proceedings.

## CHAPTER OVERVIEW

# Understanding ADR Methods

## Negotiation

The back-and-forth process by which parties reach an agreement, whether in conflict or not.

## Mediation

An independent, neutral mediator helps parties arrive at a mutually satisfactory agreement. The mediator has no power to compel actions.

## Arbitration

An independent arbitrator renders a binding decision on a case. May be voluntary or compulsory by statute or contract.

# The Reality of Modern Legal Practice



"I want to stand before judges and argue my case," says Bo after graduating law school. During his first week, he's dismayed to attend three arbitration hearings and one mediation case.

Most law schools cover mediation and arbitration only cursorily, if at all. Yet ADR saves clients money, allows firms to help more clients, and tends to result in reasonable outcomes. It's here to stay.

# Constitutional Challenges to ADR

State and federal courts have recently heard challenges to the constitutionality of certain ADR programs, raising important questions about their implementation and scope.

## **Nevada: Wells Fargo Challenge**

Wells Fargo challenged the statewide foreclosure mediation program, arguing it's unconstitutional because courts can block foreclosure if banks don't participate in good faith.

## **Delaware: Arbitration Program**

The Delaware Coalition for Open Government is challenging the Delaware Chancery Court's arbitration program, where judges sit as private arbitrators instead of public judges in certain cases.

# Ancient Roots of ADR

Arbitration as an alternative to litigation traces back at least to ancient Greeks, including Plato and Aristotle. References to arbitration appear in biblical texts and early reports of law and business throughout the Anglo-American tradition.

As the U.S. court system has become increasingly complex, clogged, and costly, disputants have sought other means for settling claims in a fair, timely, and relatively inexpensive manner.



# Why ADR Gained Popularity

## The Perception vs. Reality Debate

Conventional wisdom holds that actual increased delays and costs in the court system have powered the ADR movement. However, some analysts question whether there's any "litigation explosion" that needs addressing.

Similarly, the existence of cost savings is debated, with some observers believing nonbinding ADR actually adds to total cost. Yet the perception of cost savings has been a strong force in increased ADR use.

## What Matters Most

Whether there is, as a factual matter, time or cost savings in ADR need not be definitively determined. So long as individuals perceive these advantages, they will seek lawyers and legal assistants well prepared to take advantage of ADR's putative benefits.

# Practical Example: The Landlord-Tenant Scenario

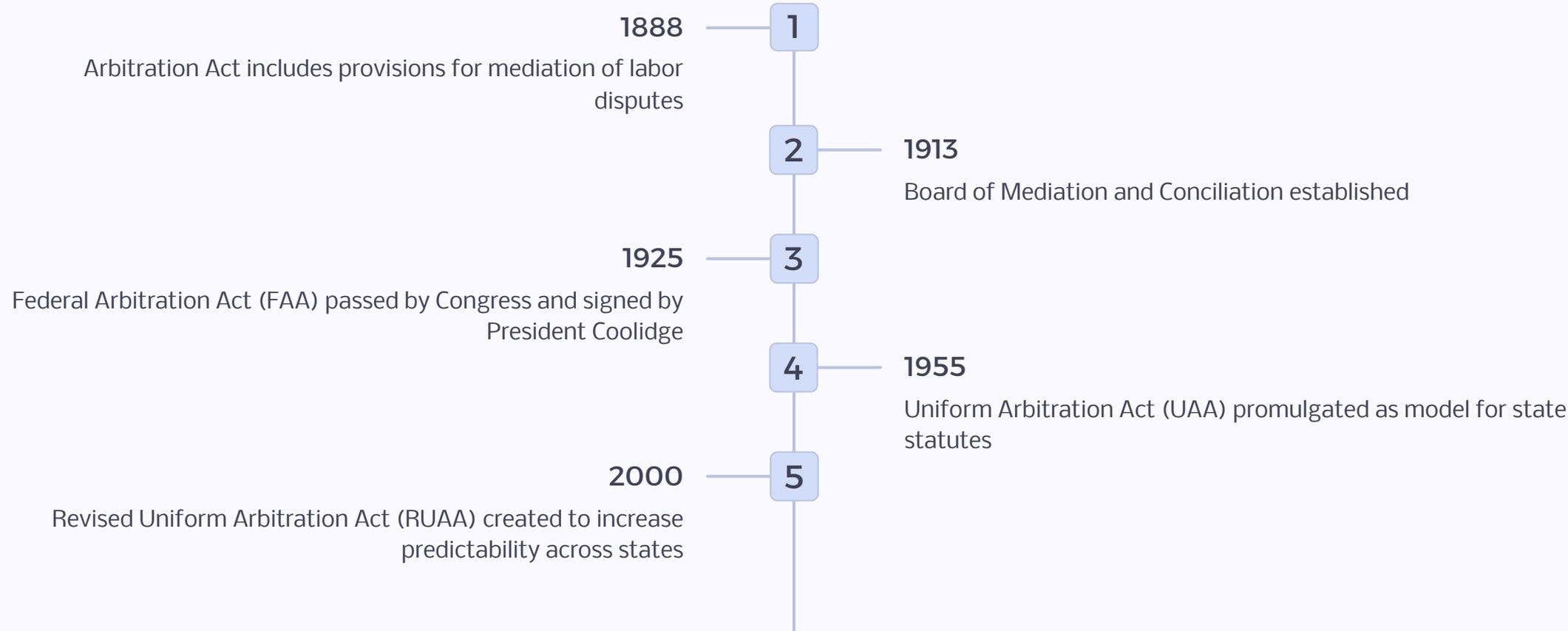


Sasha owns an apartment she rents out to supplement her income as a bank manager. Her lease includes a clause requiring both parties to seek mediation before filing suit for damages.

The cost of mediation is split between landlord and tenant, regardless of outcome. This arrangement offers potential for speedy resolution—Sasha can't simply show up to court anytime without taking a day off work. The tenant also benefits, preferring timely repairs over winning a court case months later while living without a dishwasher.

HISTORICAL MILESTONES

# Formal ADR in the United States



# The Rise of Modern ADR

Despite its rich history, arbitration and mediation became popular among U.S. disputants only about 30 years ago, applied across a wide range of disputes beyond just labor conflicts.

# 50%

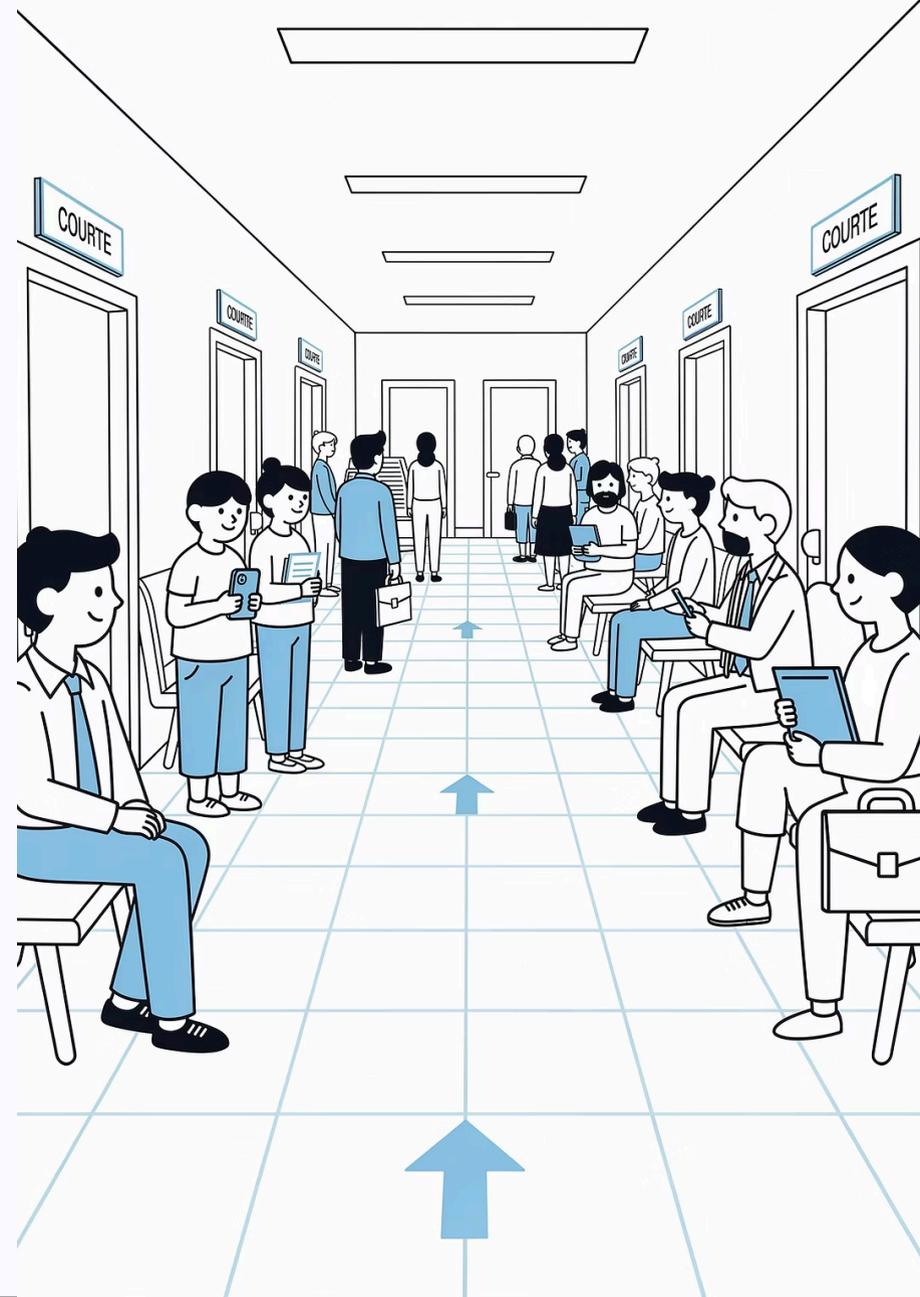
### 1985 Baseline

Fewer than half the states had mandatory arbitration programs in place or in development

# 100%

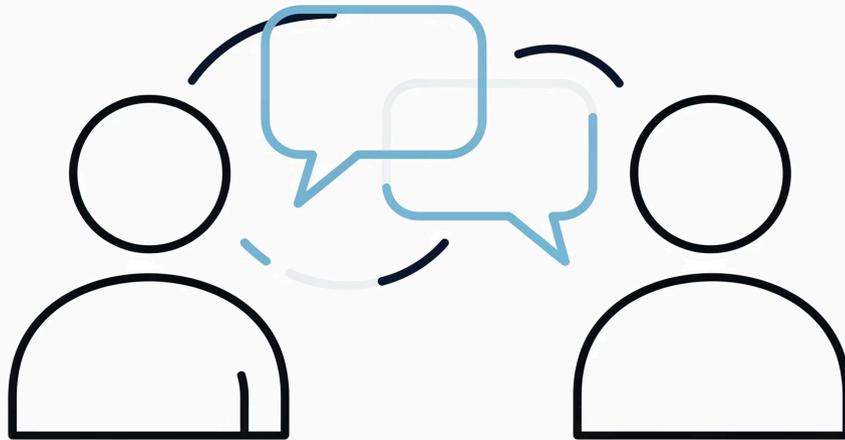
### Today

Nearly every state and federal district has some sort of ADR program in place



# Court ADR Programs Today

Not all court ADR programs entail mandatory arbitration. There are as many ways to structure these programs as there are programs in place today, but the common goal is usually to help parties reach speedier, less costly resolution.



## The Debate Continues

Critics contend that mandatory ADR is like forcing children to "get along and play nice"—unlikely to succeed and potentially increasing costs rather than reducing them.

However, courts note that even in highly contentious cases, ADR often resolves at least some issues and confronts parties with weaknesses in their positions, resulting in more efficient trials.

# The New Normal in Dispute Resolution

The traditional notion of suing over a claim and having it settled by a judge and jury is fast becoming the exception rather than the rule. Courts, insurance companies, attorneys, and even once-in-a-lifetime novice litigants are all driving demand for faster, cheaper options.

However, whether the multitudinous court programs around the U.S. today have met these goals of speed, cost-effectiveness, and fairness has not been clearly and indisputably established.

## Key Drivers

- Overwhelmed courts
- Rising litigation costs
- Demand for efficiency
- Insurance company pressure
- Attorney preferences



## NEGOTIATION

# Negotiation: Beyond the Misconception

One common misconception is that negotiation is useful only when parties stand in a non-confrontational relationship. However, every settlement agreement in a lawsuit was preceded by negotiation.

Negotiation occurs at various points throughout a case, depending on clients' wishes. It's a richer and more diverse landscape than indicated by popular culture, where TV shows suggest negotiations happen only at the last minute before a jury verdict.

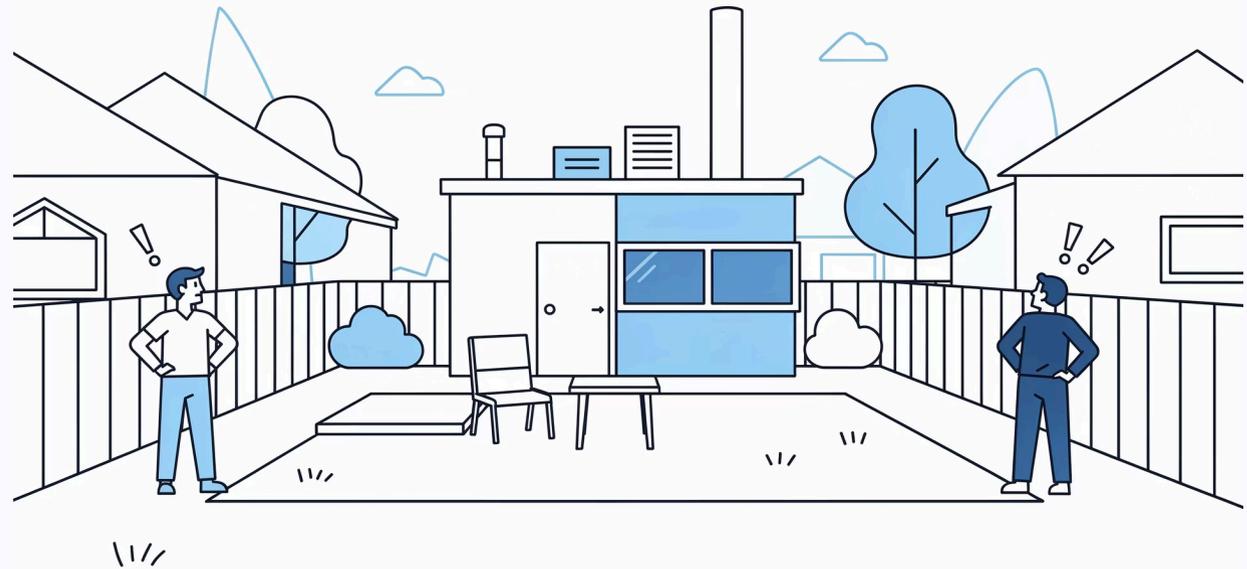
# The Neighbor Dispute: A Negotiation Case Study

## The Scenario

Lisa and Greg are neighbors in Virginia. Lisa builds a large paint mixing plant in her backyard that produces a terrible odor. The wind blows toward Greg's house, but Lisa decides the offensive smell is worth the significant cash from her new business.

Greg, who has had a good relationship with his neighbor, decides to talk the matter over with her. He has begun the process of negotiation, though he hasn't taken formal steps to determine his approach or strategy.

Greg might take an adversarial approach or present himself as a problem solver with a win-win idea. Either way, negotiations have begun.



# When Negotiation Isn't the Answer

Professor Robert Mnookin notes in *Bargaining With The Devil: When To Negotiate, When To Fight* that there are rare occasions when negotiation is not the best course of action.

Mnookin, head of Harvard Law School's Program on Negotiation, examines eight conflicts including Winston Churchill's decision to reject negotiations with Adolf Hitler and Nelson Mandela's decision to initiate discussions with South Africa's apartheid government.

He provides a straightforward account of deliberative options when facing a "Faustian tension between pragmatism and principle."



## MEDIATION

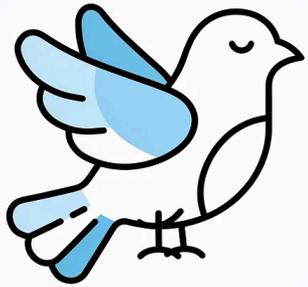
# Mediation: The Middle Ground

Mediation sits somewhere between negotiation and arbitration. The ultimate goal is to negotiate a settlement, so all negotiation concepts apply completely to mediation proceedings.

The classic mediation case has a "neutral" or mediator whose function is to facilitate parties arriving at a settlement agreement. The important distinction is that parties in mediation might never have reached the agreement on their own.



# The Mediator's Role



## Peace-Maker

Helps parties find common ground and move past emotional barriers to reach agreement



## Translator

Interprets each party's position and concerns in ways the other party can understand and accept



## Buffer

Provides a neutral space and prevents direct confrontation that might derail productive discussion

The mediator's powers are almost non-existent. If parties cannot reach a settlement agreement, mediation ends with nothing settled.

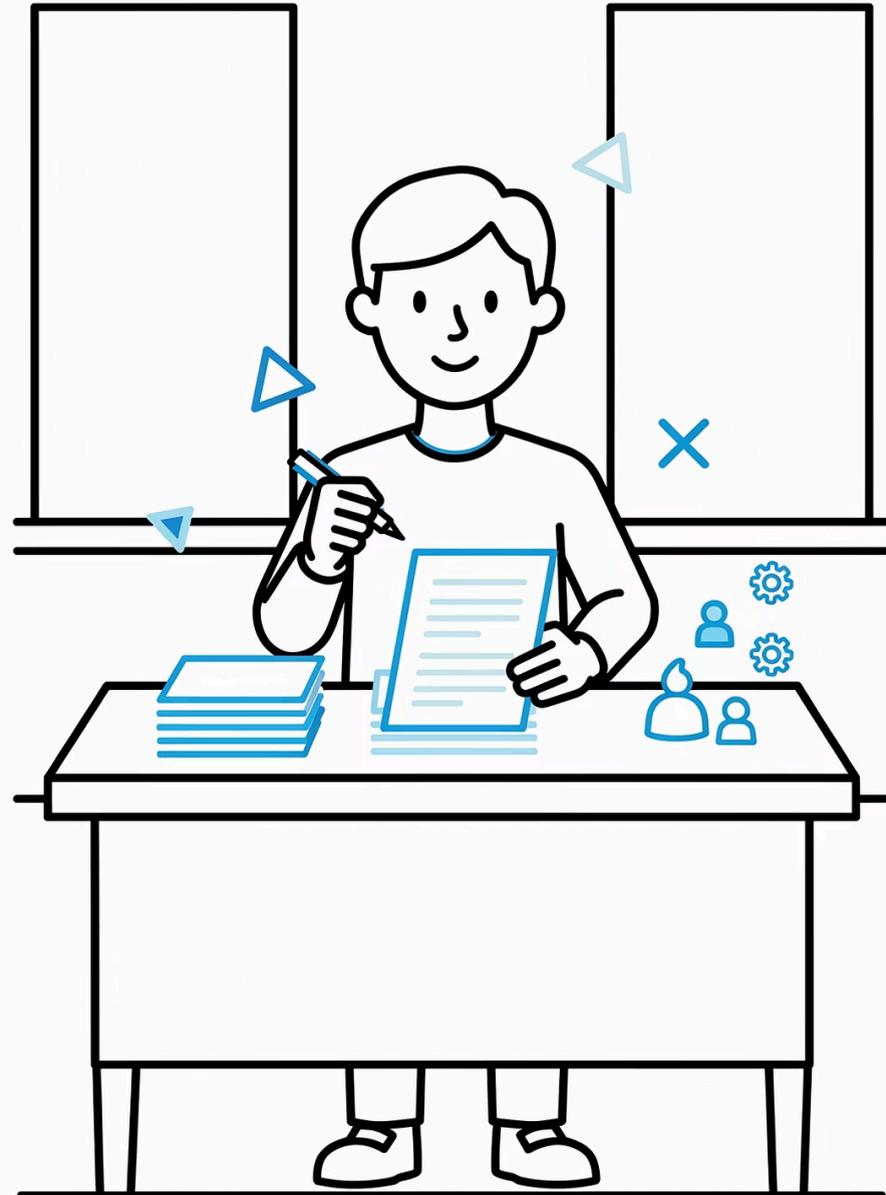
# Mandatory Mediation in Federal Court

Jerry sues Bobby in federal court for copyright infringement, claiming Bobby performed some of Jerry's songs at a concert. The District Court has a mandatory mediation program for cases of this type.

Jerry and Bobby must go through mediation proceedings in good faith. The case will go to trial only if they cannot reach an agreement. The court cannot force them to agree, but it can force them to try.



- ❏ If mediation fails despite good faith efforts, the proceedings are generally confidential. However, parties present at mediation have learned something about each other that might be useful at trial.



## ARBITRATION

# Arbitration: The Binding Decision

Arbitration is a very formal process with a crucial difference from mediation: the arbitrator settles the matter for the parties. Similar to a court, the arbitrator has power to decide who shall pay and how much, and parties are bound to that decision.

Arbitration can be entered into voluntarily after a conflict arises, or parties can include an arbitration clause in a contract, agreeing to arbitrate any future conflicts.

# Types of Arbitration



## Court-Annexed Arbitration

Also called judicial arbitration, this process diverts certain cases to arbitration rather than trial. Most court systems today have such programs in place.



## High-Low Arbitration

Parties set minimum and maximum amounts to be awarded. A novel idea in common use today that provides predictability while maintaining arbitration benefits.



## Voluntary Arbitration

Parties choose to arbitrate after a conflict arises, seeking a binding resolution outside the court system.



## Contractual Arbitration

Parties include arbitration clauses in contracts, agreeing in advance to arbitrate any future disputes arising from the agreement.

# The Finality Question in Arbitration

Despite its binding nature, not all arbitration proceedings end disputes with finality. Court-annexed arbitration often permits parties to seek trial after arbitration.

Procedural and substantive irregularities can give rise to lawsuits over the arbitration itself. By understanding the most common forms of arbitration and the issues that arise before, during, and after these proceedings, legal professionals can better serve their clients in this evolving landscape.

## Key Takeaway

ADR methods—negotiation, mediation, and arbitration—offer valuable alternatives to traditional litigation, each with distinct characteristics, benefits, and limitations that legal professionals must understand to effectively represent clients.