

**An Introduction to The Alternative Dispute
Resolution Processes in the United States:
A look into Secular Mediation and Arbitration alongside
Arbitration in Jewish law- “The Beth Din”**

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I. Introduction to ADR

Alternative dispute resolution refers to a variety of processes that assist parties in resolving their disputes without going to trial.¹ Alternative dispute resolution has become commonly referred to as ADR. While there are various different types of ADR processes the most familiar and widely used are mediation and arbitration.² Mediation is a process that involves a neutral person called a “mediator” who aids the parties in reaching a resolution that is mutually acceptable. “The mediation process is a safe alternative because it is both voluntary and non-binding.”³ The arbitration process involves a neutral person called an “arbitrator” who hears the arguments and evidence from each side then determines the outcome.⁴ Arbitration can either be non-binding or a binding process depending on the structure, and the decision of the parties at the outset. Arbitration is less formal than a trial and the rules of evidence are often relaxed.⁵ “Both processes are generally confidential, less formal, and less stressful than traditional court proceedings.”⁶

There are many advantages for parties to turn to an ADR process in resolving their dispute. ADR is both time, and cost effective. This often results in creative solutions, greater satisfaction, and better relationships among the parties involved.⁷ The rise of ADR methods to changing attitudes within the American judicial system have been traced by analysts.⁸ “During the 1980’s a new body of case law emerged that sanctioned the use of binding arbitration provisions in commercial contracts between companies, business partners, employees and

¹ New York Unified Court System: ADR, http://www.courts.state.ny.us/ip/adr/What_Is_ADR.shtml#WhatisADR

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ New York Unified Court System: ADR, http://www.courts.state.ny.us/ip/adr/What_Is_ADR.shtml#WhatisADR

⁷ *Id.*

⁸ Laurie Hillstrom & Kevin Hillstrom, ADR: Encyclopedia of Small Business 40-42 (Vol. 1. 2nd ed. 2002)

employers, etc.”⁹ In the late 1990’s this body of law evolved drastically. “The passing of the Alternative Dispute Resolution Act of 1998 extended ADR mechanisms throughout the federal district court system”¹⁰ With respect to Jewish law in the United States, a system of alternative dispute resolution has been officially in place even earlier. Dating back to the 1960’s in New York the Rabbinical Council of America affiliated itself with the most prominent form of Jewish arbitration known as the Beth Din or “house of judgment.”¹¹ The history of Jewish adjudication and most specifically its longest surviving form of arbitration will be further discussed in later sections.

II. A look into Mediation

“Mediation is simply a negotiation conducted with the assistance of a third party.”¹² The mediator is trained and skillfully structures the mediation process in a way that allows for the parties to work together to draw up inventive solutions for resolving the dispute.¹³ “The mediator serves as the guide by managing a structured discussion that includes gathering information; identifying issues, interests, and impediments; generating, assessing, and selecting options for settlement; and facilitating any bargaining.”¹⁴ The techniques employed by the mediator are designed to encourage the involvement of the clients, explore their interests, and create a collaborative environment for settlement.¹⁵ A mediator will rarely put pressure on either

⁹ *Id.*

¹⁰ *Id.*

¹¹ Caryn Litt Wolfe, Faith-Based Arbitration: Friend or Foe? An evaluation of religious arbitration systems and their interaction with secular courts, 75 *Fordham L. Rev.* 427, 428 (2006)

¹² Harold I. Abramson, *Mediation Representation* (2nd ed. 2010)

¹³ *Id.* at 94

¹⁴ *Id.* at 94

¹⁵ *Id.* at 95

party to accept a solution to the dispute. “Instead, the mediator’s role is to encourage clear communication and compromise in order to resolve the dispute.”¹⁶

“The mediator poses open-ended and focused questions, reframes issues, conducts brainstorming sessions, and uses strategies for defusing tensions and overcoming impasses.”¹⁷ A mediator may use private caucuses to learn confidential information, and assist the parties individually, in evaluating their strengths and weaknesses of their case.¹⁸ In this situation each party may be asked to leave the room for a certain period of time to discuss their issues with the mediator in private. “If the dispute does not settle, the mediator may help the participants design an alternative process for ultimately resolving the conflict.”¹⁹ From my experience working as an ADR consultant I have found the mediation process very successful. Ultimately, it is crucial to select the proper mediator who has both knowledge and experience in the particular field of law involved in the dispute. It’s just as important to select a mediator who follows an organized mediation plan as he takes the parties through the different stages of mediation, which will be introduced in the next section.

A. Stages of Mediation

There is a particular goal during each stage of the mediation process.²⁰ The stages of mediation are not followed rigidly because “mediation is a dynamic and unpredictable process, mediators must respond flexibly and intelligently, not mechanically, to whatever unfolds in the mediation.”²¹ One stage in the mediation cannot be finished before the mediation shifts into

¹⁶Hillstrom & Kevin Hillstrom, ADR: Encyclopedia of Small Business 40-42 (Vol. 1. 2nded. 2002)

¹⁷ Harold I. Abramson, Mediation Representation, at 95 (2nded. 2010)

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.* at 96

²¹ *Id.*

another stage but the mediator can always go back and revisit a previous stage. For example, a mediator may simultaneously collect information and preliminarily identify issues.²² “ Even when a stage is finished, such as information gathering or issue identification, new information may surface in later stages that may result in regressing to gather more information or reconsider the definition of issues.”²³

Harold Abramson outlines five stages of the mediation process in his book titled “Mediation Representation.” The first stage he refers to as the “Initiation of the Mediation Process.”²⁴ In this first stage the mediators are selected and agreed upon by both parties, and they become acquainted with the mediation process as it is initiated. A mediation process may be initiated according to the terms of a mediation clause in a contract between the two parties prior to the rise of a dispute, or according to the terms of an agreement formulated after the dispute arose. The mediation process may be court initiated and sometimes a judge or court administrator will suggest this to the parties. “ In this first stage of the mediation, you learn about the mediator’s orientations, whether any pre-mediation submissions are due, whether a pre-mediation conference will be held, and the scheduling dates.”²⁵

The second stage is the “ Pre-Mediation Conference.”²⁶ In this stage the mediator meets with the attorneys from both sides and prepares them for the mediation to come. This stage is recommended but optional, and always held for complex business disputes. The goal of the mediator in this conference is to answer questions, and assure that the right clients will be participating in the mediation sessions. Some mediators will use this time to educate the

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.* at 97

²⁶ *Id.*

attorneys about their mix of approaches used to facilitate an agreement, resolve any discovery disputes, or too feel out any reasons for impasse prior to the mediation.

Abramson identifies the third stage of the mediation as “Pre Mediation Submissions.”²⁷ The goal in this stage is to allow the attorneys to prepare pre-mediation materials to help educate the mediator. Some mediators only want the attorneys to submit enough information so that they can become familiar with the substance of the legal dispute and its legal history. Others may request settlement related information in order to engage the attorneys and the clients in the problem-solving process early. An incentive when preparing materials in this stage is that you are also preparing for the mediation itself. This stage allows the attorney to look at the dispute and consider what information he feels the mediator needs in order to help facilitate a proper agreement.

The next stage of the mediation process is the “Mediation Session.”²⁸ This is the most complex stage since it is where the actual mediation takes place. It’s important that by this stage the attorneys are fully prepared for the mediation as should be their clients. I have commonly seen many attorneys under the impression that mediation does not require the same preparation as would a day in court but that’s clearly not the case. An attorney is advised to prepare for the mediation as diligently as he would for a trial to ensure the best possible outcome for his client. The mediator will begin the mediation with their opening statement. It is the goal of the mediator to make both the clients and attorneys feel comfortable with the process and to “make the parties feel secure participating openly, and taking risks in the session.”²⁹ “The mediator

²⁷ *Id.*

²⁸ *Id.* at 98

²⁹ *Id.*

commonly emphasizes her role as a neutral facilitator who is not a decision maker.”³⁰ The mediator will begin with allowing each of the parties to vent and exchange information relevant to resolving the dispute before them. “Venting is a recognized feature of mediation, in which the mediator provides each party a safe place to express her frustrations, anger, and other emotions.”³¹ Venting is a healthy process for mediation, and usually is followed by mutual problem solving. Once the parties realize the issue in dispute has mutually affected both sides, the mediator can engage the parties to relate to one another and look to a settlement.

The mediator will now use the information gathered in the pre-mediation stage in the mediation to help the parties identify their specific interests, their issues for resolution, and any impediments that may hinder a settlement. This helps the mediator form an agenda in which the issues and impediments will be discussed, and resolved, in order to move forward with the mediation. “In more complex cases, the mediator may formulate the agenda openly by inviting the participants into a discussion of what should be included in the agenda.”³² After the parties overcome impediments, the mediator will work with them to “search for creative solutions.”³³ “The mediator helps the parties search beyond the legal box of possibilities for inventive solutions that may be unavailable in court.”³⁴ There are a number of methods that mediators use to encourage the participants to generate solutions. Although, the “best known technique, brainstorming, frees parties to generate a list of wide-ranging ideas without each party feeling constrained by the imminent critique of the other participants.”³⁵

³⁰ *Id.*

³¹ See *id.* (Kovach, *supra* note 1, at 36)

³² Harold I. Abramson, *Mediation Representation* (2nd ed. 2010)

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.* at 101

The mediator will encourage the parties to “assess and select options” that best meets their interests and satisfies “recognized standards of fairness or objectivity.”³⁶ The mediator will ideally bring the mediation to closure by resolving any final issues and drafting a mediation settlement agreement. This is where the final stage of the mediation comes into play. Abramson calls this Stage Five or “Implement Agreement Stage.”³⁷ After the parties sign an agreement the mediator may offer to oversee the finalizing and the implementation of it. The mediator may offer to assist the attorneys with finishing drafting the agreement if the details are incomplete. If critical terms such as payment of money and delivery of assets are vital to the agreement, the mediator may oversee these items as well.

From my experience mediation settles eight out of ten times on average, and that figure continues to rise as attorneys become more comfortable with the process and aware of its benefits. The ultimate goal is for mediation to become wide spread and uniformly accepted throughout the legal community. Being in the ADR field allows me to experience different types of cases and along with that comes different types of attorneys. Some attorneys are very open to new ideas and thought and willing to give mediation a chance. Then there are those who are stuck to their old ways. Those are the clients whose perceptions of mediation I work diligently to change on a daily basis. Mediation works if the mediator is properly trained and the parties are willing to put forward the effort needed to settle. It is very important for an ADR firm to recruit retired judges and attorneys who are well known and whose careers speak for them.

III. A look into Arbitration

³⁶ *Id.*

³⁷ Harold I. Abramson, *Mediation Representation* . at 101 (2nd ed. 2010)

In arbitration, parties agree to submit their disputes to an independent neutral third party, who hears their arguments and considers the evidence, and then hands down a binding decision.³⁸ Arbitration is commonly used to adjudicate business-to-business, business-to-employee, or business-to-customer disputes.³⁹ Once the arbitrator is selected, both sides present their view of the issue or issues in dispute much like the same way as a court proceeding, although the formal rules of evidence do not apply.⁴⁰ There are a variety of creative arbitration based solutions for resolving a legal dispute such as the conventional arbitration as discussed above, which is generally binding unless agreed otherwise. As well as other forms commonly referred to as High-Low Arbitration, Final-Offer Arbitration, Tri-Panel Arbitration, Paper Arbitration, and Mediation- Arbitration or “ Med-Arb.” All of these options are available to litigants in the ADR process, although from my personal experience clients gravitate towards mediation as a first resort since it’s the least restrictive method and non binding.

A. Conventional Arbitration

A dispute that is suitable for conventional arbitration involves questions of fact, “especially ones that implicate the credibility of fact or expert witness.”⁴¹ An arbitrator is not bound by the principle of stare decisis and usually does not feel obliged to make decisions based on strict interpretation of the law. The arbitration is organized just like a court hearing with opening and closing arguments, presentation and cross-examination of witnesses, opportunity for presenting rebuttal, and filing of briefs in some cases.⁴² The arbitrator usually has a substantive

³⁸ Hillstrom & Kevin Hillstrom, *ADR: Encyclopedia of Small Business* 40-42 (Vol. 1, 2nd ed. 2002)

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ Harold I. Abramson, *Mediation Representation*, at 374 (2nd ed. 2010)

⁴² *Id.* at 374

expertise in the subject matter of the dispute, and the parties will mutually agree on such an arbitrator.

B. High-Low Arbitration

This type of arbitration proceeding is where the two parties agree in advance to high and low parameters that will govern the arbitrator's award.⁴³ The high-low figures are not revealed to the arbitrator until after he gives his decision. In essence this high-low acts as a ceiling and floor that caps or limits the arbitrator's award.⁴⁴ If the arbitrator's decision renders an award that is below the low, then the low figure is guaranteed. If the award is above the high, then the award is reduced to the pre-agreed upon high figure. This method acts as a safety blanket for the parties to ensure that the decision will fit into their pre-determined spectrum. A money dispute is most suitable for this type of process.⁴⁵ "Because the high-low feature gives parties the protection they need from extreme results, the parties are more receptive to a binding process."⁴⁶

C. Final-Offer Arbitration

This process is generally suitable for money disputes where the parties may be reluctant to use conventional arbitration or high-low arbitration due to the fear that the arbitrator will split the difference between what each party wants instead of making a hard decision on the merits.⁴⁷ This process can motivate each party to prepare a final offer that is reasonable because the failure to do so could result in the arbitrator selecting the other party's offer.⁴⁸ The arbitrator must select the final offer of one of the parties, so each party is compelled to submit their best offer.

⁴³ www.amicusadr.com/?page_id=2

⁴⁴ *Id.*

⁴⁵ Harold I. Abramson, *Mediation Representation*, at 374 (2nd ed. 2010)

⁴⁶ *Id.* at 375

⁴⁷ *Id.*

⁴⁸ *Id.*

The arbitrator cannot split the difference between the offers or offer any modifications to either.

⁴⁹ As the parties prepare their final offers, they might welcome the assistance of the arbitrator in helping them settle the dispute with a tailored end result.⁵⁰

D. Tri-Panel and Paper Arbitration

The tri-panel arbitration is where the parties submit their dispute by contract to a panel of three arbitrators who will collaborate and render a decision.⁵¹ The tri-panel is typically recommended on cases with a value exceeding \$100,000.⁵² The parties agree to be bound by a majority decision. Paper arbitration is very similar to a conventional arbitration. In this case the parties submit their disputes to an arbitrator by way of paper submission.⁵³ There is no testimony presented by either party and there is no hearing.⁵⁴ This forum is well suited for small value disputes under \$25,000 or coverage disputes.⁵⁵

E. Mediation- Arbitration

Mediation-arbitration is commonly referred to as Med-Arb. “Med- Arb is simply a process that combines two familiar methods of dispute resolution into one back-to-back process in which arbitration becomes immediately available if the mediation does not succeed.”⁵⁶ During the course of mediation the parties may want to resort to arbitration rather than bringing their issue to court, if they feel it will better suit them. “If the mediation reaches impasse, the more expeditious and less expensive arbitration option will be in place and can be quickly

⁴⁹ *Id.* at 377

⁵⁰ *Id.* at 377

⁵¹ www.amicusadr.com/?page_id=2

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ Harold I. Abramson, *Mediation Representation*, at 377 (2nd ed. 2010)

implemented in order to bring closure to the dispute.”⁵⁷ Prior to the start of the process, both parties agree on both a mediator and a potential arbitrator to ensure that the integrity of the process is preserved.⁵⁸

There may not be a better plan than Med-Arb when you’re dealing with a complex dispute that needs careful consideration for settlement. I have seen parties that have used this process benefit substantially from having the arbitration in place. When they were close to settlement and could not agree on something minor they had the option to let an arbitrator produce a settlement. All they need to do is mutually agree to transfer the dispute to the arbitrator who will render his decision. It’s very helpful for the arbitrator to render an acceptable decision because the mediator provides a detailed background of the dispute and the progress that was made in mediation. This is not to say one approach is better than another since every case differs and a client may find a particular avenue that suits their needs sufficiently.

IV. Origins of Arbitration in Jewish Law

Arbitration has been the primary way of adjudicating disputes up to the middle of the third century C.E in ancient Greece and Rome.⁵⁹ The orthodox laws found in Jewish law outline a strict process that rabbinical judges must abide by. The surviving process of adjudication in Jewish law is referred to as “arbitration” but this is not to be confused with that of the American system. Jewish arbitration is very different from that of the American judicial system discussed in the previous section. While the term is the same and both have similar underlying principles, the distinctions will become clear in the following sections. Jewish arbitration is a more

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ Menachem Elon, *Arbitration*, in *Encyclopedia Judaica* 364, 368 (Vol. 2 2nd ed., 2007)

restrictive process where the judges have little discretion in solving common disputes. They must turn to the strict Jewish law and principle for their ruling on every matter. Where in American arbitration an arbitrator is free to use discretion and in turn this creates a process with relaxed rules and procedures.

“In Jewish law adjudication from the beginning was based on a system of regular courts, empowered to enforce their judgments on the parties.”⁶⁰ In Jewish law arbitral institutions can be traced back to the middle of the second century C.E which was one of the low periods in the history of Jewish judicial autonomy. Judicial authority was restricted in the field of civil law as opposed to criminal law.⁶¹ In order to preserve judicial authority and ensure its continued existence, the institution of arbitration was often resorted to, and Jews turned to it on their own, “prompted by their religio-national feelings.”⁶²

It is recorded in the Bible that Moses sat as a magistrate among the people, and he later delegated his judicial powers to appoint “chiefs of thousands, hundreds, fifties, and tens- reserving himself the jurisdiction in only the most difficult and major disputes that arose.”⁶³ Early reports of legal decisions indicate that there was a high standard of judicial practice and qualifications at this time.⁶⁴ Judges had to be “able men, such as fear God, men of truth, hating unjust gain” and “wise men and understanding and full of knowledge.”⁶⁵ “They were charged to “hear the causes between your brethren and judge righteously between a man and his brother and the stranger,” not be “partial in judgment,” but to “hear the small and the great alike; fear no

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ Haim Hermann Cohn, Isacc Levitats, & Moshe Drori, *Bet Din and Judges*, in *Encyclopedia Judaica* 512, 513 (Vol. 3 2nd ed. 2007). Also see -(Ex. 18:21; Deut. 1:15)

⁶⁴ *Id.*

⁶⁵ *Id.*

man, for judgment is God's."⁶⁶ Maimonides enumerated the judicial qualifications as follows: "judges must be wise and sensible, learned in the law and full of knowledge, and also acquainted to some extent with other subjects such as medicine, arithmetic, astronomy, and astrology."⁶⁷ Maimonides continued to describe the seven fundamental qualities of a judge as are wisdom, humility, fear of God, disdain of money, love of truth, love of people, and a good reputation.⁶⁸

In towns with under 120 inhabitants there was typically a court of three judges, with three being the minimum number allowed to ensure a majority decision.⁶⁹ These three judge courts generally exercised jurisdiction in civil matters generally, which some required the imposition of fines.⁷⁰ They had jurisdiction in matters of divorce, and conversion of non-Jews.⁷¹ In a town with over 120 inhabitants the court had 23 judges known as Sanhedrin Ketannah, which exercised jurisdiction in criminal matters, including capital cases.⁷² The highest court was the Sanhedrin Gedolah which comprised of 71 judges, sat in the Temple in Jerusalem, and had unlimited judicial, legislative, and administrative powers.⁷³

In Jewish law the most common arbitral tribunal used is with the three judges or "arbitrators." "The Mishnah records a dispute between R. Meir and other scholars, the former stating that each party chooses one arbitrator and both choose the third, while the other scholars

⁶⁶ *Id.*

⁶⁷ *See id.* also continued, "judges must be wise and sensible, learned in the law and full of knowledge, and also acquainted to some extent with other subjects such as medicine, arithmetic, astronomy, and astrology. "and the ways of sorcerers and magicians and the absurdities of idolatry and suchlike matters (so as to know how to judge them); a judge must not be too old, nor may he be a eunuch or a childless man; and he must be pure in mind, so must he be pure from bodily defects, but as well a man of stature and imposing appearance; and he should be conversant in many languages so as not to stand in need of interpreters."

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

hold that the two arbitrators choose the third.”⁷⁴ “The plain meaning of R. Meir’s statement seems to be that the third arbitrator is chosen by the two parties only, but the interpretation of the Babylonian scholars was that all agreed that the consent of the parties to the third (arbitrator) is also required.⁷⁵ The halakhah or “Jewish law” was decided accordingly, however it has been expressed that where the arbitrators are empowered to decide not only according to strict law, but to affect a compromise, the two arbitrators may not appoint a third without the consent of the two parties.⁷⁶ If the arbitrators were unable to agree on the appointment of a third, then the appointment was made by the elders of that particular city. It was often customary for the rabbi of that city to be selected as the third arbitrator.⁷⁷

Talmudic scholars were aware of the advantages of arbitration because each party was able to select their own arbitrator that represented the interests of that party, and this ensured that a decision would be just.⁷⁸ An arbitrator’s status has been described as equivalent to that of a judge in every way, and is precluded from hearing the contentions of the party that appointed him without the other party present. Each party pays designated fees to the arbitrators regardless of the outcome of the decision.⁷⁹ The subject matter of the arbitration may be an existing dispute between the parties or it could be one that may arise due to the result of a particular transaction. The decision of the majority of the arbitrators would prevail, unless the parties agreed to impose a compromise which would require a unanimous decision.⁸⁰

⁷⁴ Menachem Elon, *Arbitration*, in *Encyclopedia Judaica* 364,368 (Vol. 2 2nd ed., 2007)

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ Menachem Elon, *Arbitration*, in *Encyclopedia Judaica* 364,368 (Vol. 2 2nd ed., 2007)

⁸⁰ *Id.*

“According to Talmudic halakhah, a party may require the regular court to submit written reasons for its judgment, but an arbitral body is not obligated to do so, even upon request.⁸¹ In some cases it was considered “desirable” to make the reasons of a judgment known so that “you shall be blameless in the eyes of God and of the people”⁸² If a decision was made on any matters not included in the issues submitted to the arbitrators, then their decision is void. Also, any compromise imposed by the arbitrators that they are not authorized to do so, results in a void decision. “Similarly, their decision is voidable in the event of improper conduct on their part, it appears that any one of them was acting for his own benefit, or that they gave their decision without hearing both parties or that it was given after the period prescribed in the arbitration agreement.”⁸³ A party may appeal the decision of an arbitrator just like in regular courts, but the parties may stipulate in the arbitration agreement that they shall not appeal or object to the decision and must accept it as final.⁸⁴

A. Arbitration in Jewish Law: The Beth Din

It is evident that Judaism has had its own system of government for thousands of years. The bible notes that God commanded to Moses that “These are the rules that you shall place before them.”⁸⁵ The Talmud takes from that verse that Jews, when faced with pending litigation, must present such claims “before them”- that is, before a rabbinical court - and not before a secular court.⁸⁶ Orthodox Jews believe themselves to be obligated to pursue legal claims before a rabbinical court and to do so before an American court as it would violate a biblical

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*

⁸⁴ Menachem Elon, *Arbitration*, in *Encyclopedia Judaica* 364,368 (Vol. 2 2nd ed., 2007)

⁸⁵ Michael Helfand, *Religious Arbitration and the New Multiculturalism: Negotiation Conflicting legal orders*, 86 *N.Y.U L. Rev.* 26 (forthcoming 2011)

⁸⁶ *Id.*

prohibition.⁸⁷ As a result, Orthodox Jews are religiously obligated to go before a rabbinical court for the application of Jewish law.⁸⁸ Jews always had an adjudication system based on the Bible and the Talmud, and, from the time Jews were under the control of foreign secular leadership, where they have conducted their own courts.⁸⁹ Today, the form that Jewish arbitration typically takes is the beth din (also appearing as bet din, beit din or beis din; with the plural as battei din), literally the “House of Judgment,” which usually either consists of a single rabbi, or more commonly, a panel of three rabbis.⁹⁰

The development of the beth din is ascribed to leading biblical personalities such as Shem, Moses, Gideon, Jephthah, Samuel, David, and Solomon.⁹¹ The beth din belongs to the period of the Second Temple and its establishment is attributed to Ezra.⁹² At this time the beth din were comprised of the local courts, and the Great Sanhedrin of Jerusalem served as the Supreme Court.⁹³ The beth din became the stronghold of Jewish autonomy in the Middle Ages.⁹⁴ The general rule at this time was that Jews were strictly prohibited from taking litigation among themselves to gentile courts.⁹⁵ This was achieved partly by the control exercised by the community over the individual and by the conception that “judgment is God’s and hence that any recourse to gentile courts meant “aggrandizing the honor of alien gods.”⁹⁶ As emancipation of the Jew in the modern era dissolved the traditional structure, Jews tended increasingly to resort to

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ Caryn Litt Wolfe, Faith-Based Arbitration: Friend or Foe? An evaluation of religious arbitration systems and their interaction with secular courts, 75 *Fordham L. Rev.* 427, 428 (2006)

⁹⁰ *Id.*

⁹¹ Haim Hermann Cohn, Isacc Levitats, & Moshe Drori, *Bet Din and Judges*, in *Encyclopedia Judaica* 512, 513 (Vol. 3 2nd ed. 2007)

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ Haim Hermann Cohn, Isacc Levitats, & Moshe Drori, *Bet Din and Judges*, in *Encyclopedia Judaica* 512, 513 (Vol. 3 2nd ed. 2007)

the general courts.⁹⁷ Today, where there is a surviving beth din it is really a court that implements the Jewish arbitration process whose decisions are generally upheld by the law of the country in which it resides.⁹⁸ In many countries, in particular England and its dominions, and to a lesser degree in France, the beth din system, headed by the chief rabbi of the country, still plays a central role in Jewish life.⁹⁹ The State of Israel for example has given the beth din the exclusive jurisdiction over the Jewish population in matters of personal status.¹⁰⁰

The Beth Din of America is the most prominent beth din and affiliated with the Rabbinical Council of America.¹⁰¹ The Beth Din of America was founded in 1960 with its headquarters located in New York.¹⁰² “The beth din presides over religious matters such as divorce and conversion, and also offer arbitration services for commercial or business matters involving Jews, using principles of halakhah or Jewish law to settle these disputes.”¹⁰³ “Beit dins will hear a case if one participant is Jewish and both sides agree in writing that the board’s decision will be binding” says Carmi Schwartz, former director of the Beth Din of America.¹⁰⁴ Schwartz says that approximately twenty percent of the cases are business disputes, and that number is rising.¹⁰⁵ Like any private justice system the beth din has its price.¹⁰⁶ They charge each party about \$800 for the hearing that lasts about three hours.¹⁰⁷

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ Caryn Litt Wolfe, Faith-Based Arbitration: Fried or Foe? An evaluation of religious arbitration systems and their interaction with secular courts, 75 *Fordham L. Rev.* 427, 428 (2006)

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ 14 *Alternatives to high cost litigation*, January 1996

¹⁰⁵ *Id.*

¹⁰⁶ In a case that involved a billing dispute between a hotel and a company that organizes tours for observant Jews, the hotel lawyer proposed using a beit din out of respect for the tour company. At first the hotel owner thought his lawyer was “insane” but he realized that this dispute resolution method was exactly like arbitration,

These rabbinical panels base their decisions on the traditional Jewish law.¹⁰⁸ Using a beth din for commercial arbitration is purely voluntary, initiated by agreement of the parties.¹⁰⁹ Among the faith-based arbitration systems, beth din is the most formal and trial like system.¹¹⁰ “When appropriate, many beth dins include lay professionals and experts; including secular lawyers, businesspeople, physicians, and psychologists; on its panel of judges.”¹¹¹ Due to the fact that the beth din follows secular arbitration law, their awards are usually binding and American courts will generally enforce them.¹¹² However, one area where courts will not enforce the agreements of the beth din is those that determine child custody.¹¹³ The concern is that the state’s standard for custody, often the “best interests of the child” standard, will not be utilized. As one court wrote, “The court’s traditional power to protect the interests of children cannot yield to the expectation of finality of arbitration awards.”¹¹⁴

If someone wishes to bring a case to a beth din, he or she may request that the beth din sends a summons (called a hazmana, or “invitation”) to inform the person being summoned.¹¹⁵ The beth din will send up to three hazmanos in order to show that the person being summoned is refusing to answer and a contempt decree may be issued.¹¹⁶ If you receive a summons you are not obligated to go specifically to the summoning beth din, but you are obligated to either settle

and would be less expensive and significantly faster than litigation. A similar case, in litigation for five years, has cost the hotel \$40,000 in legal fees so far.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ Caryn Litt Wolfe, Faith-Based Arbitration: Friend or Foe? An evaluation of religious arbitration systems and their interaction with secular courts, 75 Fordham L. Rev. 427, 428 (2006)

¹¹⁰ *Id.*

¹¹¹ Seth Shippee, Blessed Are The Peacemakers: Faith –Based Approaches To Dispute Resolution, 9 ILSA J. Int’l & Comp. L 237, 254 (2002)

¹¹² Caryn Litt Wolfe, Faith-Based Arbitration: Friend or Foe? An evaluation of religious arbitration systems and their interaction with secular courts, 75 Fordham L. Rev. 427, 428 (2006)

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ Jewish Beth Din: The Hazmana Process, <http://www.bethdin.org/cases.asp>

¹¹⁶ *Id.*

the case or propose an alternative beth din.¹¹⁷ If the two parties cannot agree on a mutually acceptable beth din, then a “joint beth din” is formed by a procedure called “zebla”, where each side picks one judge. The two selected judges agree on a third judge and together form the beth din that will decide the case.¹¹⁸

There are additional reasons aside from the halachic requirement that the beth din has been an attractive forum for settlement between Jewish litigants.¹¹⁹ There is a general distrust of the secular court system for many Jews whose feelings stem historically from their fear of Anti-Semitism. Since most disputes revolve around Jewish concepts, the litigants doubt whether a non-Jewish adjudicator could sufficiently hear the case.¹²⁰ The beth din is an extremely attractive adjudication option for a Hebrew or Yiddish speaking party who would like to actively participate in the process while it is being conducted in their native tongue.¹²¹ One of the most important reasons that the beth din plays such a major role in the area of Jewish law is due to divorce. Jewish courts have exclusive jurisdiction in the divorce process under Jewish law principles.¹²² “One must obtain a religious divorce properly executed with the aid of a rabbinical court in order to terminate a Jewish marriage, a civil divorce alone does nothing to change the couple’s marital status.”¹²³ This encourages and in a sense puts pressure on the parties to submit all disputes related to the divorce to the beth din. Therefore, the institution of the beth din is so

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ Ginnie Fried, *The Collision of Church and State: a Primer To Beth Din Arbitration And The New York Secular Courts*, 31 *Fordham Urb. L.J* 633, 638 (2004).

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.*

firmly rooted in the history of the Jewish people that it continues to play an active role in the adjudication of Jewish disputes to this day.¹²⁴

V. A Personal view of ADR and its Presence in Every Day Life

We now see that alternative dispute resolution is far from a new concept. Under Jewish law, ADR is an avenue that has been traveled by Jews for many thousands of years. When comparing the American ADR system to that of the Jewish system, it is difficult to ignore the vast similarities between the two. It appears that the three judge arbitration panel is a universally accepted number that has survived to this day. With respect to the beth din, it is always three, while in the American arbitration system we only see three arbitrators in high profile disputes. This brings about the question as to why the beth din has continued to use the three judge panel while the American system does not require it. This question can be answered by pointing out the simple fact that the beth din must follow Jewish law and tradition, and the other is only secular. When issues are in dispute that requires the work of the beth din, it is necessary that they are heard, and decided as thoroughly as they could. They are not only dealing with the law, but more importantly Jewish law itself. Important matters such as divorce and conversion cannot be treated lightly when it comes to Jewish law. It is crucial that there are a variety of professionals on the beth din who may have different perspectives, and are fused together to determine the best possible solution for the dispute before them. In the end, these disputes involve people of the tight knit Jewish community, who only want the best for one another. This is the primary reason that the Beth Din stands to this day and continues to apply the strict Jewish law principles that were applied thousands of years before. Although the Beth Din is not the

¹²⁴ Ginnie Fried, *The Collision of Church and State: a Primer To Beth Din Arbitration And The New York Secular Courts*, 31 *Fordham Urb. L.J* 633, 638 (2004)

typical “arbitration” setting we see in the American system, it’s the most suitable translation in English to describe the process at hand.

While it is true that many Jews living within the United States are reluctant to use the American court system, the same can be said for everyday Americans. There is a significant growth in the field of ADR and this is attributed to the high costs of litigation, the excessive time frame involved, and the fear of unsatisfactory decisions. My personal experiences with ADR have been interesting over the past two years working as an ADR consultant for a Mediation-Arbitration firm. One of those most difficult tasks that I face is to convince an attorney to try mediation for the first time. Like everything else, people tend to stick to what they know and it’s tough to break a person into something new. However, I have seen attorneys that have been practicing traditional litigation for almost 50 years turn to mediation, and have yet to look back. In almost all cases these attorneys come into the process with very little optimism, but generally leave the sessions with a new outlook on the law.

ADR is looked at as the “new law”, and courses on the subject are increasingly being offered in law schools around the world. As the number of attorneys and law students exposed to ADR increases, the more widely used and successful the process will be. When I schedule a mediation, I provide both parties with a broad list of mediators and arbitrators to choose from. Parties are generally provided with a biography of the mediator which includes their different area of expertise, and their settlement rates on cases. A high settlement rate is always preferable, as the parties have the same ultimate goal of settlement and want to select the best neutral to bring about that result. Most people are unaware that Mediation has an average settlement rate of over eighty percent. This is an amazing figure that should turn heads all over the legal community.

As human beings we are applying different stages of the ADR process over the normal course of our day. If you are a parent then you're utilizing ADR much more than you would believe. As a parent you're faced with minor disputes in the household between children, and it is your role as a parent to transform yourself into a mediator, and settle the dispute. In many instances you become a self elected arbitrator. You may be simply reprimanding the children based on certain behavior or making crucial family decisions that require a significant analysis of information. You often are obligated to mediate disputes among friends, or family members and generally take a neutral approach. I have come to realize that when you're a law student, friends and family often come to you for your perspective on a legal issue or dispute. Recently a neighbor came to me with a dispute between herself and another neighbor. I was likely consulted on the issue due to my knowledge of law and became elected a so called "mediator of the block." It is of no coincidence that in Talmudic times the person that would have been consulted had to have knowledge of both life and Jewish law, so it was a "town elder" or rabbi who then joined as the third member of a Beth Din. My neighbor was unhappy that another constructed a shed on the property line, and it blocked her view of the water behind the home. After many verbal arguments between the two sides, I was approached by the unhappy neighbor to explore her legal options. My ADR training instantly kicked in, and I encouraged her to hold off with any legal recourse and allow me to speak with the other neighbor. I was dealing with a sensitive relationship, and one that needed to be preserved, so mediation was the better avenue in this case. The shed was built without a legal permit, and I informed the neighbor that there was a good chance that it would be removed if legal action was taken, costing both parties unnecessary legal fees. I emphasized that they are neighbors who have a friendly relationship, and will have to see each other on a daily basis, so it was important to resolve this on their own. This is a

common tactic used in mediation, where you point to the strong possibility that a party may lose in a court room setting, and then follow up with practical reasons to avoid litigation. Ultimately, I was able to negotiate a compromise resulting with the shed being moved a few feet, and both parties were satisfied. Evidently, alternative dispute resolution is not as far from our zone of comfort as people may think. It is practiced on a daily basis and we are unaware of a majority of instances where we use it. Alternative dispute resolution is the future of the American legal system, and I feel privileged to been exposed to its methods and practices prior to my start in the legal profession.