



*Resolving Professional
Accounting and Related
Services Disputes —
A Guide to Alternative
Dispute Resolution*



American Arbitration Association

Dispute Resolution Services Worldwide

INTRODUCTION

The last decade has presented an unprecedented increase in professional liability claims, including those brought by businesses and individuals against accounting firms. Traditionally, those disputes have been addressed through litigation that, in more than 95% of the cases, results in a settlement after the parties have waited years and have spent hundreds of thousands of dollars in preparation for trial.

Perhaps the most unfortunate byproduct of those lawsuits is loss of productivity and destruction of what once were mutually beneficial business relationships. Accountants, like other professionals—including architects, attorneys, engineers, and physicians—are looking for prompt, fair, and economical ways to resolve disputes with clients who, in many instances, have the same desire. Alternative dispute resolution techniques such as mediation and arbitration have been proven to be effective in resolving professional liability disputes. Some liability insurers favor such dispute resolution methods.

In the accounting field, a simple fee dispute can give rise to charges of professional malpractice. In many instances, disputes that are based on a simple misunderstanding can be resolved promptly and economically through mediation, a nonbinding settlement process. If the parties are unable to resolve their differences in mediation, they might wish to have them finally determined by an arbitrator. In arbitration, the parties present their dispute to a third party for a binding determination. Many of the lengthy and costly procedures associated with litigation are avoided. As a result, business relationships are preserved.

The American Arbitration Association (AAA) is a not-for profit, public-service organization offering a broad range of dispute resolution services to business executives, attorneys, individuals, trade associations, unions, management, consumers, families, communities, and all levels of government. Services are available through AAA headquarters in New York and through offices located in 36 major cities throughout the United States. Hearings may be held at locations convenient for the parties and are not limited to cities with AAA offices. In addition, the AAA serves as a center for education and training, issues specialized publications, and conducts research on all forms of out-of-court dispute settlement.

This guide has been prepared by the AAA's Professional Accounting Disputes Resolution Committee, which is composed of representatives from accounting firms, national and state professional associations, professional liability insurers, businesses that use accounting services, and attorneys practicing in

the accounting field. The committee, working with AAA staff, has created the Arbitration Rules for Professional Accounting and Related Services Disputes. In addition, it has established minimum qualifications criteria and training requirements for members of the National Panel of Mediators and Arbitrators for Professional Accounting and Related Services Disputes.

At the time the Arbitration Rules for Professional Accounting and Related Services were developed, members of the Advisory Committee included:

Robert L. May, CPA, *Chair*
Retired Partner of Arthur Andersen & Co.

William Aiken, CPA
Chief Financial Officer
The Long Island Railroad

Michael P. Carrol, Esq.
Davis Polk & Wardwell

James T. Clark, CPA
Coopers & Lybrand

James L. Coogan, Esq.
KPMG Peat Marwick

John C. Emmert, Jr.
Vice President, Chief Financial Officer and Secretary
American Arbitration Association

Dan L. Goldwasser, Esq.
Vedder, Price, Kaufman, Kammholz & Day

Michael D. Karson, Esq.
Assistant Vice President
Professional Liability & Reinsurance Claims
CNA

Norman W. Lipshie, CPA
Weber Lipshie & Co.

Vincent J. Love, CPA
Ernst & Young

Michael P. Maloney, Esq.
Vice President, General Counsel, and Secretary
Orion Capital Corporation

Thomas R. Manisero, Esq.
Wilson, Elser, Moskowitz, Edelman & Dicker

Patricia A. McGovern, Esq.
Ernst & Young

Robert E. Meade
Vice President—Program Development
American Arbitration Association

Bernard Mintz, CPA
Raich Ende Malter Lerner & Co.

James R. Peterson, Esq.
Arthur Andersen & Co.

Andrew Plunkett, Esq.
Price Waterhouse

Genevieve Roche, Esq.
Deloitte & Touche

Douglas H. Thompson Jr., CPA
President
CPA Mutual Insurance Co. of America

Scott Univer, Esq.
BDO Seidman

WHAT IS MEDIATION?

Mediation is a process by which parties submit their disputes to a neutral third party (the mediator) who works with the parties to reach a settlement of their dispute. Mediation is an extension of the negotiating process. Mediators do not have the authority to decide issues; they simply assist the parties in reaching an acceptable settlement by probing the motivations and concerns of the parties in an effort to find a basis for resolving the parties' dispute. Instead, it is the mediator's very neutrality that frequently enables him or her to transcend the posturing of the parties so that their true concerns can be addressed.

Submitting your dispute to AAA mediation will not delay any pending lawsuit or arbitration that you might have. Mediators who serve on the AAA's panel are experts in successful negotiations. Mediators receive a fee from the parties for their services. They are also rewarded by knowing that their efforts have resulted in an amicable settlement of a dispute that would have cost substantial time and money had it been litigated.

The benefits of successfully mediating a dispute to settlement vary, depending on needs and interests of the parties. The most common advantages follow.

- Parties are directly engaged in negotiating the settlement.
- The mediator, as a neutral third party, can view the dispute objectively and can assist the parties in exploring alternatives that they might not have considered on their own.
- Because mediation can be scheduled early in the dispute, a settlement can be reached much more quickly than in litigations.
- Parties generally save money through reduced legal costs and less staff time.
- Parties enhance the possibility of continuing their business relationship with each other.
- The AAA experience has been that parties are able to reach a settlement in approximately 85% of the disputes submitted to mediation.
- Creative solutions or accommodations to special needs of the parties can become a part of the settlement.

The parties might wish to attempt mediation before submitting their dispute to arbitration. This can be accomplished by making a provision for mediation in the engagement letter or contractual document. To be most effective, the mediation clause may specify the AAA's Mediation Procedures. This may be done by using the following language.

If a dispute arises out of or relates to the engagement described herein, and if the dispute cannot be settled through negotiations, the parties agree first to try in good faith to settle the dispute by mediation administered by the American Arbitration Association under its Mediation Procedures before resorting to arbitration, litigation, or some other dispute resolution procedure.

For submission of an existing dispute, the following language may be used.

The parties hereby submit the following dispute to mediation under the Mediation Procedures of the American Arbitration Association (the clause may also provide for the qualifications of the mediator(s), method of payment, locale of meetings, and any other item of concern to the parties).

WHAT IS ARBITRATION?

Arbitration is referral of a dispute to one or more impartial persons for final and binding determination. It is designed to be private and informal, quick, practical, and economical. Parties can exercise additional control over the arbitration process by adding specific provisions to their contracts' arbitration clauses or, when a dispute arises, by modifying certain of the arbitration rules to suit a particular dispute. Stipulations may be made regarding confidentiality of proprietary information, evidence, locale, the number of arbitrators, and issues subject to arbitration, for example. The

parties may also provide for expedited procedures, including those for when the award must be rendered, if they anticipate the need for hearings to be scheduled on short notice.

An important feature of arbitration is its informality. Under the AAA rules, the procedure is relatively simple: legal rules of evidence are not applicable; there is no motion practice or court conference; and there is no requirement for transcripts of the proceedings or for written opinions of the arbitrators. Although there is no formal discovery process, the AAA's rules allow the arbitrator to require production of relevant documents, deposition of fact witnesses, and an exchange of reports of expert witnesses. The AAA's rules are flexible and may be varied by mutual agreement of the parties.

The fact that the arbitrators are trained and have professional expertise is also important. Arbitrators are selected for specific cases because of their knowledge of the subject matter. Based on that experience, arbitrators can render an award grounded on thoughtful and thorough analysis.

Most parties provide for arbitration of disputes because they are seeking a final and binding resolution of their business conflicts. Court intervention and review are limited by applicable state or federal arbitration laws; award enforcement is facilitated by those same laws.

Another important advantage of arbitration is that it is designed to be private, having no public record of the dispute or of the facts presented in the resolution of the dispute.

The AAA has prepared a guide, *Drafting Dispute Resolution Clauses for Professional Accounting and Related Services*, that sets forth many examples of specific provisions that may be included in a submission or an arbitration clause. Copies of that guide may be obtained from any AAA regional office. In addition, the AAA also offers a *Guide to Arbitration and Mediation for Business People*, which details how to start and prepare for the arbitration process. That is also available through any AAA regional office.

WHAT ARE THE BENEFITS OF ARBITRATION?

- **Confidentiality**—Arbitration is a private process. There is no public record of the proceedings.
- **Limited Discovery**—Extensive discovery is avoided. Arbitrators arrange for limited exchange of documents, witness lists, and depositions appropriate to the particular dispute.
- **Speed**—There is no docket or backlog in arbitration. Hearings are scheduled as soon as the parties and the arbitrator have dates available.

- **Expert Neutrals**—The arbitrators have expertise in the subject matter in dispute as well as training in the arbitration process.
- **Cost Saving**—Because of the limited discovery and the informal hearing procedures, as well as the expedited nature of the process, the parties save on legal fees and transactional costs.
- **Business Relationships Preserved**— In most instances litigation between professionals and their clients destroys the working relationship. Arbitration is less adversarial and, because of its informal nature, it is more likely that the parties will be able to continue to have a business relationship.

Parties may agree to arbitrate disputes either by inserting a future-dispute clause in an engagement letter or contract or by submitting an existing dispute to arbitration. Following is the standard arbitration clause.

Any controversy or claim arising out of or relating to this engagement shall be settled by arbitration administered by the American Arbitration Association under its Arbitration Rules for Professional Accounting and Related Services Disputes and judgment on the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof.

Arbitration of existing disputes may be accomplished by the following.

We, the undersigned parties, hereby agree to submit to arbitration administered by the American Arbitration Association under its Arbitration Rules for Professional Accounting and Related Services Disputes the following controversy: (cite briefly). We further agree that the above controversy be submitted to (one) (three) arbitrator(s). We further agree that we will faithfully observe this agreement and the rules, that we will abide by and perform any award rendered by the arbitrator(s), and that a judgment of the court having jurisdiction may be entered on the award.

Accounting firms should consult with their professional liability insurers to ensure that policy provisions permit use of arbitration clauses to resolve disputes.

WHO ARE THE MEDIATORS AND THE ARBITRATORS?

The National Panel of Professional Accounting and Related Services Disputes includes corporate financial and accounting officers—practicing and retired—CPAs, lawyers, former judges, and business people who have met the qualification criteria and who have been trained by the AAA in arbitration and/or mediation techniques. Qualification criteria include

- a minimum of fifteen years’ professional or business experience

- successful completion of AAA mediator or arbitrator training programs
- relevant academic and business or professional credentials and licenses
- scholarship and continuing education achievements
- dispute management and neutral skills
- reputation in the business or professional community and
- commitment and availability to serve as a neutral arbitrator or mediator.

When a case is filed with the AAA for resolution, *you and the other party* select the arbitrator or the mediator from lists prepared by the AAA for the specific case. The list includes the proposed arbitrators' credentials, including educational institutions attended, degrees earned, employment history, professional licenses or certifications, offices held in professional and trade associations, a description of the individuals' work experience, and participation in neutral training programs.

Mediators and arbitrators must disclose any relationship with the parties, their attorneys, or others involved in the case, such as witnesses, and those with disqualifying relationships will not be permitted to serve on that particular case. This assures the parties that the mediators and arbitrators are neutral.

WHAT IS THE ROLE OF THE AAA?

The AAA conducts educational programs; it prepares materials that explain alternative dispute resolution (ADR) processes; it maintains current data on panel members; and it provides extensive administrative services to the parties.

When you are considering using an ADR procedure, the AAA will

- provide sample language for the contract clause or the submission agreement;
- meet with you and the other parties to the dispute to facilitate agreement on an ADR procedure; in this regard, the AAA will contact the other party(ies) to gain their agreement to participate in an ADR procedure; and
- provide relevant materials, articles, and videotapes to educate the parties in the use of ADR.

When you have a dispute, your initial step is to notify the AAA and the other party(ies). To bring the matter to a prompt, fair conclusion, the AAA will provide administrative services that will include but not be limited to

- receipt and acknowledgment of claims and counterclaims
- conduct of an administrative conference with the parties and their counsel
- preparation of lists of neutral arbitrators or mediators suitable to the specific dispute
- supervision of the neutral arbitrator or mediator selection process
- scheduling of meetings or hearings in AAA facilities or at other locations convenient to the parties
- management and facilitation of all communications between the parties and the neutral, including arrangements for compensation of the neutral arbitrator or mediator
- determination of whether a neutral arbitrator or mediator has a disqualifying relationship and
- ensuring that the mediated settlement or decision of the arbitrator is achieved promptly and fairly.

You can obtain informational material, rules, filing forms, and general information on ADR by calling any of the AAA regional offices or by contacting the AAA's Customer Service Department at 1-800-778-7879.

Rules, forms, procedures and guides are subject to periodic change and updating. To ensure that you have the most current information, see our World Wide Web home page at **<http://www.adr.org>**



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