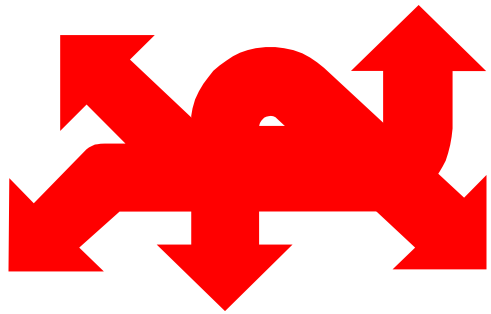


RESOLVING DISPUTES

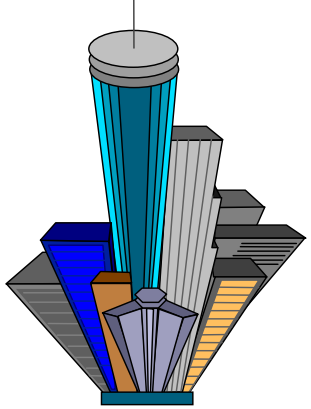
Chapter 4

CHAPTER ISSUES

- **The settlement process as it pertains to the trial process**
- **Alternative Dispute Resolution (ADR)**
  - **Strategic Considerations**
  - **Arbitration**
  - **Negotiation-Settlement**
  - **Mediation**
  - **Other forms of ADR**

Strategic Considerations: The Court System vs. Alternatives to Resolving Disputes (ADR)

- The court system is adversarial in nature
- Parties argue positions before a court
- Underlying belief: Best way to discover the truth is through competing evidence
- Lawyers represent competing claims
- Judges don’t investigate
- Court applies legal rules



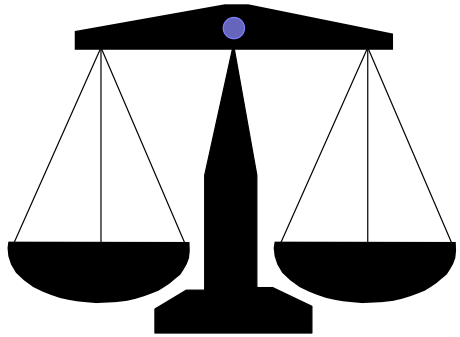
Decision-Making Factors of Business Involving Itself As A Plaintiff

- What is the probability of winning?
  - Can it get defendant before the court?
  - Is there a justifiable defense?
  - Can it produce necessary witnesses/documents?
  - What are the monetary costs of the case?
- Would the provided relief be worthwhile?
  - Is settlement, arbitration or mediation better?
  - Will/Can defendant pay?
  - What is the impact on company's goodwill?
  - Is there a disclosure (i.e. trade secret) that may result?

Business As A Defendant

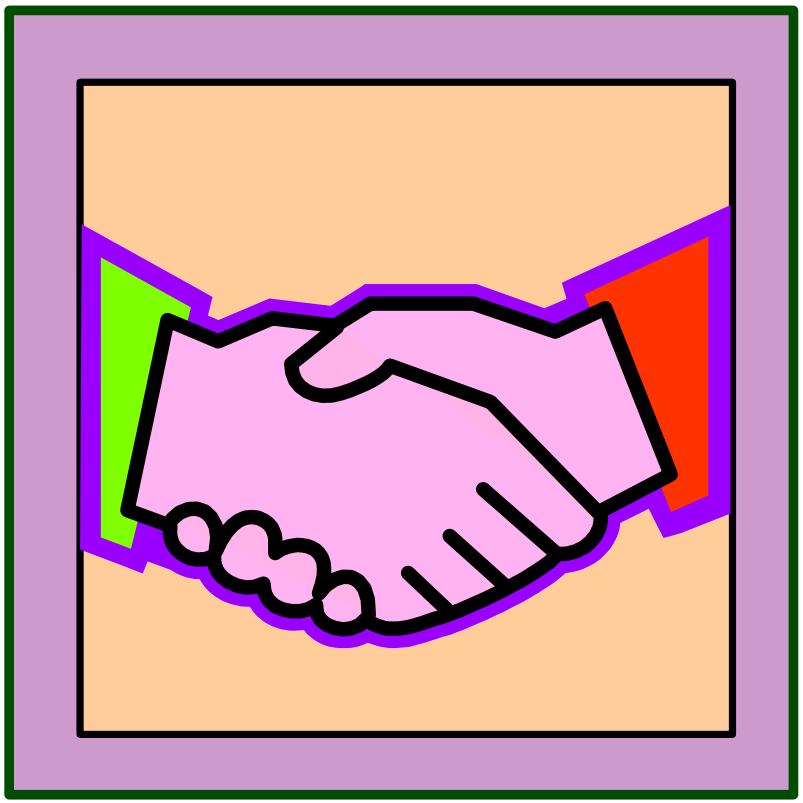
- How will lawsuit affect its goodwill?
  - Concern of publicity or reputation
  - If the viability of the company is at stake, it overrides concerns of goodwill, i.e. in the tobacco industry
- How important is the disputed business relationship?
  - Is the plaintiff's relationship worth keeping?
- Is there a viable alternative?
  - Consider settlement, arbitration, etc.
  - Are there indirect costs of the lawsuit to consider?
- Nuisance Actions
  - Does it cost less to "pay off" than to litigate?
  - Does business wish to discourage a lawsuit at any cost?
- Rational lawsuits
  - Better to incur liability than to perform on a costly contract

Resolving Disputes Through Courts



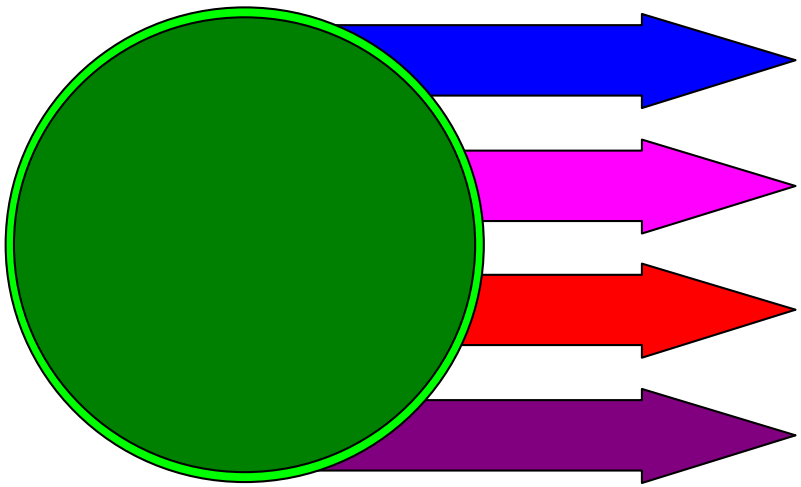
- Complex facts and issues
  - Example of the "5000-page Response"
- Greater use of documents and exhibits
  - Texaco/Borden case: 500,000+ pages in documents
- Heavier reliance on expert testimony
  - Scientists, doctors, economists needed to assist
- Longer trials
  - Takes several years to even get to the trial stage
- Large damage awards
  - Businesses are viewed as "deep pockets"
  - Sympathy to plaintiff vs. "Corporate America"

Negotiation



- **Least formal form of ADR**
- **Parties decide to settle matter between themselves**
- **Often use lawyers or representatives, though not required**
  - **Lawyers, etc. are *agents* of the parties of the dispute**
- **Negotiated settlement is usually a contract, which *is enforceable, like other contracts*, by the courts**

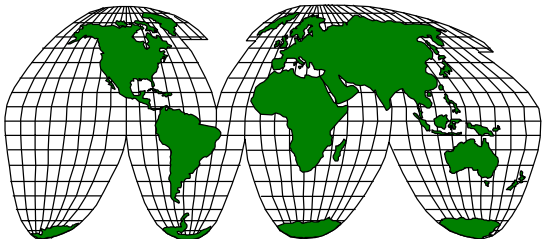
Stages of Negotiation



- **Stage 1: Study issues; plan the negotiation**
- **Stage 2: Exchange of information**
  - **Different styles: i.e."tough guy" vs. "problem solver"**
- **Stage 3: Work your strategy**
  - **Usually involves compromise**
- **Stage 4: Agreement is reached; usually a contract is written**
- ***Policy of the courts is to enforce negotiated settlements***

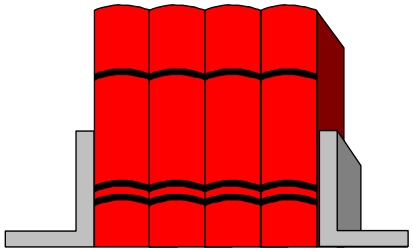
ARBITRATION

- Most widely recognized
- Over 200,000 cases filed in 2000 with American Arbitration Association
- 3rd neutral party or panel (usually expert)
  - Arbitrator/Arbiter
- Parties agree upon this ADR in contract or during the dispute
- Arbitrator's decision is *binding*
- Usual rule: *No right* to go to trial (parties to the dispute give up this right)
  - Appeals are very specific and limited
- Uniform Arbitration Act (UAA) upholds the integrity of this process
- See "Europe Emerges as the Arbitration Forum of Choice"



"Europe Emerges as the Arbitration Forum of Choice"

- **In international business, arbitration is <u>widely</u> used**
  - **Jurisdiction problems create the need for an ADR**
- **Many European countries have changed their laws to accommodate this ADR**
- **United Nations Commission on International Trade Law (UNCITRAL) has rules for effective arbitration**
- **Private organizations also have rules for arbitration. These private organizations include**
  - **International Chamber of Commerce**
  - **London Court of International Arbitration**
  - **Stockholm Chamber of Commerce**



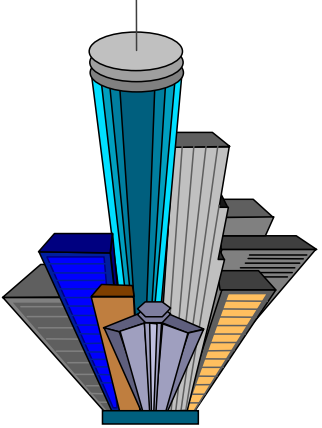
The Arbitration Process

- Decided at time of making the contract *or* after dispute arises
- Begins when party files a *submission* (See Exhibit 4.2)
- Parties agree on *arbitrator(s)*
- The *hearing*
  - Closed door
  - Less restrictive procedural and evidentiary rules than a trial court
- The *award* (decision)
  - Usually given in writing within 30 days of close of arbitration hearing
  - Arbitrators have broad powers to decide remedies
- *Appealing* the award
  - Attacks on arbitrators are rarely successful
  - Errors of fact or law are not reviewable
  - Grounds for overturning appeal: fraud, partiality, serious procedural misconduct, excess use of power by arbitrator
  - Arbitrators have wide latitude in awards
- Generally arbitration award is *final*

Compulsory Arbitration

(A Required Dispute Resolution Process)

- Labor Contracts
  - Unions
  - Insurance contracts
  - Stockbrokers
  - Pro-baseball, football
- Public Sector Employment
  - Police officers
  - Firefighters
  - Public school teachers
- Court-Annexed Arbitration a/k/a Judicial Arbitration
  - Some courts require it as a pretrial requirement
  - Either party may reject the decision
  - Parties may proceed to trial after arbitration
  - Reduces court backlogs
- See "Global Acceptance of Arbitration"
- See also Cyberlaw: "International Arbitration and Mediation of Domain Name Disputes"

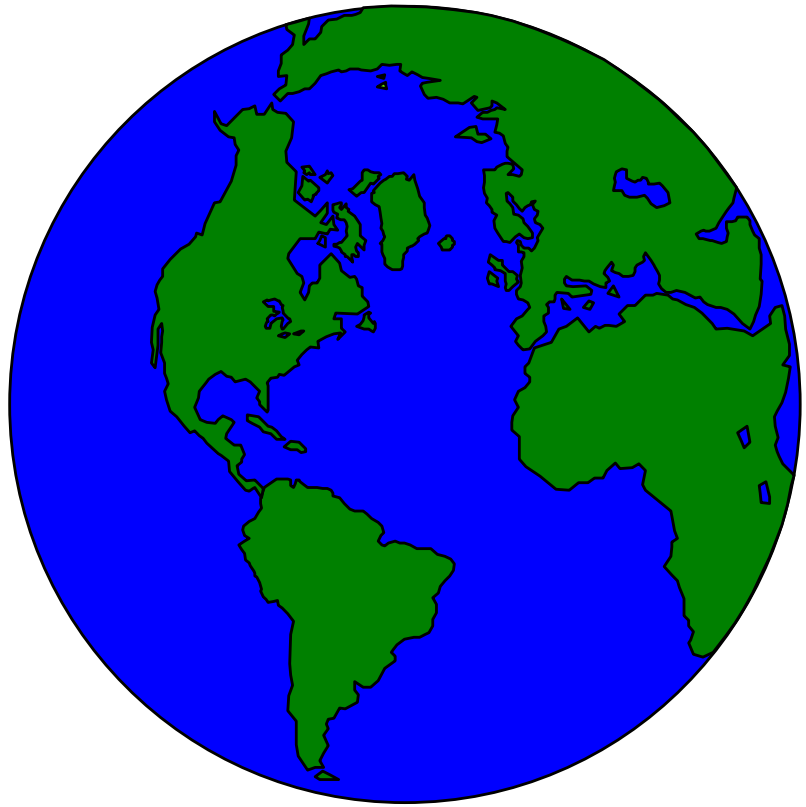


EEOC v. Waffle House (2002)

- **Eric Baker worked as a cook at Waffle House.**
- **Signed employment contract requiring arbitration of any dispute.**
- **Fired after suffering seizures on the job;complains to EEOC about disability discrimination.**
- **EEOC sues Waffle House on behalf of Baker; district court allows suit to proceed; appeals court holds that matter must go to arbitration.**
- **Supreme Court holds that since suit brought by EEOC, which was not a party to contract with Waffle House, it did not have to arbitrate. Litigation could proceed.**
- **Note: If Baker had sued; he would have had to go to arbitration even though suit is based on a federal right.**

"Global Acceptance of Arbitration"

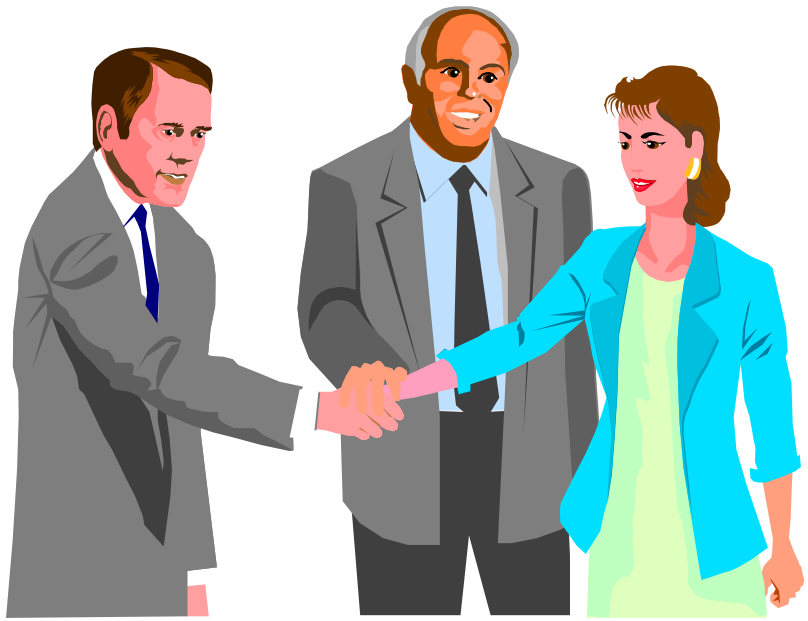
- Over 100 nations have signed the UN Convention on the Recognition & Enforcement of Foreign Arbitral Awards
- In some countries, it is harder to receive enforcement, but trend toward judicial enforcement globally.
  - China and India had reputations for non-enforcement, but improving
  - Germany recently adopted laws meeting international standards



Cyberlaw: "International Arbitration and Mediation of Domain Name Disputes"

- World Intellectual Property Organization (WIPO) in Geneva establishes rules for trademarks and other intellectual property
- WIPO has domain name resolution service to protect domains (i.e. .mx for Mexico and .edu for education)
- WIPO has a Uniform Domain Name Dispute Resolution Policy (UDRP) dealing with such problems as "cybersquatting"
- Parties go to Arbitration and Mediation Center (http://arbiter.wipo.int) where experts handle disputes
- Fees are assessed
  - If 1-5 names included in a complaint--$1500
  - If 3 panelists are requested -- $3000
- Over 1000 disputes/year submitted to the Center for resolution

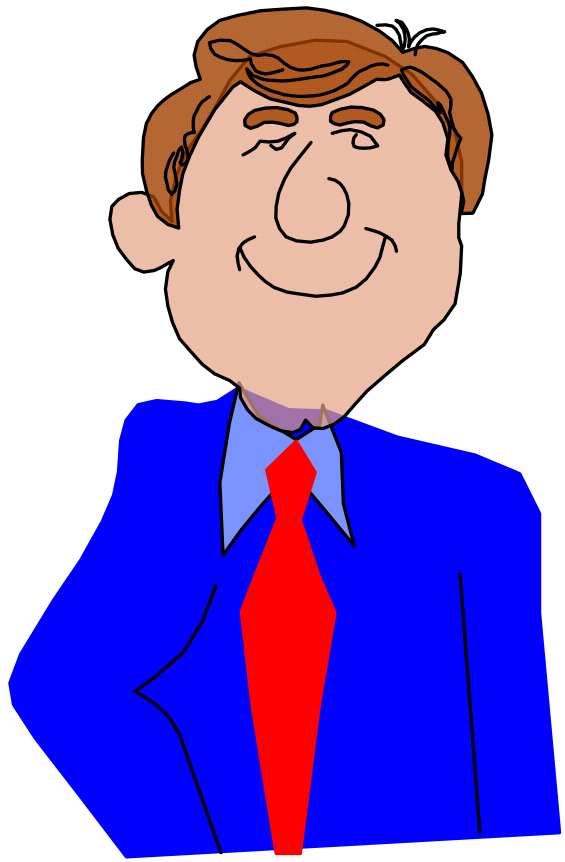
Mediation

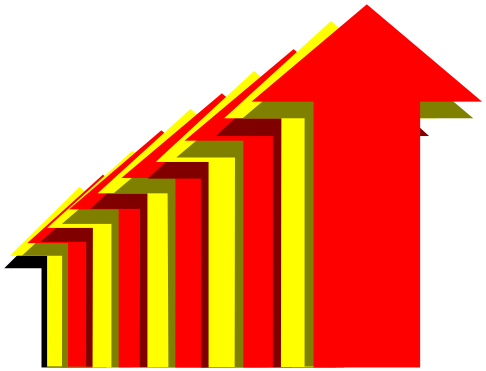


- 3rd neutral person (*mediator*) assists the parties of the dispute
- Parties mutually decide on a resolution
- Mediator makes ***suggestions***; all discussions confidential.
- Mediator's suggestions are ***NOT BINDING*** on the parties
- Parties may go to trial after this ADR
- Mediation often helps to maintain the relationship between the parties

The Mediator

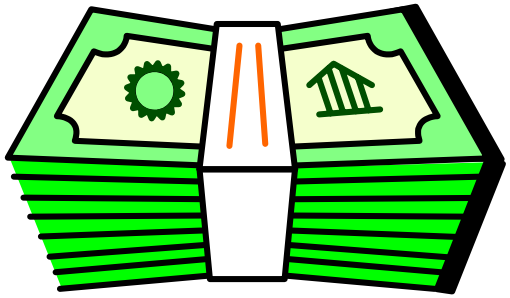
- Some states have no requirements at law
- Most people prefer a trained or experienced person
- If no requirements, the mediator may be the choice of the parties
- If mediator fails to act professionally, may be subject to liability to one of the parties





The Mediation Process

- **Mediator collects information, outlines key issues, listens, asks questions, observes the parties, discusses options, and encourages compromise**
- **Mediator often helps to draft the settlement agreement**
- **The settlement agreement is enforceable in court**
- **Mediator may assist in deciding the confidentiality of the case**
- **If confidentiality is agreed upon, which is normal, nothing can be said in public**
- **Information revealed during negotiation or mediation should not be used as evidence if the dispute goes to a later trial**
- **See *Paranzino v. Barnett Bank of South Florida***



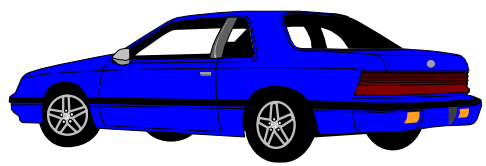
Paranzino v. Barnett Bank of South Florida

- **Paranzino claims she gave $200,000 to bank & received only 1 certificate for $100,000**
- **Bank gave her receipt for $100,000; denies her claim**
- **Her bank statements reflect the bank's claim**
- **Parties attend court-ordered mediation *with an agreement that includes a confidentiality statement***
- **Paranzino offered $25,000 by the bank to settle, which she rejects**
- **She calls the newspaper which prints story about the case**
- **Bank moves trial court to strike her pleadings and asks for sanctions for breach of confidentiality**
- **Trial Ct. strikes pleadings; dismisses case w/ prejudice**
- **Paranzino appeals**
- **Held: Affirmed order of the trial court. Case dismissed with prejudice.**
- **She "willfully & deliberately disregarded the confidentiality agreement. . "**

Creative Business Use of Mediation

Example of Ford Motor Company

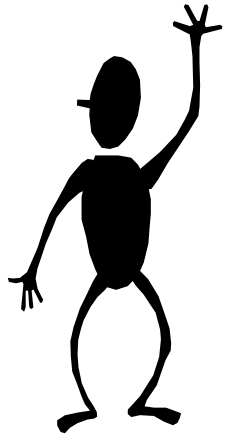
- **Ford is an example of efforts that try to avoid "bad press" through mediation**
- **First consumers discuss complaint with dealer & local district office**
- **Next complaint filed with Ford Consumer Appeals Boards**
- **Board's decision: binding on Ford but *not* consumers, who can still seek legal remedies**
- **Process encourages dealer responsiveness to consumer problems**
- ***See also* "Creative Dispute Resolution"**



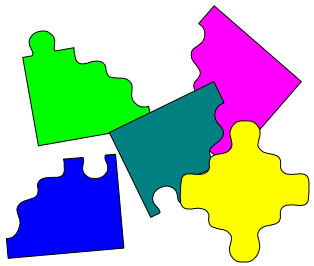
Innovative Forms of ADR

- **Alternative Dispute Resolution Act of 1998 directs federal courts to implement a dispute resolution program, though Congress has not funded the mandate**
- ***Minitrial/Private trial*: Parties decide a structural settlement process that blends negotiation, mediation and arbitration**
  - **Parties may quit the process at any time**
  - **Several federal district courts use "court supervised" minitrials**
- ***Summary Jury Trial*: The jury equivalent of a minitrial**
  - **Usually six advisory jurors; witnesses rarely used**
  - **Judgment is *not binding* (though jurors don't know this)**
  - **Dissatisfied parties may still take the case to court**
  - **Courts have held that ADR proceedings are closed to the public and the press**

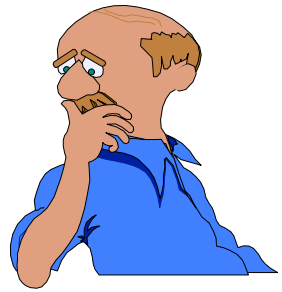
Expanding the Use of ADR (Congressional Encouragement)



- **The Judicial Improvements Act of 1990**
  - **Encourages (sometimes requires) use of ADR by federal district courts**
  - **Courts must develop a caseload management plan**
  - **1998 RAND Report indicates there has been little impact on caseload speed or cost to parties**
- **The Administrative Dispute Resolution Act of 1990**
  - **Authorizes use of ADR by federal administrative agencies--they must adopt some kind of policy**
  - **Requirement that all parties (public & private) must consent to use of an ADR technique**



Pros & Cons of ADR To Business



- **Pro**
  - Avoids high cost litigation
  - Greater degree of control of the problem
  - More control over process itself
  - Quicker resolution of case
  - May maintain business relationship
  - Outcome and/or agreement is confidential
  - See *Should Lawyers Agree Not to Sue?*

- **Con**
  - Legal outcomes are better--give direction to future business decision-making
  - Learn from mistakes of others from public cases
  - In arbitration, legal right to the court system is given away
  - Emotional appeal to juries are not available (in fact, this may be a “pro” for businesses)

Should Lawyers Agree Not to Sue?

"Some Lawyers Promise Not to Sue in Exchange for Cash from Firms"

- **Little-known negotiated settlement term: "Law firm agrees not to sue a defendant again on behalf of future potential clients." (Ex: Company privately pays lawyer large sums to settle cases, IF the lawyer agrees not to sue the company again for future clients**
- **Unethical? Usually under states' legal ethics codes**
- **HOWEVER: If a company signs the plaintiff's lawyer up as a "consultant", then a "conflict of interest" is created in the lawyer who then can't sue company again.**
- **It's a contrivance, but is within the rules -- Recent cases:**
  - **DuPont: pays lawyers $6.4 million arranging to not bring future cases against DuPont—lawyers had great expertise in matter**
  - **BellSouth in discrimination lawsuit allowed lawyers to determine their "consulting fees" from the $1.5 million settlement fund of the lawyers' clients**
  - **Warner Lambert (now unit of Pfizer) agreed to pay lawyer $225,000, issue refunds to 90 potential members, etc. if lawyer dropped the clients, kept payment secret, and agreed not to sue Warner Lambert in the future.**