ALTERNATIVE DISPUTE RESOLUTION TECHNIQUES

United States District Court
For the Southern District
of Illinois

INTRODUCTION

The purpose of this pamphlet is to provide basic information to litigants and their lawyers concerning various alternative dispute resolution (ADR) techniques.

ADR techniques are increasingly being used in the United States to resolve disputes without the necessity of a formal trial. Legislation and court rules throughout the country encourage ADR. One of the most significant statutes authorizing increased use of ADR is the Civil Justice Reform Act of 1990. Section 473(a)(6) of this Act requires every one of the 94 United States District Courts to consider the implementation of local rules that designate or otherwise make available various ADR techniques. See also Federal Rules of Civil Procedure 16(a)(5) and 16(c)(6), (7) and (11).

Because many people, including lawyers, in this area are not familiar with the various ADR techniques, this Court has concluded that, at this time, it is not appropriate to implement a pervasive ADR system for this District.

The Court has determined, however, that litigants and their attorneys should be encouraged to explore the possibility of using ADR to resolve cases filed in this District. Therefore, the Court has established a procedure whereby copies of this pamphlet, prepared by members of the District's Civil Justice Reform Act Advisory Committee, will be distributed to all attorneys at the time the initial pleadings in a case are filed. Moreover, the possibility of using a voluntary ADR technique will be discussed at the initial pre-trial scheduling and discovery conference pursuant to Local Rule 11(c).

Broadly defined, ADR encompasses various methods for resolving legal disputes both inside and outside of the courtroom, as well as techniques for managing litigation cost effectively and preventing litigation from arising in the first place. Any and all of these ADR methods may be molded to fit the parties' requirements. This pamphlet will briefly discuss the five major types of ADR: arbitration, mediation, court mini-trials, neutral fact finding and private trials.

ARBITRATION

Arbitration involves a hearing before a neutral arbitrator, or panel of arbitrators in which each party's case is presented. There are two types of arbitration. The first, known as binding arbitration, results in a judgment that has the same effect as a judgment entered by a judge in a formal court proceeding. The arbitrator's judgment can only be appealed on jurisdictional and procedural grounds. Binding arbitration is widely used to resolve a variety of commercial disputes and labor-management disputes. Arbitration of major league baseball players is one well-known recent use of binding arbitration. Another is the increased use in recent years of binding arbitration to resolve disputes between brokers and purchasers of securities. Various statutes including the United States Arbitration Act, 9 U.S.C. §1 et seq. and the Uniform Arbitration Act, which has been adopted by a majority of the states (including Illinois and Missouri), authorize the use of binding arbitration and resolve certain technical and constitutional problems that were raised when arbitration first began to be used in this country.

The second form of arbitration, known as non-binding arbitration, is also frequently used for both commercial and non-commercial disputes. In non-binding arbitration, either party can appeal to a court for a de novo hearing on the merits. Therefore, the main functions it serves are (1) to provide a forum where the parties can air their disagreements and (2) a cooling off period before a court action can be brought. These are significant functions and serve to resolve many disputes without an appeal to be courts. One of the most interesting ADR developments in this country in the latter part of the 20th century is the increased use of mandatory non-binding court annexed arbitration in which claims filed in a court are required to be submitted to arbitration conducted under court rules and regulations. Court annexed arbitration is now authorized by statute or court rule in over 21 states and several federal district courts and is principally used for small claims. Even though either party can appeal to the delegating court for a full trial on the merits, very few cases are actually appealed. This is one reason why more and more states and federal district courts are authorizing court annexed arbitration as a means of

significantly decreasing the number of cases that have to be tried in the courts. This court does not at this time have a rule authorizing court annexed mandatory non-binding arbitration.

MEDIATION

Mediation is a process where a neutral mediator helps the parties to a dispute reach their own agreements. Solutions are not imposed upon the parties. The process allows the parties to candidly explore settlement possibilities. By learning the confidential concerns and positions of all parties, the mediator can often develop options beyond the perceptions of the parties. Except in unusual circumstances, mediation is non-binding.

The mediator's role and the mediation process can take various forms, depending on the nature of the dispute and the relationship of the parties. The mediator can identify and narrow issues, from each side's underlying interests and concerns, carry messages between the parties, explore bases for agreement and the consequences of not settling, and develop a cooperative, problem-solving approach. The mediator may work primarily with lawyers or propose a settlement package to them. If they reject the proposed settlement package, the mediator may attempt to bring the parties to an agreement through a series of separate confidential meetings.

Mediation is frequently used in labor relations cases and multiparty disputes involving environmental and land use planning issues. It has been used much less frequently in large-scale disputes involving business and public institutions. However, businesses have shown a growing interest in mediation in recent years.

The statements or other communications made by any of the parties or their representatives in connection with a mediation conference are confidential and are not admissible in any trial of the case or in a related case. Local Rule 11(c)(4) specifically incorporates this confidentiality concept with the respect to cases in this District in which a settlement conference must be held. See also Rule 408 of the Federal Rules of Evidence.

MINI-TRIALS

Although referred to as a mini-"trial", this process is not actually a trial at all. Instead, it is a confidential, non-binding settlement process. Its creators called it an "information exchange", but it has since been dubbed a "mini-trial".

The mini-trial is very flexible and has no mixed forms. However, most mini-trials follow similar procedures. The process is started by an agreement establishing the ground rules, which often include a limited period of discovery. At the heart of the mini-trial are abbreviated case presentations made by counsel to principals from each side and a neutral advisor of the parties' choosing, often a six person jury, a former judge, or an experienced lawyer. If the parties are corporations, the principals are normally senior executives with settlement authority.

The case presentations enable the executives to gain a clearer view of the strengths and weaknesses of each side's position. After the presentations, the parties meet to negotiate settlement. The neutral advisor, if requested, gives an advisory opinion on the likely litigated outcome of the dispute or helps the principals reach an agreement.

Many mini-trials result in prompt settlements. The process has been used with particular success in intercorporate disputes. With their knowledge of business operations and objectives, executives are often able to reach innovative resolutions that would be beyond the power of a court to impose, or that lawyers alone could not achieve.

One type of mini-trial that has been increasingly used in recent years is the summary jury trial. The purpose of a summary jury trial is to determine the potential reaction of a jury to various kinds of evidence or different ways of presenting evidence in a complex lawsuit. Often a summary jury trial will be conducted by one of the parties in a simulated fashion.

Summary jury trials are also sometimes held before a real judge and jury and conducted much like a mini-trial. In this situation a jury renders an advisory verdict,

which can provide the parties with a rational basis for constructing a realistic settlement of the case. This is the type of summary jury trial authorized by Local Rule 34.

PRIVATE TRIALS

Parties can agree on their own, without court involvement, to select a private "judge", sometimes referred to as a referee. The parties can then conduct a private trial under their own rules. The referee is often either a highly experienced neutral attorney or a former federal or state judge. Private trials may be party directed, or they can rely on strong assistance form the referee. They may have the informality of non-binding procedures like the mini-trial, or they may parallel traditional court processes and use certain procedural or evidentiary rules. The parties may want the referee to provide a well-grounded opinion just as they would receive in a bench trial. Except in California and a few other states which have specific legislation giving judgments in private trials the same status as public trials, a private trial can be handled as a binding arbitration proceeding with agreed upon modifications.

CONCLUSION

The Court encourages litigants and their lawyers to explore the use of one or more of the ADR techniques discussed in this pamphlet. There are several organizations that provide lists of third party neutrals and other ADR expertise. The best known of these is the American Arbitration Association. A non-inclusive list of national and local organizations that provide assistance with ADR techniques can be obtained from the Clerk of this Court. [For further detailed information on ADR programs, contact the American Bar Association Standing Committee on Dispute Resolution, 1800 M Street, NW, Washington, DC 20036 or the National Institute for Dispute Resolution, 1901 L Street NW, Suite 600, Washington, DC 20036.]