"I was never ruined but twice - once when I lost a law-suit, once when I won one." VOLTAIRE

"Discourage Litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a real loser: in fees, expenses and waste of time." ABRAHAM LINCOLN

OPPORTUNITIES FOR ALTERNATIVE DISPUTE RESOLUTION IN THE UNITED STATES DISTRICT COURT NORTHERN DISTRICT OF INDIANA

WHY DOES THE COURT OFFER ALTERNATIVE DISPUTE RESOLUTION ("ADR")?

It is the mission of this court to help parties resolve their disputes as fairly, quickly and efficiently as possible. The cases filed in this court present a wide range of issues and circumstances; accordingly, the litigation process cannot be expected to meet the needs of all of these cases.

While traditional litigation can serve the parties' interests well in some situations, many cases have needs that can be better met through other procedures. We offer a wide selection of both binding and non-binding ADR options--each of which provides different kinds of services--so that parties can use the

procedure that best fits the particular circumstances of their case.

ADR offers numerous advantages over formal litigation. In contrast to formal litigation, ADR procedures generally lead to resolutions that are:

-- faster

-- less expensive

-- more creative

-- tailored to the underlying interests of all the parties.

With such apparent advantages, we urge your consideration of ADR.

This handbook informs you about:

-- the benefits of ADR

-- available ADR options

-- selecting an appropriate ADR process

-- procedures used in ADR programs.

To help ensure that you make informed choices, the Fort Wayne Division of this court requires that every attorney and client certify that they have read this handbook and have considered the ADR options. The judicial officer presiding at the preliminary pretrial conference will expect the parties and counsel to come to that conference prepared to discuss ADR options that may be most suitable for this case. While there is a presumption favoring mediation, all other options should be carefully considered.

Counsel and their clients in the Fort Wayne Division will also be required to certify that counsel has communicated to the client the full extent of all fees, expenses and costs that may be incurred if the case goes to trial. Further, counsel must certify that they have communicated that fee, expense and cost information to opposing counsel to the extent that their clients may incur liability for those amounts in the future. The estimate you receive should also separately estimate what it will cost in the way of fees and expenses through to the completion of an early successful mediation. This full disclosure of estimated fees, expenses and costs

will ensure that all parties are fully and realistically informed of the potential financial burden that they will undertake if they proceed with the litigation, and the corresponding benefits that an early successful mediation can yield.

The court's experience has shown that litigants who have used ADR conscientiously have saved money, time, and have obtained more satisfying results. Therefore, litigants and lawyers should keep an open mind regarding the utility of ADR at all times during the course of litigation.

The concept of "justice" is elusive, but when all is said and done, it ultimately resides in the mind of the individual litigant. The judicial officers of the United States District Court for the Northern District of Indiana do their very best to dispense justice fairly and equitably, according to the dictates of the law and the facts before them. Frequently, however, it is the disputants who are in the best position to decide what is fair; particularly when contrasted with the almost always burdensome costs that come with judicially dispensed justice. It follows then, that ADR in any of its many forms, should be considered, evaluated, and, when appropriate, pursued. In this way, the judges, the lawyers and the litigants can work together to ensure that the federal district court in Northern Indiana continues to provide the kind of high-quality justice for which it has been traditionally known, and to which the public is entitled.

HOW CAN ADR HELP MY CASE?

Most cases can benefit in some way from ADR. The various ADR processes offer different types of benefits. Each ADR process offers at least some of the following advantages over traditional litigation.

Produce more satisfying results

After litigating a case through trial, even the winners may feel they have lost. The costs and time commitment on both sides may be enormous. Sometimes neither side is satisfied with the result--and any relationship that may have existed between the parties is likely to have been severely strained. On the

other hand, ADR may:

-- help settle all or part of the dispute much sooner than trial

-- permit a mutually acceptable solution that a court would not have the power to order

-- save time and money

-- preserve ongoing business or personal relationships

-- increase satisfaction with the process and outcome, and thus result in a greater likelihood of a lasting resolution

-- afford the parties an opportunity to agree on a level of confidentiality.

Allow more flexibility, control and participation

In formal litigation, the court is limited in the procedures it must follow and the remedies it may award--and submitting a case to a judge or jury can be extremely risky. ADR processes are more flexible and permit parties to participate more fully and in a wider range of ways. They afford parties more control by providing opportunities to:

-- tailor the procedures used to seek a resolution

-- broaden the interests taken into consideration

-- fashion a business-driven or other creative solution that may not be available from the court

-- protect confidentiality

-- eliminate the risks of litigation

-- provide a choice of binding or non-binding procedures.

Enable a better understanding of the case

In traditional litigation, sometimes the parties stop communicating directly--and it is only after a significant amount of time, expensive discovery, or motions, that the parties understand what is really in dispute. ADR can expedite the parties' access to information. It can also improve the quality of justice by helping the parties obtain a better understanding of their case early on. It may:

-- provide an early opportunity for clients to communicate their views directly and

informally

-- help parties get to the core of the case and identify the disputed issues

-- enhance the parties' understanding of the relevant law and evidence, as well as the strengths and weaknesses of their positions

-- help parties agree to exchange key information directly.

Improve case management

Attorneys in litigation sometimes find it difficult, early in the case, to devise a cost-effective case management plan, reach stipulations or narrow the dispute. An ADR neutral can help parties:

-- streamline discovery and motions

-- narrow the issues in dispute and identify areas of agreement and disagreement

-- reach legal and factual stipulations

-- control timing, rules, use of neutral experts, and designation of third party facilitators or decision makers who have experience or expertise in the subject matter involved in the dispute.

Reduce hostility

Due to its adversarial nature, litigation sometimes increases the level of hostility between sides, which can make communication more difficult and impede chances for settlement. In contrast, an experienced ADR neutral can:

-- improve the quality and tone of communication between parties

-- decrease hostility between clients and between lawyers

-- reduce the risk that parties will give up on settlement efforts.

When ADR may NOT be useful

Although almost every case can benefit in some way from ADR, some select cases might be better handled without ADR. These include suits in which:

-- a party seeks to establish precedent

-- a dispositive motion requiring little preparation will probably succeed

-- a party needs the protections of formal litigation

-- a party prefers that a judge preside over all processes.

Even if your dispute falls into one of these categories, you should still seriously consider trying ADR and give careful thought to selecting the most appropriate process for your case.

Which ADR processes does the court offer?

The court sponsors six major ADR processes:

1. Mediation
2. Arbitration (non-binding, or binding if all parties agree)
3. Special Master
4. Mini Trial
5. Summary Jury Trial
6. Settlement Conferences (conducted by magistrate judge or district judge)

Each of these programs is described separately in the next few pages.

Mediation is the most common and popular form of ADR. At the preliminary pre-trial conference the court will enter an order to mediate unless the parties and the court agree that some other form of ADR is more appropriate, or the parties clearly demonstrate to the court that ADR would not be useful.

1. MEDIATION

Mediation brings the parties in a lawsuit together before a neutral mediator whom they have selected. The role of the mediator is to attempt to mediate and resolve the dispute on a mutually agreeable basis. The mediator seeks to understand the confidential concerns and interests of the parties (often meeting with them separately at least part of the time), works to advance problem-solving approaches, encourages concessions, and clarifies issues or misunderstandings. The mediator may also provide a confidential evaluation as to the merits and value of a case. Of course, the mediator's

evaluation is nothing more than an opinion, and the parties may decide to give it little weight. However, it should be remembered that this may be the first totally neutral assessment of the case by anyone, and therefore deserves some weight and respect.

Mediation, honestly entered into, can save the parties money because it will put an end to fees and costs as soon as possible. The parties may enter into the mediation process at whatever stage of the case they believe would be optimal and cost effective. Mediation will also allow the parties to achieve a result for themselves that, while not perhaps everything they may want, is at least acceptable. The alternative, a court-imposed result, may be something unacceptable. Finally, mediation will put an end to delay and will give the parties an opportunity to get on with other things in their lives.

This court-offered "opportunity" bears a modest cost when compared to the cost of litigating the case. Unless otherwise agreed, each side pays one-half of the mediation fee. Therefore, a successful mediation session will invariably net the parties a considerable savings when contrasted with the estimate of fees and expenses which counsel are to provide to their clients.

2. ARBITRATION

Arbitration is a private trial-like proceeding presided over by one neutral, or a panel of neutrals, chosen by the parties or by an arbitration organization. The arbitrator(s) conduct a hearing according to agreed rules of evidence and procedure, after which they render a decision which usually is binding on the parties and enforceable, although the parties can also choose non-binding arbitration.

Binding arbitration involves relinquishing control over the outcome to one or more decision-makers, who may have specialized backgrounds or experience relating specifically to the subject matter of the case (e.g., patents, real estate, securities, etc.).

The parties, in a written arbitration agreement, are also free to set high and low limits on the arbitrator's award, or to otherwise define and limit the scope of relief that the arbitrator may grant; in order to avoid unexpected or undesirable results.

Binding arbitration may prove to be very advantageous, depending on the particular case. Some of the key advantages of arbitration over federal court litigation may be:

1. Less formal procedures which the parties can shape through agreement;

2. Faster and less costly resolution than litigation;

3. May be used to resolve a specific narrow issue which is preventing settlement of the overall dispute.

Arbitration tends to be more useful than mediation if:

1. A settlement is too unlikely without a neutral decision;

2. The parties' relationship will end once the dispute is resolved.

However, ultimately the crucial analysis is to the likelihood of the success of mediation, or arbitration, when balanced against cost and time factors. Nonetheless, it should be remembered that arbitration can still be used even after a failed mediation.

Non-binding arbitration involves having a neutral render an advisory decision; thus, it differs from pure mediation in that a mediator will generally seek to facilitate a fair agreement without offering an opinion as to who should prevail.

Non-binding arbitration can be useful if the parties are likely to adhere to the result. Arbitration, whether binding or non-binding, has the potential for great savings in both time and costs, when utilized in the appropriate case. Usually, the costs of the arbitration will be shared by the parties.

3. SPECIAL MASTER

A special master is a private person who may be appointed to perform any of a wide range of tasks in response to a motion or on the court's own initiative. Fed. R. Civ. P. 53 and 16(c). The court can appoint a master selected by either the court or the parties. Compensation for masters is determined by the judge and the parties may be ordered to share the fee.

Referral of a case or specific issues to a special master can speed resolution of those cases involving specific factual disputes for which the services of a third party (often an expert in the field) are especially valuable. Special masters also can serve as mediators. In addition, they can also be called upon to resolve massive, protracted and costly discovery battles.

A master's determinations are subject to district court review. In non-jury trials, a court accepts the findings of fact of the master unless clearly erroneous. Within ten (10) days of service, a party may file an objection to such findings. In jury trials, a master's findings are admissible as evidence. The parties may also stipulate that a master's findings are to be deemed final.

There can be several advantages to using a special master. The order of reference to a master can be carefully tailored to fit the needs of a particular case. Although the direct cost of a special master can be substantial (depending on the terms of compensation), in appropriate cases the appointment of a special master has resulted in substantial savings to the litigants. Masters may reduce the time to resolve pretrial disputes. The master's familiarity with the details of the case can discourage litigants from disruptive and costly positions. The master also may have greater expertise in a specialized field than a judge.

4. MINI-TRIAL

This is a flexible proceeding conducted by a neutral moderator in front of the litigants' senior management each of whom has full authorization to settle. The lawyers and experts for the litigants make informal summary presentations of their positions, usually followed by negotiations between the executives with the neutral-moderator acting as a mediator. Ordinarily used with corporate litigants, a

mini-trial is intended to give the business people a realistic appraisal of their respective positions, as well as the opportunity to communicate and settle with their counterparts. Either the judge or a private moderator presides over the mini-trial. This procedure should be considered as a process to facilitate settlement where appropriate to the litigants, issues, and amounts in controversy.

5. SUMMARY JURY TRIAL

A summary jury trial is a proceeding in which the lawyers present the case in the courtroom to a jury, using summaries of witness testimony or other agreed procedures such as narratives by counsel, or *limited* deposition excerpts, or videotaped or live testimony. The jury, which usually believes the proceeding is a real trial, is given an abbreviated charge and then returns a verdict, which generally is advisory only, although the parties may agree that it will be binding. Clients are expected to be present so that they can evaluate their respective cases for settlement purposes. The proceeding usually lasts one or two days. The district judge, a magistrate judge, or a private substitute, may preside. The Civil Justice Reform Act specifically authorizes summary jury trials. 28 U.S.C. § 473(a)(6)(B). If a district judge or magistrate judge presides, it may not be the judge or magistrate judge to whom the case is assigned.

A summary jury trial is an interesting but limited technique. It is useful if the results will be a catalyst for settlement. A summary jury trial takes more time and resources than most other ADR techniques, however, if other methods have failed and the trial is expected to be a multi-week one, then the judge and litigants may conclude that the potential benefits of this technique warrant the commitment of time, expense and effort.

6. SETTLEMENT CONFERENCES WITH A DISTRICT OR MAGISTRATE JUDGE

A settlement conference presided over by a district judge or magistrate judge currently is a commonly used ADR technique in the federal courts. The 1983 revision to Rule 16 specifically authorized judges to discuss settlement at pre-trial conferences in furtherance of active case management.

Judicial participation in settlement discussions can be important. As advocates, litigators are often

reluctant to broach settlement until they have established a track record of toughness with the opposing side. The presence of a judge at the settlement conference may afford the litigants their first opportunity to communicate meaningfully. Furthermore, the judge may help the parties or counsel understand the parameters and reasons for a reasonable settlement; but that participation, while potentially valuable, will occur only if the parties desire it. The judge will not force settlement on an unwilling litigant. In order to encourage candor and forthrightness in the settlement conference and, so as to avoid any prejudice to the parties as a result of the discussions in the settlement conference, it is this court's policy to assign the settlement conference to a different judicial officer than the one who will be presiding at trial.