



Winter 1988

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Recommended Citation

Richard A. Enslin, *ADR: Another Acronym, or a Viable Alternative to the High Cost of Litigation and Crowded Court Dockets - The Debate Commences*, 18 N.M. L. Rev. 1 (1988).

Available at: <https://digitalrepository.unm.edu/nmlr/vol18/iss1/2>

ADR: ANOTHER ACRONYM, OR A VIABLE ALTERNATIVE TO THE HIGH COST OF LITIGATION AND CROWDED COURT DOCKETS? THE DEBATE COMMENCES*

RICHARD A. ENSLEN**

I. INTRODUCTION

In the past ten years a new direction in case management and accountability has emerged in many of our country's trial courts. Styled "Alternative Dispute Resolution" by its innovators, utilization of these new techniques has been revealed in the literature only in the past three or four years. Advocates of these new procedures seek alternatives to the traditional litigation process which has witnessed escalating and more complex civil case filings. They express growing concern with increased delays and costs. Acknowledging the criticism voiced by the public that our courts are swamped and unmanageable, they seek ways to terminate disputes in a less costly and more timely fashion. Since the vast majority of civil litigation is concluded by compromise, the proponents of alternatives argue that they are uncovering ways to expedite the settlement process, while improving effective management of the judges' caseload in the bargain.

In this same three or four year time frame, skeptics have begun to publish concerns that alternative judicial methods may so undermine traditional adjudicative responsibility as to seriously impair notions of due process and judicial impartiality. The debate is, then, only in its infancy. This Article joins the emerging controversy in the early stages and analyzes its parameters. Commencing with the responsibility for case management argument, it touches briefly on the possible causes for the increase in civil litigation, before turning to a discussion of the new court connected alternatives. This Article notes the processes available, the early experiences of the judges who employ them, and then assesses their efficacy and their future.

II. SHOULD JUDGES MANAGE THEIR CASELOADS?

To many, this question is no longer debatable. With the adoption of

*The substance of this article was drawn from a thesis submitted by Judge Ensen as part of his Master of Laws requirement by the University of Virginia.

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the Federal Rules of Civil Procedure in the 1930s, many state and federal courts moved away from the central assignment system into a case management system requiring personal judicial responsibility.¹ The vast majority of state and federal courts currently utilize the personal assignment basis for case management. Prior to such adoption, however, most trial courts had left scheduling largely to the lawyers. The court would not schedule a civil case until the lawyers announced their readiness. In the past sixteen years, federal trial courts have significantly changed their method of operation to resolve problems of permitting lawyers to set trial dates often caused by pre-trial discovery delays.² In 1969, most metropolitan federal district courts transferred from a master calendar system to an individual assignment system.³

Some courts, however, continue with a central assignment/master calendar system. Civil cases are not assigned to a judge for a trial until the trial date itself. As the case progresses, different judges assume different responsibilities, usually on a rotating basis. One judge may hear motions, both dispositive and non-dispositive; another may conduct pre-trial conferences; and still another may hold settlement conferences. As a consequence, no single judge has any management responsibility, and the case progresses (or does not) according to the pace of the lawyers. If a lawyer desires a hearing, he or she simply requests the Clerk of the Court to schedule the matter by issuing a praecipe.

Proponents of the central assignment/master calendar system argue that the calendar moves promptly during "trial months." Judges are not predisposed to any consideration of the merits or the lawyers, and can take a fresh judicial approach to the issues, parties, and lawyers at trial.

The individual assignment system, by contrast, places a civil case on the calendar of a single judge who is responsible for it until its disposition. This requires the judge to manage and monitor it through the various stages leading to trial, and then, if it has not been settled or dismissed, to try it.

Those who oppose personal management systems point out that the judge who has been involved in various motions and, more importantly,

1. Necessarily, pretrial procedure envisages the invocation of initiative on the part of the judge. It transforms him from his traditional role of moderator passing on questions presented by counsel, to that of an active director of litigation. [It makes it] possible to dispose of the contest properly with the least possible waste of time and expense. By exercising his authority to the fullest extent in this direction, the pretrial judge not only advances the cause of the administration of justice, but also enhances the respect for the courts on the part of the public.

Pretrial Procedure Abridged Report of the Comm. on Pretrial Procedure to the Judicial Conference of the District of Columbia, 4 Fed. R. Serv. 1015 (1941).

2. Peckham, *A Judicial Response to the Cost of Litigation: Case Management, Two-Stage Discovery Planning and Alternative Dispute Resolution*, 37 RUTGERS L. REV. 253 (1985).

3. *Id.* at 257.

in settlement discussions or pre-trial conferences, may well form a bias toward a recalcitrant party or lawyer, may tend to pre-judge issues and people, and may ultimately believe the vast majority of cases ought to be settled and not tried.⁴ After all, opponents argue that a case disposed of is a case disposed of. The judge who disposes of a case in a two or three hour settlement conference receives the same "credit" as the judge who conducts a sixteen week trial. Furthermore, the judge who settles the case is "appeal-free" and will not be called upon to make various evidentiary rulings, compose jury instructions, or perform other judicial functions.

The central assignment proponents also argue that the executive and legislative branches have already usurped much Article III initiative by the creation of special courts,⁵ and that "adjunct" courts, attached to Article III courts themselves, may also have intervened on some Article III powers. Of course, the latter reference is principally to the bankruptcy court and to federal magistrates. It is contended that federal district judges are very apt to adopt decisions from these tribunals without rehearing testimony in order to "siphon off work."⁶ A managing judge, they fear, may further erode the adjudication process by assigning to others—neutrals—certain judicial "power" in an effort to settle cases. The litigating public, it is urged, ought to be assured that those matters remaining within the judicial branch of the government will have a free and uncompromised right to litigate their disputes in a judicial forum free from arm twisting judges who are motivated to look statistically superior by their disposition of an increasing number of civil cases.

Professor Judith Resnik is, perhaps, the most outspoken critic of case management. She charges that emphasis on judicial case supervision is a departure from the traditional role of judges and appears to be inconsistent with our notions of due process and the adversarial system.⁷

Professor Owen Fiss is also critical of personal management systems. Fiss believes that adjudication, in the traditional sense, is far more likely to do justice than case management or the utilization of alternative dispute resolution techniques. He calls for a renewed appreciation of traditional adjudication.⁸

These academics, joined by some judges, have voiced valid concerns which cannot be ignored. Nevertheless, individual case management, with all of its potential evils, is a necessity in the latter stages of the Twentieth Century.

4. Resnik, *Managerial Judges*, 96 HARV. L. REV. 374 (1982).

5. Resnik, *The Mythic Meaning of Article III Courts*, 56 UNIV. COLO. L. REV. 581 (1985).

6. *Id.* at 605-06.

7. Resnik, *supra* note 4.

8. Fiss, *Out of Eden*, 94 YALE L. J. 1669, 1673 (1985).

First of all, the judiciary needs to be held accountable. If judges are merely called upon to try lawsuits or hear contested motions on weekdays, they can work at their own pace, mindless of the mounting pressure of the increasing number of unresolved civil cases. Judges can turn their attention to more glorious ways of accountability—perhaps by penning the erudite 75-page opinion which will be sure to be debated in the legal journals following publication in *Federal Supplement*.

Federal judges often come to the trial bench following highly competitive careers. Many were active and often able trial lawyers. Others pursued, full or part-time, political careers or were academics competing with their collegial brethren. Still others were engaged in business enterprises. When judges reached the bench, their competitive instincts did not simply dissipate. Instead, they revealed themselves in other fora. Opinion writing, conducting the celebrated trial, writing law review articles, publishing books, addressing public audiences, and receiving awards are some of the ways in which judges “compete” in an effort to still demons who continue to demand proof of their worth.⁹

The monthly, semi-annual, and annual statistics forwarded to judges by court administrative offices are instant and constant reminders of how judges are ranked in relation to their colleagues with regard to disposing of those cases assigned to them. They are assailed with data concerning the length of time between filing and disposition; median times between filing and trial; effective use of jurors; pending civil and criminal case-loads; and even their “standing” in the Circuit and the United States.¹⁰ Judges are thus urged to be productive and are held “accountable” for their management skills.

Those judges who came to the bench from the trial bar are well aware that the busy trial lawyer, left to his own devices, rarely races to judgment. As lawyers, judges most strongly disliked an order scheduling events from filing to trial, and preferred, instead, uncertain trial dates (or if certain, trial dates far in the future), an unspecified period of time in which to complete discovery, and the leisurely filing of non-dispositive and dispositive motions. Realizing that most settlements occur close to the trial date, the case management oriented judge orders all events scheduled, which includes a chronological staging leading to a certain trial date.¹¹

A judge who is responsible for his own caseload and feels the responsibility of ultimately concluding marathon discovery, also brings to the litigant, through the lawyer, some hope that their case will not be “lost”

9. From my own observations, conversations, and by examining my own soul.

10. See, e.g., *Federal Court Management Statistics, 1985*: Prepared by the Administrative Office of the United States Courts.

11. See my own “Order Scheduling Events,” Appendix A to this Article.

in the paper shuffle of the busy clerk's office. Knowing at the outset that the litigation will terminate, and progress on a reasonable schedule, ensures parties and the lawyers that some end is in sight.

Whether one likes it or not, personal case management appears to be with us today and in the immediate future. Courts are assisted in this new management by new hardware and software, by case managers, by management oriented clerks, and by judges who feel the responsibility of satisfying the statistical necessity of looking productive. While it is certainly possible that the management oriented judge may become too acquainted with the litigation, the parties, and their lawyers, this possibility, articulated by the academics, is but another challenge to be overcome by the fair-minded judge. Further, it cannot be said that the danger of pre-disposition is unique to case management judges. An easily biased judge, much like a juror, can be as swayed by an opening statement or by the first few hours of trial.

"Impartiality is a capacity of mind—a learned ability to recognize and compartmentalize the relevant from the irrelevant and to detach one's emotional from one's rational faculties."¹² Judge Peckham, Chief Judge of the Northern District of California, argues that a judge must be able to develop and possess these faculties in order to exercise the power inherent in his Article III status. He indicates that a judge who presides over a pre-trial suppression hearing where a defendant proclaims, under oath, ownership of seized evidence to establish standing, is, nonetheless, permitted to sit on the trial and issue further rulings.¹³

In the pre-trial setting, a judge can assign a settlement conference to a magistrate, or some other judge, and thus assist in reducing possibilities for partiality. A responsible judge in any litigation is constantly assailed with motions, pleadings, and conduct which assault the judge's notions of impartiality. Regardless, vigilance and responsibility must go with the robe.

Charges that judicial supervision weakens the adversarial system present a most serious issue. The adversarial system, however, in its current form, is precisely the reason why civil litigation is so expensive and why the courts are so cluttered. Professors Resnik and Fiss argue that the responsibility for improving the system lies with the lawyers, whereas Judge Peckham and this Article place the responsibility primarily with the judge.¹⁴ The responsibility on the part of the judge, however, does not detract from the lawyers' function. Rather, it is intended only to assist attorneys in planning the efficient progress of lawsuits.¹⁵

12. Peckham, *supra* note 2, at 262.

13. *Id.* at 262-63.

14. *Id.* at 265.

15. *Id.*

Some of the dangers can be mitigated by the employment of some of the alternative dispute resolution techniques discussed in this Article by utilizing non-judges in non-binding fashion. The use of case managers can also remove from the judge's view a myriad of lawyer requests, particularly for continuances and for relief from administrative orders. Indeed, such non-judicial managers are at the very essence of a well-managed trial court.¹⁶

The dangers discussed in case management cannot and should not be permitted to derail the judiciary from the responsibility of effectively managing a civil caseload in the face of expanding litigation and the new complexity in civil filings. Accountability, the use of management strategies involving others than the judge, and the improved use of alternative dispute resolution techniques will, at the very minimum, reduce these dangers.

III. A SOCIETY GONE LITIGIOUS: THE UBIQUITOUS CIVIL CASE FILING INCREASE, THE "NEW COMPLEXITY," AND THE COURT'S BURDEN

While not entirely free from contention,¹⁷ most concede that the American public has become increasingly litigious in the past twenty-five years or so.¹⁸ The reasons for this increased litigation are multiple, complex, and not readily susceptible of simplistic reduction. Some of the causes are obvious, others are somewhat more subtle. By way of the most summary of treatments, they include:

A. *The Congress*

The legislative branch has contributed to increased civil litigation by responding to the body politic in a variety of fashions. Civil rights legislation of the 1960s and 1970s has increased causes of action for civil litigants.¹⁹ The Civil Rights Act of 1964²⁰ was, perhaps, a harbinger of the years which followed. Statutes prohibiting discrimination in employment, in housing, in public accommodations, in the school setting, in federal and state-financed construction and support, in licensing, in labor, and even in the so-called private sector contributed greatly to increased filings in the 1970s and 1980s.

16. D. SAARI, *AMERICAN COURT MANAGEMENT—THEORIES AND PRACTICES* 61-114 (1982).

17. Daniels, *We're Not a Litigious Society*, 24 *THE JUDGE'S JOURNAL* (Judicial Administration Division, ABA) 18 (1985).

18. J. LIEBERMAN, *THE LITIGIOUS SOCIETY* (1983).

19. See, e.g., Equal Pay Act of 1963, 29 U.S.C. § 206 (1983); Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000(e) (1983) (Equal Employment Opportunities); Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621 (1983); Civil Rights Act of 1968, 42 U.S.C. § 3601 (1983) (Fair Housing); Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988 (1983).

20. Pub. L. 88-352, 78 Stat. 241 (1964).

New legislation affecting our environment, our economy, our retirement rights, our social security entitlements, state and local revenue sharing, our obligations to serve the military or at least register for military service, and our federal tax obligations are but examples of how increased legislation has imposed upon the courts new and complex responsibilities.²¹ Congress also increased civil litigation delays by enacting new criminal legislation, including complex criminal syndicalism statutes,²² and by passing the omnibus Crime Control Act of 1984.²³

Through these enactments, Congress responded politically to public pressure. As a result, the courts were left to deal with many new causes of action, sometimes long after the political debate had subsided.

B. The Courts

The judicial branch is not without responsibility for increased civil litigation, however. A host of newly created causes of action emanated from the courts, particularly the Supreme Court, in the past twenty-five or so years. Constitutional theories for new tort liability, *Bivens* causes of action,²⁴ increased court use of congressional post-Civil War statutes on civil rights,²⁵ state legislative reapportionment,²⁶ expanded prisoner "rights",²⁷ mental illness rights,²⁸ abortion,²⁹ and death penalty decisions,³⁰ are but some examples of the courts' contributions to the litigation explosion.

C. More Lawyers

While it may be a source of debate, the increased lawyer population has probably also increased the filing of civil lawsuits. It is not seriously doubted that any under-employed professional population will seek a means to improve its employment prospects. Any judge in any federal or state trial court will attest to the increase in filings in areas heretofore largely unlitigated. School discipline cases are but one example of this phenomena. In a single month in one court in Michigan, three students filed federal lawsuits over disputes about their grades. One litigant sought

21. See, e.g., Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. § 9601 (1983); Employment Retirement Income Security Act of 1974, 29 U.S.C. § 1001 (1983).

22. See Racketeering Influenced and Corrupt Organizations Act of 1970, 18 U.S.C. § 1961 (1983).

23. Pub. L. 98-473, Title II, 98 Stat. 1837, 1976 (1984).

24. *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971).

25. See *Monell v. Department of Social Services*, 436 U.S. 658 (1978).

26. See *Reynolds v. Sims*, 377 U.S. 533 (1964).

27. See *Hutto v. Finney*, 437 U.S. 678 (1978); *Estelle v. Gamble*, 429 U.S. 97 (1976).

28. See *Youngberg v. Romeo*, 457 U.S. 307 (1982); *O'Connor v. Donaldson*, 422 U.S. 563 (1975).

29. See *Roe v. Wade*, 410 U.S. 113 (1973).

30. See *Gregg v. Georgia*, 428 U.S. 153 (1976); *Furman v. Georgia*, 408 U.S. 238 (1972).

relief from a school principal who had declined to "apologize" to his son for giving the lad a verbal reprimand. The student had not been disciplined in any other way, yet the parent sought "vindication" in the courts.

Terminations of employees often result in some kind of litigation. When a plant ceases business in the locality, a variety of discrimination lawsuits inevitably follow.³¹ Breached implied contracts of employment, age discrimination claims, and allegations of unions' failures to adequately represent their members represent additional evidence of increased use of the courts by lawyers who formerly were engaged elsewhere.

It is also not unusual for a lawyer representing a client in a workers' compensation claim to file a collateral suit for social security benefits. While lawyers have been involved in workers' compensation litigation for a long time, the increased social security disability filings demonstrate the lawyers' "might as well touch every base" approach to the new competition.

While lawyer over-population is probably not one of the major causes of increased civil filings, it, nonetheless, is a factor.

D. The Contribution of Science

The natural sciences, too, have contributed to new and somewhat complex litigation. In an effort to rule out the causes of cancer, toxicologists and epidemiologists have offered new evidence on the incidence of cancer stemming from toxic substances discovered in our environment. Suits against tobacco companies,³² and factories discharging wastes into our rivers, streams, and air,³³ are examples of this new wave of litigation. The asbestos litigation by itself provides one of the best nationwide examples of plaintiffs' use of new scientific information to litigate the responsibility for cancer producing agents. In an effort to insure against side effects of a massive government program to immunize the population against swine flu, federal courts were met with a deluge of litigation.³⁴

In addition, science has prolonged life, and new legal debates rage over when life terminates and when life prolonging devices can be removed. A physician's responsibilities to the patient, to the family, and to society provide other examples of scientific knowledge causing the courts new and complex problems.³⁵

31. See *Massa v. Eaton Corp.*, (No. K85-15) (W.D. Mich.) (11 plaintiffs alleged breach of implied contract of employment and age discrimination due to corporate reduction in force).

32. See, e.g., *Pritchard v. Liggett & Myers Tobacco Co.*, 350 F.2d 479 (3d Cir. 1965), cert. denied, 382 U.S. 987 (1966); *Green v. American Tobacco Co.*, 304 F.2d 70 (5th Cir. 1962).

33. See, e.g., *Hancock v. Train*, 426 U.S. 167 (1976).

34. See 42 U.S.C. § 247b(j) (1983); *Unthank v. United States*, 732 F.2d 1517 (10th Cir. 1984); *Daniels v. United States*, 704 F.2d 587 (11th Cir. 1983); *Petty v. United States*, 679 F.2d 719 (8th Cir. 1982).

35. See Note, *Withholding Treatment from Birth-Defective Newborns: The Search for an Elusive Standard*, 31 WAYNE L. REV. 187 (1984).

E. The Role Played by an Increasingly Centralized Government, Business Environment, and Society

In a simple time, and in a more rural setting, people resolved many of their disputes in the family, the neighborhood, the school, the church, and business entities. As the government centralized, along with the business community, and as families dispersed across the country, smaller communities dissolved and became less capable of resolving disputes among their members. The citizen, feeling frustrated by computerized answers from his or her government or from the manufacturer of a product, began to turn more and more to the courts for answers to unresolved disputes and complaints.³⁶ At the same time, the lack of trust in the government and institutions, perhaps prompted in part by the Watergate scandals, caused society to be less trusting of the ruling class. Hence, lawsuits against schools, teachers, and Boards of Education involving school discipline, against manufacturers for product implied warranties, against doctors, lawyers, dentists, and other professionals for malpractice highlighted this lack of confidence and further added to the caseloads of our courts.

Whatever are the principal causes, it cannot be seriously doubted that the courts are overloaded, and that the filings increase. In the federal district courts alone, there was a sixty-three (63%) percent increase in new case filings in six years—1980 through 1985.³⁷ Possibly of even greater consequence, however, was that the complexity of the cases increased as well. Of the actions per judgeship filed in 1985, fully ninety-six (96%) percent had some complexity above the average case.³⁸ While this crush of cases was being filed in one year alone, the federal district judges increased their terminations by eleven (11%) percent in civil cases and almost five (5%) percent in criminal cases.³⁹ "Federal judges are working longer hours and more days than ever before but, like Alice in Wonderland, they cannot run fast enough even to stay in the same place."⁴⁰

It should be obvious that the courts have more filings, dispose of more matters, and address more new and complex problems than at any other time in history. At the same time, the caseloads increased faster and the backlog of cases awaiting decision grew during the statistical year ending June 30, 1985.⁴¹

36. M. HARRIS, *AMERICA NOW: THE ANTHROPOLOGY OF A CHANGING CULTURE* 41, 166-74 (1981). (The whole book is worth reading, however read the Introduction 7-16 if nothing else.)

37. Federal Court Management Statistics, *supra* note 10, at 167. There was an increase from 188,487 cases filed in 1980 to 299,164 in 1985. *Id.*

38. *Id.* "Weighted" filings figures for 1980 through 1985 were based on the weights developed from the 1979 Time Study conducted by the Federal Judicial Center. A detailed discussion of the 1979 Time Study can be found in the 1979 *Federal District Court Time Study*, published by the Federal Judicial Center in October, 1980. *Id.* 453 "weighted" cases out of a total of 475 were filed per judge in 1985.

39. *Id.*

40. Chief Justice Burger, 1985 Year End Report of the Judiciary 3 (1986).

41. *Id.*

What are possible solutions to this dilemma? Certainly not more adjudication as suggested by Professors Fiss and Resnik. Increasing the number of judges is a matter for Congress, but more judges seem to lead to a self-fulfilling prophecy, such as an increase in case filings. Limitation of jurisdiction is also a matter for Congress. This Article focuses upon one suggestion—the use of court annexed alternatives, having as a partial goal, the presentation of a more speedy and less costly system of justice.

IV. WHAT ALTERNATIVE TECHNIQUES ARE AVAILABLE TO THE TRIAL JUDGE IN THE 1980s?

A fairly large number of alternative dispute resolution (ADR) techniques have evolved in the past ten years in attempts to both assist in the managing of caseloads and to bring disputes to a resolution without trial in cases that might or might not have settled absent the ADR technique. This section will deal with some of those methods which have enjoyed the greatest publicity and sometimes have provoked the most debates.

A. *The Mini-Trial*

The Mini-Trial is not a trial at all, nor was it so termed by its innovative founders.⁴² It is a settlement device intended to assist in complex corporate litigation.⁴³ It is binding on no one (unless the parties and lawyers want to be bound), has no sanctions, and is often employed without court intervention or even suggestion.

It is usually employed after considerable discovery has taken place, and is largely an attempt to persuade the decision makers, usually the chief executive officer (CEO) of the corporations involved, that settlement of the issue is the more attractive alternative to continued litigation. There are no hard and fast rules for a Mini-Trial, although it is urged that it ought to commence with a written agreement between the competing parties as to the parameters of the Mini-Trial process.⁴⁴ It is during this negotiation that the lawyers consider the length, the depth, and the degree of participation of the actors to be involved in the process. It can be tried with or without a so-called neutral expert, tried to the opposing chief executive officer, or in any variety of methodologies.⁴⁵

Almost always, some kind of evidence is presented. Evidence can take the form of expert opinions, monologues, or the more customary examination/cross-examination of an expert. It can include, or it can be limited

42. The Mini-Trial takes its name from a headline in a 1978 *New York Times* story describing the original Mini-Trial.

43. E. FINE, *MINI-TRIAL WORKBOOK 1-DEFINITION* (1985).

44. *Id.*

45. E. GREEN, *MINI-TRIAL HANDBOOK 21* (1982).

to, deposition testimony, interrogatories, and other discovery devices. The contract between the parties and the lawyers will usually provide the structure in this otherwise unstructured approach to dispute resolution.⁴⁶

From the literature, however, one can structure an approach to the Mini-Trial setting utilizing an independent expert. The lawyers draft their Mini-Trial agreement, and agree on an independent expert. They then furnish to the expert the material they have amassed, together with briefs of what they expect to present during the Mini-Trial. The expert acquaints himself with the material prior to the hearing. On the first day of the hearing, the plaintiff produces approximately four hours of "evidence" in whatever form is agreed upon, and the defendant rebuts for two hours. At the conclusion of that day, the lawyers and the CEOs discuss settlement. On the second day, the defense presents four hours of "evidence" and the plaintiff rebuts. This day can be followed by a meeting of the CEOs—without the lawyers.⁴⁷

If settlement does not result, the independent expert contracted to render an "opinion" can decide on the facts and the law. His "opinion" may serve as the basis for further settlement negotiations. James Davis was the "Neutral Advisor" in *Telecredit, Inc. v. TRW Inc.* He never wrote his non-binding opinion because the case settled on the premises within one-half hour of the conclusion of the process. The advisor facilitated the discussion with questions. His comments often indicated where he felt serious problems existed for each side, and he assisted the parties in recognizing the strengths and weaknesses of their cases.⁴⁸

Advocates of the Mini-Trial approach believe that the persons responsible for making the decisions within their respective corporations are able, through the process, to understand the strengths and weaknesses of both sides, enabling them to comprehend the cost-benefit realities of the instant litigation. It is argued that those persons responsible for the ultimate decision are all too often sheltered by, consciously or unconsciously, corporate counsel or even by trial counsel, from the "truth." The Mini-Trial experience is intended to sharpen these realities, both in terms of the probabilities of success and of the cost of continuing the litigation through trial and appeal.

Variations on the Mini-Trial are unlimited. An independent expert need not be appointed. Lawyers can try their cases directly to the CEOs. Live

46. *Id.*

47. This was the format employed in the first mini-trial, *Telecredit Inc. v. TRW Inc.*, and reported in various journals. See E. Green, *supra* note 45, at 22-26; Davis & Omlie, *Mini-Trials: The Courtroom in the Boardroom*, *Litigation* (Fall 1982).

48. Davis & Omlie, *supra* note 47, at 24, and from comments made in a panel discussion at Northwestern Law School in November 1982 by Davis, the two CEOs and the lawyers involved in this first Mini-Trial.

evidence can be presented, but need not be. The essential element is that the lawyers and the parties have contracted for settlement discussions without the intervention of a judge.⁴⁹ No particular formula is superior to another. While information is not completely available, it is believed that most, and possibly all, Mini-Trials are followed by settlement.

The Mini-Trial was not intended for other than the complex corporate litigation. At the date of this Article, it is widely acclaimed as an expensive but largely successful method. It can be employed with or without court rule, and with or without judicial order, but requires a maximum of cooperation by the lawyers and parties. Cooperation is, in part, guaranteed by the expense of the undertaking.

At least two lawyers have urged that a mini-hearing should be considered even in disputes between government and industry. Their experience in a NASA case indicated that the Mini-Trial process could and did terminate complex litigation in both a timely and satisfactory manner. They urged corporate counsel, concerned about litigation management and the control of litigation costs, to consider the process "with increasing frequency."⁵⁰ A Washington, D.C., law firm is so intrigued by the Mini-Trial process that it conducted a one-day seminar for its law firm, inviting "outsiders" to speak during the proceedings.⁵¹

While at least one federal district judge has become part of a mini-hearing process,⁵² the Mini-Trial is generally not attached to the court at all. Thus, it falls outside the criticisms about a judge's neutrality, the need to adjudicate most matters, and the judge's desire to improve his caseload statistics. It was discussed in this section because those cases which have had Mini-Trials were on the dockets and were being pre-tried when the lawyers and the parties contracted for this extraordinary procedure. The remainder of this section will be devoted, instead, to court-connected alternatives and will not consider "private court systems."⁵³

49. For the best discussion of the varieties which have been tested, see both the Handbook and the Workbook published by the Center for Public Resources, and Matthew Bender & Company, *supra* notes 43 and 45.

50. Parker and Radoff, *The Mini-Hearing: An Alternative to Protracted Litigation of Factually Complex Disputes*, 39 BUS. LAW. 35-44 (1981).

51. The firm also produced the most exhaustive single volume, apart from the Center for Public Resources manual described in the footnotes, that has yet been attempted. Anyone seriously interested in exploring the Mini-Trial process further ought to consult this exhaustive work, which incorporates many articles, examples of many trials, and has proposed forms and agreements in the material. Howrey & Simon, *Mini-Trial Seminar Workbook* (Sept. 20, 1984). See also Seminar on Business Litigation, Dec. 6-7, 1985, prepared by Office of Continuing Legal Education, University of Kentucky College of Law and the Kentucky Bar Association.

52. Judge Robert E. Keeton of Boston employs a process he designates as a Conditional Summary Trial. It is very much like a Mini-Trial, except that he sits with the competing CEOs as a sort of "Neutral Expert." This process is annexed to the Court.

53. The California "Rent a Judge" program and the services offered by "Judicate," describing itself as "The National Private Court System," are examples of the new "privatization" movement.

B. The Summary Jury Trial

Conceived by Judge Thomas Lambros of the Northern District of Ohio in 1980, the Summary Jury Trial (SJT), like the Mini-Trial, is not a trial at all. It is a settlement device, in many ways similar to the Mini-Trial.⁵⁴ Here, however, the nature of the dispute does not have to be corporate litigation. Indeed, in its early stages, the SJT was employed for ordinary tort and contract litigation.

Like the Mini-Trial, most or all of the discovery process is complete when the SJT commences. Lawyers are briefed about the process in advance of the SJT date. In the Western District of Michigan, for instance, a pre-trial conference is held prior to the SJT so that the lawyers can understand what is expected of them.⁵⁵ Like the Mini-Trial, the parties are required to be present.

The SJT takes place in the courtroom with a judge or a magistrate presiding. In the simple two party setting, approximately ten jurors are summoned to court. Brief voir dire is conducted by the judge and each party is entitled to two peremptory challenges.⁵⁶ The jury may, or may not, be told at the outset that this is a non-binding "trial." One school of thought argues that SJTs are more effective when the jury does not understand that its verdict is not binding because it will be more likely to return a "true" verdict on the issues. Another school, however, advises that juries will be just as responsible when advised, in advance, of the nature of their mission, and that fairness dictates full disclosure.⁵⁷

Each lawyer is given the same amount of time to make his presentation. Usually, the lawyers are permitted an hour or two in total. Depending upon the judge and the setting, lawyers can make opening statements, presentations, and arguments, utilizing information gathered from discovery. There is no reason, however, why "live" witnesses may not testify or be extended a brief opportunity to summarize their opinions. Evidence

54. Judge Lambros, *The Summary Jury Trial*, A Report to the Judicial Conference of the United States Committee on the Operation of the Jury System (January 1984, revised October 1984).

55. The magistrate who has conducted the most Summary Jury Trials in the Western District of Michigan always holds a Pre-Trial Conference. The judges in the district, however, do not necessarily hold such conferences.

56. Like the Mini-Trial, "rules" for the conduct of a SJT are very flexible and are usually set by the judge or magistrate with the input and advice of the lawyers. While the Western District of Michigan has a local rule (Rule 44) permitting the parties to request the SJT, or the court to order this process, there is no rule as to its conduct.

57. In the Western District of Michigan, the juries are not advised in advance of the SJT. They are so advised, however, following the "verdict," and are invited to participate in the evaluation process after the judge has left the bench. Not a single juror has ever refused to discuss the issues with the lawyers and the parties, despite their being invited to depart should they choose. By contrast, Judge Norma Shapiro from the Eastern District of Pennsylvania always advises jurors, in advance of the process, that their verdict is not binding. A California professor, formerly of the Federal Judicial Center, is currently undertaking an empirical study to determine which process is more effective.

cannot surpass, of course, matters known to both sides from discovery or otherwise.

Following the lawyers' presentations, accompanied or unaccompanied by live testimony, the jurors are charged by the judge or magistrate on the law. They then deliberate exactly as a jury would deliberate, and announce a verdict. After the verdict is given, jurors are invited to discuss with the lawyers and the parties the jurors' observations of the strengths and weaknesses of their cases and the presentations, and to announce the reasons why the verdict was rendered.⁵⁸

When that process is concluded, a settlement conference is held by the judge or magistrate with the parties and their lawyers. By this time, the clients, their lawyers and the judge have a great deal of information about the fact finders' observations of the case. There are no sanctions for failure to accept the jury's verdict, a trial *de novo* can be scheduled, and, like all settlement processes, the lawyers cannot use, at trial, matters which occurred during this summary procedure.

Innovative variations on this process have included trying more than one related case to more than one jury at the same time. In asbestos litigation in the Northern District of Ohio, Judge Lambros has tried cases to more than one jury for the purpose of establishing a "range" for the benefit of the lawyers and their clients. This author is doing the same thing with some toxic tort litigation involving poisoned wells, and for the same reasons.

By way of an example, the plaintiff can select the "best" case in a class-type setting. The defendant can do the same, and a "medium" case can be presented as well. The purpose of "trying" all three to a summary jury is to provide information to the lawyers and the litigants as to the impartial fact finder's view of the litigation and "probable" jury verdicts. The Federal Judicial Center has produced a video presentation of the summary jury process as it is practiced in the Western District of Michigan.⁵⁹

The SJT can be utilized by judges throughout the country with or without court rule. The Western District of Michigan has a court rule providing for SJTs at the request of the lawyers or by order of the court.⁶⁰

58. See *supra* note 57. This is an important part of the whole process in Western Michigan, and it evolved accidentally. Lawyers always want to discuss a case with jurors after their verdict. One of the judges in Michigan, after telling the jury about the nature of its advisory-only decision, invited the jurors to remain in the courtroom and to frankly discuss the case with the lawyers and parties. He then left the bench. A two-hour discussion ensued, and the Michigan court has been following that practice ever since.

59. The video depicts parts of presentations in three potential cases (one plaintiff's and two defendants' presentations). During the presentations, "side bar" comments were offered by the presiding judge. A pre-trial and a settlement conference are depicted.

60. Rule 44(b) of Local Rules of Practice and Procedure of the United States District Court for the Western District of Michigan.

There is no reason, however, why a judge could not order a SJT without court rule since it is merely another settlement technique. Indeed, Chief Justice Burger has recommended the SJT in his last two State of the Judiciary messages.⁶¹

Like the Mini-Trial, the clients in the SJT are one of the essential ingredients in the process. Complaints about not being involved in the settlement discussions should dissipate with the client's involvement in both the Mini-Trial and the SJT process. Reassessment and vindication are elements present in that process. Honest differences as to valuation by competent lawyers and insurers are also addressed by the SJT.

C. Mediation

Mediation is most often thought of in the labor-management context or in the divorce/custody situation. Usually, a single mediator in these instances attempts to conciliate the differences between the parties. The mediator's decision can either be binding or non-binding, depending upon the situation or the law of the case. Sometimes the court is involved in ordering mediation, and sometimes it is not. Both formal and informal mediation occur on a daily basis throughout the country.

For several years, the state and federal courts in Michigan have employed a new kind of mediation in which the "mediators" play only an indirect role in the intervention between conflicting parties in an effort to promote settlement. Because the role of the "Michigan Mediators" is different from the more classical mediation, some prefer not to call it mediation at all. However, the Michigan courts have described it as such in their court rules.

In Michigan, the mediators are all lawyers and sit in panels of three. Both the parties and the court have a role in selecting the mediators. Discovery is occasionally complete at the mediation stage, but must at least have commenced before the mediation hearing. There is a period of approximately four months from the date mediation is assigned to the date of a hearing. Discovery continues during this interval. This mediation can be ordered by the court, or one or both parties can request it.

The lawyers prepare short written memoranda for the mediators in advance of the hearing. At the hearing, each side is permitted thirty minutes to present its case to the mediation panel. While the court rules usually do not require the presence of the parties, more and more of the judges in Michigan, at least, are requiring the parties to be personally present during the mediation hearing. Although they are not obligated to do so, the mediators often announce their decision immediately following the hearing. The mediators are required, whether or not they announce

61. See, e.g., Burger, *supra* note 40, at 12-13.

the mediation award verbally, to reduce their award to writing within ten days of the hearing. Each party then has twenty days to accept or reject the award. In the event that all parties agree on the mediation award, a judgment is entered by the court.

If there is no agreement, the lawsuit continues and the mediation award is not binding. However, and this is the most controversial provision of the Michigan rules, sanctions apply in the event that the plaintiff does not improve his or her position by ten percent at trial over the award. Similar sanctions apply to defendants who do not make a ten percent improvement on the downside of the award. Those sanctions apply only if the mediation panel is unanimous, but it almost always is. The sanctions include actual costs and attorneys fees from the time the mediation award is rejected.

Although the rule has been in effect in federal and state courts in Michigan for some years, the sanctions provision has never been tested in an appellate court. Several cases have included such a sanction on appeal, but they have all settled prior to the appeal. The argument against the imposition of sanctions is that they might tend to dissuade a party from exercising his Seventh Amendment right to a trial with a jury.

While the court rule does not mandate that the mediators affix a value to every case which results in an award to the plaintiff, most mediators in Michigan treat the rule in that fashion. Hence, they do function more as mediators than outsiders might suspect. Lawyers in Michigan are accustomed to mediation, and the program, except for the sanctions, promotes little controversy. Lawyers who serve as mediators are reimbursed in a nominal amount paid by the parties, must have certain background requirements before they are permitted to serve, and seem to enjoy their roles.

One of the advantages to the court of the "Michigan Mediation" is that the court itself has little involvement or investment, aside from helping select the mediators. The entire process is conducted outside of the courtroom in a location that the mediators choose and the schedule for the mediation hearing is, within limits set by the court, set by the mediators themselves.

The mediation rule in the Western District of Michigan is attached to this paper as Appendix B, and footnotes to this section have been omitted because the entire Rule is provided.

D. Arbitration

Arbitration may be either binding or non-binding, like mediation, depending on the circumstances. Much labor arbitration, for instance, is binding. Labor arbitrators are generally professional, and often arbitration

serves as their only vocation. The American Arbitration Association (AAA) trains arbitrators, and arbitration has become a separate discipline by virtue of its years of experience, by regulation, and by law.⁶²

A new kind of arbitration has recently found its way into certain federal courts as a pilot project. The arbitrators, like the mediators described in the mediation section, are always lawyers, are selected by the court, and are required to have trial experience in civil litigation. Like the mediators, they are paid a nominal sum, but unlike most mediators, they are required to "decide the case" as if they were the judge hearing the matter.

Most of the pilot districts assign *all* cases to arbitration with potential damage awards below an established dollar ceiling as determined by court rule. At the outset of the arbitration program, the amounts were relatively low but they are now approaching more substantial figures. In the Northern District of California, for example, the figure is now \$75,000, and in the Western District of Michigan, that figure is \$100,000.

In those districts that use arbitration, (if the clerk of the court determines that the case in controversy will not exceed the court ordered figure), a case is automatically assigned to arbitration as soon as the complaint and answer are filed. A lawyer for either side may certify that the amount in controversy exceeds the regulated amount, and if so, a judge or magistrate decides whether the case should remain on the "arbitration track," or whether it should be removed. If the case seeks only equitable relief, it is not assigned to arbitration. If there are demands for equitable relief along with a claim for money damages, a judge or magistrate decides whether the case ought to be arbitrated or not. Whatever the amount in controversy, the arbitrators are not bound by the court ordered maximum limit, and can award any damages the arbitrators believe are fair and just.

Like mediation, the arbitrators are supplied, in advance of hearing, with written pleadings from the parties, and the court rules usually stipulate the amount of discovery time permitted before arbitration. In the Western District of Michigan, the period for discovery is four months, but the time varies from district to district. It is usually, however, a relatively short period of time.

Most districts hold the hearing in a courtroom type setting. The hearings are scheduled to last for one day or less; live testimony is permitted; exhibits are utilized; and the case proceeds along guidelines set by the arbitrators in advance of the hearing. In addition, the parties are required to be present. Most districts use three arbitrators, but one arbitrator is the rule in the Western District of Michigan (even though that district uses three mediators in the mediation situation.)

62. See R. COULSON, PROFESSIONAL MEDIATION OF CIVIL DISPUTES (1984). (Mr. Coulson is the President of the AAA.)

The most significant differences between mediation and arbitration are that the arbitrators are required to render the verdict they believe to be required by law. The arbitrators do not set "values," nor do they attempt to mediate or conciliate. They can utilize their offices, after the fact, if they desire, in a conciliatory or settlement mode.

Arbitration is also not binding, and a trial *de novo* follows where no agreement is reached. There are minimal sanctions in arbitration, unlike mediation. If one side rejects the award, however, and does not improve that position at trial, sanctions can be employed by "taxing" the arbitrator's nominal fees.⁶³ Statistics from one of the districts (Eastern District of Pennsylvania) reveal that arbitration is very successful in terms of settlements reached before trial.⁶⁴

E. The New Role for Court Appointed Experts, and the Special Master for Settlement

Recently, some courts have begun to experiment with using yet another "outsider" for settlement purposes. Under the Federal Rules of Civil Procedure, the Special Master is used only sparingly by appellate interpretation of Rule 53. In those circumstances, a Special Master usually assists the court in "referring" discovery disputes, making reports and recommendations to the trial judge, setting the scheduling conferences, and in moving the case toward trial.

Several federal judges, however, have employed a settlement master for the purposes of negotiating settlement. Judge Lambros has employed settlement masters in the asbestos litigation in the Northern District of Ohio; an Alabama court has appointed a settlement master in a massive toxic tort case; and the author of this Article employed a Special Master, for settlement purposes, in a complex and lengthy "Indian Fishing Rights Case." In the latter instance, litigation that had lasted for fifteen years appeared to be headed for another massive stage when the parties asked the court to allocate the resource (fish) among the competing parties. Earlier decisions of the court had given the Native Americans substantial rights to fish the Great Lakes with no, or only minimal, regulation by the State Department of Natural Resources.⁶⁵ However, Native American

63. The Arbitration Rule for the Western District of Michigan is reproduced in its entirety as Appendix C to this Article. Footnotes have been omitted in the text since they would only have cited the same Rule.

64. For an eighty-five (85) month period (2/01/78 to 2/28/85), court statistics reveal that out of 8,309 cases in arbitration in the Eastern District of Pennsylvania, only 1.7 percent finally required a trial *de novo*. See Statistical Summary presented at Federal Judicial Center Seminar in San Antonio, Texas, on March 15, 1985.

65. See *United States v. Michigan*, 471 F. Supp. 192 (W.D. Mich. 1979), *remanded*, 623 F.2d 448 (6th Cir. 1980), *on remand*, 520 F. Supp. 207 (W.D. Mich.), *modified*, 653 F.2d 277 (6th Cir.), *cert. denied*, 454 U.S. 1124 (1981).

commercial fishermen, Native American sports fishermen, non-treaty commercial fishermen, and non-treaty sports fishermen continued to war, often openly, during the heart of the fishing season.

Moreover, and of greater consequence to the instant piecemeal litigation, was the fact that the resource was being "out-fished," and the court was being required each summer to issue closure orders for certain species in certain portions of the lakes. A trial date for this issue was set by the court and a Special Master was appointed by an Order of Reference which gave him both discovery authority and settlement authority.

The selection of the Special Master was unique inasmuch as the parties in the lawsuit were given the opportunity to recommend people for the position, and had veto rights over the judge's decision. Semi-parties, called by the court "litigating amici," also had the right to nominate persons for the Special Master position but had no veto power. The "litigating amici" were in the case by their own petitions, and with the court's indulgence, because they represented substantial fishing rights not joined in the original litigation. They had not been permitted to intervene, however, and hence enjoyed the unique status of "litigating amici."

After all of the parties and "litigating amici" had made their nominations, interviews were held over a two-day period with the lawyers and the court. A portion of each interview was conducted outside the presence of the trial judge. Agreement on two individuals was finally reached after some negotiation, and the court appointed one of them.

The Special Master appointed set up a discovery schedule, worked with the parties both jointly and ex parte, and finally conducted a three-day negotiation session in the backyard of the Native Americans, who argued that their interests had not been properly represented in earlier Treaties signed in Washington.⁶⁶ On the third day of the bargaining session, a written settlement was reached, which was later approved by the Court.

The same court is now utilizing a court appointed expert in a massive civil rights case filed by the United States against the State of Michigan over prison conditions in three of Michigan's largest prisons.⁶⁷ Ironically, both cases are styled *United States v. Michigan*.

66. Ironically, these very Treaties served as the basis for the earlier court order granting the Native Americans substantial fishing rights in perpetuity. In any event, the setting for the negotiation was Lake Superior College in Michigan's Upper Peninsula. There were over fifty representatives of the parties and non-parties present with credentials as "negotiators." Such a large number of individuals might have made the proceeding unwieldy. However, the Special Master divided those assembled into different groups with varying responsibilities. When agreement had been reached, a large table was assembled, and the principal negotiators signed the agreement, one by one, very much as in the fashion of the Treaty of 1837.

67. See *United States v. State of Michigan*, No. 84-63, slip op. (W.D. Mich. October 2, 1985) (opinion and order appointing expert).

F. Community Alternatives

Some communities have established settlement centers without court order in an effort to settle minor disputes. These centers are usually established to assist parties in landlord/tenant disputes, neighborhood disputes of all varieties, custody disputes between warring parents, and even minor criminal and juvenile referrals.

The American Bar Association, through its Special Committee on Dispute Resolution, has assisted in establishing centers in Washington, D.C., Tulsa, Oklahoma, and Houston, Texas. These centers, called "multi-door resolution centers," permit parties to go directly to the center, or accept referrals from courts, police departments, and other social agencies. The relief-seeker goes through a "door" to find out what type of process and what type of person will be able to attempt to adjust his dispute. Referral is made within the center to a person who acts as a conciliator, mediator, or settlor.

The resources of the community fund these agencies, but the courts make considerable use of the agencies by referrals. Promoters of these centers are of the belief that this alternative dispute process keeps many cases from ever officially finding their way into the courts.

G. The Judge as a Settlor

More and more judges with individual case assignment responsibility are, through the pre-trial process, acting in a settlement mode before trial. These judges may employ some of the ADR techniques or they may attempt to settle the case without an ADR referral. Some judges do both. The question presented is whether the judge ought to assist in settlement, or whether such assistance tampers with the judge's impartial trial mode stance. Lawyers in several districts, however, appear to welcome the judge's intervention in the settlement process.⁶⁸

The alternative dispute resolution techniques discussed in this section are not, of course, exclusive. Neither are they incapable of modification in each instance. A tactic that works well in one locale with one type of judge, may not work as well somewhere else.

IV. WHAT HAVE THE "PIONEERS" LEARNED BY THEIR EXPERIENCES WITH ALTERNATIVE TECHNIQUES?

The ADR "movement," if it can be called that, is relatively new in the civil litigation process. While labor arbitration and some kinds of mediation have long been in and around the courts, the techniques dis-

68. "85% of the 1,886 lawyers . . . feel that involvement by federal judges in settlement discussions is likely to improve significantly the prospects for achieving settlement." Brazil, *What Lawyers Want From Judges in the Settlement Arena*, 106 F.R.D. 85 (1985).

cussed in this Article have no real substantial learning experience or custom upon which to rely. Moreover, the judges who have employed the techniques described here are few in number.

The Federal Judicial Center sponsored a very important meeting in August 1985 in Kansas City where eighteen United States District Judges, who had employed some or all of the ADR techniques, gathered for a two-day symposium. A paper written by a Federal Judicial Center Fellow served as a part of the basis for that meeting and the paper discussed the varying methodologies employed and the reasons for employing them.⁶⁹

There appears to be no dispute that the Mini-Trial should only be employed in extensive and expensive commercial litigation, or in industrial-government controversies. At least one federal district judge, however, has utilized his own method of a Mini-Trial which he labels a "conditional summary" trial. Like all other ADR processes, innovation and utilization of the resources at hand seem to provide the best answers.

Those courts which have employed court annexed arbitration seem to believe that the guidelines on the dollar amount and the non-equitable relief supply the clearest answer on when to utilize this technique. The debate, if any, in court annexed arbitration centers around the dollar limit which will trigger the arbitration track, the number of arbitrators who should be employed by the court, and whether equitable claims ought to remove a case from arbitration.⁷⁰

Early studies, conducted by the Federal Judicial Center, suggest that cases referred to arbitration ought not be too factually or legally complex for a truncated procedure; nor should they involve legal issues which are so uncertain that resolution by a non-judge would be considered unpersuasive by most practitioners. This study points out that "straight-forward" compensation cases are better suited to this process.⁷¹ The judges at the Kansas City meeting, who were utilizing arbitration, were in agreement with the studies. All believed, however, that their local court rules, and the practice of "un-tracking" an arbitration case and returning it to the trial calendar, achieved the result the study suggested.

The mediation process, described in this paper as "Michigan Mediation," does not have similar problems with regard to the number of mediators or the equitable nature of relief sought. The Michigan rule, for no apparent substantial reason, excludes constitutional issues. This omission may be an attempt to avoid appellate criticism and possible sanctions.

Most cases which are referred to "Michigan Mediation" are ordinary

69. M. Provine, *Settlement Strategies for Federal District Judges* (Aug. 2, 1985); submitted to the Kansas City meeting as a draft, it was later published by the Federal Judicial Center in 1986 under the same title.

70. *Id.* at 52-59.

71. *Id.* at 58.

compensation cases recommended by the Federal Judicial Center study in the arbitration setting. Moreover, the Michigan Mediation panels attempt to show the lawyers and the parties the probable value or lack thereof of their cases. Submitting complex legal problems to such a panel would be foolhardy, and it is perhaps another reason why constitutional issues are excluded. Unlike arbitration, mediation cases are assigned by the judge and there is no "automatic" track. Besides standard tort and contract litigation, state and federal judges in Michigan are referring more and more employment disputes to mediation in part because of the status of Michigan law on implied employment contracts.

The use of SJT is more controversial. Some believe that it is most amenable to ordinary tort litigation where the presentations are simple and the issues well-defined for the jury.⁷² Others believe that lawsuits which are unlikely to settle before trial provide the best setting for SJT. The argument presented is that certain categories of cases, notably Section 1983 actions, suits claiming police brutality, suits involving prison conditions, and suits involving hotly disputed and public issues ought to be considered for the SJT process.

An additional argument concentrating on time benefit considerations is that neither a judge nor a magistrate ought to expend the time necessary to conduct a SJT without considering the length of the scheduled trial.⁷³ This argument does not relate to whether a court should utilize ADR techniques, but rather how to effectively utilize a judge's time in the settlement process. The SJT, like most other of the ADR techniques, does require the presence of a judge or a magistrate. The decision for the judge is how best to commit scarce public resources in a resourceful and productive manner.

It is urged by Judge Keeton, a District Court Judge in Massachusetts, that a judge who takes no action in this respect has made a decision to commit judge time as opposed to what he labels "hands-off" techniques. Keeton suggests a five sequence set of choices that should be considered before deciding on the use of judicial time in a given settlement technique. His paper includes an "Analytic Grid" for evaluating techniques of judicial involvement. Listing the techniques available, Keeton analyzes judge-time quotient for proceedings before trial; judge-time estimated for trial; judge-time quotient for techniques of intervention; and total predicted judge-time commitment. The grid considers the matter in hours and percentages of likelihood of trial.⁷⁴

72. This was the initial view of Judge Lambros who instituted SJTs. See HANDBOOK AND RULES OF THE COURT FOR SUMMARY JURY TRIAL PROCEEDINGS (N.D. Ohio 1981).

73. R. Keeton, Make Wise Choices About Techniques of Judicial Involvement in Dispute Resolution, (paper delivered and discussed in Kansas City, Mo. 1985).

74. *Id.*

The judges in Kansas City were persuaded that careful planning, on their part, was necessary before deciding to commit their resources to a SJT, or to any other process involving the judge's time. One judge, ignoring all but the time/benefit argument, employed a SJT in a very complex anti-trust suit involving multiple parties and settled the case on the eve of trial. That particular case had already been tried, had reached the appellate level, and had been returned for re-trial. The lawyers anticipated a six month trial. Obviously, in that case, the judge became a believer of the SJT process.⁷⁵ Another judge tried a very complicated rate case, and while it did not settle, the ultimate verdict was so comparable to the summary jury trial verdict that it apparently validated the process.

This author is of the belief that the SJT is most successful in two instances. The first instance involves litigation in which highly competent lawyers are unable to agree on the value of a given case. Frequently, the disagreement occurs when liability is questionable, but damages are extensive. To illustrate this dilemma, anecdotal treatment need be rendered inasmuch as empirical evidence is lacking on SJTs.

In one case, a small child was severely scalded by hot water in her parents' home. Plaintiff brought suit against the manufacturer of a thermostatic device in the water system. Counsel agreed that a damage award would be enormous, but apparently disagreed on the liability issue. Defendant believed there to be almost no chance of a plaintiff's verdict while plaintiff believed the child had nearly a fifty percent chance of recovery. A SJT resulted in a verdict for the defendant. However, in the discussion between the jurors, counsel, and parties which followed the SJT, the defendant became alarmed at the amount of sympathy the jury felt for the child. Indeed, when the magistrate told the jury their award was not binding, but was taken in an effort to assist the parties to settle, several jurors remarked that they would have made a substantial award in favor of the plaintiff had they known that fact. (This instance also underscores the controversy about advising the jury in advance of the SJT whether its verdict will be binding.) As a result of those discussions, and no so much as a result of the verdict, the defendant put together a very attractive structured settlement offer, which was accepted by the plaintiff.

In another instance, a head-on collision had resulted in serious head injuries to a deputy sheriff. The deputy had collected modest policy limits from the errant driver and had collected his workers' compensation benefits. Notwithstanding these benefits, the sheriff's injury was so serious

75. Judge Lee West of Oklahoma, who was assisted in this SJT by Judge Lambros. West reported at the conference that only one case failed to settle out of twenty-five (25) cases assigned to SJTs, and the regular jury agreed with the summary jury in that case. This latter feat was reported by Chief Justice Burger in his 1985 Year End Report, *supra* note 40.

and his family so large and young, that he was virtually uncompensated for his head injuries. His lawyer brought suit against the manufacturer of a gun rack which had been located behind his head and, surviving summary judgment, was prepared to go to trial on a product liability theory. The lawyers, once again, realized that the damages were very large, but differed on the potential for liability. The SJT verdict, again, was for the defendant.

After the settlement discussions which followed the jury verdict, and the discussion undertaken by the jurors, the parties, and the lawyers, the court held its usual settlement conference. Defendant withdrew the nominal offer it had made prior to trial. Plaintiff's counsel named a settlement amount, and an excess insurance carrier believed it to be so reasonable that he threatened the insurance counsel for the principal defendant with a "bad-faith" settlement rejection. Ultimately, the argument of the excess carrier proved persuasive, and the case settled one week later for the amount demanded by plaintiff. The settlement was not large, but it was in excess of the original amount offered by the primary carrier.

A second situation in which a SJT has been helpful involves the case where the lawyers could settle the case, but the clients, largely for emotional reasons, refused all compromise. No matter which way a SJT goes in this instance, the "winning" party is very apt to feel vindicated, and to feel that he has had his "day in court." The "loser" may feel a need to reassess in view of the jury's verdict, and especially in view of the comments made by jurors following the "verdict."

Again, and anecdotally, one such instance occurred when two corporate executive officers were litigating a breach of contract claim over the failure of the defendant to sell a corporate jet to the plaintiff. Defendant's CEO announced, on the morning of the SJT, that he would never settle. Hours later, however, when a jury returned an award in favor of his corporation, he offered to settle the dispute on the spot. Plaintiff, by contrast, through very able counsel, immediately reassessed its position given the fact that the jurors were so persuasive in their post-trial discussion, and given the further fact that several other people in the courtroom, including the judge, had "voted" consistently with the jury's verdict.

Lacking empirical evidence, cases are likely to be ordered to SJT by judges who have learned from their own experiences. Hardly any judges, after some years of experience, would assign a simple two or three day jury trial to summary jury disposition, particularly when other less costly and time consuming ADR techniques are available. The experiences, however, continue.

In the Western District of Michigan, for example, three lawyers have requested the court to hold a SJT by utilizing three separate juries and

three separate cases. Twenty-nine or thirty plaintiffs, not composing a class, have all sued a manufacturer for permitting toxic substances to get into their well water supply. The lawyers, realizing the possibility of exposure, cannot agree on the values of the cases. None of the plaintiffs have contracted cancer, but given the latency problem associated with cancer, they have based a large part of their claim on the increased risk and increased fear of developing cancer. The lawyers have agreed to submit four cases to two juries sitting at the same time, but deliberating separately. The four plaintiffs are members of the same family and represent both stronger and weaker cases (but thought to be representative of all plaintiffs) for plaintiffs. The lawyers have advised the court that this will establish a range of values sufficient for settlement to occur in all of the cases.

In another court, in the Northern District of Ohio, a similar innovation was attempted when ten separate asbestos cases were submitted to three jury panels. These cases were selected from approximately two hundred suits awaiting trial. Each of the three juries deliberated separately and returned three separate verdicts. Two of the panels returned a verdict for the defendants, and one for the plaintiffs. The two juries who had decided in favor of the defendants were then instructed to go back and make an award for the plaintiffs as if they had decided for the plaintiffs. After the second procedure, the verdicts were so similar that it resulted in settlement of all ten cases. In this latter regard, there is absolutely no reason why an innovative judge, with the consent of the lawyers, could not return any defendant's verdict to the jury for an assessment of damages.

The SJT is so new that it can be properly described as being in its "experimental stages." Until there is empirical evidence to justify or not justify the continuation of any particular method, lawyers and judges will continue with the experimentation, no doubt resulting in additional variation on what has already been tried.

Judge Robert Peckham reported in Kansas City about a new program being tried in the Northern District of California. It is labeled "Early Neutral Evaluation." The judge appoints a lawyer with considerable experience in the field covered by the lawsuit, who is often uncompensated. That lawyer works with the lawyers and their clients in an effort to evaluate the probabilities of a verdict or settlement at a very early stage of the litigation.

The classification process will continue by those judges employing ADR techniques. Of the eighteen judges who gathered in Kansas City, however, no one desired to disengage from his own use of ADR techniques. By contrast, several indicated a desire to try one of the techniques described by the other judges, and by Ms. Provine's thorough paper.

While the classification continues (which cases deserve what treatment, when, and why), the discussion of the value of these processes emerges and is the subject matter of the next section of this Article.

VI. DOES EMPIRICAL EVIDENCE EXIST TO PROVE THAT ADR TECHNIQUES WORK? IF NOT, SHOULD WE CONTINUE?

The search for empirical answers joins the issue and enlarges the debate. ADR, like other movements, was commenced by innovative pioneers seeking new answers to the complex civil docket problems of recent vintage. The new ADR movement only started in the mid-to-late 1970s and gained momentum in the early 1980s. Now the empiricists are questioning whether there is any available evidence that these procedures will assist the process of civil litigation. This, of course, demands an answer to the questions: What are the proponents of ADR attempting to accomplish? Are they attempting to settle apparently unseizable cases? Are they attempting to cull out of the litigation process some kinds of disputes which are better resolved outside of the courtroom? Are they interested in responding to the "litigation explosion?" Is their goal the reduction of costs and time for the litigating public? As this Article has emphasized, these are all appropriate goals to one degree or another.

Whatever the goals, those concerned about the effectiveness of ADR are raising hard questions about traditional adjudication, due process, the disadvantages, and the judges' continued impartiality. These concerns are real and deserve investigation and response. It is necessary, as a starting point, to separate ADR techniques into two broad categories.

On the one hand, we have witnessed in the past ten or fifteen years a new kind of privatization: the private litigation center. These non-court annexed litigation centers are also divided between the costly organizations which provide a service to lawyers and litigants who wish to resolve their dispute outside the courtroom and the cost-free minor dispute mediation centers, now numbering over one hundred fifty in forty states.⁷⁶

The private profit organizations are almost entirely undebated. It is presumed that lawyers and clients who place their money in the private system rather than the court system have made a knowing and monetary choice. These lawyers and litigants apparently seek a faster adjudication than is available in our court system. The only criticism is that important public issues cannot be resolved in this fashion. Only rarely, however, are such issues brought to private adjudication centers.

Proponents of the minor dispute mediation centers (like the ABA multi-door centers in Houston, Washington, D.C., and Tulsa) seek a quick

76. Edelman, *Institutionalizing Dispute Resolution Alternatives*, 9 JUST. SYS. J. 134 (1984).

adjudicative device for minor disputes involving disputants with limited resources. The objectors point out that courts will be limited in their ability to address issues involving minority rights, civil rights, and civil liberties if such disputes are resolved in a private setting.⁷⁷ Judge Edwards, who disapproves of minor dispute mediation centers, expresses alarm that some proponents urge that community resolution of disputes should use community values instead of the rule of law.⁷⁸ This concern is highlighted if private ADR is extended to constitutional or public law issues.⁷⁹ Professor Fiss has also expressed the same concern.⁸⁰ Acknowledging these concerns as being serious and real, it is suggested that as long as the outside decision makers apply clearly defined rules of law, and as long as the articulation of public law remains in the courts, this kind of private dispute resolution can relieve the stress on the courts and reduce the cost to the litigants.⁸¹

The remainder of this Article will be devoted to ADR annexed to the courts for two reasons: first, because the courts have little influence on "private" ADR and, second, because the debate is sharper in the court-annexed ADR process. It is certainly undisputed that one of the goals proponents of court-annexed ADR seek is a less expensive way, both in money and time, to seeing civil litigation to a conclusion. It appears to be generally accepted that nearly ninety percent of all civil cases filed are terminated without adjudication.⁸² Because that figure is fairly accurate, one question is what prevents these cases from settling earlier?

Part of the problem appears to focus on the lawyers and litigants. Lawyers appear to be concerned about initiating settlement discussions because it may be viewed by their opponents as a sign of weakness. Lawyers also tend to become as convinced as their clients about the merits of the case, resulting in the lawyer possessing "wholly unrealistic expectations" about its value.⁸³ Moreover, the settlement process is not only difficult to launch, but it also has pitfalls involving, among other things, uncertain notions about how to negotiate.⁸⁴

As a matter of fact, judges and lawyers often share this same deficiency in not possessing settlement and negotiation expertise. While they are trained in law schools in civil procedure, appellate procedure, and the rules of evidence, there did not exist much in the law school curriculum

77. Edwards, *Alternative Dispute Resolution: Panacea or Anathema*, 99 HARV. L. REV. 668 (1986).

78. *Id.* at 675-76.

79. *Id.* at 676.

80. Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984).

81. Edwards, *supra* note 77, at 680.

82. *Id.* at 670, n. 8.

83. *Id.* at 670.

84. Brazil, *supra* note 68.

that assisted them in developing negotiation abilities. This is more remarkable because ninety percent of the litigations' cases settle. Lately, law schools have begun to cure this deficiency by adding courses to bolster these skills. Nonetheless, adversarial lawyers and adversarial clients, in the main, do not seem to know how to go about negotiating a settlement. Judges have no greater skills, and really do not know what to do in the settlement conference except what they have heard from their colleagues, or believe to have been successful in the past.

Finally, this problem is exacerbated by the fact that the settlements occur so late in the process as not to assist greatly in cost and time reductions. In this respect, the court annexed arbitration programs in the eleven pilot federal districts have the advantage of placing a settlement mechanism before the lawyers and the parties early in the litigation process. Early scheduling of conferences mandated by Rule 16 of the Federal Rules of Civil Procedure, and the utilization by the judge of the early settlement device as the Rule proposes, further expedite the settlement process. The Northern District of California's early neutral evaluation program also seeks to provide the basis for earlier settlements.

To specifically answer the questions raised in the first paragraph of this section, it is essential, however, to further analyze whether court-annexed ADR techniques are functioning properly. The goals generally can be defined in this fashion: (1) to relieve court congestion as well as undue cost and delays; (2) to enhance community involvement in the dispute resolution process; (3) to facilitate access to justice; and (4) to provide more effective dispute resolution.⁸⁵ All four goals are sought in the SJT process. Sections IV and V of this Article described that process and anecdotically pointed out what could be considered "successes" insofar as these goals are concerned.

Judge Richard Posner, in a most intriguing and thoughtful paper delivered at a seminar on this subject at the Yale Law School in October 1985, has questioned the effectiveness of the SJT, and has called for an extensive empirical study of its use.⁸⁶ While expressing confidence that the SJT will increase the likelihood of settlement, he lacks confidence that it will have a "big effect."⁸⁷ He seeks verification and proposes, for empirical purposes, selecting randomly 1,000 federal civil cases, dividing them into groups of 500 cases each, using SJT in all cases in one group and no cases in the other. He would then measure the settlement rates between the two groups.⁸⁸

85. P. GOLDBERG, E. GREEN, AND F. SANDER, *Dispute Resolution* (1985).

86. R. Posner, *The Summary Jury Trial and Other Methods of Alternative Dispute Resolution: Some Cautionary Observations*, 53 U. CHI. L. REV. 366 (1986).

87. *Id.* at 374.

88. *Id.* at 376.

A 2,000-case test of SJTs is virtually impossible, however, given the selectivity with which judges employ this device. This selectivity is appropriate, given Judge Posner's concerns about the cost of the procedure. It is unclear how Judge Posner arrived at the number which appears to be larger than necessary for an adequate test of the effectiveness of SJTs, even under conservative statistical assumptions. Such a study would also be impractical, at least for a single court to perform. A single judge or magistrate would have to try a SJT every single day of the year for four solid years in order to try 1,000 cases.

In his paper, Posner relies in part on data from the Northern District of Ohio (Judge Lambros's district). Using the number of cases terminated over time in that district, or even by a single judge, is a demonstrably unreliable way to assess the efficacy of a procedure that effects no more than a small percentage of total dispositions in a year.

Posner also expresses concern that lawyers may begin withholding some of their best evidence or arguments in a SJT in an effort to surprise the opponent at the real trial, a kind of new "strategizing."⁸⁹ This fear is, at best, unrealistic. As Posner indicates, holding back one's best arguments at SJT is not a rational strategy for a litigator, and in my experience, has not occurred.

Other points which Judge Posner raises in his paper are, however, more difficult to answer. He is concerned about judges using jurors for SJTs without specific authorization and legislation. While there may be no simple answer for this concern, it must be recalled that the SJT has been endorsed at least twice by former Chief Justice Burger. In most jurisdictions employing it, summary jurors and regular petit jurors are kept in separate panels and do not serve both functions. Moreover, exit questionnaires used in Western Michigan, for instance, reveal no juror dissatisfaction after serving as a summary juror. While this may reduce Judge Posner's concern about specific authorization, such concern does warrant congressional attention.

Judge Posner is also critical that misinforming summary jurors about their true function may have a bad impact on jurors and the system. Of course, there are indications that many summary jurors, after the experience, think they might have decided some types of cases differently had they known their verdict was non-binding.⁹⁰ Are we not asking the wrong question, however? The crucial question is not how jurors perceive their own decision process, but how counsel and clients evaluate a summary jury verdict. Perhaps lawyers and their clients would regard a verdict

89. *Id.* at 374.

90. This conclusion is based upon exit questionnaires returned by summary jurors in the Western District of Michigan.

delivered after an appropriately severe (however accurate) judicial instruction as persuasive.

Judge Posner's principal concern about the SJT involves its effectiveness in reducing the cost of litigation. He includes here the cost to the litigants and the cost to the government in providing court services. His suspicion is that the SJT is effective, but not all that effective, in producing settlements. The proposition that the increased number of settlements from SJTs reduces the overall cost of litigation is, in Judge Posner's view, even less likely.⁹¹

It cannot be determined if SJTs actually save litigants and the courts money with the currently available data or data that is likely to be obtained in the near future. Even to be able to speak definitively about the degree to which SJTs actually eliminate cases from the trial calendar appears to be beyond our capacity, given the number of cases that go through the process in a single year.

However, Judge Posner is, of course, correct that we must attempt to answer, empirically, if possible, these hard questions. Many experimental cases will have to be tried before we can determine with confidence how many cases are settled by the SJT. Answering his question of how much money courts and litigants save by avoiding trials seems to pose additional difficulties. Yet, this does not suggest that we should abandon the effort to evaluate SJTs. Instead, we should ask questions about the procedure that demand fewer experiments to answer (or be more patient in seeking answers).

Two alternative approaches can be taken to analyze the effectiveness of the SJT.⁹² One would be to perform a controlled experiment as suggested by Judge Posner; the other would be to survey those knowledgeable about the process, including judges, litigators, and clients. The latter approach is the one followed by the Federal Judicial Center's early study of SJTs.⁹³ This approach is not likely to satisfy a Posnerian skeptic, however. Such a skeptic will assume that the judges who conduct SJTs and the litigants who participate are neither disinterested nor objective.

Can one design an experiment that will satisfy a skeptic that the SJT is effective, but that at the same time, would not demand an impracticably large number of cases? The answer may well be "yes." It might be wise to abandon the demand questions posed by Judge Posner and admit that we are not likely to discover the answer to questions about how many trials are prevented by the SJT, and how much money it saves litigants

91. Posner, *supra* note 86, at 375.

92. Provine, *supra* note 69.

93. Jacobovitch & Moore, *Summary Jury Trials in the Northern District of Ohio Federal Judicial Center* (1982).

and courts. Instead, we could seek an answer to whether designation for SJT enhances prospects for settlement or does not.

Such an experiment would commence with some kind of designation by the assigning trial judge as to which cases are and are not good candidates for summary jury disposition. These designated cases could then be randomly assigned either to the control group or the treatment group. At this point, the litigants whose cases went into the treatment pile would be scheduled for SJT and those in the control group would move toward trial in the usual manner. Cases in both groups would have to be followed to termination. The purpose of such an approach would be to allow one to assess the impact of assignment to SJT and whether that assignment had a favorable impact on settlement, further allowing a determination of whether cases which failed to settle after SJT take less time to try. It would also measure the SJTs' ability to predict trial outcome.

Such an approach is dependent upon several variables: the degree of certainty desired, the proportion of cases which would settle in any event without SJT, and the degree of improvement necessary to pronounce the SJT a success or failure.⁹⁴

Although not satisfying empirical requirements, some data is available from the Northern District of Ohio and from other courts. Additional data is available from the Western District of Michigan. In that District, from January 2, 1982, through December 1985, forty-six SJTs were conducted. Only three of those cases have ultimately gone to trial, but none has resulted in a completed jury trial. (One was a directed verdict, and two switched to bench trials. Six additional cases have neither settled, nor gone to trial. The remaining thirty-seven have settled.)

While awaiting needed empirical data, what should happen to ongoing ADR programs? They should, of course, continue and, in fact, are escalating. Judges and lawyers will learn from experience and from the vast amount of literature just now appearing on this subject. In that latter regard, a very recent issue of a Law Review devoted an entire publication to the cost-reducing aspects of ADR in civil litigation.⁹⁵ In it, the authors carefully analyze the problem of reducing costs and the progress being made by the use of ADR techniques. In one of the presentations, Professor Levin and Ms. Colliers note that judicial response to the cost dilemma includes the successful implementation of ADR techniques.⁹⁶ The court-

94. I am deeply indebted to Ms. Provine, who has returned to her academic duties at Syracuse University, for her recommendations for empirical review which I have adopted here. Such a study is about to commence in our District, thanks to her insight and concern. I am also in debt to United States Magistrate Hugh W. Breneman, Jr., who, with Ms. Provine and myself, has contributed to lively correspondence debates on this subject.

95. *Symposium: Reducing the Costs of Civil Litigation*, 37 RUTGERS L. REV. 217 (1985).

96. Levin & Colliers, *Containing the Cost of Litigation*, 37 RUTGERS L. REV. 219, 240-51 (1985).

annexed arbitration programs were thoroughly analyzed in three federal district courts and adjudged successful in reducing both costs and delay in those courts.⁹⁷

The judges who practice these innovations are, of course, enthusiastic about their contributions to the goals set forth earlier in this section. It must be confessed, however, that judges really have more information about the structure of particular settlement-oriented procedures than they currently do about their impact on civil litigation in its totality. Judges have responded because a response seemed indicated, and have introduced new procedures without always establishing the controls necessary to measure whether changes have occurred in the number and timing of settlements. This means the judgements about effectiveness must be reached informally (such as at the Federal Judicial Center's seminar in Kansas City alluded to earlier). This process, of course, risks premature adoption or rejection of any one innovation.

For judges who want to try the new procedures suggested in this Article, we must again confess that we lack reliable information about the impact of the procedures in the courts which tried them first, and that it is uncertain how transferrable the ideas are. It will be difficult to gauge how successful a procedural transplant will be for four reasons: (1) no innovation stands alone (other characteristics of a court will impact on innovative ideas); (2) details matter; (3) personalities count (personal styles vary widely); and (4) expectations about the conduct of litigation vary from district to district.⁹⁸

As the reader of this Article has by now surmised, the ADR techniques discussed herein are controversial. Many judges and academics remain skeptical about them, questioning whether settlement should not be left to the parties. Moreover, this disagreement is not apt to dissipate in the near future, given the absence of unequivocal evidence that judicial settlement efforts have a dramatic effect on the rate at which cases go to trial and how they settle.

However, efforts in the area of ADR will and should continue, since they are part of a broader trend. This trend is evidenced by the 1983 revisions of the Federal Rules of Civil Procedure; by proposals to increase the scope and power of Rule 68; by the increasing concerns voiced by corporations and insurance companies in attempts to reduce litigation costs by the move "in-house" for legal services; by teaching ADR techniques and conciliation in law schools; and by developing alternative dispute resolution sections in law firms.

97. Lind & Shapard, *Evaluation of Court Annexed Arbitration in Three Federal District Courts*, Federal Judicial Center (1983).

98. Provine, *supra* note 69, at 114-17.

The debate will continue and so will ADR. The technology is addressing the four goals its proponents set. While sometimes lacking hard evidence in the accomplishment of those goals, clients have become more involved in the settlement process; lawyers and judges have become more knowledgeable about what it takes to achieve settlement; some of the techniques (more than others) are, in fact, reducing the delay factors; and others (notably court-annexed arbitration) are reducing costs. The lay community in the SJT process has enhanced its involvement in the dispute resolution process as has the legal community in the arbitration and mediation settings. Furthermore, apart from ADR and the revised Federal Rules, no other proposed alternatives have emerged to address the "effective" improvement of resolving disputes. Because court-annexed strategies preserve the right to trial and leave constitutional and public policy issues to the judge, the danger of public law resolution in non-judicial fora is largely circumvented, and the neutrals, working with the courts, simply seek a better, less expensive, and quicker way to resolve disputes.

VII. CONCLUSION

The National Institute for Dispute Resolution (NIDR), polled a diverse group of public servants, scholars, long-time mediators and arbitrators, and dispute resolution activists seeking predictions of the future of dispute resolution.⁹⁹ The responses were strikingly similar: Courts will continue to experience difficulties in promptly resolving disputes.¹⁰⁰ Increased costs and delays, accompanied by uncertain outcomes, will encourage litigants to seek alternatives.¹⁰¹ As we increase our understanding of dispute resolution techniques, we will come to understand its universal application and will apply them with increasing frequency.¹⁰² Prevention of disputes may occur where, identifying the greater number of disputes, structural and organizational means of prevention are developed and employed.¹⁰³

However, there will not be a massive shift from the courts. People will continue to place their trust in the judiciary to resolve their disputes.¹⁰⁴ In these courts more and more judges will come to utilize alternative settlement devices to assist in reducing costs, delays, and in an effort to deal more effectively with escalating caseloads.

99. NIDR published portions of thirteen responses in its April 1985 issue of FORUM.

100. Robert Coulson, President of the American Arbitration Association in FORUM.

101. John T. Dunlop, Professor of Economics at Harvard and former U.S. Secretary of Labor in FORUM.

102. Theodore W. Kheel, a New York City lawyer in FORUM.

103. Laura Nader, Professor of Anthropology at the University of California at Berkeley in FORUM.

104. Lawrence Susskind, Executive Director of Harvard Law School's Program on Negotiation in FORUM.

Lawyers, judges, and academics have introduced us to a new methodology which, carefully employed, can be of great assistance to the courts and the litigating public, without damaging the rule of law. One must be cautious, however, in the use of any technique which impairs access to the courts, which threatens judicial impartiality, or which removes constitutional or public policy matters from the adjudicatory process. Moreover, one must be mindful to effectively engage judicial resources, litigants' needs, and lawyers' abilities with a watchful eye cast towards practical efficacy and reality.

The "Litigious Society," as Jethro Lieberman would have it, will not wither and pass from view because alternatives to the full litigation process have become available. On the other hand, more effective procedures can short cut discovery excesses, resulting delays, and costs. It can also, perhaps, reduce the frustration levels of lawyer and litigant alike, who cannot seem to bring their disputes to resolution.

APPENDIX A

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN

Plaintiff,

v

File No.

Defendant.

_____ /

ORDER SCHEDULING EVENTS

To insure readiness of this case for Trial, to initiate disposition by settlement, dismissal, or other means, and to facilitate the completion of discovery, IT IS HEREBY ORDERED:

- A. Joinder and/or amendment will be completed by _____ .
- B. The deadline for filing motions is _____ .
The filing of motions *should not* stop the discovery process.
- C. Discovery* is to be completed by _____ .

1. DISCOVERY SHALL proceed regardless of the motions pending before this Court.

2. COUNSEL SHALL FILE A DISCOVERY REPORT within ten (10) days after the date given above for discovery completion. Said report is to be submitted by each party, detailing, by date, the discovery undertaken. It shall further contain dates for conference of counsel at which documentary and physical exhibits are inspected, made available for copying, and marked as trial exhibits and the names of trial witnesses and expert witnesses, if any, disclosed in accordance with Rule 26(b)(4)(A)(i), Federal Rules of Civil Procedure.

3. TIME EXTENSIONS FOR DISCOVERY, joinder or pleading deadlines will rarely be granted unless filed within 60 days of this Order. It is the policy of this Court to deny extensions. Discovery extensions are granted only for good cause shown and the failure to promptly file a discovery motion presumptively negates subsequent assertions of good cause because of delay. All such requests for extension therefore must be made by written motion (See Federal and Local Rules) and may be set for hearing by the Court. All counsel and parties may be required to be personally present at said hearing.

D. This case is set for final pretrial on _____ .

E. Bench/Jury trial in this matter is set for the _____ trial term. A schedule of the week your case will be tried will be forwarded one month prior to trial.

F. Your case will be set for _____ (ADR method).

GENERAL INFORMATION:

*DISCOVERY: Discovery dispute rulings by the Court may result in the imposition of monetary or dismissal sanctions. The following procedure will be observed in resolving discovery disputes:

1. Written motion and brief must be filed with the Court by the moving party. The motion must contain the following:
 - a. specific information requested;
 - b. the date the parties met (by telephone or in person) to resolve the problem(s);
 - c. the result of the meeting;
 - d. short statement of the applicable law.
2. Without waiting for a responsive pleading, the Court will issue an Order for Oral Hearing on the discovery dispute. The Court's Order will describe:
 - a. date and time of the hearing, and;
 - b. due process notice that sanctions may be imposed on the lawyers and/or parties at the hearing.
3. At the hearing, the discovery issue will be resolved and sanctions may be awarded the least culpable discovery disputant(s).

INTERROGATORIES: THIS COURT REQUIRES THAT WRITTEN INTERROGATORIES NOT EXCEED 30 QUESTIONS. Deviations from this rule require the party proposing to ask in excess of 30 questions to seek leave of the Court to do so by: filing a motion; an affidavit setting forth the reasons why additional questions are required; and a complete list of all interrogatory questions proposed.

BRIEF LENGTH: All motions require briefs. Briefs submitted on dispositive motions may not exceed 20 pages (See Local Rule 30, as amended); briefs submitted on non-dispositive motions may not exceed 10 pages (See Local Rule 30, as amended).

IT IS SO ORDERED.

Dated:

RICHARD A. ENSLEN
District Judge

SENT TO:

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGANLocal Court Rule 42
(Mediation)Rule 42. *Mediation*

(a) *Eligible Cases*—The Court may submit to mediation any civil action, or part thereof, not involving claims of constitutional rights.

(b) *Manner of selection of cases*—A case may be selected for mediation:

- (1) By stipulation of the parties with the approval of the Court;
- (2) On motion of a party with notice to opposing party; or
- (3) On the Court's own motion without notice to any party.

(c) *Objection to mediation order on Court's own motion*

(1) Objections must be made by motion for reconsideration within ten (10) days of the date of the Court's order.

(2) Copy of the motion for reconsideration is to be served on opposing counsel and on the Court.

(3) Mediation procedures are stayed pending decision on motion for reconsideration unless otherwise ordered by Court.

(d) *Mediation Panel*

(1) Mediation shall be by a panel of three (3) lawyers who reside in the Western District of Michigan and have at least five (5) years of practice.

(2) The Mediation Clerk shall maintain a list of mediators which shall have a minimum of fifty (50) persons at all times and shall be updated from time to time in order to maintain said number. The Mediation Clerk shall select the attorneys to be included on the list of mediators in a manner directed by the Judges of the Court. Copies of the list of mediators shall be retained by and shall be available at the office of the Mediation Clerk.

(3) When a case has been submitted for mediation, the attorney for the plaintiff and the attorney for the defendant may each select one mediator from the list of mediators. The third mediator, who shall serve as chairman of the panel, shall be chosen by agreement of the respective attorneys. If the attorneys are not able to agree on the third mediator, said third mediator shall be selected by the agreement of the first two mediators chosen; if they fail to agree on the selection of the third mediator, the Mediation Clerk shall select the third mediator; provided, however, that the judge assigned to the case may appoint the third mediator, and such appointee need not be on the list of attorneys and may include a Magistrate of this district.

(4) If a mediator chosen by either party is unable or unwilling to serve on the particular case, then the attorney who selected him shall select another, or as many as is necessary to provide a mediator for the panel. If the third mediator chosen, either by agreement or by the Mediation Clerk, is unable or unwilling to serve, then either the attorneys for the parties or the Mediation

Clerk, respectively, shall select another name from the list until the third mediator is selected.

(5) In cases involving multiple parties, if the attorneys for either plaintiffs or defendants cannot agree among themselves on a particular mediator, then they shall propose one name from the list of mediators, and the Mediation Clerk shall select from those names provided.

(6) In cases involving multiple parties or multiple claims, the Court may order an alternative method of selecting arbitrators.

(7) Selection or designation of all mediators for a given panel shall be completed in accordance with the deadline as stated in the Mediation Order or within thirty (30) days of the order or stipulation submitting the case to mediation. If a party fails to notify the Mediation Clerk in writing of the selection of a mediator by the stated deadline, the Mediation Clerk will designate that party's mediator, and provide written notice to the parties. For good cause shown, a party may seek relief from this provision.

(8) An award may be rendered by any two (2) of the three (3) mediators.

(9) The Mediation Clerk shall be appointed by the Judges of the district.

(e) *Procedure for Mediation*

(1) *Time and place for hearing—notice.* After a case has been assigned for mediation, the Mediation Clerk shall set the time and place for the hearing and send notice to the mediators and opposing counsel at least thirty (30) days before the date set.

(2) *Submission of documents*—At least ten (10) business days before the hearing, all documents on questions of liability and damages shall be submitted to each mediator and opposing counsel, with proof of service to the Mediation Clerk. The documents shall include all medical reports, bills, records, photographs, and any other documents supporting the party's claim, including a summary or brief of factual and legal positions.

Failure to submit the documents or the proof of service within the time designated shall result in costs of sixty (\$60) dollars being assessed, payable by separate checks in the amounts of twenty (\$20) dollars to each of the attorneys on the mediation panel and sent to the Mediation Clerk with the proof of service of the mediation document. If a Judge or Magistrate is a panel member, the fee remains the same; however, the checks shall be made payable in the amount of thirty (\$30) dollars to each of the other two mediators only. The panel shall make no award until it has received this fee. If any mediator shall waive these costs, they shall be paid into the court and treated as recovery of court costs.

(3) *Presence of parties, evidence*—A party has the right, but is not required, to attend or be present at a mediation hearing. When scars, disfigurement or other unusual conditions exist, they may be demonstrated to the mediation panel by a personal appearance; however, no testimony shall be taken or permitted of any party.

(4) *Decision*—Within ten (10) days after the hearing, the mediation panel shall notify in writing each counsel of its evaluation. The evaluation shall include all fees, costs and interest.

(5) *Action on mediation panel's decision*—Written acceptance or rejection

on the mediation panel's evaluation shall be given to the Mediation Clerk within twenty (20) days of the mailing of the evaluation. There shall be no disclosure of a party's acceptance or rejection until expiration of the twenty (20) days or until all parties have responded with an acceptance or rejection. Upon receipt of responses from all parties, the Mediation Clerk shall send a notice indicating each counsel's acceptance or rejection of the evaluation.

(6) *Preparation of Judgment*—If the mediation panel's award is accepted by all parties, the plaintiff shall prepare a judgment, approved as to form by opposing counsel, for entry by the Court.

(f) *Fees*

(1) Within ten (10) days after the mailing of the notice of the mediation hearing, the plaintiff and the defendant shall each send to the Mediation Clerk three (3) checks each in the amount of fifty (\$50) dollars and each payable to a separate attorney on the mediation panel. If a Judge or Magistrate is a panel member, the fee shall remain the same; however, only two (2) checks shall be sent in by each party, each in the amount of seventy-five (\$75) dollars and each made payable to one of the other two mediators. The Mediation Clerk shall mail or deliver the checks to the mediators on the day of the hearing.

(2) Derivative claims (husband/wife, parent/child) shall be treated as one claim.

(3) In the case of multiple injuries to members of a single family, the plaintiffs may elect to treat the case as involving one claim, with the payment of one fee and the rendering of one lump sum award to be accepted or rejected. If no such election is made, a separate fee must be paid for each plaintiff, and the mediation panel will then make separate awards for each claim, which may be individually accepted or rejected.

(4) In the case of multiple parties, except in a case of derivative claims, each party shall pay the sum of one hundred fifty (\$150) dollars for each award. However, in those cases in which an attorney certifies at the time of paying the mediation fee(s) that he/she represents multiple parties without conflict of interest and that there presently exists a substantial unity of interest between said parties on all issues, said parties may pay one fee. The mediation panel may make one lump sum award or separate awards to these parties, or a combination thereof, in its discretion, which shall be accepted or rejected in a lump sum or separately in the same manner as awarded.

(5) For good cause shown, the Court may alter the amount which a party is to pay to a mediator.

(6) Failure to pay the fees within the time designated shall result in additional costs of sixty (\$60) dollars being assessed, payable in the same manner as provided for in Section (3)(2). However, these costs shall be considered cumulative to any costs assessed pursuant to Section (e)(2). If any mediator shall waive these costs they shall be paid into the court and treated as recovery of court costs.

(g) *Hearings*

(1) *Time Limits*—Presentation to a mediation panel shall be limited to thirty (30) minutes a side unless there are multiple parties or unusual circumstances warranting additional time.

(2) Settlement negotiations and insurance—The mediators may request information on the applicable insurance limits and the status of settlement negotiations.

(3) Subsequent proceedings—Statements by counsel and the brief or summary are not admissible in any court or evidentiary proceeding.

(h) *Adjournment of Hearing*

(1) Adjournments of mediation hearing may be had only for good cause shown upon motion to the Court.

(2) When cases are settled or otherwise disposed of before the hearing date, it is the duty of counsel to notify the Mediation Clerk of the disposition of the case immediately.

(3) If notice of the disposition of a case is given to the Mediation Clerk at least ten (10) days before the hearing date, the fees sent to the Mediation Clerk, and payable to the mediators shall be returned. Otherwise, the Mediation Clerk shall forward the checks to the mediators.

(i) Evidence—The rules of evidence do not apply before the mediation panel. Factual information having a bearing on the question of damages must be supported by documentary evidence whenever possible.

(j) *Effect of mediation*

(1) If the mediation panel's evaluation is not rejected by any of the parties within twenty (20) days, a judgment shall be entered by the Court in the amount of the evaluation.

(2) If any party rejects the mediation panel's evaluation, the matter shall proceed to trial as the Court may direct. If the evaluation of the mediation panel is rejected, the Mediation Clerk shall place all mediation documents in a sealed envelope before forwarding them to the Clerk of the Court for filing. The envelope may not be opened in a nonjury case until the trial judge has rendered judgment. The penalty provisions set forth in subdivisions j(3), (4) and (5) of this Rule shall apply.

(3) If the mediation panel's evaluation is unanimous and the defendant accepts the evaluation but the plaintiff rejects it and the matter proceeds to trial, the plaintiff must obtain a verdict in an amount which, when interest on the amount and the costs from the date of filing of the complaint to the date of the evaluation are added, is more than ten (10%) percent greater than the evaluation in order to avoid the payment of actual costs to the defendant.

(4) If the mediation panel's evaluation is unanimous and the plaintiff accepts the evaluation but the defendant rejects it and the matter proceeds to trial, the defendant must obtain a verdict in an amount which, when interest on the amount and costs from the date of filing of the complaint to the date of the evaluation are added, is more than ten (10%) percent less than the evaluation in order to avoid payment of actual costs to the plaintiff.

(5) If the mediation panel's evaluation is unanimous and both parties reject the evaluation and the amount of the verdict, when interest on the amount and costs from the date of filing of the complaint to the date of the evaluation are added, is not more than ten (10%) percent above or below the evaluation, each party is responsible for its own costs from the mediation date. If the verdict is in an amount which, when interest on the amount and costs from the date of

filing of the complaint to the date of the evaluation are added, is more than ten (10%) percent above the evaluation, the defendant shall be taxed actual costs. If the verdict is in an amount which, when interest on the amount and costs from the date of filing of the complaint to the date of the evaluation are added, is more than ten (10%) percent below the evaluation, the plaintiff shall be taxed actual costs.

(6) For good cause shown, the Court may order relief from payment or any or all costs as set out in subsections (j)(3) through (j)(5), above.

(k) *Actual Costs*—Actual costs include those costs and fees taxable in any civil action and attorneys' fees for each day of trial as may be determined by the Court.

(l) *Construction*—The term "Court" as used in this Rule means the Judge to whom the case has been assigned unless the context indicates otherwise. No provision in this Rule shall be construed to confer any right to mediation upon any litigant or to preclude the Court from altering any procedure when appropriate.

(m) *Northern Division*—There shall be no list of mediators maintained for, or Mediation Clerk assigned to, the Northern Division at Marquette. All eligible cases may, however, be selected for mediation pursuant to subdivision (b) of this rule. When a case is so selected, the Court may make orders which it deems necessary concerning, but not limited to, the selection of mediators and the designation of a Mediation Clerk.

(n) *Effect on trial docket*—Selection of a case for mediation has no effect on the normal progress of the case toward trial.

APPENDIX C

CIVIL RULE 43. MANDATORY ARBITRATION

(a) *Scope and Purpose*—This Rule governs the mandatory referral of certain actions to arbitration.

It is the purpose of the Court, through the adoption and implementation of this Rule, to provide an alternative mechanism for the resolution of civil disputes leading to an early disposition of many civil cases with the resultant savings in time and costs to the litigants and to the Court, but without sacrificing the quality of justice to be rendered or the right of the litigants to a full trial *de novo* on demand.

(b) *Table of Contents*—

Subsections:

- (c) Actions subject to this Rule
- (d) Determination of Monetary Claim
- (e) Referral to Arbitration
- (f) Selection and Compensation of Arbitrators

- (g) Discovery
- (h) Hearings
- (i) Award and Judgment
- (j) Trial De Novo
- (k) Pending Cases
- (l) Effective Date
- (m) Relationship to Mediation

(c) *Actions Subject to this Rule*—All civil actions (excluding social security actions and *pro se* civil rights actions) wherein money damages only are being sought in an amount not in excess of \$100,000, exclusive of punitive damages, interest, costs, and attorney fees, shall be subject to this Rule.

(1) *Non-Monetary Relief Claim*—Actions which are subject to this Rule except that they include a claim for non-monetary relief shall be referred to the assigned Judge or Magistrate immediately after the filing of a responsive pleading for determination whether for purposes of this Rule that claim is insubstantial. That determination may be made, in the Court's discretion, *ex parte* or following consultation with the parties.

(2) The parties may consent to arbitration as provided in this Rule with respect to any action not otherwise within its provisions.

(3) The parties may stipulate in writing prior to the hearing that the award of the arbitrator shall be deemed a final determination on the merits and that judgment shall be entered thereon by the Court.

(d) *Determination of Monetary Claim*—

(1) For the purpose of making a determination concerning the dollar amount of unstated or unliquidated claims incident to the application of subsection (c) of this Rule, claims for damages shall be presumed in all cases to be less than \$100,000 exclusive of punitive damages, interest, costs, and attorney fees, unless counsel asserting the claim certifies in writing under oath, consistent with Rule 11 of the Federal Rules of Civil Procedure, before the case is referred by the Clerk for arbitration, the damages recoverable exceed \$100,000 exclusive of punitive damages, costs and attorney fees. Such certification shall include itemization and specification of the components of damage claimed.

(2) Notwithstanding the amount alleged or stated in a party's pleadings relating to liquidated claims, and despite a party's certification concerning the amount recoverable with regard to unliquidated claims, a District Judge or Magistrate may in any appropriate case at any time disregard such allegation or such certificate and require arbitration if satisfied that recoverable damages do not in fact exceed \$100,000 exclusive of punitive damages, interest, costs and attorney fees.

(e) *Referral to Arbitration*—

(1) *Time for Referral*—Every action subject to this Rule shall be referred to arbitration by the Clerk in accordance with the procedures under this Rule twenty (20) days after the filing of the last responsive pleading, except as otherwise provided. If any party notices a motion to dismiss under the provisions of Rule 12(a) and/or (b) of the Federal Rules of Civil Procedure prior to the expiration of the twenty-day period, the motion shall be heard by the assigned Judge

or Magistrate and further proceedings under this Rule will be deferred pending decision on the motion. If the action is not dismissed or otherwise terminated as the result of the decision on the motion, it shall be referred to arbitration twenty (20) days after the filing of the decision.

No Rule 56 motion will be noticed or heard prior to completion of the arbitration process.

(2) *Authority of Assigned Judge*—Notwithstanding any provision of this Rule, every action subject to this Rule shall be assigned to a Judge upon filing in the normal course in accordance with the Court's assignment plan, and the assigned Judge and in his absence, a Magistrate, shall have authority, in his discretion, to conduct status and settlement conferences and in all other respects supervise the action in accordance with these Rules notwithstanding its referral to arbitration.

(3) *Relief from Referral*—At any time prior to the expiration of the twenty-day period following the filing of the last responsive pleading, any party may notice a motion for relief from the operation of this Rule. Such motion shall conform to the requirements of Local Rule 27 and shall be supported by a memorandum and, if appropriate, declarations showing good cause. The assigned Judge, or Magistrate, may, in his discretion, exempt an action from application of this Rule where a party has demonstrated the existence of significant and complex questions of law or fact or other grounds for finding good cause.

Furthermore, any civil action subject to arbitration pursuant to this Rule may be exempt or withdrawn from arbitration by the presiding Judge or Magistrate at any time on his own motion, before or after reference, upon a determination for any reason that the case is not suitable for arbitration.

(f) *Selection and Compensation of Arbitrators*—

(1) *Certification of Arbitrators*—

(i) The Chief Judge shall certify as many arbitrators as determined to be necessary under this Rule, after consultation with the Judges of the Court and the Court's Committee on Alternative Dispute Resolution (Rule 41).

(ii) An individual may be certified to serve as an arbitrator if he or she

(1) has been for at least five years a member of the bar of the State of Michigan; and

(2) is admitted to practice before the U.S. District Court for the Western District of Michigan;

(3) is determined by the Judges to be qualified and competent to perform the duties of an arbitrator.

(iii) Each individual certified as an arbitrator shall take the oath of affirmation prescribed by 28 U.S.C. § 453 before serving as an arbitrator.

(iv) Lists of all persons certified as arbitrators shall be maintained in the office of the Clerk at Grand Rapids, Kalamazoo and Marquette.

(2) *Compensation and Expenses of Arbitrators*—Arbitrators shall be paid a fee of \$250 and shall be reimbursed for expenses reasonably incurred. At the time when the arbitrator files his or her decision, he or she should submit a voucher on the form prescribed by the Clerk for payment by the Administrative

Office of the United States Courts of compensation and reasonable expenses necessarily incurred in the performance of the duties under this Rule. No reimbursement will be made for the cost of office or other space for the hearing. In determining whether actual expenses incurred are reasonable, the arbitrator shall be guided by the prevailing limitations placed upon travel and subsistence expenses of federal judiciary employees in accordance with existing travel regulations. In cases settling within a period of two (2) days prior to a scheduled arbitration hearing, an arbitrator may apply for compensation in the amount of \$50,00 plus expenses reasonably incurred, upon representation that prior to the settlement he or she had been actively studying the documents submitted by the parties.

(3) *Selection of Arbitrator in Case to be Heard—*

(i) *Action by the Clerk—*Whenever an action is referred to Arbitration pursuant to this Rule, the Clerk shall forthwith furnish to each party a list of three arbitrators whose names shall have been drawn at random from the roster of arbitrators maintained in the Clerk's Office.

Provided, however, that the Clerk shall remove from consideration and selection the name of any arbitrator then having five pending cases for arbitration.

In the event that there is more than one party plaintiff and/or defendant, the Clerk shall then submit a number of names or arbitrators equal to the number of parties, plus one.

(ii) *Action by Party or Counsel—*

(1) *One plaintiff and one defendant—*Each side shall be entitled to strike one name from the three names produced by the Clerk. In the event more than one name remains, *viz.* If both parties strike the same name(s), the Clerk shall select the arbitrator at random from the names remaining.

(2) *More than one party plaintiff and/or party defendant—*The Clerk shall have furnished the names of arbitrators equal to the number of parties plus one and each party may strike one name.

In the event more than one name remains, the Clerk shall reduce the number of arbitrators to one as provided for in (ii) (1).

(iii) *Failure to Strike—*In the event that any party or his (her) counsel fails to comply with the provisions of subsection (f) (3) (ii) (1) or (2), the Clerk shall strike a name of an arbitrator for the party failing to do so through the random system.

(iv) *Notification by the Clerk—*The Clerk shall promptly notify the person whose name appears as the choice of the parties of their selection, or, if no choices have been made, the person he has selected. If any person so selected is unable or unwilling to serve, the Clerk shall notify the parties and the process will be followed again as in subsection (f) (3) (i) (ii) (iii) with a new panel.

(v) *Disqualification—*

(1) No person shall serve as an arbitrator in an action in which any of the circumstances specified in 28 U.S.C. §455 exist or may in good faith be believed to exist.

(2) *Withdrawal by Arbitrator—*Any person whose name appears

on the roster maintained in the Clerk's office may ask at any time to have his name removed or, if selected to serve, decline to serve, but remain on the roster.

(g) *Discovery*—Discovery shall be limited to 120 days from and after the last responsive pleading.

Provided, however, that in computation of time for discovery, such time as taken to dispose of motions as set forth in subsection (e) shall not be charged against the 120 days allowable for discovery.

(h) *Hearings*—

(1) *Hearing date*—The Clerk shall set a date for hearing not less than 20 nor more than 45 days after the time allotted for discovery [subsection (g)] and after the arbitrator has been selected under the provisions of subsection (f) (3).

(2) *Continuances*—The date for hearing shall not be continued except for extreme and unanticipated emergencies as established in writing and approved by the Judge (or in the event of his unavailability, by a Magistrate) assigned to the case. Discovery shall have terminated twenty (20) days prior to the hearing.

(3) *Submission of Documents*—At least ten (10) business days prior to the hearing, a summary or brief of factual and legal positions together with copies or photographs of all documents on questions of liability and damages shall be marked for identification and submitted to the arbitrator and opposing counsel, with proof of service to the Clerk of the Court. The documents shall include all medical reports, bills, records, photographs, and any other documents supporting the party's claim. The arbitrator may refuse to receive into evidence any exhibit, a copy or photograph of which has not been delivered to the adverse party, as provided herein. Failure to submit the documents or proof of service within the time designated shall result in costs of sixty dollars (\$60.00) being assessed, payable to the arbitrator and sent to the arbitration clerk with the proof of service of the arbitration documents. If the arbitrator shall waive these costs, they shall be paid into the court and treated as recovery of court costs.

(4) *Presence of Parties*—Each individual who is a party shall attend the hearing in person. Each party which is a corporation, governmental body, or other entity, including an unnamed party, shall be represented at the hearing by an officer or other person with complete settlement authority.

(5) *Conduct of Hearing*—Each party shall be allowed a maximum of 2½ hours for the presentation of its case. The conduct of the hearing and the admission of evidence shall be within the discretion of the arbitrator. It is contemplated that presentations will be made in summary fashion; however, witnesses may testify in person, but the scope of direct and cross-examination shall be within the discretion of the arbitrator. The arbitrator is authorized to administer oaths and affirmations and all testimony shall be given under oath or affirmation.

(6) *Transcript of Recording*—A party may cause a transcript or recording to be made of the proceedings at its expense, but shall, at the request of the opposing party, make a copy available to the party at no charge, unless the parties have otherwise agreed. In the absence of agreement of the parties and except as provided in subsection (j) (2) relating to impeachment, no transcript of the

proceedings shall be admissible in evidence at any subsequent de novo trial of the action.

(7) *Time of Hearing*—Unless the parties agree otherwise, hearings shall be held during normal business hours.

(8) *Place of Hearing*—Hearings shall be held at any location within the Western District of Michigan designated by the arbitrator. Hearings may be held in any courtroom or other room in any federal, state, or county courthouse or office building made available to the arbitrator by the Clerk's Office. When no such room is available, the hearing shall be held at any other suitable location selected by the arbitrator. In making the selection, the arbitrator shall consider the convenience of the parties and the witnesses.

(9) *Authority of Arbitrator*—The arbitrator shall be authorized to make reasonable rules and issue orders necessary for the fair and efficient conduct of the hearing before him.

(10) *Ex Parte Communication*—There shall be no ex parte communication between an arbitrator and any counsel or party on any matter touching the action except for purposes of scheduling or continuing the hearing.

(i) *Award and Judgment*—

(1) *Announcement and Filing of Award*—The arbitrator shall endeavor to announce the award to the parties immediately upon conclusion of the hearing; but in any event shall file the award with the Clerk's office not more than ten days following the close of the hearing. The Clerk shall serve copies on the parties.

(2) *Form of Award*—The award shall state clearly and concisely the name or names of the prevailing party or parties and the party or parties against which it is rendered, and the precise amount of money and other relief if any awarded, including prejudgment interest, costs, fees, and all attorney's fees. It shall be in writing and (unless the parties stipulate otherwise) be signed by the arbitrator.

(3) *Entry of Judgment on Award and Time for Demand for Trial De Novo*—Promptly upon the filing of the award(s) with the Clerk, the Clerk shall enter judgment thereon in accordance with Rule 58, Federal Rules of Civil Procedure. Unless a party files and serves a written demand for a trial de novo within thirty (30) days of the entry of judgment on the award, the judgment shall have the same force or effect as any judgment of the Court in a civil action, except that no appeal shall lie from such a judgment (any notice of appeal shall be treated as a demand for a trial de novo).

(4) *Sealing of Results*—The contents of the award and judgment shall not be made known to the judge assigned to the case until the district court action is ultimately terminated. If a trial *de novo* is demanded, the arbitration clerk shall place all arbitration documents in a sealed envelope before forwarding them to the Clerk of the Court for filing.

(j) *Trial De Novo*—

(1) *Acceptance or Rejection of Award*—

(i) Each party has the option of accepting all of the arbitrator's awards covering the claims by or against the party or of accepting some and

rejecting others. However, as to an award on any particular opposing party, the party must either accept or reject the award in its entirety.

(ii) A party who accepts all of the awards may specifically indicate that he or she intends the acceptance to be effective only if all opposing parties accept. If this limitation is not included in the acceptance, an accepting party is deemed to have agreed to entry of judgment on those awards as to which all opposing parties accept, with the action to continue on the remaining outstanding claims between the accepting party and those opposing parties who reject.

(iii) If a party makes a limited acceptance under subparagraph (j)(1)(ii) and some of the opposing parties accept and others reject, for the purposes of the cost provisions of subparagraph (j) the party is deemed to have rejected as to those opposing parties who accept.

(iv) If any demand for a trial de novo is made as provided for in subparagraph (i)(3), the judgment entered thereon, or any portion of it pertaining to an award(s) which has been rejected, shall immediately be vacated by the Clerk and the action, or the portion thereof pertaining to the rejected award(s), shall proceed in the normal manner before the assigned Judge.

(2) *Limitation on Evidence*—At a trial de novo, unless the parties have otherwise stipulated, no evidence of or concerning the arbitration may be received into evidence, except that statements made by a witness at the arbitration hearing may be used for impeachment only.

(3) *Arbitrator's Costs*—The party requesting a trial de novo will deposit the cost of the arbitrator's services prior to trial de novo and if he fails to obtain judgment in an amount which, exclusive of interest and costs is more favorable to that party, such funds so paid will be retained by the Clerk. If he is successful in obtaining a more favorable result, he shall be reimbursed such prepaid costs.

(4) *Opposing Party's Costs*—

(i) If a party has rejected an award and the action proceeds to trial, that party must pay the opposing party's actual costs unless the verdict is more favorable to the rejecting party than the arbitrator's award on that claim. However, if the opposing party has also rejected that award, a party is entitled to costs only if the verdict is more favorable to that party than the arbitrator's award.

(ii) For the purpose of subparagraph (j)(4)(i), a verdict must be adjusted by adding to its costs and interests on the amount of the verdict from the filing of the complaint to the date of the arbitrator's award. After this adjustment, the verdict is considered more favorable to a defendant if it is more than 10 percent below the award, and is considered more favorable to the plaintiff if it is more than 10 percent above the award.

(iii) Actual costs include those costs and fees taxable in any civil action and attorneys' fees for each day of trial as may be determined by the Court.

(iv) For good cause shown, the Court may order relief from payment of any or all costs as set out in subparagraphs (j)(3) and (j)(4)(i) and (4)(ii).

(v) The provisions of paragraph (4)(i), (ii) and (iii) shall not apply to claims to which the United States or one of its agencies is a party.

(k) *Cases in Process*—Notwithstanding the provisions of the rules set forth above, each District Judge shall select cases from his docket currently in process and notify counsel involved of his intention to place such case on the arbitration track.

A case will qualify for resort to arbitration if it complies with the provisions of this Rule.

Provided, however, that no case notwithstanding such selection for arbitration shall be set for arbitration hearing without providing thirty (30) days for additional discovery unless the parties have been previously advised by either a scheduling or pretrial order that the case shall be ready for trial prior to the expiration of such 30-day period.

(l) *Effective Date*—The effective date of this Rule for the Southern Division of this District shall be _____, except for those cases deemed ready for arbitration on or before that date and preselected by the District Judges for arbitration.

(m) *Relationship to Mediation and Summary Jury Trials*—In the adoption of Rule 43, the Court does not intend to abolish Rule 42 or 44. All cases that meet the eligibility requirements of Rule 42 or 44 qualifying for mediation, summary jury trial or mini-trial will continue to be so qualified by the Court.

Provided, however, any party who has been subject to Rule 43 process may not be required to forego his right to trial de novo under the provisions of subsection (j).