

1-1-1989

Alternative dispute resolution: opportunities

Daniel A. Noonan

Follow this and additional works at: <https://digitalcommons.stritch.edu/etd>



Part of the [Business Commons](#)

Recommended Citation

Noonan, Daniel A., "Alternative dispute resolution: opportunities" (1989). *Master's Theses, Capstones, and Projects*. 1060.
<https://digitalcommons.stritch.edu/etd/1060>

This Applied Management Decision Report (AMDR) is brought to you for free and open access by Stritch Shares. It has been accepted for inclusion in Master's Theses, Capstones, and Projects by an authorized administrator of Stritch Shares. For more information, please contact smbagley@stritch.edu.

ALTERNATIVE DISPUTE RESOLUTION: OPPORTUNITIES

By

Daniel A. Noonan

An Applied Management

Decision Report

submitted in partial fulfillment

of the requirements for the degree of


Master of Business Administration

Cardinal Stritch College

December 1989


APPROVAL PAGE

This committee has approved the Applied Management Decision Project of Daniel A. Noonan



Cary Silverstein, Research Advisor

12/24/89
Date



Mark Fenster, Second Reader

12/15/89
Date

TABLE OF CONTENTS

	Page
ABSTRACT	v
ACKNOWLEDGMENT	vi
1. DESCRIPTION OF NATIONAL AND LOCAL ALTERNATIVE DISPUTE RESOLUTION TECHNIQUES AND SERVICES	1
Example Case	2
ADR's Fundamental Offering	4
A Business Executive's Perspective	5
Dispute Resolution Processes and Techniques	10
Mediation: The Sleeping Giant of ADR	14
The Joint Session	18
The Caucus	18
The Role of the Mediator	19

2. LITIGATION COSTS	22
ADR: A Cost Saver	24
Criticism	25
Growth Industry	27
3. OPPORTUNITY STATEMENT	30
4. ANALYSIS AND POSSIBLE SOLUTIONS	31
Financial Performance	33
5. CONCLUSION	36
BIBLIOGRAPHY	37
APPENDIX A USA BROCHURE	39
APPENDIX B NEWSLETTER	41
APPENDIX C FINANCIAL STATEMENTS	43
APPENDIX D PROJECTED OPERATING STATEMENT	46

ABSTRACT

Approximately one year ago, the researcher became affiliated with United States Arbitration and Mediation, a nationwide network of attorneys and retired judges offering primarily mediation services for insurance and business litigants. United States Arbitration and Mediation of Wisconsin, Inc. (USA) is the local officeholder providing such services within the state of Wisconsin. The researcher is the sole owner of this entity. Currently, our local panel of mediators includes two judges and five attorneys providing primarily mediation services to insurance litigants. Some of the insurance companies currently referring cases are Allstate, American Family, Travelers, Liberty Mutual, John Deere and The Hartford. This service business is a part-time endeavor for both the researcher as an adjunct to a small law firm and the outside independent panel of mediators. Presently, USA's function is to provide the business administration of this service. The issue is whether or not this business can survive independent from this writer's law firm. Currently, U.S.A. of Wisconsin, Inc. uses offices machines, equipment and space provided by the law firm.

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

-Abraham Lincoln

DESCRIPTION OF NATIONAL AND LOCAL ALTERNATIVE DISPUTE RESOLUTION TECHNIQUES AND SERVICES

Alternative Dispute Resolution (ADR) are words currently in use to describe a number of techniques such as arbitration, mini-trials and mediation which involve the use of third parties to help litigants or disputants resolve their differences outside the formal judicial system. Throughout the country, there is a growing perception that the court system is not well-suited for every dispute. People are recognizing that the delays, complexity, and expense of litigation often make "justice" difficult if not impossible. This recognition has created a climate in which potential and real users have sought alternatives to the court system. This national movement has received the highest levels of support from our courts, bar associations and major United States corporations. Chief Justice Warren E. Burger stated (Burger, 1982, p.2):

The obligation of our profession is, or has long been thought to be, to serve as healers of human conflicts. To fulfill our traditional obligation meant that we should provide mechanisms that can produce an acceptable result in the shortest possible time, with the least possible expense and with a minimum of stress on the participants. That is what justice is all about.

The law is a tool, not an end in itself. Like any tool, particular judicial mechanisms, procedures, or rules can become obsolete. Just as the carpenter's handsaw was replaced by the power saw and his hammer was replaced by the stapler, we should be alert to the need for better tools to serve our purposes.

Many thoughtful people, within and outside our profession, question whether that is being done today.

They ask whether our profession is fulfilling its historical and traditional obligation of being healers of human conflicts.

Today, I address the administration of justice in civil matters, which shares with criminal justice both delay and lack of finality. Even when an acceptable result is finally achieved in a civil case, that result is often drained of much of its value because of the time-lapse, the expense and the emotional stress inescapable in the litigation process.

Abraham Lincoln once said: "Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a real loser -- in fees, expenses, and waste of time." In the same vein, Judge Learned Hand commented: "I must say that, as a litigant, I should dread a lawsuit beyond almost anything else short of sickness and of death."

I was trained, as many of you were, with that generation of lawyers taught that the best service a lawyer could render a client was to keep away from the courts. Obviously that generalization needs qualifying, for often the courts are the only avenue to justice. In our search for "better ways", we must never forget that.

Example Case

In a major dispute between NASA, Spacecom, and TRW over technical issues in a construction contract that threatened to delay the launch of an important component of the space shuttle program, the executives were concerned that during the previous year, their lawyers had spent an estimated one million (\$1,000,000.00) dollars in discovery and depositions and the lawsuit would have cost at least another million in addition to the costs related to a launch delay. Then one

of the lawyers suggested a simple alternative to court: a minitrial. . . . rather than go to court, the parties would lay the case before their own managers, and advance their best arguments within the space of a single day. The managers would then know the strengths of their opponent's case and the weaknesses of their own and be motivated to settle, and settle quickly.

In February 1982, lawyers for NASA, Spacecom, and TRW sat down to present their case before four people: the director of the Goddard Space Flight Center, NASA's associate administrator for tracking and data systems, Spacecom's president, and a divisional vice-president of TRW. They listened for five hours and met the next day. Within a week they resolved not only the primary dispute, but also several other matters pending before a NASA appeals board. (Henry and Lieberman 1985, p. 7).

This speedy, inexpensive settlement of a fractious, costly lawsuit was neither a miracle nor an aberration. It was an example of alternative dispute resolution (ADR), a movement characterized as a "quiet revolution" in the way corporations and other institutions are learning to settle disputes without resort to the courtroom.

The fundamental lesson of the NASA-TRW settlement is that practical, businesslike methods exist for managers to resolve disputes quickly, effectively, and economically. These methods will work for any manager who is willing to pitch in and become directly involved in the dispute resolution process. The manager who

takes charge and maintains control of corporate disputes will discover that it is possible to reduce the large expenses and the days, weeks, or months of precious executive time eaten up by lawsuits.

ADR'S Fundamental Offering

ADR's fundamental offering is unique but simple: the business manager or executive should take charge of disputes and play a substantial role in planning, bargaining and carrying out a settlement strategy. Routinely referring disputes to the legal department or an outside lawyer is insufficient and may be an abdication of management's role of controlling the business enterprise. Management should use their business skills and the art of negotiation.

ADR is quite new in this country. It first received attention in the late 1970's and became more widely known in the 1980's. But many of the techniques used are very old. The Pacific basin countries, such as Japan have practiced "conciliation" for centuries. Most lawsuits, perhaps as high as 90% are settled without a trial anyway. So what we are really discussing is coming up with alternatives that accelerate the settlement process, thereby saving the company's business opportunities and avoiding the costs of discovery and litigation.

A Business Executive's Perspective

Often a business executive will and should question outside counsel about the pressures to litigate rather than settle cases and suggest ways that together they might change that pattern. In a CEO's letter to counsel contained in a Harvard Business Review article, the author points out (Fisher 1985, p.3-44):

Little work on settlement

It's fair to say, I believe, that although most lawsuits get settled, your time is still largely devoted to the alternative means of resolving differences, namely litigation. Our judgment on whether to settle or litigate may suffer from the disproportionate amount of time that you spend on the litigation option. Together we spend a great deal of time trying to prove the worst case about our adversary's past conduct but little time trying to structure a future arrangement that would be to our mutual advantage.

You develop a litigation strategy but no settlement strategy. You think at length about the best questions to ask during cross-examination but you rarely devise the best questions to ask in negotiating a settlement. You have a clear idea of the most we should ask for in damages but you have little notion of the least we should accept in settlement. You formulate clear arguments for why, when we are the defendant, we owe nothing, but you arrive at no clear figure for the maximum amount we should be prepared to pay in settlement.

We corporate clients are probably even worse when it comes to thinking about settlement. Once we have given a case to outside counsel, we are likely to see it as "their problem."

Can We Change Our Practice?

These diagnoses point to some remedies that we should explore.

Foster a new working assumption

Could we introduce into your way of doing business and ours the premise that it is in the interest of all parties to settle every case promptly and fairly? Litigation should be a last resort: it is better than dueling but much more expensive. As soon as you could prepare yourselves to do so, you might initiate settlement talks with the other side - not because your case is weak but because your client has given you standing instructions to that effect.

Nor should you postpone settlement talks until you have gathered all possible evidence and removed all possible uncertainties. Even with the best of discovery, litigation is always uncertain. Gathering data may well not be worth either the cost or the time. Furthermore, uncertainty may promote settlement. Depending on the parties' aversion to risk, a modest and quick payment to resolve a dispute in which neither side has invested much may be an ideal outcome for both. Like an insurance premium, it may be a small price to pay to avoid uncertainty. And when we are the plaintiff, particularly when we are business people whose time is probably best spent in other ways, a bird in the hand may be worth quite a few in the bush.

Presumably, if we clients make our wishes clear, you lawyers can pursue our interests in settlement with all the zeal that you now devote to litigation. What general guidance could we propose, what working assumptions might be most useful, to switch outside counsel's pattern of behavior away from litigation and toward the prompt settlement of disputes?

An advocate for settlement?

To improve the quality of judicial decisions, you lawyers rely on the adversary process. You have

convinced yourselves - and most of us - that it is difficult for a judge to decide wisely without hearing both sides. The chance of the judge's reaching a sound decision is enhanced by having different people present the cases for different courses of action.

Because we end up litigating more often than we should, I fear that as a client I am making poor decisions. Perhaps I, like a judge, would benefit from the adversary process. Perhaps we, as a corporation, would reach wiser decisions if we had one lawyer develop the case for litigation and a different lawyer press on us the case for settlement. Wouldn't that be a logical application of the adversary process to which you are so deeply committed?

There seems no feasible way to avoid emotional involvement, partisan bias, and the natural desire to pass the buck. If we have to live with these risks, shouldn't we create a countervailing force that will give us the opposing case clearly and persuasively? If a judge needs opposing advocates to produce a good decision, perhaps we too would benefit from having an advocate for settlement to oppose those counsel who advise to litigate.

Overcoming the financial disincentive

I would welcome your suggestions for how we might overcome the financial disincentive to settle.

I know of at least one law firm that will quote a fixed fee for handling a case all the way through litigation or until a settlement satisfactory to the client has been produced. If the law firm is of high quality and has a wide base of experience on which to quote the fixed fee, I can see great advantages in this approach. The law firm has an incentive to use its time efficiently and, if possible, to produce a quick settlement satisfactory to the client. (To be sure, because the firm has little incentive to obtain a settlement better than the minimum the client is willing to accept, a client in such a situation has to be on guard). . . .

How about awarding a contingent bonus for any lawyer in the office who is able to settle a case to the client's satisfaction against the recommendation of the litigation department? (Such a bonus could come from

funds that otherwise would be divided among partners in the litigation department.) Alternatively, maybe we should pay your firm some kind of contingent fee for developing a settlement proposal and convincing both sides that the settlement is preferable to litigation.

Can you think of some way to reduce the pressure on associates in your firm to maximize the billable hours they devote to a big case? It is easier to compare the number of hours that two associates have worked in a year than to compare the quality of their work on different cases for different partners. There must be a risk - in other firms if not in yours - that you will reward associates for spending more time rather than less in accomplishing a given task. I am sure you can tell your best young lawyers from your worst, but on the margin, how do you avoid rewarding inefficiency?

We may want to get some expert consultant in to advise us on how we might best line up the personal financial incentives with the interests the lawyers' work is intended to serve. Perhaps we should look more seriously at other incentives such as prestige or publicity for settling cases, extra vacation time, a bigger office, more assistants, or whatever. Your thinking about this will, I am sure, be helpful.

A two-track approach

It is probably impossible - as well as undesirable - for lawyers to abandon the role of knight in shining armor. But how about creating a second and parallel role for lawyers: the problem solver, the mediator, the conciliator? (emphasis supplied) In our effort to reap the benefits of the adversary process, I propose that for every major case we have one lawyer pursue litigation and another (who might well be a member of your litigation department) explore and develop, at the earliest possible date, the best settlement option obtainable. This "advocate for settlement" would be expected to press on us the reasons for accepting a settlement (or making an offer) and would provide a counterweight to the litigator's partisan bias by pointing out weaknesses in our litigation position.

Just as lawyers are capable of arguing either side of a given case, obviously many are fully capable of

litigating a case and negotiating a settlement of it. But this does not mean that they should try to do both at the same time. The psychological orientation of a general engaged in battle is quite different from that of a diplomat engaged in peace negotiations. While a soldier should have little concern for suffering on the other side, a negotiator should empathetically appreciate an adversary's interests. The soldier-lawyer looks back at the causes of the dispute and seeks to demonstrate and vindicate the wrongs committed, the diplomat-lawyer looks forward to the opportunities for reconciling differences.

You may respond to this suggestion by pointing out that having two teams work on the same case would tend to increase rather than reduce legal fees. For the time being at least, I am prepared to take that gamble. My specialist in settlement might well be one of those doing research on the case and helping others prepare it for litigation. I do not propose erecting a Chinese Wall between litigators and settlers. But I do think we would be well served if your firm had specialists in negotiation and settlement - perhaps people with experience as mediators and business negotiators - who were devoting their energies to trying to settle our disputes quickly, wisely, and amicably.

This two-track approach should benefit both the litigator and the settler. The litigator would be under no pressure to pull his punches for fear that an unduly adversarial approach might damage the chances of settlement. And the harder the litigator pursued that option, the more it would strengthen the hand of the lawyer working toward settlement. It would be a classic Mutt and Jeff - good cop, bad cop-approach, but with no deception of any kind.

Of course, both lawyers would not have to be in the same firm. I have thought that if we retain your firm to handle litigation we might develop within the office of our in-house counsel some experts in settlement.

Another alternative, which some companies have adopted and which I would like to consider, would be to hire an outside expert in settlement to work in parallel with your firm's work on the litigation front. There are negotiation experts who might be hired either to mediate (if the other side were interested) or simply to generate a settlement of interest to both sides. Such an expert

might have full authority to negotiate on the understanding that no settlement would be binding until the corporation had approved. Before giving such approval we would, of course, expect to hear from litigation counsel.

Once someone is in charge of settlement, it is important to develop a settlement strategy and quantify in dollars the value of litigating vs. settlement. Increasingly executives are opting for and Alternative Dispute Resolution technique.

Dispute Resolution Processes and Techniques

The following has been excerpted from the American Bar Association's ADR primer (Sander 1987, p.2), Riskin, "Dispute Resolution and Lawyers" (Riskin 1987, p.2-6), and added commentary by this writer:

A. Adjudicative - Imposed decision

Adjudicative processes are characterized by distributive results, sometimes called "zero sum" in the sense that a gain to one side is typically a loss to the other. Adjudicative processes are also characteristically based on response to, or selection of, a dispositive position or issue of a party appearing before a tribunal in an adversarial presentation. The focus is toward decision making and opinion giving not negotiation,

- 1) Adjudication -- A third party, such as a judge, is vested with power (i.e., distinguish adversarial positions of the parties and impose a solution (i.e. judgment) affecting their rights and responsibilities. Civil litigation is the most common example, however administrative tribunals also apply.
- 2) Arbitration -- Borrowing heavily from court-oriented dispute resolution, an arbitrator or arbitration panel hears evidence and renders awards and/or decisions enforceable in courts of general jurisdiction. Statutorily empowered in most states and at the federal level, arbitration in less formal, may be quicker

and less expensive than typical litigation, and usually offers certainty short of appeal. Entry into arbitration is usually voluntary unless a pre-existing contractual obligation requires the parties to submit to it. Such contractual obligations have been held to be valid by the U.S. Supreme Court (*Shearson Lehman/American Express v. McMahon*, 1987).

- 3) Private Judging -- Known in the vernacular as "rent-a-judge," a private tribunal may hear a matter like an elected or appointed judge. Where employed, these procedures may be sanctioned by statute and the private judge's decision is entered on the docket of the court as judgment as if the case had been heard by a judge of the court.

B. Consensual - Voluntary Agreement

Consensual processes are characterized by integrative results, often hailed as seeking a "win-win" solution by which all parties may successfully resolve a dispute to mutual satisfaction, if not gain. Interests, rather than positions, predominate. Consensual implies voluntariness and, typically, voluntary adherence to the solution the parties reach. Unless reduced to writing and agreed to be subject to enforcement as a contract, results are nonbinding.

- 1) Ombudsman -- An official is appointed to gather facts and recommend solutions concerning a dispute. Usually, an ombudsman is associated with an institution or organization to facilitate resolution of complaints lodged against it.
- 2) Factfinding -- A neutral party reviews a situation and ascertains facts pertinent to it. Factfinding may be used to facilitate all forms of dispute resolution, whether adjudicative or consensual. Factfinding is different from the appointment of a special master or statutory referee, which more closely approximates the typical adjudicative process from which it depends. The outcome is nonbinding but the results may be admissible in court. This process is useful in resolving complex scientific or technical cases, where the use of a neutral expert will promote fast and fair settlement without strategic posturing that sometimes characterizes the litigation process.
- 3) Negotiation -- Consensual negotiations should be distinguished from settlement negotiations. Consensual negotiations usually involve face-to-face discussions between the parties and/or their attorneys with a view to accommodation on grounds of a dispute. This is often a legal issue.

- 4) Mediation -- is usually a private, voluntary, informal process where a party-selected neutral assists disputants to reach a mutually acceptable agreement. In some jurisdictions (e.g., child custody disputes in Wisconsin) parties are now required to attempt mediation before they can go to court. During the mediation there is a wide opportunity to present evidence and arguments and to explore the interests of the parties.

There are three basic types of mediation:

Rights-based mediation is most familiar to the trial lawyer. The lawyer may be involved either as the non-partisan neutral or as a partisan representative. The goal is to settle the dispute with attention to the identified legal rights of the parties. Often called risk analysis, the strengths and weaknesses of each side are discussed with a view toward possible outcomes.

Interest-based mediation is more freewheeling with less attention given to the individual rights of each party, but with a focus on the interest or compelling issue of the dispute. This is often a nonlegal issue.

Therapeutic mediation focuses more on the problem-solving skills of the parties involved. The mediator may emphasize the emotional dimensions of the dispute. Often, the parties discuss ways of handling similar conflicts in the future.

Within each of these types, a variety of styles of practice exist. For example, some mediators prefer to meet with parties in separate sessions or "caucuses." This is sometimes referred to as "shuttle mediation."

A mediator's style depends upon the nature of the conflict, its setting, the experience and resources of the disputants, and the background and training of the mediator.

- 5) Conciliation -- Conciliation is a mediation conducted by a passive neutral. An example of conciliation is the shuttle approach to negotiation in which a third party bears information back and forth between parties (e.g., an intermediary). Once the neutral takes a proactive role, the process becomes mediation.

C. Mixed:

Mixed processes, as aptly described, take on aspects of both binding and nonbinding processes.

- 1) Med-Arb -- Mediation between the parties is initiated with a view toward achieving an integrative solution. Failing that, the process converts to an arbitration to obtain a distributive result. An important, yet often ignored or discounted, element in med-arb processes is the bifurcation of functions; the mediator should not simply change hats, a different individual should be selected to serve as arbitrator.
- 2) Mini-Trial -- Mini-trials are sometimes dubbed "structured settlement negotiations" since they utilize a fairly formal format in which mediation is based on adversarial presentation of fact. Mini-trials customarily employ a three member panel, one decision maker from each side of the dispute and one neutral, who hear "evidence" and argument. The decision makers retire to negotiate a resolution which may, if impasse occurs, be mediated by the neutral. Mini-trial procedures are established by contract which governs the process, appointment of the neutral, the effect of a negotiated solution, costs and other relevant matters.
- 3) Summary Jury Trial -- A summary jury trial is a court-annexed technique to foster settlement once a matter is mostly or completely through pretrial. An advisory jury usually six from the regular list is impaneled by the court to hear attorneys for each side argue their respective cases. Usually there are no witnesses; presentation takes on the character of closing arguments with offers of proof as though testimony had been taken. The jury returns an advisory "verdict" based on the summary presentation, typically the same day. Summary jury trial is generally used as a predictive tool, to dispel unrealistic expectations prior to a lengthy trial.
- 4) Conditional Summary Trial -- Conditional summary trials are an amalgamation of mini-trial and summary jury trial techniques. A conditional summary trial is best described as a mini-trial in which the role of "neutral" is played by the judge or a magistrate. In an interesting variation, inability of the parties to reach a settlement is followed by submission of acceptable settlement terms by each to the judge, who picks one or the other as better representative of where he views the case to be going. This is treated as an offer of judgment.

Mediation: The Sleeping Giant of ADR

"In the long run, it is likely that mediation - a process so far used mainly in labor disputes and domestic relations cases - will be recognized as the sleeping giant of ADR." (Henry & Lieberman 1985, p.3) While mediation has been used in many cultures to resolve problems for hundreds of years, it has not been a part of the Western legal system until this century. Mediation was first introduced in this country in the 1920's to resolve the serious labor-management problems of that time. The Federal Mediation and Conciliation Service was the first American agency to officially use this process, and the FMCS is still a leader in the field. To this day, the largest and most complex cases to be resolved through mediation have been in the labor field.

Since the 1960's, and particularly in the last ten years, the techniques of mediation have been used with increasing frequency in the area of family law. The legal profession pioneered the use of mediation in divorce disputes, and that field now boasts several thousand attorney and non-attorney practitioners around the country. Mediation is becoming standard procedure in many family courts including Wisconsin, which recently passed legislation requiring at least a first mediation session before litigating a custody or visitation dispute (Wisconsin Statutes. §767.11(5). 1988)

In the late 1970's, mediation began to be used as a settlement tool in a wide variety of matters including landlord/tenant disputes, merchant/consumer

problems, real estate conflicts, corporate and partnership disputes, and employer/employee grievances. Many cities now boast dispute resolution centers, where community problems are resolved by volunteer mediators quickly and locally.

By definition, mediation is an extension of the negotiation process. In mediation, the two or more parties to a dispute begin or continue talking with each other in a way to facilitate settlement. This is done with the help of a neutral third party, the "mediator". As an example, if a husband and wife are divorcing and have worked out a property settlement but are still at loggerheads over custody, a mediator will help them to continue to work together to come up with a solution to the remaining problem. On the other hand, if for some reason the parties are unable to begin negotiating at all, a mediator can be called in to get them talking. Then the mediator will work with them to negotiate a solution to their disagreement.

A mediator is neither a judge nor a counsellor. He or she will not tell the disputants what they should do, nor will he/she make a decision for the parties in matters left undecided. Rather, the mediator will work with the parties together and separately to come up with their own ideas for a solution. The mediator will encourage the parties to vent their feelings and concerns, will work with them to develop options, and will reality-test these possibilities and hear the interests of the other side.

The final agreement is solely in the hands of the parties. Both attendance and settlement are purely voluntary in mediation. The mediator will

work hard to insure that both parties state all their concerns and doubts, because the parties' full participation in the process is the most important tool a mediator has to help them reach an agreement. This same participation is the best insurance that the agreement will be kept.

Because the parties themselves decide the outcome, mediation is a cooperative process. There is no judge to determine who is at fault, who is winner or loser. At worst there will be a stalemate. Because the disputants are still negotiating and can look at creative solutions, they may reach an outcome that is good for both of them. This is known as win-win or positive sum solutions in the popular vocabulary. There are no formal rules of evidence in a mediation, and therefore the parties can talk about their concerns and feelings in a candid and problem-solving manner. Though the disputants may go into a mediation session quite angry with each other and unable to see a positive outcome, still the process is cooperative. Quite often participating in mediation will put the disputants in that frame of mind as well.

One way that mediation differs from adjudication is that in mediation the process is cooperative and the parties themselves decide the outcome (which may not be to settle at all). In any kind of formal adjudication the judge or arbitrator makes a final, legally-binding decision.

A second way that mediation differs from adjudication is that the focus of mediation is on problem-solving for the issues at hand. Therefore, the

parties can come up with any solution that seem reasonable to them. As an example, in a recent Wisconsin case, a family run business found itself in a hostile dispute between a minority shareholder older brother and the majority shareholder(s) sister and younger brother whereby the majority wanted the "nuisance" and "trouble making" older brother squeezed out of the business. After two days of mediating, this researcher's organization, USA, facilitated a multi-million dollar buyout. Such a resolution would not have been available in court.

Before describing a typical mediation session, it is important to note that a preliminary question each mediator will ask is "who are the primary stakeholders to this dispute?". This is not dissimilar to an attorney asking who should be the parties to a lawsuit. In a process preceding mediation called "conciliation", the mediator will usually talk to the people involved in the conflict. In conciliation, the mediator will determine just who has an interest strong enough to require them to be at the bargaining table. During this time, the mediator will also encourage the parties to begin or continue negotiating if possible, explain the nature of mediation, determine the issues in the dispute, and address any concerns the parties may have. A surprising number of disputes are actually resolved at the conciliation stage.

What actually happens in a mediation session? Attorneys will recognize that just as there are many ways to pursue a lawsuit, there are also many different formats in which mediation can occur. And, just as in a lawsuit there is a

basic generic pattern, so too in a mediation is there one format that is used most commonly.

The Joint Session

At the beginning of a mediation session the mediator will introduce all those attending, and re-affirm the parties' agreement to participate. This is called the joint session. The mediator will again explain the process, describe the flow of mediation, and lay the ground rules. Then, one party will have uninterrupted time to explain his or her position. This will often involve emotional venting, expressions of doubt as to the good faith of the other party, and any facts that tend to prove their side. It will also include a discussion of what that party wants. At the end of this uninterrupted time, the mediator may ask questions to clarify any matters and paraphrase the first party's points. Then the second party will have uninterrupted time to respond, to vent, and to explain their problems and wants. The mediator will allow each party to talk as long as necessary to tell their story. At the end of this time, the mediator will clarify the second party's position. Often the participants will speak to each other at this time and begin problem-solving.

The Caucus

The next stage of this generic mediation session is called a caucus. In a caucus, the mediator will meet with one party alone, and then with the second party alone. What each side tells the mediator during this period is confidential

between the mediator and the disputant. It is not related to the other party without the disclosing party's consent. Many mediators are amazed at the amount of movement towards settlement that occurs in caucus. This is a time when an employee will say "it's true that I came to work late frequently" and an employer will say "I may have judged this staff person more harshly than others". People will often confide in the mediator their responsibility in a situation, and begin talking about what they feel is a reasonable settlement. Often, the parties will share what they reveal in caucus to the other side once they have talked it over with the mediator.

The Role of the Mediator

The following is excerpted from Riskin "Dispute Resolution and Lawyers" (Riskin 1987, pp. 2-6) with added commentary by the researcher. The mediator's role is to function in the following capacities:

- A. Catalyst: As in a chemical process in which a catalyst facilitates a result without direct interaction or intervention, a mediator brings parties together for discussion and keeps those discussions focused. In many negotiations, the participation of the parties and the efforts they have undertaken toward dispute resolution begin to sustain the process and keep it moving forward; in other words, an investment in the process itself, both in terms of time and money, makes that process self-actualizing. A mediator should capitalize on the desires of the parties to reach resolution and lend a constructive posture to those discussions while maintaining neutrality and objectivity. Most importantly, a mediator must listen.
- B. Educator: A mediator must be thoroughly conversant with the nature of the dispute, the interests of the participants, the reality of their goals or objectives, and the likely workability of proposed solutions. The parties look to the mediator to provide a balance and subtle steerage in their negotiations by virtue of his ability to explain to one party the positions and

interests of another given his understandings of those factors. Providing objective enlightenment is a key function of a mediator in dispelling misunderstandings or polarizations which can occur during active, hotly-contested negotiations.

- C. Translator: Keeping in mind that the disputants engaged in mediation are there because they face adversarial problems, and because they have been otherwise unable to resolve their dispute, the mediator must expect each side to present its position employing value - or judgment-laden terms (e.g., "As an infringer of my patent. . .", "When you stole my trade secret. . .", etc.). Even the best intentions of a negotiating party to present his case objectively can result in a dialogue which comes across in a strident or accusatory tone. It is an important function of the mediator to translate those undercurrents of accusation into something the parties can work with more easily, in the absence of discordant innuendo.
- D. Provider: Information may be important or critical to creating value or providing new insights the parties may use to resolve their dispute. Likewise, support services may be helpful during a mediation, such as clerical or administrative support. A mediator can promote the ongoing process by having at his disposal the necessary resources the parties may require in their negotiations or at least be able to locate those resources for their use while they retain their focus on solving the problem at hand.
- E. Bearer of Adversity: There is an ebb and a flow in every negotiation. As parties bargain at interest and/or position levels, expectations rise and fall. Face-to-face discussions in which these expectations are frustrated can lead to counter-productive results. Obviously, bad news must be transmitted but, when the mediator carries the message, he can cushion the impact and allow the party receiving that news the cathartic effect of (figuratively) killing the messenger, to transfer hostility which could otherwise contribute to or create polarized positions. This can be accomplished while providing a safe place to vent frustration and diffuse tension.
- F. "Agent of Reality": Unrealistic expectations more than any other factor keep parties apart from the concurrence that leads to dispute resolution or, indeed, any other mutual accommodation. A wise mediator will be alert for rising expectations which likely cannot be met and refocus objectives toward a more obtainable goal. This can be accomplished by risk analysis. A mediator should ask, "Tell me the strengths and weaknesses of your case."

- G. Scapegoat: Generally it is preferred for principals involved in the resolution of a dispute to have an ownership interest in the solution; it is proven that such an ownership interest facilitates implementation of the solution better than cases where the result is prescribed (as by a judge or other "outsider"). It should also be recognized, though, that the principals involved in the negotiation of a settlement may perceive that their colleagues at the "home office" are likely to second-guess the wisdom or cleverness of the result they have negotiated. In such instances, a mediator serves the function of a scapegoat on whom either or both of the principals may cast a certain element of blame for a less than perfect solution.
- H. Value Creator: Integrative solutions are typically the product of creative thinking. An important aspect of mediation is the generation of options for both sides to consider to find middle ground where each party can attain its interests. Unlike litigation, where issues are sharply crystallized through pretrial procedures to focus sharply on as few as possible, mediation oftentimes becomes successful in direct proportion to the number of issues or interests which can be developed and shared by the parties. Perhaps no higher function is served by a mediator than creating or finding options to allow the parties to give and take or share in the benefits represented by them.
- I. Closure: Once the parties have reached common ground, the mediator can bring about closure.

LITIGATION COSTS

Businesses including insurance companies have been finding out that just referring the case to outside counsel and "letting the attorneys handle it" will get them very quickly into a sizable bill for services rendered without any end in sight to neither the costs nor the litigation. Brian Muldoon in an article written for Business Insurance opined (Muldoon 1987, p.35):

More than 95% of all lawsuits settle without a jury verdict, but these settlements often come in the last stages of litigation. The conventional wisdom used to be that the best settlements are reached on the courthouse steps. It was assumed the prospect of settlement was enhanced by vigorously preparing for trial and waiting for the opposition to wave a white flag.

The cost of this assumption is high. Formal discovery is the most expensive component in resolving disputed claims. On the average, as a recent Rand Corp. study shows, the total cost of trial preparation exceeds what plaintiffs receive as compensation.

Nationally, not only are the costs of litigation high, but in some particular areas of the law, the litigation costs exceed the amounts paid out in the actual claims. In Business Marketing, the writer, Steven Meyerowitz stated (Meyerowitz 1989, p.78):

. . . corporations pay trial lawyers more than \$20 billion a year, and more than 60% of every dollar spent on product liability litigation goes to the lawyers, not to the plaintiffs.

Litigation is also time-consuming, frustrating and damaging to future business relationships. For one thing,

it may result in undesirable publicity for one or both of the involved companies.

It is certainly true in the insurance industry. One study has shown that for every two dollars and seventy one cents (\$2.71) spent on administering claims only one dollar (\$1.00) is spent on payment to claimants. (Henry & Lieberman 1985, p.64). Kathleen M. Cullen, who is the National Director of The Travelers Companies Alternative Dispute Resolution program wrote an article in Risk Management in which she stated (Cullen 1987, p.28):

Statistics show new lawsuits are increasing in record numbers. In 1984, over 13.6 million civil suits were filed in state courts. Additionally, there were 150,000 cases filed in federal jurisdictions. Considering the fact that there is only one lawyer for every 350 Americans, is it any wonder that a recent Rand Corporations study confirms only one-third of the processing costs of litigation actually reaches the plaintiff. Two-thirds of the \$35 billion spent on litigation in 1985 went to pay legal fees and transaction costs netting the plaintiff less than \$15 billion of the \$35 billion.

Litigation is sometimes used as a business strategy. George Melloan has stated in the Wall Street Journal (Melloan 1989, p.A25):

Corporate lawyers sometimes practice "strategic litigation," just to tie up competitors in court. Tort litigation has exploded. Given the old saying, "Justice delayed is justice denied," there clearly is room for new thinking about dispute resolution.

ADR: A Cost Saver

Not only has the insurance industry discovered that it can save costs by implementing ADR programs, but corporate America has taken notice. Lis Wiehl of the New York Times has written (Wiehl 1989, p.B5):

. . . over the past two years, 400 corporations, many of them Fortune 500 companies, have signed a pledge to mediate or arbitrate before pursuing litigation, according to the Center for Public Resources Inc., a nonprofit organization in New York that circulated the pledge. Recently, 60 corporate signatories announced a two year savings of nearly \$50 million in legal fees, and costs, (an average of \$804,000 per case) according to officials of the center.

General Mills Inc., one of the companies that saved money, will only enter contracts that mandate mediation or arbitration of disputes.

We've reduced our litigation docket by two thirds, and we've had fantastic savings in legal fees, " said Clifford I Whitehill, the company's senior vice president and general counsel. "unlike litigation, these alternatives resolve our disputes quickly so we can get on with business."

Insurance companies are among the most avid proponents of private justice providers. Last year the Travelers Corporation sent nearly 5,500 personal injury and commercial claims to mediation or arbitration, an eightfold increase over that of 1984. The company estimates an annual savings of more than \$4 million in legal fees.

Mr. James Henry, President and co-founder of the Center for Public Resources in an article written by Collin Nash for Business Insurance, stated (Nash 1988, p.15):

ADR practices also eliminate other indirect, yet notable, costs such as diversion of management time, lost market opportunities and unwanted publicity by providing a more "rational, businesslike approach to dispute resolution."

Criticism

Observers of the ADR movement fear that two systems of justice are emerging one for the rich, who can afford the luxury of selecting their own private jurists and the public system for the rest. An example of the former appeared in an article in Barron's magazine, entitled Rent a Judge (Scholl 1988, p.60):

Privatization of the courts may rework the adage "justice delayed is justice denied" into "justice in a flash if you're flush with cash." A case involving the actress Valerie Harper, which was tried for three weeks before a rent-a-jury as well as a rent-a-judge, costs the litigants well over \$100,000. Those expenses included the jurors' \$12-day compensation, \$250 an hour for former Los Angeles Superior Court Judge William Hogoboom, and fees for the bailiff, court reporter and clerk.

Harper had sued Lorimar Productions and NBC (later dropped from the suit) over her discharge as star of the television show, Valerie, in August 1987. Initially, neither Lorimar nor NBC cared much about a speedy resolution, since both were being sued for monetary damages. But when Harper sought an injunction barring the network from using the name Valerie, NBC suggested bypassing the public courts. Fearing that the injunction might be granted, NBC proposed; a last-minute compromise: let the network keep the name, Valerie, for the rest of the broadcast season and, in exchange, it would agree to have the case tried privately. (Lorimar went along reluctantly, after failing to persuade NBC to change the name of the show instead.)

A little more than a year later, the dispute was over, with the rent-a-jury awarding Harper \$1.4 million in damages, plus a share of profits from the show.

"My career was on hold, so rent-a-judge worked great for me," says Harper. "But, my God, why should anyone who can't afford it have to wait six years?" Her lawyer, Barry Langberg, agrees, "The process works exceptionally well, and it's a terrible shame that it's necessary," says Langberg, the advocate in several privately-adjudicated suits.

Speed is one of the strongest arguments for rent-a-judge. Endless numbers of pre-trial motions aren't part of the private adjudication system, which attracts litigants honestly interested in resolving disputes quickly.

The past President of the American Bar Association, Robert Raven expressed his concern in an U.S. News and World Report Article (Gest & Hawkins 1988, p.56):

. . . the trend has raised the specter of "a two-tiered system of justice in which those able to afford private judges abandon the public system, leaving it to the poor and to those accused of crimes," says American Bar Association President Robert Raven.

The ripples of concern could prompt some reaction. ABA President Raven asking a panel to study the question of two-tier justice system. Alabama Chief Justice C.C. Torbert notes that "rent-a-judge is taking the pressure off reforming the system." He worries that when legislators are asked to aid the courts, "they" say the private boys have taken over, and we don't need to fund you." Which could suit dispute-weary corporations just fine. For them, spending big money on judges who rapidly solve their problems seems better than racking up huge legal bills in the odyssey for justice.

The Wall Street Journal has found one operator of an ADR service, Mr. Jay D. Seid of Judicate, who disagrees with the criticism that private courts constitute justice for the rich and stated (Melloan 1988, p.A25):

"Many of our clients are low-income people. For an insurance company to get a dollar to a plaintiff in a normal case, it's going to cost them two dollars out of pocket because of delays, litigation costs and court fees. If this system works right, you can get more money to the plaintiff with less cost to the defendant and everybody benefits."

Also, it's important to note that in mediation, the mainstay ADR technique, the final outcome still rests with the disputing parties and not the mediator. In a mediation, the parties always retain the right to walk away and go back to litigation. They control the outcome.

Growth Industry

With growing demand in a variety of market segments, private ADR service providers have commenced business operations. The writer of a New York Times article stated (Wiehl 1989, p.B5):

"Spurred by corporations impatient with clogged courts and the high cost of litigation, more than 50 organizations are now providing mediators whose specialty is resolving disputes and arbitrators whose decisions are binding. Some companies even employ retired judges to preside over private trials.

"Five years ago there were few, if any, for-profit providers of this kind," said Prof. Frank E. A. Sander of

Harvard Law School, who is chairman of the American Bar Association's committee on dispute resolution. "Now, driven by corporate demand, alternatives to litigation have become big business."

Even though some for profit organizations seem to be thriving, one company that went public didn't do so well as reported in Barron's Dec. 19, 1988 issue (Scholl 1988, p.29):

"It's trendy and even intellectually appealing, but the private-judging movement is taking longer to catch on than Judicate, among others, predicted. After the company went public in 1985, a unit consisting of one common share and a warrant to purchase a share sold for \$2.50. The units got as high as \$5.75 in early 1986, but they have since dropped to around \$2.50. Last May, the board of directors forced Judicate's founder and president, Alan B. Epstein, to resign. It was a classic case of a brainy entrepreneur failing to manage his company adequately, according to people familiar with the company. Perhaps Judicate's biggest problem was its attempt to offer rent-a-judge services in all 50 states from the start. 'They marketed an idea and couldn't deliver,' is the assessment of one observer. . ."

The American Arbitration Association reports that in 1976 there were 4,093 commercial cases filed and ten years later the number had more than doubled to 9,311. (Raven, 1988, p.2)

The researcher's ADR service organization, United States Arbitration and Mediation of Wisconsin, Inc., is part of a nationwide network of private attorneys and retired judges linked together by licensing or franchise agreements with its home office in Seattle, Washington. Each locale has an administrative

office and usually a panel of mediators. See Appendix A for a more detailed description. The way most of these businesses promote is through educational seminars, newsletters, articles and finely targeted ads in professional journals. See Appendix B for a sample.

OPPORTUNITY STATEMENT

The main opportunity presented is to determine whether or not there is a sufficient level of business available to permit a local stand alone ADR service provider which is not subsidized by this writer's law firm.

ANALYSIS AND POSSIBLE SOLUTIONS

A restatement of the foregoing opportunity statement could be framed in terms of a "go" decision in favor of establishing an independent operating entity or a "no go" decision in favor of retaining the operating entity under the umbrella of the researcher's law firm. Normally, a start up business encounters heavy costs of equipment acquisition necessary to produce. In the instant case, the usual equipment needed such as word processing, printing, photocopying, and telephone were already in place, including the office space. Thus with the exception of stationery, brochures, franchise fees and a new incoming telephone line, the costs of start up were non-existent.

The way this service is sold is first and foremost through education, usually seminars of two to four hours each to the claims department of insurance companies to get referral cases. Then one on one, lawyer to lawyer by telephone to convince the complainant's lawyer to agree to the mediation process. Additional educational seminars were recently given to 110 of the Milwaukee Bar Association's trial lawyers in an effort to encourage them to become volunteer mediators to assist in the resolution of cases as referred by several Milwaukee County Circuit Court civil judges during what has now been dubbed, Settlement Week. These educational efforts directly increase the awareness of the mediation process and indirectly sell the service.

In an effort to employ what has been described as the ". . . heart of modern strategic marketing . . . STP marketing - namely segmenting, targeting, and positioning . . ." (Kotler 1988, p. 279) A major thrust to penetrate the targeted insurance industry segment of the ADR business was commenced several years ago by USA national. Local efforts began two years ago by utilizing newsletters and seminars. However, recent emergence of a start-up competitor known as Resolute, which uses retired judges has prompted our local firm to hire a part-time commissioned salesman to make direct and frequent interpersonal contacts with insurance claims adjusters. As of this writing, its uncertain as to whether such a traditional sales approach will prove fruitful enough to move USA of Wisconsin closer to being an independent operating entity. Additional efforts to tap into the insurance industry segment have been made by approaches to the State of Wisconsin Insurance Commissioner regarding the possibility of handling some of the many consumer complaints filed against insurance companies through the Insurance Commissioner's office.

An alternative would include a more heavily advertised campaign. However, the experience of other officeholders in the nation has been that general advertising has been ineffective. This service seems to be sold only on a case by case basis after each corporate entity approves of the procedure as a matter of policy and then elects to authorize its claims personnel on a selective basis to use the service.

Other potential markets include corporate disputes, both against each other and from within, family disputes, real estate and government programs. Given USA's national directive to concentrate on the insurance industry, efforts to penetrate these other areas have not yielded sufficient repeat business to warrant much local effort. These markets will gradually open up after ADR gains acceptance.

Most of the above nonfinancial considerations seem to support a "no go" decision. However, there are some nonfinancial factors which would support a "go" decision. Some of these include the perhaps negative perception by users and potential users that the business is not successful enough to sustain itself as an independent operating entity. Also there are small but growing administrative problems that may adversely affect the law firm and USA as they are difficult to tell apart when operating. One subtracts from the time devoted to the other. For example, the law firm charges its clients on an hourly rate and USA charges on a flat rate plus an hourly rate for outside mediators. Thus, the administrative work spent on USA diminishes the number of hours available for billing to clients of the law firm. Only an independent operation could resolve these problems.

Financial Performance

Revenue is generated by charging an administrative fee, currently \$290.00 per case, and an hourly rate for the mediator's time, currently \$120.00 per hour. The researcher's administrative agency, United States Arbitration and

Mediation of Wisconsin, Inc. (USA) retains \$20 to \$30 of the hourly rate fees and pays its mediators \$90 to \$100 per hour as independent contractors. Payments to the mediators are shown as costs of operations on the statement of operations for USA. (Appendix C)

The average case takes about 3.5 hours of time so the average breakdown per case is as follows:

Administrative fee:	\$290.00
Hourly Fees (3.5 x \$120)	<u>\$420.00</u>
TOTAL BILLED TO USER:	\$710.00
Total USA revenue	\$710.00
Less cost of mediator (3.5 x \$90)	<u>(\$315.00)</u>
GROSS PROFIT PER CASE:	\$395.00

In 1988, the first full year of operation, total revenue was \$48,123.84, cost of operations (payments to mediators) was \$21,969.34 leaving a gross profit of \$26,154.50. (See Appendix C) This researcher was able to draw \$12,000.00 as compensation in the first year and make a contribution to a retirement plan in the sum of \$1800.00.

Ten percent (10%) of Administrative fees is paid to the national organization's home office in Seattle, Washington. This is listed as an expense along with other minor expenses listed in the statement of operations. After expenses the

business showed a net profit before taxes of \$1,669.49 for the year ended Dec. 31, 1988.

In contrast to the above, if an independent operation were set up, two major operating expenses would be incurred: rent and an administrative assistant's salary of fifteen thousand dollars (\$15,000.00). Given the current volume of business, these two expenses alone would place the business in a substantial net operating loss position (see Appendix D) not to mention the need for additional capital outlay costs to acquire office equipment. Thus, from a financial standpoint, it appears that, absent a substantial increase in gross sales, a "no go" decision for the foreseeable future is the logical choice.

CONCLUSION

Although, the future seems bright, with the emergence of Alternative Dispute Resolution techniques finding new applications in insurance and business, the success of the business will depend on the quality of the service to insure its continued growth and silence the skeptics. The best way to accomplish this is to allow the service to find its own level of success while providing it with the support of a law firm's staff and equipment. Thus, for the foreseeable future, United States Arbitration & Mediation of Wisconsin, Inc. should remain a part time adjunct to this researcher's law firm.

BIBLIOGRAPHY

- Burger, W. E. (1982). American Bar Association. Midyear Meeting. Annual Report on the State of the Judiciary. Chicago, Illinois: pp.3Q-3Z.
- Coulson, R. (1984). How to Stay Out of Court. New York, New York: American Arbitration Association.
- Cullen, K. M. (1987, June). ADR: Shaking Hands Instead of Shackling Them. Risk Management. pp.28-32.
- Fisher, R. (1985, March-April). Corporate Litigation. Harvard Business Review. pp.3TT-3AA.
- Fisher, R. and Brown, S. (1988). Getting Together - Building a Relationship that Gets to Yes. Boston, Massachusetts; Houghton Mifflin Company.
- Gest, T. and Hawkins, S.L. (1988, December 5). Slug it out in the privacy of your own courtroom. U.S. News & World Report.
- Henry, J.F. and Lieberman, J.K. (1985). The Managers Guide to Resolving Legal Disputes. New York: Harper & Row.
- Kotler, P. (1988). Marketing Management. Englewood Cliffs, New Jersey: Simon & Schuster.
- Melloan, G. (1989, February 7). New Alternative to the Public Logjam. The Wall Street Journal. Business World. pp.A24-A25.
- Muldoon, B. (1987, March). Working It Out. Business Insurance. pp.35-36.
- Nash, C. (1988, July 25). Avoiding Courts Saves Money: Experts. Business Insurance. p.15-16.
- Raven, R.D. (1988, June). Alternative Dispute Resolution: Expanding Opportunities. The Arbitration Journal. 43,2.
- Riskin, L. and Westbrook, J. (1987). Dispute Resolution and Lawyers. St. Paul, Minnesota: West Publishing Co.
- Sander, F. E. (1987). Alternative Dispute Resolution - an ADR Primer. Washington, D.C. American Bar Association.
- Scholl, J. (1988, December 19). Rent A Judge - More Litigants Turn to Private Courts for Action. Barron's. pp. 29; 60 & 61.
- Shearson/American Express, Inc. v. McMahon, 482 U.S. 220 (1987).

Wiehl, L. (1989, February 17). Private Justice for a Fee: Profits and Problems.
The New York Times. p. B5.

Wisconsin State Statues, §767.11(5). (1988).

APPENDIX A
USA BROCHURE

In addition to offering arbitration and mediation, the services offered by USA offices are flexible and may be customized to fit a particular situation. Some examples:

CLASS ACTION ADMINISTRATION — Services include sending out claim forms, screening claims, mediation, arbitration, and keeping statistics.

SPECIALIZED INDUSTRY PROGRAMS — USA has developed customized programs for the insurance and construction industries.

FACT FINDING — An independent investigation of a conflict, followed by a report of the findings, and a recommendation.

MINI-TRIAL — An abbreviated presentation of a case that is viewed by representatives of all parties. Mini-trials have proven effective in complex cases.

REFEREE — Many state statutes allow the parties to a lawsuit to select a referee to hear their case. The referee sits as a judge, a court trial is held, and the referee renders a formal court decision.

CONSULTING SERVICES — USA is available to review and improve customer relations and internal grievance procedures; identify potential conflict situations; and train managers and employees as needed.

EDUCATION & TRAINING

USA offices have a very active involvement in educational services. Such services include seminars, speakers, and a library of arbitration and mediation related books, articles and video-tapes.

USA offices also offer training in the techniques of dispute resolution.

For more information, contact the USA office nearest you.



**UNITED STATES
ARBITRATION
OF WISCONSIN, INC.**

"I must say that, as a litigant, I should dread a lawsuit beyond almost anything else short of sickness and death."

— Judge Learned Hand

- **ARBITRATION**
- **MEDIATION**
- **SPECIALIZED DISPUTE SETTLEMENT PROGRAMS**
- **EDUCATION & TRAINING**

UNITED STATES ARBITRATION

APPENDIX B
NEWSLETTER



USA Selected By Manville Trust

The Manville Personal Injury Settlement Trust (Trust) is the first product liability Trust of its kind. It is charged with settling all valid asbestos health claims against the Manville Corporation (formerly Johns-Manville). The Trust recently elected United States Arbitration & Mediation to administer alternative dispute resolution services involving such claims.

Following a barrage of lawsuits charging Manville with personal injury stemming from its production of asbestos, the company sought protection under Chapter 11 in August, 1982. At the time of filing for Chapter 11 protection, the company had approximately 17,000 pending lawsuits. Manville, with about \$2.0 billion in assets, became the most solvent corporation in history to seek bankruptcy protection.

After four years of intense negotiations, the Trust was established as the vehicle to settle cases with valid Manville asbestos health claimants. Asbestos-related disease may take up to 30 years to manifest symptoms. Therefore, it is difficult to estimate how many people were actually injured by asbestos, once known as a miracle fiber. The actual number of claimants may range from 100,000-200,000.

On November 28, 1988, as part of Manville's emergence from Chapter 11 Bankruptcy protection, the Trust Agreement was consummated, allowing the Trust to begin compensating valid Manville victims. Funding for the Trust comes from a variety of sources, including insurance settlements, cash from Manville Corporation, 50% of Manville's Common Stock, Manville Preferred Stock, bonds and notes from Manville, Manville profit sharing, and income from invested funds. Estimated Trust resources are approximately \$3.0 billion.

CANADIAN ADR PROGRAM BEGINS

USA's international affiliate, International Dispute Resolution, LTD., is pleased to announce the formation of Arbitration & Mediation Service of Canada, LTD. Established by well-known insurance attorney Larry H. Gilbertson and his associates, with headquarters in Toronto, the organization is now available to provide mediation/arbitration services for commercial and tort cases throughout Canada. A first-rate panel of mediators and arbitrators has been assembled, and Mr. Gilbertson recently hosted an introductory seminar that was attended by approximately 100 insurance company representatives. The first cases are currently being processed.

In the near future, Mr. Gilbertson will be establishing local offices throughout Canada. For more information contact: Larry Gilbertson, Arbitration & Mediation Services (ADR) Canada, Limited, Suite 1006, 111 Richmond Street West, Toronto, Ontario, CANADA M5H 2G4; (416) 360-7717.

The stated goal of the Trust is to settle claims and avoid litigation. A claimant must first file a Proof of Claim with the Trust and make an effort to reach settlement. If such discussions are unsuccessful, the claimant retains his/her right to go to court. They may also proceed to use various forms of "alternative dispute resolution" including:

Neutral Evaluation: A non-binding decision by an expert after written submissions by the parties;

Mediation: A non-binding settlement discussion with the aid of a neutral expert.

Arbitration: A final, binding decision rendered by a neutral expert after a hearing. Some cases may be arbitrated upon only written submissions, and some may involve only advisory decisions.

All alternative dispute resolution procedures are offered free-of-charge to claimants. The goals of the alternative dispute resolution procedures are to achieve fair resolutions of claims as quickly as possible, and to minimize transactional and court costs to the Trust and the claimants.

In November, 1988, after a competitive bidding process and with the concurrence of claimants' attorneys, the Trust awarded the contract to administer ADR services to USA. USA will help develop program forms and procedures, will help locate qualified neutrals around the country, and will process cases. Case processing includes talking with claimants and attorneys about alternative dispute resolution procedures, assigning neutrals, scheduling cases, maintaining statistics, and generally overseeing the ADR proceedings.

In operating the Manville Trust ADR program, USA will draw upon its experience gained from designing and administering a series of consumer protection class actions, operating the Washington State Lemon Law Arbitration Program, and providing a high-volume, nationwide, mediation/arbitration program for commercial and tort cases.

Department of Agriculture Selects USA

The U.S. Department of Agriculture, through the Farmers Home Administration (FmHA), recently selected USA's Louisville Office to operate a farm foreclosure mediation program in the State of Tennessee. There were 36 other bidders, and the contract was the first of its kind granted. The Agricultural Credit Act requires lenders, including the FmHA, to mediate farm loans before foreclosing. The mediations will be attended by the debtor and all creditors, with 250-300 cases expected in Tennessee the first year. For more information contact: Ted Spiegel, United States Arbitration MidSouth, Inc., Two Paragon Centre, Suite 130, 6040 Dutchmans Lane, Louisville, KY 40205; 1-800-562-1379.

APPENDIX C
FINANCIAL STATEMENTS

UNITED STATES ARBITRATION
OF WISCONSIN, INC.

BALANCE SHEET
AS OF 12/31/88

ASSETS

CURRENT ASSETS

Cash in bank - General	\$ 39.79	
Cash in bank - Payroll	<u>4.34</u>	
Total Current Assets		\$ 44.13

FIXED ASSETS

Franchise	<u>12,000.00</u>	
Total Fixed Assets		<u>12,000.00</u>
Total Assets		12,044.13

LIABILITIES AND EQUITY

SHORT TERM LIABILITIES

Note payable to Daniel A. Noonan & Associates, S.C.	1,100.00	
---	----------	--

LONG TERM LIABILITIES

Note payable to United States Arbitration	<u>4,000.00</u>	
Total Liabilities		5,100.00

STOCKHOLDER'S EQUITY

Capital Stock	8,000.00	
Retained Earnings	(2,725.36)	
Net Profit (Loss)	1,669.49	
Total Stockholder's Equity		<u>6,944.13</u>
Total Liability and Equity		12,044.13

UNITED STATES ARBITRATION
OF WISCONSIN, INC.

STATEMENT OF OPERATIONS
FOR THE 12 MONTHS ENDING 12/31/88

REVENUE	\$48,123.84
COSTS OF OPERATIONS	<u>21,969.34</u>
Gross Profit	\$26,154.50
OPERATING EXPENSES	
Wages	\$13,800.00
Advertising	650.40
Bank Service Charges	149.06
Office Supplies/Printing	1,668.34
Postage	7 51.65
Royalty fees	2,646.05
Subscriptions/Publications/Dues	125.90
F.I.C.A.	1,036.44
Telephone	761.37
Unemployment Taxes	442.80
Profit Sharing	2,070.00
Travel	<u>383.00</u>
Total Operating Expenses	\$24,485.01
Net Operating Profit (Loss)	1,669.49
Net Profit (Loss)	1,669.49

APPENDIX D
PROJECTED OPERATING STATEMENT

UNITED STATES ARBITRATION
OF WISCONSIN, INC.

PROJECTED STATEMENT OF OPERATIONS
INDEPENDENT SERVICE

REVENUE	\$ 48,123.84
COSTS OF OPERATIONS	<u>21,969.34</u>
Gross Profit	\$ 26,154.50

OPERATING EXPENSES

Wages - Administrative	\$ 15,000.00
Wages - Officers	13,800.00
Lease Expense	5,000.00
Advertising	650.40
Bank Service Charges	149.06
Office Supplies/Printing	1,668.34
Postage	751.65
Royalty Fees	2,646.05
Subscriptions/Publications/Dues	125.90
F.I.C.A.	1,036.44
Telephone	761.37
Unemployment Taxes	442.80
Profit Sharing	2,070.00
Travel	<u>383.00</u>

Total Operating Expenses	\$ 44,485.01
Net Operating Loss	(\$ 18,330.51)
Net Loss	(\$ 18,330.51)