HON. CANDY WAGAHOFF DALE

# Judicially Supervised Alternative Dispute Resolution: Perspectives from a Magistrate Judge

**As a process option available through the Alternative Dispute Resolution (ADR) program for the District of Idaho, settlement conferences supervised by a magistrate judge are frequently requested by the litigants or chosen by the trial judge for referral at various stages of civil litigation. Our local rule regarding** settlement conferences predated the ADR Act of 1998 that required every district court in the country to adopt an ADR program and to make ADR options available in civil cases. Although the initial rule contemplated a settlement conference in every case *after* discovery was completed or dispositive motions were decided, judicially supervised ADR processes have been and continue to be integrated successfully into our ADR program at virtually all stages of litigation. For example, our early neutral evaluation (ENE) program proposes the services of one of our magistrate judges as a neutral party who will work with the parties in advance of, or in supplementation to, case management conferences as well as during settlement conferences that occur at a time when mediation of the dispute may be a productive alternative to trial. The ENE judge is someone other than the one assigned randomly to the case as the trial judge or referred for pretrial motions. In addition, the ENE judge does not share any of the discussions or information obtained during the ENE conferences or settlement conferences with the trial judge assigned to the case.

Perhaps because of the perception that ADR bears at least partial responsibility for the phenomenon of vanishing trials, our focus on settlement has tempered, and judicially supervised ADR has proven valuable even when resolution of the dispute is not achieved without trial. Several years ago, during a lecture she gave at the University of Idaho College of Law, former U.S. Attorney General Janet Reno noted that ADR should stand for "Appropriate" Dispute Resolution. As a former trial attorney, I definitely understand her opinion and agree with her that sometimes a trial itself is the most appropriate method for dispute resolution, and traditional "alternatives" such as mediation will not suffice. However, involvement of a neutral judge early in litigation can assist the parties with eliminating or reducing the inordinately high transactional costs and time associated with aggressive litigation by narrowing issues and discovery, making it possible for the parties to actually afford going to trial. In addition, truncated discovery plans directed toward assessment of evidence or information necessary for informed settlement discussions can pave the way to settlement before the majority of the costs and fees of protracted litigation are incurred. Further, pre-answer mediation in certain prisoner cases filed under 42 U.S.C. § 1983 can assist with remedying prison conditions before those conditions persist or actually amount to civil rights violations.

From my perspective, ADR sessions supervised by a judge who is not assigned as the trial judge provide the opportunity for the litigants and clients to address issues that led to the dispute at hand or have arisen since litigation was pursued, and the litigants can do so without the risk of making a "record" that will follow them into the courtroom. The attorneys can and will take off their advocate hats, with the judge explaining to the clients that he or she has required this but also acknowledging that direct experience shows that the attorneys are quite capable of courtroom battle and zealous and competent representation if the matter proceeds to trial. The judge also can inform the parties about the risks, costs, and emotional expenses associated with litigation and trial and ask whether an alternative resolution should be attempted to avoid prolonged uncertainty and continued emotional and financial investment. The ADR judge also can ask the parties to consider creative solutions that might not be achieved even if the trial were to deliver a favorable verdict or judgment.

ADR sessions with a judge provide the opportunity for the clients to have their day in court—albeit without a jury. The reality is that clients may listen more closely to a judge than to a mediator who they may perceive is aligned with the other side or "paid" to make both sides happy by finding the midpoint in the financial settlement offers that are placed on the table during private mediation. Judges have tools that private mediators—including former judges—often do not possess, merely by virtue of their presence on the bench in the district and their knowledge of the litigation culture and the motion and trial outcomes in our court. Similarly, judges can share what juries have concluded in cases

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that have proceeded to trial and highlight the unpredictability of jury deliberations.

While cognizant of the sanctity of the attorney-client relationship, I am careful not to interfere with that relationship while meeting with the parties during Alternative Dispute Resolution sessions. However, the ADR judge can support an effective attorney-client relationship. For example, in a recent session, after I had explained to the plaintiff my understanding of how the employment-at-will rule and the antidiscrimination statutes would come into play in his lawsuit, the plaintiff's attorney reinforced the fact that she previously had given her client similar explanations regarding the burden of proof. Hearing similar information from a federal judge enhanced the credibility of the lawyer and may have been a factor in achieving settlement without trial.

As with any ADR process, each ADR session conducted by a judge will have unique dynamics, depending on the style of the ADR judge, the attorneys for the parties, the litigants, and the nature of the issues presented in the litigation. One criterion is paramount, however, and that is the confidentiality that attaches and the parties' trust that the ADR judge will not share information obtained during the ADR session with the trial judge assigned to the case. In addition, the ADR judge must be sensitive to and understand what issues are ripe or appropriate for resolution, depending on the timing of the ADR session and the interests that are driving the litigation at that point. Whether the ADR judge facilitates a full alternative to trial or otherwise assists the parties as they reach trial, judicially supervised Alternative Dispute Resolution sessions should remain integral to the ADR program for the District of Idaho. **TFL**

*Candy Wagahoff Dale is the chief magistrate judge for the District of Idaho; her appointment as magistrate judge was effective March 30, 2008. She currently supervises the Pro Se and Capital Habeas Unit as well as the ADR coordinator for the District of Idaho; and she serves on the Ninth Circuit's Magistrate Judges' Executive Board. Judge Dale is an active participant and member of the FBA Idaho Chapter.*

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lem of determining federal jurisdiction in the normal course of a § 4 petition that involves no filed lawsuit. The dissent's suggestion that the examination has to be hypothetical at least in part is surely correct, because there will be no complaint or counterclaim to examine. The dissent suggests examining whether a court would have jurisdiction of the subject matter of a suit arising out of the controversy. Added to that is the majority ruling that jurisdiction must exist over the entire dispute.

There are several practice points to be mined from this opinion for those who proceed to seek relief under a contract containing an arbitration provision. First, practitioners should try to anticipate potential counterclaims and articulate the nature of the entire potential controversy between the parties before ignoring the arbitration agreement. Having anticipated those counterclaims, practitioners should consider whether filing an arbitration demand with a § 4 petition that encompasses all the potential federal counterclaims will assure federal jurisdiction. Finally, the state court's remedies should not be ignored when assessing the best way to proceed. **TFL**

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**Endnotes**

[1]The exception is that the FAA grants federal jurisdiction over cases brought on the basis of Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 9 U.S.C. § 201 et seq. *See* 9 U.S.C. § 203 (an action under the convention "shall be deemed to arise under the laws and treaties of the United States"); 9 U.S.C. § 205 (allowing removal from state to federal court notwithstanding the well-pleaded complaint rule: "the ground for removal provided in this section need not appear on the face of the complaint but may be shown in the petition for removal.").

[2]Discover Bank could have sought relief in state court. Section 2 of the FAA, which validates arbitration clauses and makes them enforceable, applies to the states, and by itself it dictates a state remedy even though the Supreme Court has not held that §§ 3 and 4 of the FAA apply to the states. *See* Slip Op. at 20 n.20. In any case, the Maryland Arbitration Act provides for a stay of the litigation: Md. Cts. & Jud. Proc. Code Ann. § 3-209 (Lexis 2006): "(a) A court shall stay any action or proceeding involving an issue subject to arbitration if: (1) A petition for order to arbitrate has been filed." Maryland law also affords a means to compel arbitration and does not provide for a pre-arbitration determination of compliance: Md. Cts. & Jud. Proc. Code Ann. § 3-207 (Lexis 2006): "(a) If a party to an arbitration agreement described in § 3-202 of this subtitle refuses to arbitrate, the other party may file a petition with a court to order arbitration; (b) If the opposing party denies existence of an arbitration agreement, the court shall proceed expeditiously to determine if the agreement exists; (c) If the court determines that the agreement exists, it shall order arbitration. Otherwise it shall deny the petition."

[3]The well-pleaded complaint rule does not enjoy universal approbation. However, Congress has not acted on commentators' repeated recommendations to consider responsive pleadings. *See* Slip Op at 10 n.11.