

**ALTERNATIVE DISPUTE RESOLUTION**

**Michael J. Pike**  
**[mpike@gallaghersharp.com](mailto:mpike@gallaghersharp.com)**

**I. INTRODUCTION**

**II. TWO MOST POPULAR TRADITIONAL ALTERNATIVE DISPUTE RESOLUTION MECHANISMS**

- A. Mediation
- B. Arbitration

**III. MEDIATION**

- A. Generally - a method of non-binding dispute resolution involving a neutral third party who tries to help the disputing parties reach a mutually agreeable solution. Blacks Law.
- B. Types
  - 1. Private
  - 2. Court Administered
  - 3. Court Participating
  - 4. Post-Arbitration
- C. Characteristics
  - 1. Mediator usually chosen by agreement of the parties
  - 2. Defendant(s) will pay some amount to plaintiff(s)
  - 3. Informal
  - 4. Confidential
  
  - 5. No evidentiary submissions, although a mediation brief usually submitted
  - 6. No witnesses presented
  - 7. Low cost
  - 8. Can be used at any point in the litigation process

9. Unlimited in time and scope
10. Most of the control of the proceedings remains with the parties
11. Structure of proceeding can be determined by parties
12. Flexible settlement terms
13. Non-binding
14. No findings of fact or conclusions of law

D. When to Use

1. Clear liability - solely an issue of damages
2. Liability disputed
  - a. Most likely the only time you can speak directly to the opposing party and present the weaknesses in their case before trial
  - b. Provides an opportunity for a neutral evaluation of the strengths and weaknesses of a case by an impartial third party
  - c. Introduce the notion that plaintiff may get nothing at trial
3. Complex or highly technical matters beyond the comprehension of jurors
4. Simple cases where the issues are more mundane
5. Serious injury or death cases involving substantial dollar amounts
6. Lower monetary amount at issue
7. Two party actions
8. Numerous party matters
9. Resolution of matter early in the litigation process
10. Resolution of case late in the litigation process

E. Summary

1. Most popular form of alternative dispute resolution
2. Since Cuyahoga County initiated their own program, nearly 50% of all cases that are mediated are resolved
3. Applicable to wide variety of circumstances and matters
4. Provides the greatest flexibility and retained control for the parties
5. Mechanism by which both sides purchase certainty
  - a. Defendants give up the possibility of a defense verdict and eliminate the uncertainty of verdict values
  - b. Plaintiffs forfeit the potential of receiving a larger award at trial and eliminate the possibility of getting nothing at all in exchange for a discounted amount

#### IV. ARBITRATION

- A. Generally - a method of dispute resolution involving one or more neutral third parties who are usually agreed to by the disputing parties whose decision is binding. Blacks Law.
- B. Types:
  - 1. Binding or Non-Binding
  - 2. Voluntary or Court Ordered
  - 3. Contractual
  - 4. Mixed
- C. Binding - parties agree to forego the right to appeal any decision rendered by the arbitration panel
- D. Non-Binding - more popular of the two - parties right to de novo appeal the decision of the panel is preserved. Case then returned to active court docket and case proceeds as though case never arbitrated.
- E. Voluntary - parties agree to submit to and/or petition to the court to have their dispute heard by the arbitration panel
- F. Court Ordered - Court, on its own accord, transfers the matter to be heard by the arbitration panel - always non-binding.
  - 1. **Cuyahoga County** - Local Rule 29 (Attached)
    - a. Requirements
      - (1) Amount in controversy is less than \$50,000 per plaintiff
      - (2) All discovery must be completed and timely motions must be ruled upon before a case is referred to Arbitration. The case should be ready for trial.
    - b. Arbitrators
      - (1) Admitted to Ohio Bar and practicing for not less than 1 year
      - (2) Chairpersons admitted to Ohio Bar and practicing for not less than 3 years
    - c. Evidence
      - (1) Chairperson rules on evidentiary matters with the advice of other panel members.
      - (2) Strict conformity to the rules of evidence is not necessary
    - d. Hearings
      - (1) Witnesses testify under oath (administered by the Chairperson)
      - (2) Conducted like a mini-trial

- e. Arbitration Brief
    - (1) Not required but you may want to file one in certain situations
      - (a) If there are unusual allegations contained in the complaint and the panel might not be familiar with the standard of proof or where you want to introduce evidence or exhibits
      - (b) The plaintiff will generally file an arbitration brief - they have the burden of proof and need to get the medical records into evidence (See example)
  - d. Report and Award
    - (1) The Arbitration panel shall file a report and award in the ADR office within 7 days following the hearing (See example)
  - e. Appeals
    - (1) Any party may appeal the report and award de novo (the same as if it had not been heard before, as if no decision had been previously rendered)
    - (2) Notice of appeal and a supporting affidavit must be filed within 30 days after the entry of the award of the Panel (See example)
2. Surrounding Counties: Every county has their own particular rules governing arbitration which are generally similar, but have differences that could be significant
- a. **Geauga County** - Local Rule 24 (Attached)
    - (1) \$40,000 or less per claimant rule
    - (2) The Court can submit a case to arbitration, or any party in a case pending for at least 6 months may move the court to have the case be submitted for arbitration
    - (3) Arbitrator fees: one half (\$250) to be paid by each party at least 14 days prior to the arbitration
    - (4) Documentary evidence - must be provided to the other party at least 7 days before the arbitration date
  - b. **Lorain County** - Local Rule 20.1 (Attached)
    - (1) \$50,000 per claimant limit
    - (2) Arbitrators must be admitted to practice law for at least 2 years
    - (3) Documentary evidence to be submitted to the opposing party at least 14 days prior to the hearing

- c. **Lake County - Standing Order (Attached)**
  - (1) There is no monetary limit for an award.
  - (2) Appeal (\$500 appeal fee) and results in return to active docket and trial de novo
  - (3) Fees - \$100 - \$150 per arbitrator per case depending on the class of arbitrator, which is determined by the attorney's years in civil practice
  - (4) Transcripts of proceedings not made, can be requested at discretion and cost to party
  
- d. **Summit County - Local Rule 10 (Attached)**
  - (1) \$50,000 limit per claimant limit.
  - (2) Non-disclosure of offers of settlement to the arbitrators
  - (3) Documentary evidence exchanged 7 days prior to the hearing
  - (4) Can agree to have one arbitrator hear the case instead of three
  - (5) Transcripts or recording of the proceeding not permitted
  - (6) Appeal - costs (\$230) and a \$50 fee

G. **Contractual Arbitration**

- 1. Contract - generally outlines the terms of the arbitration - whether it can be unilaterally requested or whether both sides have to agree to it or it may apply to any dispute between the parties to the agreement. Arbitration clauses are routinely contained in insurance policies in the UM/UIM sections, in construction contracts and other contracts.
- 2. Statutory Authority - Ohio Revised Code Section 2711.01 et seq.
  - a. If a contract contains an arbitration clause, there is a presumption that this clause is valid, enforceable and irrevocable, with a few limited exceptions
  - b. If an action is brought upon any issue referable to arbitration under an agreement in writing for arbitration, upon application by one of the parties the court will stay the trial of the action until the arbitration of the issue has been had in accordance with the agreement
- 3. Private Arbitration Forums
  - a. Arbitration Forums, Inc.
    - (1) Most property and casualty insurance companies are members. If there is a dispute involving insureds of two member companies then that dispute must be resolved through intercompany arbitration. Handle arbitrations in the following areas: medical payments, property damage,

automobile property damage, uninsured motorists, personal injury protection

b. American Arbitration Association

- (1) Similar to Arbitration Forums, Inc., this is a private organization that handles arbitrations for contracts that have an arbitration clause that cites submission to AAA. Frequently found in construction, real estate, labor, internet commerce, consumer finance and mass claims contracts

H. Powers of the Arbitrators - O.R.C 2711.06

1. May administer oaths or affirmations to witnesses
2. Fix the time, place, and length of their hearings
3. May subpoena witnesses
4. May order witnesses to produce documents and records
5. May petition the Common Pleas Court where the matter is pending to issue contempt orders for the failure of any witness to obey a subpoena
6. Make findings of fact and conclusions of law that become final if not appealed within prescribed time period

I. General Characteristics

1. Arbitrator not chosen by party
2. Like a mini-trial, but with relaxed evidentiary rules
3. Not Confidential
4. Evidentiary submissions required
5. Arbitration brief usually required
6. Witnesses presented
7. Higher Cost than mediation, but usually lower than trial
8. Intended to be used late in the litigation process
9. Length of proceeding can be limited by panel
10. Control of the proceedings with the arbitration panel
11. Structure of proceeding NOT determined by parties
12. Resolution limited to defense verdict or traditional monetary award
13. Can be Binding or Non-binding
14. Arbitration panel makes findings of fact and conclusions of law
15. Findings can be used in subsequent proceeding

I. When to Use

1. When unable to settle the matter or mediation has failed
2. Parties want the matter adjudicated - fault determined - resolution
3. Business or Contract cases
4. Decision date needs to be definite
5. Value of case in great dispute

6. Liability in dispute or in cases of clear liability
7. Discovery and significant motion practice complete
8. Complex or highly technical matters beyond the comprehension of jurors
9. Straightforward matters
10. Generally, claim is for less than \$50,000.00
11. Where length and expense of trial is outweighed by amount of claim

## V. FEDERAL COURT ADR IN OHIO

- A. Types
  1. Mediation
  2. Arbitration
  3. Early Neutral Evaluation
  4. Summary Jury Trials
  5. Summary Bench Trials
  6. Magistrate Judges
  
- B. Mediation - Northern District of Ohio - Loc. R. 16.6 (Attached)
  1. Any civil matter is eligible for mediation
  2. Timing - "when the status of discovery is such that the parties are generally aware of the strengths and weaknesses of the case," or "any earlier time by agreement of the parties"
  3. Selection of Cases - by the Court, motion of a party, or by stipulation.
    - a. Notice of Referral issued to parties
    - b. Any party may object to referral to mediation "for good cause shown" within ten days of Court Order
  4. Selection of Mediator:
    - a. From list provided by the Court with Notice of Referral (or someone else)
    - b. Parties to confer and submit agreed list of three mediators within ten days of Notice of Referral being issued
    - c. Court assigns mediator based on order of preference and availability
    - d. Mediator schedules mediation within thirty days of assignment
    - e. At least five days before mediation, parties to submit briefs and materials to the mediator
  5. Process is informal - to be determined by the mediator
  6. General outcome reported to ADR Administrator
  7. No cost to mediate matters, unless mediation exceeds 4-1/2 hours (\$150/hour thereafter) or the parties conduct private mediation
  8. Entire process is confidential.

- C. Arbitration - Northern District of Ohio - Loc. R. 16.7 (Attached)
1. Any civil matter is eligible for mediation
  2. Timing - at the Case Management Conference or any time thereafter by the Court, motion of a party, or by stipulation
  3. Selection of Cases - by the Court, motion of a party, or by stipulation.
    - a. Notice of Selection issued to parties.
    - b. Any party may object to the Notice of Selection within twenty days by filing an objection to selection with the ADR Administrator - Judge to which matter is or may be assigned is not to be informed of identity of party who objected to selection for arbitration
  4. Selection of Arbitrator:
    - a. From list of five names provided by the Court with Notice of Selection
    - b. Parties confer to select a panel of three
    - c. If parties elect to have matter heard by one arbitrator, parties alternate striking one name from the list (plaintiff first) until only one name remains
    - d. Arbitrator schedules mediation within thirty days of assignment
    - e. At least five days before arbitration, parties to submit briefs and materials to the arbitrator and other parties
    - f. Arbitrator(s) to file award with ADR Administrator within ten days of proceeding
  5. Unless otherwise agreed, no dispositive motions may be pending at time of the arbitration
  6. Parties have right to appeal decision and have trial de novo
  7. Entire process is confidential
- D. Early Neutral Evaluation - Northern District of Ohio - Loc. R. 16.5 (Attached)
1. Defined: "[A] pre-trial process involving a neutral evaluator who meets with the parties early in the course of the litigation to help them focus on the issues, organize discovery, work expeditiously to prepare the case for trial, and, if possible, settle all or part of the case. The neutral evaluator provides the parties with an evaluation of the legal and factual issues, to the extent possible, at that early stage of the case." Loc. R. 16.4(b)(3)
  2. Any civil matter is eligible for Early Neutral Evaluation
  3. Timing - No formal proclamation, but early in the status of litigation
  4. Selection of Cases - by the Court, motion of a party, or by stipulation
    - a. Notice of Referral issued to parties
    - b. No prescribed objection procedure
  5. Selection of Evaluator:
    - a. From list provided by the Court with Notice of Referral

- b. Parties to confer and submit agreed list of three evaluators within ten days of Notice of Referral being issued
  - c. Court assigns evaluator
  - e. Evaluator schedules conference within thirty days of assignment
  - f. At least five days before evaluation, parties to submit briefs and materials to the evaluator, and an evaluation statement not to exceed ten pages stating:
    - (1) The names of the parties and counsel
    - (2) Legal and factual issues at issue whose prompt resolution would aid in resolving the matter or settlement
    - (3) The discovery that is contemplated
    - (4) Copies of all pleadings by the submitting party
  - 6. Parties shall be prepared to discuss with the Evaluator:
    - a. Estimated litigation costs
    - b. Lay and expert witnesses
    - c. Damages, including computations in support of the amounts
    - d. Plans for discovery
  - 7. Process is informal - to be determined by the Evaluator
  - 8. General outcome reported to ADR Administrator along with any agreements entered into by the parties
  - 9. Entire process is confidential
- E. Summary Jury Trials - Northern District of Ohio - Loc. R. 16.8 (Attached)
- 1. Defined: a court-annexed, non-binding process in which the parties briefly present their case to a jury with a Judicial Officer presiding and then use the decision of the jury and information about the jurors' reaction to the legal and factual arguments as an aid to settlement negotiations
  - 2. Eligible Cases - any civil case triable to a jury may be assigned for summary jury trial
  - 3. Selection of Cases - by the Court, motion of a party, or by stipulation
  - 4. Procedure - flexible, to be determined in advance by the assigned Judge in light of the circumstances of the case
  - 5. Timing - Ordinarily summary jury trial when discovery is substantially completed and conventional pretrial negotiations have failed to achieve settlement. To facilitate an early summary jury trial, limited and expedited discovery should be obtained to accommodate earlier settlement potential. The summary jury trial should usually precede the trial by approximately sixty days
  - 6. Selection of Judge - conducted by the District Judge or Magistrate Judge to whom the case is assigned or referred
  - 7. Written Materials - usually advantageous, but not required

8. Jury Panel - usually will consist of six (6) jurors. Presiding Judge may choose to use the challenged or unused panel members as a second jury
9. Length - usually concluded in a day or less
10. Voir Dire - ordinarily permitted limited voir dire
11. Opening Statements - per discretion of the Presiding Judge
  - a. May be combined with Voir Dire - Loc. R. 16.8 indicates that fifteen minutes for both should be sufficient
12. Case Presentations - It is expected that counsel will present a condensed narrative summarization of the entire case consisting of an amalgamation of an opening statement, evidentiary presentations, and final arguments which may include:
  - a. Exhibits
  - b. Read excerpts from exhibits
  - c. Read reports
  - d. Read deposition transcripts
  - e. The admissibility of which to be determined in advance
13. Witnesses - generally, not be permitted, although exceptions may be made by the Presiding Judge
14. Jury Instructions are to be given and jurors allowed a limited time to deliberate
15. Jury decisions - unanimity encouraged, but separate verdicts allowed
16. Post-verdict, the Presiding Judge should initiate and encourage a discussion of the case by the parties and the jurors
17. Settlement Negotiations - shortly after verdict, Presiding Judge and the parties should meet to see whether the matter can be settled
18. Entire process is confidential

F. Summary Bench Trials- Northern District of Ohio - Loc. R. 16.9 (Attached)

1. Defined: a court-annexed pretrial procedure intended to facilitate settlement consisting of a summarized presentation of a case to a Judicial Officer whose decision and subsequent factual and legal analysis serves as an aid to settlement negotiations
2. Eligible Cases - any case not triable to a jury may be assigned for a summary bench trial
3. Selection of Cases - by the Court, motion of a party, or by stipulation
4. Selection of Judge - shall be conducted by a Judicial Officer other than the Judicial Officer who will ultimately preside at the binding trial
5. Parties shall submit proposed findings of fact and conclusions of law in advance of the summary bench trial
6. Similar to Summary Jury Trial, except Judge acts as fact finder

## V. PRIVATE JUDGING ALTERNATIVE TO TRADITIONAL ADR MECHANISMS

A. Generally - lesser known and utilized alternative to trial that provides the flexibility and control of mediation combined with the fact finding and finality of arbitration

B. Statutory Authority - O.R.C. 2701.10(B)(1) - only available in state courts

"The parties to any civil action or proceeding pending in any court of common pleas, municipal court, or county court unanimously may choose to have the action or proceeding in its entirety referred for adjudication, or to have any specific issue or question of fact or law in the action or proceeding submitted for determination, to a judge of their choosing who has registered with the clerk of that court in accordance with division (A) of this section." ORC 2701.10 (Attached)

C. Procedure

1. Retired Judges to register with the clerk of any court of common pleas, municipal court, or county court for the purpose of receiving referrals for adjudication of civil actions or proceedings, and submissions for determination of specific issues or questions of fact or law in any civil action or proceeding, pending in the court
2. Retired judges can register with an unlimited number of courts
3. Each court is required to maintain an index of all retired judges who have registered with the clerk of that court pursuant to ORC 2701.10
4. If there is unanimous agreement to refer all or part of a matter to a retired judge then simply request a copy of the list of judges that have registered with a particular court
5. Prepare an agreement to be signed by all parties which:
  - a. Designates the retired judge to whom the referral or submission is to be made
  - b. If a submission is to be made, describes in detail the specific issue or question to be submitted
  - c. Indicates either of the following:
    - (1) That the action or proceeding in its entirety is to be referred to, and is to be tried, determined, and adjudicated by that retired judge
    - (2) Indicates that the issue or question is to be submitted, and is to be tried and determined by that retired judge
  - d. Indicates that the parties will assume the responsibility for providing facilities, equipment, and personnel reasonably needed by the retired judge during his consideration of the action or

proceeding and will pay all costs arising out of the provision of the facilities, equipment, and personnel

- e. Identifies an amount of compensation to be paid by the parties to the retired judge for his services and the manner of payment of the compensation
6. A signed copy of the agreement is to be filed with the clerk of the court or the judge before whom the action or proceeding is pending
  - a. Include an order for the judge before whom the action or proceeding is pending, that orders the referral or submission in accordance with the agreement (Not required)
7. Upon the entry of an order of referral or submission the retired judge to whom the referral or submission is made shall have all of the powers, duties, and authority of an active judge of the court in which the action or proceeding is pending
8. A retired judge to whom a referral is made under this section shall try all of the issues in the action or proceeding, shall prepare relevant findings of fact and conclusions of law, and shall enter a judgment in the action or proceeding in the same manner as if he were an active judge of the court
9. Any decision rendered shall have the same force and effect as if it had been entered or made by an active judge of the court, and any appeal from the judgment, finding, conclusion, or determination shall be made as if the judgment had been entered, or the finding, conclusion, or determination had been made, by an active judge of the court

D. Characteristics

1. Parties get to choose their judge
2. Confidentiality - generally not confidential, but depending on the circumstances, can be modified to some extent
3. Evidentiary submissions - determined by the parties
4. Briefs usually required - but up to the discretion of the parties
5. Witnesses - can be presented, via briefing, or via deposition transcripts
6. Costs less than arbitration and trial - depending on the structure
7. Can be used at any time in the proceedings
8. Length of "trial" determined by parties
9. Control of the proceedings with parties
10. Structure of proceeding determined by parties
11. Resolution more flexible than arbitration - up to parties
12. Binding as if judgment rendered
13. Findings of fact and conclusions of law can be used in subsequent proceedings

## VI. EXAMPLE OF PRIVATE JUDGING IN PRACTICE

- A. Factual background
  - 1. Facts of the case
  - 2. The Parties
    - a. Plaintiff
    - b. Building Owner
    - c. Former Elevator Maintenance Company
    - d. Elevator Upgrade Company
    - e. Current Elevator Maintenance Company - at time of accident
  - 3. Experts
  
- B. Procedural background
  - 1. Discovery closed
    - a. Party representative depositions
    - b. Resident depositions
    - c. Expert reports, supplemental reports, and depositions
  - 2. Two unsuccessful mediation attempts
  - 3. Two aborted trial dates - court involved mediation
  
- C. Substantive positions of the parties
  - 1. Plaintiff
  - 2. Building Owner
  - 3. Former Elevator Maintenance Company
  - 4. Elevator Upgrade Company
  - 5. Current Elevator Maintenance Company
  
- D. Resolution
  - 1. Defendants confidentially entered into an agreement prior to a third mediation whereby they all agreed to submit to private judging proceeding and be bound by outcome
  - 2. Overcame the impasse regarding the amounts to be contributed toward settlement by each party with potential to recoup some or all of increased settlement amount later at the private judging proceeding
  - 3. With the agreement in place, defendants were able to set forth a united defense front and settle the matter
  - 4. But, at the cost of increasing the risk of potentially being solely liable for the full settlement amount
  - 5. The increased risk was tempered by ability to cap damages in a wrongful death action that had the potential for punitive damages
  - 6. Settling the matter also avoided the problem of four defendants pointing the finger at one another, making the plaintiffs case that much easier

7. Tried the matter to a retired judge and structured it to be decided on the paper submissions to the judge and oral arguments by the respective parties' attorneys

## **VII. CONCLUSION**

- A. These are but a sampling of the many Alternative Dispute Mechanisms available today
- B. No one method is a panacea for all possible circumstances
- C. In many cases, like the one above, it can take a combination of several mechanisms before a favorable resolution is achieved
- D. Be open to new ways to attack a problem and think creatively to come up with solutions that maximize the benefits and minimize the risks to your position