



ALTERNATIVE DISPUTE RESOLUTION: A HANDBOOK FOR JUDGES

AMERICAN BAR ASSOCIATION
Standing Committee on Dispute Resolution

Public Services Division
Governmental Affairs Group



DISPUTE RESOLUTION MONOGRAPH NO. 3 — October, 1987
— Second Edition, May 1991

ALTERNATIVE DISPUTE RESOLUTION: A HANDBOOK FOR JUDGES

Philip J. Harter

Staff Editors

Lawrence R. Freedman

Prudence B. Kestner

AMERICAN BAR ASSOCIATION
Committee on Dispute Resolution
Public Services Division
Governmental Affairs Group



AMERICAN BAR ASSOCIATION

John J. Curtin, Jr. President
Talbot D'Alamberte President-Elect

STANDING COMMITTEE ON DISPUTE RESOLUTION

Nancy H. Rogers, Chair Columbus, OH
Richard J. Badolato Roseland, NJ
Pamela C. Enslen Kalamazoo, MI
Fournier J. Gale, III Birmingham, AL
Resa Harris Charlotte, NC
Thomas J. Moyer Columbus, OH
William H. Neukom Redmond, WA
Eleanor Holmes Norton Washington, DC
Michael L. Prigoff Englewood, NJ
Sharp Whitmore Fallsbrook, CA
Gerald R. Williams Provo, UT

LIAISONS

Craig H. Baab Governmental Affairs Group
Emerson Bruns Law Student Division
Aubrey Ford, Jr. Judicial Administration Division
Kimberlee K. Kovach Young Lawyers Division
A. A. Sommer, Jr. Board of Governors
Lamont Stallworth Society for Professionals in Dispute Resolution
William A. Zolbert Litigation Section

ADVISORS

Christine Carlson Columbus, OH
Richard A. Enslen Kalamazoo, MI
Frank G. Evans Houston, TX
Gladys Kessler Washington, DC
Melinda Ostermeyer Washington, DC
Frank E. A. Sander Cambridge, MA

ABA STAFF

Maureen W. Brown Administrative Secretary
Rayzelda Gravely Administrator
Richard D. Hyde ABA-Wide Coordinator
John M. Johnson Project Assistant
Prudence Bowman Kestner Associate Director
Larry E. Ray Director
Frederick E. Woods Staff Attorney

© 1987 All rights reserved.

© 1991 Second Edition by the American Bar Association. Copies of this publication can be obtained from the ABA upon written request. Permission to quote from or reproduce materials in this publication is granted when due acknowledgement is made.

ISSN: 0742-2614

This publication expresses the views of the Standing Committee on Dispute Resolution and should not be considered to represent those of the American Bar Association.

ERRATA

The Honorable Wilfred Feinburg is Chief Judge of the United States Court of Appeals for the Second Circuit, not as listed in the contributors page or on page 78.

Acknowledgment is made to Marie Provine of Syracuse University, New York, for her editorial advice and review of the document prior to its publication. Readers should be aware of significant contributions to the field made in her Federal Judicial Center publication, "Settlement Strategies for Federal District Judges."

The title and address given on page 33 for the Honorable Donald B. King is incorrect, the correct title and address are as follows:

Honorable Donald B. King, Justice
California Court of Appeal
4200 State Building
San Francisco, California 94102
(415) 557-0718

FUND FOR JUSTICE AND EDUCATION

The ABA's Fund for Justice and Education is the 501(c)3 charitable arm of the Association. Its mission is to improve the American legal system through public service and law-related education programs which promote quality legal services, equal access to justice, better understanding of the law, and improvements in the justice system.

★ ★ ★ ★ ★ ★ ★ ★ ★ ★

For dispute resolution information, please contact:
The ABA Standing Committee on Dispute Resolution
1800 M Street, N.W.
Washington, D.C. 20036
202-331-2258

★ ★ ★ ★ ★ ★ ★ ★ ★ ★

Acknowledgments

The Standing Committee on Dispute Resolution would like to acknowledge Ronald L. Olson, who chaired the Committee through its developing years, 1979 to 1986. This handbook for judges was begun during his tenure and developed with his support.

The Committee would also like to express thanks to the TRW Foundation, the William and Flora Hewlett Foundation, the Culpeper Foundation, the State Justice Institute, the American Association of Retired Persons, and the National Institute for Dispute Resolution for continued support of Committee projects. We appreciate the cooperation of the Young Lawyers Division and other ABA entities.

CONTRIBUTORS

The Standing Committee on Dispute Resolution is grateful to the following people who contributed material for the Handbook:

Judge Marvin E. Aspen, U.S. District Court, Northern District of Illinois -- *Special Masters*

Judge Raymond J. Broderick, U.S. District Court, Eastern District of Pennsylvania -- *Court-Annexed Compulsory Arbitration*

Judge Lawrence H. Cooke, Former Chief Judge, State of New York -- *Community Mediation*

Judge Richard Enslen, U.S. District Court, Western District of Michigan -- *Case Evaluation* -- *"Michigan Mediation"*

Chief Judge Wilfred Feinberg, U.S. District Court, Southern District of New York -- *Civil Appeals Management Plan*

Eric D. Green, Professor of Law, Boston University School of Law -- *Private Judging and Mini-Trial*

Philip J. Harter -- *Private Arbitration and Regulatory Negotiation*

Judge Robert E. Keeton, U.S. District Court, District of Massachusetts -- *Conditional Summary Trial*

Judge Patrick Kelly, U.S. District Court, District of Kansas -- *Settlement Conference*

Judge Donald B. King, San Francisco Superior Court -- *Divorce Mediation*

Judge Thomas D. Lambros, U.S. District Court, Northern District of Ohio -- *Summary Jury Trial and Special Masters*

Richard Maiman and Craig McEwen -- *Small Claims Mediation*

Michael Mills, Ombudsman, Anchorage, Alaska -- *Ombudsman*

Judge Frank A. Orlando, Circuit Court, Broward County, Florida -- *Divorce Mediation*

Chief Judge Robert F. Peckham, U.S. District Court, Northern District of California -- *Early Neutral Evaluation*

Judge Dominick J. Salfi, with Juvenile Court Coordinator Gayle Hair, Eighteenth Judicial Circuit, Florida -- *Juvenile Arbitration*

Senior Judge Robert C. Zampano, U.S. District Court, District of Connecticut -- *Judicially Supervised Settlement Conference*

INTRODUCTION

The Standing Committee on Dispute Resolution of the American Bar Association is pleased to publish this third volume of its Monograph Series, Alternative Dispute Resolution: A Handbook for Judges. This collection of papers, by judges and other scholars who have firsthand experience with the processes described, is designed to assist the judiciary as it explores the applicability of alternative dispute resolution techniques in the courts.

The ABA's House of Delegates has charged the Standing Committee on Dispute Resolution to "study, experiment with, disseminate information concerning, and support the appropriate institutionalization of methods for resolution of disputes other than the traditional litigation process." As part of that charge, the Standing Committee provides comprehensive clearinghouse services and technical assistance. It plays a role in encouraging state and local bar involvement in dispute resolution, conducts public and professional education programs, and helps to develop alternative career opportunities for lawyers. The Committee also conducts research on program development and legislative models. For example, it helped to develop and continues to evaluate the innovative and experimental Multi-Door Dispute Resolution Project (Multi-Door Courthouse Project) which now operates in Houston, Texas; Tulsa, Oklahoma; and Washington, D.C. The Committee is part of the Public Services Division of the Governmental Affairs Group, which provides management oversight to the Committee.

Because of its commitment to public and professional education, the Committee offers this monograph to inform judges, court administrators, educators, bar leaders, and attorneys about dispute resolution processes -- many of them recently developed, but all used successfully -- which are available to the courts. The methods included here cover extra-judicial approaches such as mediation and arbitration, and also techniques to resolve pending litigation.

The techniques included are those the ABA's Standing Committee on Dispute Resolution has identified as most useful to the courts, especially judges. Much of the material has been contributed by judges who have developed and advocated the use of these techniques. Although the processes have been selected as important to be encouraged by or used by judges, others in the legal profession should also find the compendium helpful. The publication is intended for the entire judiciary, including state, federal, and local jurisdictions. Therefore, techniques for resolving disputes of varying magnitude, from community to divorce to corporate, are included.

This monograph introduces the techniques, placing them in the larger arena in which they occur. Most of the articles are brief and, at times, cursory. Therefore, a listing of references and resources is included for each specific technique. The General Bibliography contains a reference list on the broader aspects of judicial involvement in alternative dispute resolution.

The Standing Committee on Dispute Resolution is convinced the compendium will be an effective tool to improve the functioning of the judicial system.

Philip J. Harter, Chair
Subcommittee, Judges' Handbook

Lawrence R. Freedman and Prudence B. Kestner
Staff Editors

STANDING COMMITTEE ON DISPUTE RESOLUTION

The Standing Committee on Dispute Resolution “shall study, experiment with, disseminate information concerning, and support the appropriate institutionalization of methods for the resolution of disputes other than the traditional litigation process” as charged by the ABA’s House of Delegates. There are six major objectives that serve as guidelines for the Committee towards fulfilling the above-stated mission. Those objectives are as follows:

- The Committee will provide comprehensive clearinghouse services and technical assistance to ABA entities (e.g., Family Law Section, the Young Lawyers Division, the Section on General Practice, the Litigation Section, the Administrative Law Section) and external groups, including the 350 dispute resolution programs nationwide.
- The Committee will activate state and local bar involvement in dispute resolution.
- The Committee will conduct public and professional education programs (e.g., Conflict Mediation and Education Conference, April 1988; Mediation in the Legal System, Minnesota State Bar and others; ALI-ABA Video Law Review, ADR Techniques: Incorporating ADR in Your Law Practice, June 1987).
- The Committee will develop alternative career opportunities for lawyers.
- The Committee will conduct a program of research and development including programmatic and legislative models.
- The Committee will develop and evaluate innovative and experimental programs such as the Multi-Door Dispute Resolution Project operating in Houston, Texas; Tulsa, Oklahoma; and Washington, D.C.

AMERICAN BAR ASSOCIATION’S DIVISION OF PUBLIC SERVICES

The Public Services Division of the Governmental Affairs Office provides management oversight to the Standing Committee on Dispute Resolution. It helps promote the public welfare by applying the knowledge and experience of the legal profession to concerns facing all sectors of the general public. The division pursues this ABA goal through programs which address the rights of the disadvantaged (including the elderly, mentally and physically disabled) and substantive issues of national importance such as housing and the environment.

ANNOTATED
TABLE OF CONTENTS

<u>Introduction</u>	i
 I. <u>Processes over which judge actively presides</u>	
 CONDITIONAL SUMMARY TRIAL	1
An abbreviated trial before the trial judge and representatives of the parties who have authority to settle. If the parties are unable to negotiate a settlement, the judge selects from the prepared dispositions submitted by the parties. A party who declines to accept the outcome of the abbreviated proceeding and who does not obtain a more favorable outcome in full trial must pay the adversary's litigation costs.	
 SUMMARY JURY TRIAL	7
An abbreviated mock jury trial, presided over by a judge or magistrate, designed to help litigants determine how a jury might evaluate their cases. Useful where informal settlement methods have failed and for civil disputes where evaluation of factual evidence is key.	
 JUDICIALLY SUPERVISED SETTLEMENT CONFERENCE	11
A settlement discussion held with the presence and active participation of the trial judge. Useful for civil litigation where settlement options have not yet been fully explored.	
 II. <u>Processes which judges supervise</u>	
 SPECIAL MASTERS	24
An individual or individuals employed by the court to assist in resolving disputes or managing litigation. Useful for complex and/or multi-party civil litigation.	
 SETTLEMENT CONFERENCE	29
A conference among parties, counsel, and a neutral attorney or magistrate, aimed at exploring options for settling the dispute.	
 DIVORCE MEDIATION	32
A neutral third-party mediator assists divorcing couples in fashioning their own resolutions to issues that arise from divorce.	
 COURT-ANNEXED COMPULSORY ARBITRATION	48
A program where all civil claims below a certain dollar amount must go to arbitration before trial. If the parties do not agree to the arbitral decision, they have the right to a trial de novo, but the parties exercising that right must pay the costs of arbitration if they do not receive a more favorable outcome at trial. Useful for civil claims for monetary damages.	

CIVIL APPEALS MANAGEMENT PLAN	77
A pre-hearing intervention by an appeals court staff attorney to facilitate settlement.	
CASE EVALUATION -- "MICHIGAN MEDIATION"	87
A process where a panel of lawyers evaluates cases upon referral from a judge and provides an advisory opinion as to value. Parties may continue their action in court but face assessment of costs if they do not improve their position.	
EARLY NEUTRAL EVALUATION	99
A pre-trial evaluation session attended by all counsel and parties and hosted by a neutral, experienced lawyer-mediator who appraises the case and discussed its merits with the parties.	
SMALL CLAIMS MEDIATION	107
A program, usually affiliated with the court, where parties reach mediated agreements on small claims actions.	
JUVENILE ARBITRATION	111
A process of resolving disputes involving youth as an alternative to the formal court process.	
III. <u>Processes to which judges may refer cases</u>	
OMBUDSMAN	115
A neutral party who investigates complaints made by constituents, clients, or employees against an institution or a branch of government. Useful in disputes over the propriety of the actions of governmental officers or organizational entities.	
COMMUNITY MEDIATION	119
A process by which neighborhood and other disputes may be resolved by trained volunteer mediators operating in a non-profit, community program. Useful in landlord-tenant, consumer, and neighbor-neighbor disputes.	
PRIVATE DISPUTE RESOLUTION SERVICES	128
Independent entities, sometimes for-profit, which provide a range of dispute resolution services for a fee.	
PRIVATE JUDGING	130
The referral of a case, upon agreement of the parties, to a privately selected "judge" whose decision is entered, under appropriate statutory authority, as the decision of the court. Useful in cases requiring specific subject matter expertise.	
PRIVATE ARBITRATION	136
A consensual process where a neutral third party considers arguments and evidence and renders a binding award. Useful in contract and commercial disputes.	

REGULATORY NEGOTIATION

143

A process for developing governmental rules or other policy choices where representatives of the affected parties meet to develop a consensus on the proposed rule or policy.

MINI-TRIAL

149

A private, consensual proceeding where a negotiated resolution is sought following an expedited summary presentation of the best case for each party in a dispute, made in the presence of those parties. A neutral advisor may make advisory opinions to assist the negotiations. Useful in large inter-corporate disputes involving mixed questions of law and fact.

IV. General Bibliography

160

CONDITIONAL SUMMARY TRIAL

I. DESCRIPTION OF PROCESS: A conditional summary trial is a two-day abbreviated "trial" before a panel composed of a trial judge (or a master paid by equal contributions from the parties) and chief executive officers or representatives who have authority to settle. A judge issues an order assigning a case to a conditional summary trial when the circumstances are appropriate. One distinctive characteristic of a conditional summary trial is that the parties must stipulate to file bond to secure payment of the other party's litigation costs if a party declines to accept the outcome of the summary trial and the full trial outcome is not more favorable.

The conditional summary trial procedure gives decision makers for the parties unscreened information about the controversy upon which to base a fair disposition, and it provides an economic incentive to arrive at and stick with a settlement. The procedure also limits the hearing time at the summary trial and delineates a specific set of procedures under which this summary hearing takes place.

II. TYPES OF CASES: Cases that would take three weeks or longer to litigate are appropriate. Large, two-party cases involving over \$1 million are the usual type.

III. REFERENCES:

Provine. Settlement Strategies for Federal District Judges. Federal Judicial Center, Washington, D.C. (1986).

IV. RESOURCES: Hon. Robert E. Keeton
1525 McCormack Post Office and Courthouse Building
Boston, MA 02109
(617) 223-9243

SUPPLEMENT: CONDITIONAL SUMMARY TRIAL

by Judge Robert E. Keeton
United States District Judge
District of Massachusetts

UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

Plaintiff

v.

CIVIL ACTION

Defendant

No.

Memorandum to Counsel

Attached is the most recent draft of a "Proposed Order for Conditional Summary Trial" that I am considering entering as a standing order applicable to all cases pending before me that qualify under the terms of the order.

If you have an interest in proceeding under this kind of proposed stipulation I will be pleased to confer with you about it.

United States District Judge

Proposed ORDER for Conditional Summary Trial

Aims. This order establishes a procedure aimed at facilitating early disposition of cases at reduced cost, both to the parties and to the public.

Most cases on any court docket settle. Many settlements occur, however, only after substantial cost of preparation has been incurred and trial is imminent. A factor contributing to the tendency to postpone settlement is the concern of each party that an opposing party's early offer or demand is not as good as will be made when trial is imminent. An early settlement is impossible when each party holds back. Incentives for both parties to make genuine best proposals early might overcome this obstacle to early settlement. One aim of the Conditional Summary Trial is to create such an incentive structure.

A second aim is to reduce the cost of discovery. Even if the case is not settled at or near the time of the hearing, much discovery will have been accomplished at lower cost than would have been incurred through use of formal discovery procedures.

Procedure for Electing Conditional Summary Trial. Unless the court allows an exception for good cause, the procedure established by this order may be invoked only in cases in which the estimated length of a full trial exceeds 50 hours, and only by stipulation in the form attached as Exhibit A.

Length. A maximum of 10 hours allocated evenly among the parties, unless stipulated otherwise, will be allowed for hearing evidence and arguments. Ordinarily the hearing will be held on two successive days; but for good cause, including other demands of the court calendar, the presiding officer may adopt an alternative schedule, such as three or four half-day sessions.

Conditions. The following are conditions to which the parties agree by stipulating to this procedure:

1. Each party (or, if an entity other than a person, the party's chief executive officer), or a person having the full authority of the party to make a binding agreement to settle, shall attend the Conditional Summary Trial. A premise of the court's commitment of its scarcest resource--hearing time--to one case ahead of older cases is that it will produce dispositions earlier and with less use of the court's resources than would otherwise be required. That is not likely to result unless the parties take the hearing seriously enough to justify personal attendance of the parties (or their chief executive officers) or representatives having full authority to settle.

2. During the hearing, each party will make a full disclosure of all its grounds of claim or defense. Except for good cause shown, no party may thereafter offer evidence or argument to support a ground of claim or defense not asserted during the Conditional Summary Trial. Good cause is established if a party shows that the newly asserted ground of claim or defense was first discovered by that party after the hearing and is supported by evidence known to and available to the opposing party before the hearing. A party's voluntary disclosure of evidence unfavorable to it at or before the hearing will, of course, fully protect against such a claim of good cause for asserting, after the hearing, a new ground of claim or defense based on that evidence.

3. Unless the parties stipulate otherwise, they shall have equal shares to the total hearing time of 10 hours. The time may be used for testimony in narrative form, testimony in question-and-answer form (including cross-examination of an adverse party or representatives of an adverse party), and argument on the facts and on the law, allocated as the party chooses. Objections that proffered evidence is inadmissible may be stated and argued in the time period allocated to the objecting party. Questions to an adverse party, if calling for discoverable information, shall be answered regardless of admissibility. The presiding officer will hear and determine any assertions of privilege or nondiscoverability. The time required for such hearing and determination will not be charged against either party.

4. Unless otherwise stipulated, the order of proceedings will be as follows:

- 3 hours to plaintiff
- 3-1/2 hours to defendant
- 1/2 hour to plaintiff
- 1 hour for questioning of witnesses or counsel by the Hearing Panel
- 1 hour to defendant for summation
- 1 hour to plaintiff for summation

5. Each attending party (or the party's designee) will serve with the presiding officer as a member of the hearing panel. The party representatives on the panel may, as they prefer, consult with each other privately or in the presence of the presiding officer. Any disposition of the case on which they agree shall be incorporated into an Agreed Judgment, subject to the court's approving it as a lawful disposition. If the party representatives cannot agree on a disposition within 24 hours after the hearing is closed, each party representative (with freedom to consult with counsel) shall, within 48 hours after the hearing is closed, file a proposed disposition. Within 72 hours after the hearing is closed, the presiding officer shall file a decision selecting whichever party representative's proposed disposition is in the judgment of the presiding officer the more appropriate disposition as between the two. The presiding officer is limited to choosing one or the other of these proposed dispositions. The disposition selected by the presiding officer shall be incorporated in a Judgment by Acquiescence unless opposition in writing, accompanied by a bond to secure performance, is filed within 30 days after receipt of a copy of the presiding officer's report. If an objection and bond are filed and the outcome of trial is not more favorable to the objecting party than the disposition selected in the presiding officer's report, litigation expenses shall be assessed against the objecting party and added to or offset against the judgment otherwise due.

6. Unless the parties otherwise specify in their stipulation, the amount of litigation expenses awarded in accordance with paragraph 5 shall be \$5,000 for each day of the trial (but not for participation in the Conditional Summary Trial), subject to a maximum of \$250,000 even if the trial should be longer than 50 days.

7. The parties may, but are not required to, stipulate to other conditions. For example, they may agree to one or more of the following conditions:

(a) The presiding officer shall file findings of fact and conclusions of law within one week after the conclusion of the hearing. Each finding of fact and conclusion of law will thereafter have the same effect in the case as a stipulation of the parties, unless within one week after receipt of a copy of the findings and conclusions, a party files an objection together with a statement of the proposed finding or conclusion that the objecting party proposes in substitution for the challenged finding or conclusion.

(b) The stipulation for hearing may request that the hearing officer find minimum and maximum figures defining the range for reasonable settlement value. If the case is thereafter tried, judgment will be entered that in no event will the judgement award be less than the presiding officer's minimum figure or more than the presiding officer's maximum figure.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

_____)	
Plaintiff(s))	
)	
v.)	CIVIL ACTION
)	NO.
Defendant(s))	
_____)	

Stipulation for Conditional Summary Trial

The undersigned parties to this case stipulate that they elect to have a Conditional Summary Trial in this case, on the terms and conditions stated in the court's Standing Order for Conditional Summary Trial.

We estimate that the length of a full trial would be more than 50 hours.

Place "X" in the applicable blank below:

_____ The parties elect that the hearing be before the judge before whom the case is pending, and each party waives any claim that presiding over the hearing will be grounds for recusal from presiding over the trial.

_____ The parties request that the court appoint as a Master, to conduct the hearing, the following person, for whose compensation the parties will be responsible (in equal shares, or as otherwise agreed): _____

_____ The parties request that a magistrate of this court be designated, by drawing, to preside at the hearing.

Other conditions of this stipulation are as follows:

_____ Conditions 1-6 without modification. No other conditions.

_____ As stated in Exhibit A attached

(Signatures of parties or counsel)