Wisconsin's New Court-Ordered ADR Law: Why It Is Needed and Its Potential for Success

Michael E. Weinzierl

Follow this and additional works at: http://scholarship.law.marquette.edu/mulr

Part of the Law Commons

Repository Citation
Available at: http://scholarship.law.marquette.edu/mulr/vol78/iss3/2

This Article is brought to you for free and open access by the Journals at Marquette Law Scholarly Commons. It has been accepted for inclusion in Marquette Law Review by an authorized administrator of Marquette Law Scholarly Commons. For more information, please contact megan.obriens@marquette.edu.
On December 6, 1993, Wisconsin joined a national trend when its Supreme Court ordered the creation of a statewide Alternative Dispute Resolution (ADR) program for the early resolution of civil and family matter disputes. Across the United States, state and federal courts have been embracing ADR procedures to help reduce the backlog of civil cases and offer earlier, cost effective settlement options to litigants. Today, more than half of the states in America have enacted, or are considering enacting, some type of court-related ADR program. Wisconsin's court-ordered ADR law went into effect July 1, 1994. It is too early to evaluate the effectiveness of the program in resolving civil and family disputes earlier in, and more economically and efficiently than, the litigation process. However, based on the success of similar court-mandated ADR programs and voluntary ADR use, Wisconsin citizens, businesses, corporations, municipalities, government workers, and attorneys will likely find the results to be favorable.

This Article focuses on ADR primarily as it relates to civil, nonfamily litigation. It argues that Wisconsin's ADR law, based on the performance of similar ADR plans, will prove effective in settling many civil disputes outside of court. It discusses how ADR can save litigants time and money, and why ADR is preferable to litigation. It then analyzes Wisconsin's new ADR law and the settlement procedures it outlines. The Article then analyzes and evaluates the effectiveness of Florida's
and Illinois' approaches to court-mandated ADR procedures. Finally, the Article suggests why litigants will be pleased with the Wisconsin ADR law, and how it will ultimately encourage greater use of voluntary ADR procedures.

I. THE RISE OF ALTERNATIVE DISPUTE RESOLUTION

A. Why Alternatives to Litigation Are Needed

In Wisconsin and across the United States, much attention has been focused recently on the need for ADR as an alternative to litigation. Eminent jurists, from Wisconsin state judges to former Chief Justice of the United States Supreme Court Warren Burger, have called for ADR procedures to be available to litigants. These proponents all contend ADR offers a quicker, more efficient avenue for dispute resolution. Additionally, other advocates argue ADR reduces court backlogs, reduces the depletion of court resources, saves litigants time and money, offers litigants more settlement options, preserves relationships, and produces better results. Others maintain that ADR is not nearly as stressful and traumatic to the parties as is the litigation process. An examination of the current state of civil litigation illustrates why ADR should be considered as a settlement option by civil litigants.

1. Cost Considerations

Despite an effort to decrease legal costs, a recent study revealed that U.S. companies reported an eighteen percent (18%) increase in legal expenditures in 1993. Although many of the companies surveyed have in-house counsel, the study reported a forty-five percent (45%) increase in 1993 in outside legal spending, resulting, in part, from increased litiga-

The average amount of money spent per company on litigation increased from $1.8 million in 1992 to $2.8 million in 1993, an increase of fifty-six percent (56%).

The cost of civil litigation on a per-case basis can be significant to both plaintiff and defendant. For instance, it is estimated that the typical cost of defending an employee dispute ranges from $20,000 to $200,000. This range is realistic for the defense of other civil actions as well, such as personal injury, contract, commercial, and libel disputes. For instance, Randall P. Bezanson and John Soloski found that news organizations or their insurers spend approximately $150,000 to defend an average libel dispute. Even so-called nuisance claims can require thousands of dollars to defend.

Plaintiffs in civil litigation face similar financial difficulties as they will also likely incur considerable discovery, deposition, and expert witness costs during the litigation process. These costs ultimately offset the jury award or settlement amount late in the litigation process. The earlier a plaintiff can resolve a dispute, the greater the portion of his or her compensation that is actually realized. In addition to the economic difficulties of initiating litigation, the plaintiff, along with his or her family in most cases, will experience an unpleasant interruption of their lives during the traumatic, protracted litigation process.

Municipalities and governments are also feeling the litigation pinch. New York City, for instance, will spend approximately $300 million on judgments and settlements in fiscal year 1994. These costs, associated with the increasing number of civil lawsuits, as well as large jury verdicts, are draining municipal budgets coast-to-coast. ADR would help reduce the risk municipalities face when they go to court, as they are often perceived by jurors as having "deep pockets."
Today, it is estimated that liability lawsuits cost Americans roughly $130 billion annually.\textsuperscript{18} The tort system in the United States has grown four times faster than the economy since 1930.\textsuperscript{19} In the face of these realities, using ADR to reduce litigation costs should be given careful and serious consideration by the parties and their attorneys in appropriate cases.

2. Increasing Numbers of Civil Disputes

In addition to the financial cost of litigation, the increasing number of civil cases is straining the nation’s state and federal court systems. In Milwaukee County, 18,243 civil cases were filed in 1993, not including small claims cases.\textsuperscript{20} Nationally, many trial and appellate court dockets will likely increase one hundred percent (100\%) by the year 2000 if current litigation trends continue.\textsuperscript{21} Despite efforts by the courts to dispose of cases more quickly, new filings often considerably surpass those dispositions.\textsuperscript{22}

In 1992, the number of appeals filed increased 5.8 percent (5.8\%) from 1991 figures to 259,276, the highest in U.S. history.\textsuperscript{23} Should this rate remain constant through the end of the decade, there will be over 350,000 appeals pending by the year 2000, a cumulative increase of at least forty percent (40\%) since 1990.\textsuperscript{24} The number of new cases filed in state courts is also on the rise. In 1992, approximately 93.8 million new criminal and civil cases were filed in state courts, Puerto Rico, and the District of Columbia.\textsuperscript{25} Although this number is actually lower than its peak of 100.5 million cases in 1990,\textsuperscript{26} the number of new civil lawsuits filed increased three percent (3\%) over 1991 figures to 19.7 million.\textsuperscript{27} These new filings have resulted in an increase in the number of pending civil lawsuits as well.\textsuperscript{28} ADR is viewed by many as a way to alleviate

\begin{itemize}
  \item \textsuperscript{18} Budd, \textit{supra} note 12 at 12.
  \item \textsuperscript{19} \textit{Id.} at 13.
  \item \textsuperscript{20} Stingl, \textit{supra} note 7, at B1.
  \item \textsuperscript{21} Randall Samborn, \textit{Accelerating Caseloads Threaten to Swamp Courts}, \textit{Nat'l L.J.}, May 9, 1994, at A11.
  \item \textsuperscript{22} \textit{Id.}
  \item \textsuperscript{23} \textit{Id.}
  \item \textsuperscript{24} \textit{Id.}
  \item \textsuperscript{25} \textit{Id.}
  \item \textsuperscript{26} \textit{Id.}
  \item \textsuperscript{27} \textit{Id.}
  \item \textsuperscript{28} See \textit{id.}
\end{itemize}
some of the demands placed on court systems by reducing the number of pending lawsuits and appeals.

B. The Advantages of ADR

The advantages of ADR can be examined from a number of angles. There is little doubt that using ADR saves litigants time and money. Joshua Rosenberg observed the range of savings ADR produced to be from $1000 per case in a family court to an average of $80,000 per case in a U.S. District Court, as estimated by litigants and attorneys. A recent study of federal courts revealed that on average, federal litigants saved roughly $40,000 for every $4000 they spent on ADR.

Corporations and insurance carriers have reported significant cost savings from their ADR programs. For instance, since Motorola instituted an ADR program several years ago, it has seen its litigation costs decrease by approximately seventy-five percent (75%). Four hundred companies that participated in a corporate ADR program beginning in 1990 reported a savings of $150 million in attorney fees and expert witness costs through 1993. Another recent study of major civil cases suggested that use of ADR saved each party approximately $800,000 per dispute. A major U.S. insurance carrier reported its institutionalized ADR program saved approximately $7 million in legal expenses in 1993. And in one instance, Chevron estimated its mediated settlement of a dispute, which cost Chevron $25,000 in mediation costs, saved the corporation approximately $2.5 million in potential litigation expenses.

ADR is generally more time efficient than litigation, a feature attractive to both plaintiff and defendant. While litigation often results in
lengthy delays between the alleged injury and the ultimate settlement or disposition, ADR significantly expedites the settlement process. ADR is more efficient than litigation because it is more informal and generally administered independently of the courts. The typical ADR session can be arranged within days or weeks after the parties agree to employ it, as opposed to a much longer wait for a jury trial.

In addition to cost and time savings, many litigants use ADR to preserve relationships. Litigation often can be damaging to relationships between businesses and customers, corporations and distributors or franchisers, individual citizens, and insurance carriers and their policy holders. By offering a speedier alternative to litigation, ADR can preserve relationships by resolving a dispute in a timely fashion and eliminating the confrontational atmosphere of litigation.

In 1993, the Wisconsin Automobile & Truck Dealers Association (WATDA) and automobile and truck manufacturers created a dispute resolution program to settle disputes between the dealers and manufacturers. Although one of the program goals was to save automobile dealers and manufacturers considerable litigation costs, a primary reason the program was initiated was to preserve relationships between dealers and manufacturers. Businesses and corporations involved in long-term relationships with distributors and dealers benefit from timely resolution of disputes. The WATDA Manufacturer program anticipated resolving approximately twelve disputes annually. Toyota Motor Sales, USA, implemented a national dispute resolution program of its own in 1985 called the Reversal Arbitration Board, for the resolution of disputes between itself and its dealers. Among the goals for the program were improving relationships between dealers and Toyota, as well as avoiding unnecessary confrontation. The program has succeeded in substantially improving relations between the manufac-

38. See generally Stuller, supra note 7, at 17; see also Shaw, supra note 2, at C1; Mazadoorian, supra note 30, at C10; Survey, supra note 30, at 8, 14; Weinzierl, supra note 4, at 193, 201, 208, 215; Sander & Goldberg, supra note 7, at 66; Stingl, supra note 7, at B1; Kennedy, supra note 7, at C1; Lee, supra note 29, at B1.
41. Id.
42. Id.
43. Id.
45. Id. at 93.
46. Id. at 106.
turer and its dealers by "providing an appropriate forum for the enforcement of corporate policy." 47 In addition, Toyota has significantly reduced its dealer dispute litigation costs, 48 as well as the number of disputes between dealers and itself. 49 Since implementing the program, the number of disputes over vehicle and sales credit allocation has decreased from 178 cases in 1985 to twenty-seven in 1992. 50

Controlling risk is yet another advantage that ADR offers to disputants. When parties elect to resolve their dispute through trial, the outcome, to a considerable degree, is taken out of their hands. Although jury verdicts can be somewhat anticipated through statistical analysis of past awards within a particular jurisdiction, there is certainly no formula for predicting an award. By contrast, ADR allows the parties to make the decisions regarding the outcome of the dispute. 51 In other words, the parties control the risks otherwise left to an unpredictable jury.

From the defense perspective, the risk of having large damages awarded in emotionally charged disputes such as sexual harassment, wrongful death, product liability, or libel disputes is significant. For example, the news media have increasingly been subjected to large jury awards in libel actions. 52 For instance, in 1990 and 1991, juries awarded significant damages in several libel verdicts, including a $58 million verdict against Belo Broadcasting Corporation and a $34 million verdict against the Philadelphia Inquirer. 53 During the first two years of the decade, the median libel punitive damage award increased twelve times from what it was in the 1980s to $2.5 million. 54 An average of 10.5 libel judgments per year were awarded by juries during this time, totaling $190.4 million. 55 Risk analysts attribute these large awards to emotional juries, who may or may not understand the law, but award large damages because they are sympathetic to the plaintiff. 56 Defendants in personal

47. Id. at 109.
48. Id. at 107.
49. Id.
50. Id.
52. Junda Woo, Juries' Libel Awards Are Soaring, With Several Topping $10 Million, WALL ST. J., Aug. 26, 1992, at B3; Sara Marley, Huge Libel Awards No Longer the Rule, But Big Risks Remain, BUS. INS., May 30, 1994, at 3. For a general discussion on the risks and costs of libel disputes, and how ADR can be used to avert them, see also Weinzierl, supra note 4, at 193-216.
53. Marley, supra note 52, at 3.
54. Woo, supra note 52, at B3.
55. Id.
56. Marley, supra note 52, at 26.
injury cases face similar risks. For instance, an Albuquerque, New Mexico jury awarded $2.7 million in punitive damages to a patron of a fast-food restaurant who suffered severe burns after spilling hot coffee on herself. Although the judge reduced the punitive damages portion of the award to $640,000 (the dispute ultimately settled out of court), this case illustrates the unpredictability of juries, as well as how jury emotions can drive the outcome of a case.

From the plaintiff's perspective, the opposite may hold true. In personal injury cases generally, juries are increasingly displaying less sympathy for claimants. A study of approximately 90,000 civil cases revealed that the percentage of juries siding with alleged personal injury plaintiffs in 1992 declined to roughly fifty-two percent (52%) from sixty-one percent (61%) in 1987. Another recent study of jurors revealed that seventy-five percent (75%) believe jury awards are too high and over two-thirds indicated that there are too many lawsuits filed. Although the defendants may have had some degree of culpability in these disputes, they prevailed at trial. Although this recent trend of declining jury sympathy is not indicative of what outcome will be achieved in individual civil disputes, it does illustrate the potential risks claimants must consider when selecting the method they will use to settle their disputes. The unpredictable nature of all juries is something that should be weighed by both the plaintiff and the defense. Resolution of a civil dispute through ADR controls risk and uncertainty.

Finally, the confidentiality of ADR makes it an attractive settlement option. In employment disputes, such as an alleged case of sexual harassment, mediation could result in a private resolution of the matter without negative or embarrassing publicity. If a celebrity is involved in a dispute, the privacy aspect of ADR should be especially attractive. For instance, a recent civil lawsuit involving a popular musician accused of sexually molesting a minor child was reportedly resolved through mediation, thus ending the dispute quickly and privately.

58. Id.
60. Id.
61. Id.
tion undoubtedly helped the entertainer maintain his public image by avoiding a prolonged, public courtroom battle.

C. The Rise of Court-Mandated ADR Programs

As the advantages of ADR to civil litigants and those involved in family disputes became increasingly clear over the last several years, and court backlogs increased substantially, state and federal courts began exploring incorporating mediation, arbitration, and other settlement procedures directly into their scope of power. As of 1992, over 1200 state court-sponsored ADR programs were identified in the United States. Over one-third of the Federal court districts had implemented some form of ADR by 1990 including, in some jurisdictions, authorizing judges to order litigants to use some form of ADR in an effort to settle their dispute. The Civil Justice Reform Act of 1990 is seen by many legal scholars and observers as one of the primary catalysts of the courts' rising use of ADR.

Although court-annexed ADR continues to grow across the country, uniformity is lacking in the procedures and methods of administration of these programs. Each jurisdiction has adopted its own approach to court-ordered ADR, often creating confusion for litigants exposed to more than one jurisdiction and voluntary use of ADR procedures. The Wisconsin ADR law, however, provides ADR procedures in the traditional sense of each option.

II. WISCONSIN'S COURT-ORDERED ADR LAW

Under Wisconsin state law, the state Judicial Council is authorized to advise the Wisconsin Supreme Court as to "changes which will, in the council's judgment, simplify procedure and promote a speedy determination of litigation upon its merits." The Judicial Council petitioned for a statewide court-ordered ADR system, which was adopted by the Wisconsin Supreme Court with slight modifications. Wisconsin state statutes were amended to create section 802.12, Wisconsin's new ADR law. The law established a policy of encouraging ADR as an alterna-

---

63. Shaw, supra note 2, at C1.
64. Id at C16.
66. See Mazadoorian, supra note 30, at C10.
67. Shaw, supra note 2, at C16.
tive to litigation.\textsuperscript{71} Under the new law, state judges are authorized to order ADR in civil disputes at any stage of the litigation process and to compel the plaintiff and defendant to personally participate in the settlement process along with their legal representatives.\textsuperscript{72} Further, the law directs the parties to select a procedure and provider of the ADR service.\textsuperscript{73} However, if the litigants are unable to select a procedure or provider or both, the court may make those determinations for them, as well as direct payment of the fees and expenses of the provider.\textsuperscript{74} The new ADR law provides for a number of binding and nonbinding settlement procedures from which the parties can select.

A. Binding Arbitration

In binding arbitration, the litigants contractually authorize a neutral third party to hear their dispute and render a decision they must accept.\textsuperscript{75} The parties, by contract, or the neutral determine the applicability of the rules of evidence.\textsuperscript{76} Typically, the parties would make an abbreviated presentation of their case to the neutral, often introducing written documentation (by mutual stipulation) directly as evidence in order to reduce costs. They are legally bound to the findings of the arbiter, although the award is subject to review under Wisconsin Statutes sections 788.10 and 788.11.\textsuperscript{77} It is important to note that judges cannot order litigants to use binding arbitration to resolve their dispute. All parties must consent to binding arbitration.\textsuperscript{78}

The advantages of employing binding arbitration for resolving disputes are numerous. It is dramatically more cost effective than litigation because of its informality. Parties may submit documentation supporting their case, such as medical reports, hospital bills, lost wage statements, accident reconstruction reports, tax returns, and expert witness reports directly to the arbiter as evidence. Unlike arbitration, when a dispute goes to trial, expert witnesses, doctors, employers, witnesses, and

\textsuperscript{71} Id.
\textsuperscript{72} Id. at xvii (creating Wis. Stat. § 802.12(2)(a)).
\textsuperscript{73} Id. at xvii-xviii (creating Wis. Stat. § 802.12(2)(b)).
\textsuperscript{74} Id. at xviii (creating Wis. Stat. § 802.12(2)(c),(d)).
\textsuperscript{75} Id. at xvi (Wis. Stat. § 802.12(a)).
\textsuperscript{76} Id. at xvi (creating Wis. Stat. § 802.12(a)).
\textsuperscript{77} Id.
\textsuperscript{78} Id.
police officers must personally testify in court, resulting in significant costs to the plaintiff and defendant.\textsuperscript{79}

In addition to reducing costs, arbitration also allows the parties to control risk. For example, "high-low" parameters can be agreed to and stipulated in the arbitration agreement which limit the scope of the arbitrator's award. In a case in which the plaintiff is demanding $70,000 and the defendant is offering $30,000, these numbers could be selected by the parties as "high-low" figures. The $70,000 in effect becomes a ceiling on the amount of potential damages recoverable by the claimant. The $30,000 becomes the floor, or the minimal amount of recovery. These figures are not shared with or revealed to the neutral third party. The arbiter hears the dispute and renders a decision. If her or his award falls between $30,000 and $70,000, whatever that figure is stands as the award. But if the award exceeds $70,000, the plaintiff may only recover $70,000. Likewise, if the award falls below the $30,000 floor, the defendant is still compelled to pay $30,000. Thus, a best- and worst-case scenario are envisioned and stipulated prior to the arbitration hearing.

\textbf{B. Direct Negotiation}

Direct negotiation is the only process outlined in the ADR law that does not require the intervention of a neutral third party.\textsuperscript{80} Direct negotiation involves an exchange of offers and counteroffers by the litigants, and directs the parties to discuss the strengths and weaknesses or the merits of their positions.\textsuperscript{81} This settlement procedure may or may not prove to be effective. The parties are in litigation because their direct discussions have not produced a settlement. The intervention of qualified neutrals will likely prove more effective in resolving a dispute than requiring the parties to make another exchange of offers and demands.

\textbf{C. Early Neutral Evaluation}

This procedure entails the litigants making a brief oral or written presentation of their positions early in the litigation process to a neutral party. The neutral then provides an analysis of their case, and makes recommendations for conducting discovery and obtaining legal rulings to

\textsuperscript{79} It is important to note, however, that in many injury cases, liability is stipulated so the dispute centers around the extent of the injury and what constitutes fair compensation. In this scenario, testimony concerning liability is avoided, thus eliminating those potential costs.

\textsuperscript{80} Wis. Sup. Ct. ORDER 93-13, 180 Wis. 2d xv, xviii (creating Wis. Stat. § 802.12(1)(b)).

\textsuperscript{81} Id. (creating Wis. Stat. § 802.12(1)(b)).
resolve the dispute as efficiently as possible.\textsuperscript{82} If the parties agree, this neutral may also help them attempt to negotiate a settlement.\textsuperscript{83}

Early neutral evaluation will be especially beneficial to parties involved in complex disputes that could require significant discovery. It may give the parties insight into how best to conduct cost effective discovery and focus the parties on achieving a settlement rather than continuing through litigation. It may also lay the groundwork for future mediation should negotiations fail.

\textbf{D. Focus Group}

In this settlement process the parties select a panel of citizens to hear an abbreviated presentation of their dispute.\textsuperscript{84} After hearing the presentations, the panel deliberates, renders an advisory opinion about how the dispute should be settled, and discusses its opinion with the litigants.\textsuperscript{85}

Focus groups are typically used by parties who want to "test the water" in terms of trial strategies and possible outcomes. This process is frequently used in cases where there is potential for a large jury verdict. It is also used in significant cases where liability is in dispute. Attorneys can test their theories before a panel of citizens that in all likelihood reflects the type of jury they would draw at the courthouse. The advisory opinion the panel renders can be extremely helpful to the attorneys as they consider whether to continue through the litigation process or make an offer to settle.

\textbf{E. Mediation}

Mediation is a non-binding procedure in which a neutral third party attempts to help the parties reach a mutually acceptable settlement to the dispute.\textsuperscript{86} The mediator has no authority to render a decision or place a value on the case.\textsuperscript{87} Rather, the mediator works back and forth between the parties, privately discussing the strengths and weaknesses of each party's case, as well as helps the parties focus on the primary issues of the dispute.\textsuperscript{88}

\textsuperscript{82} \textit{Id.} (creating Wis. Stat. § 802.12(1)(c)).
\textsuperscript{83} \textit{Id.}
\textsuperscript{84} \textit{Id.} (creating Wis. Stat. § 802.12(1)(d)).
\textsuperscript{85} \textit{Id.}
\textsuperscript{86} \textit{Id.} (creating Wis. Stat. § 802.12(1)(e)).
\textsuperscript{87} \textit{Id.}
\textsuperscript{88} \textit{Id.}
Mediation is also extremely informal and offers many of the same advantages as arbitration in terms of cost effectiveness. Unlike arbitration, however, mediation will not result in the neutral rendering a decision. Therefore, risk is controlled not by limiting the scope of an award, but by empowering the parties to negotiate a mutually acceptable settlement. Because mediation is a continuation of the direct negotiation process, it is important that the parties negotiate in good faith, but not bid against themselves. In mediation, the parties discuss their case with the neutral privately. Anything revealed to the mediator in these discussions is not shared with the opposing party. Therefore, the parties can test potential settlements without bidding against themselves.

F. Mini-Trial

This settlement procedure involves litigants selecting a panel of neutrals who are authorized to negotiate a settlement to the dispute after hearing presentations by the parties. The panel considers the legal and factual issues of the dispute in its settlement negotiations. Among the persons selected to the panel may be a neutral or neutrals with expertise in the particular area of the dispute. The mini-trial is often employed for the resolution of complex business or commercial disputes. Typically, cases that go through mini-trials are significant. The advantage of using a mini-trial as opposed to mediation, for instance, is that it allows participation in the settlement process from both an expert mediator and an expert in the field. In business disputes, executives from the disputing companies often sit on the panel along with the neutral chair. The companies' attorneys make presentations to this panel. After the presentations, the neutral leads the executives in settlement discussions. In this scenario, parties to the dispute actually participate in settlement discussions and deliberations.

G. Moderated Settlement Conference

In a moderated settlement conference, the litigants make abbreviated presentations of their case to one or more neutrals. The neutrals then conduct settlement conferences and may also render an advisory opinion to aid in settlement discussions. This settlement procedure is

89. Id. (creating Wis. Stat. § 802.12(1)(f)).
90. Id.
91. Id. at xvi-xvii.
92. Id. at xvii (creating Wis. Stat. § 802.12(1)(g)).
93. Id.
very similar to the mini-trial, but not quite as formal. A focus on settlement and the interests of the parties is prevalent.

H. Nonbinding Arbitration

Nonbinding arbitration operates in the same fashion as binding arbitration with the exception that the parties are not bound by the neutral’s decision. The goal of the process is to produce a settlement figure that may be considered by the parties in future settlement discussions.

Nonbinding arbitration offers the litigants advantages identical to those of binding arbitration, but only if both parties accept the arbitrator’s findings. The primary disadvantage of nonbinding arbitration is that either party may reject the decision. The parties could go through the presentation process and not settle the dispute. The advantage of finality is removed. On the other hand, the flexibility of being able to reject the award could be perceived by the parties as an advantage. In this scenario, the arbitration process is likely used to test the waters before an experienced, knowledgeable arbitrator, such as a former judge. The award, although it may be rejected by one or both parties, will help them focus on potential outcomes at trial.

I. Summary Jury Trial

A summary jury trial consists of attorneys making abbreviated presentations of their cases to a small panel of citizens selected from the regular jury pool. A judge is selected to preside over the hearing and determine the applicability of the rules of evidence. The mock jury renders a verdict that may be used by the parties in subsequent settlement discussions. The litigants may also discuss this verdict with the mock jurors at the time of the verdict.

The summary jury trial is really a formalized focus group. In addition to the panel of citizens, a judge is also selected to preside over the presentations of the case. What results is an informal jury trial. Again, this procedure is used less frequently than arbitration and mediation, and primarily in significant exposure cases. The parties’ goal is to use the information learned in the summary jury trial as a basis for future

94. Id. (creating Wis. Stat. § 802.12(1)(h)).
95. Id.
96. Id. (creating Wis. Stat. § 802.12(1)(j)(1)).
97. Id. (creating Wis. Stat. § 802.12(1)(j)(2)).
98. Id. (creating Wis. Stat. § 802.12(1)(j)(4)).
99. Id. (creating Wis. Stat. § 802.12(1)(j)(3)).
offers and demands, and subsequent settlement discussions. The information can also be used for trial strategies as the parties can discuss why jurors and the judge responded to their presentations in certain ways.

Once the parties select one of these procedures and a neutral provider, they must notify the trial judge. If the parties cannot agree upon a procedure or provider, the trial judge may make those decisions for them. However, the judge is obligated to specify the least costly procedure that she or he feels will be most effective at bringing the parties to a settlement. The trial judge is not authorized to order the parties to binding arbitration, nonbinding arbitration, or a summary jury trial. Under the law, the trial judge may also direct payment of the neutral(s) and provider if the parties cannot agree upon how to divide the costs.

In addition to affecting civil litigation, the new Wisconsin ADR law provides procedures for the resolution of family matter disputes. All of the settlement procedures outlined in the law are available for the resolution of family disputes except the focus group, mini-trial and summary jury trial options. The law also provides that if the court has appointed a guardian ad litem for a minor child, that guardian will be a party to any court-sponsored ADR procedure “regarding custody, physical placement, visitation rights, support, or other interests of the ward.”

Parties to family disputes may mutually agree to employ binding arbitration for the resolution of disputes involving property division under section 767.255, maintenance under section 767.26, attorney fees under section 767.262, and post-judgment orders modifying maintenance under section 767.32. Parties, including guardians ad litem, may also agree to employ arbitration for the resolution of custody and physical placement disputes under section 767.245, visitation rights under section 767.245, child support under section 767.25 or section 767.51, and modification of the aforementioned under section 767.32 or 767.325.

The goals of family orientated ADR programs are similar to those for the resolution of other civil disputes: fair, cost effective, and efficient.

100. Id. at xvii-xviii (creating Wis. Stat. § 802.12 (2)(b)).
101. Id.
102. Id.
103. Id. (creating Wis. Stat. § 802.12(2)(d)).
104. Id. (creating Wis. Stat. § 802.12(3)(a)).
105. Id. (creating Wis. Stat. § 802.12(3)(b)).
106. Id. (creating Wis. Stat. § 802.12(3)(c)).
107. Id. (creating Wis. Stat. § 802.12(3)(d)).
resolution of disputes. In addition, family ADR programs are designed to avoid the trauma of family litigation, particularly for children.

Wisconsin's ADR law was designed to offer several viable options for the settlement of civil and family disputes, and to encourage voluntary ADR use prior to litigation. The law provides the various ADR procedures in order to fit litigants with the most suitable settlement procedure for their particular dispute. Rather than mandating one procedure, such as nonbinding arbitration, the law remains flexible in order to increase the likelihood of settlement. This philosophy (of designing a court-annexed ADR program) emerged from the approach adopted by the state of Florida. Florida's court-ordered ADR system was structured after the American Bar Association's "Multi-Door Courthouse" which matches disputants with appropriate settlement procedures.

III. The Florida Model

As court-annexed mediation and arbitration programs have increased in popularity throughout America, one such program has emerged to become largely regarded as the "Cadillac" of court-ordered ADR. Florida's settlement program is widely considered one of the most, if not the most, successful court-sponsored ADR programs in the United States. The historical success of Florida's program suggests that the Wisconsin model will also likely meet with favorable results over the years.

Florida was among the first states to implement court-ordered ADR. In 1987, in response to a study by Florida's Legislative Study Commission, Florida state statutes were amended to empower state judges to order ADR procedures in civil, family, and community disputes. Under Florida's guidelines, nondomestic civil disputes over $15,000 are eligible for circuit court-ordered ADR. Civil nonfamily disputes under $15,000 are referred to County Civil Mediation programs. For the

109. Larry Ray & Prue Kestner, The Multi-Door Experience; Dispute Resolution and the Courthouse of the Future, Standing Committee on Dispute Resolution of the ABA (1988).
111. Compendium, supra note 108, at 5-8.
purpose of this article, the analysis will focus solely on the resolution of civil nonfamily disputes over $15,000.

Once ordered to ADR, parties may select a private ADR provider or use a court-appointed provider, if available.\textsuperscript{112} In Florida, each county is responsible for its own program. Some counties provide volunteer mediators and arbitrators to the litigants at no expense, while in other counties, parties must rely on the services of private ADR providers.\textsuperscript{113} If the parties select or must select a private provider, they are responsible for compensating the neutral. Generally, the neutral's fee is divided among or between the parties.\textsuperscript{114} The litigants may also select the ADR procedure they will use. Typically, litigants are matched with the most appropriate settlement procedure for their particular dispute. Nonbinding mediation is frequently selected or assigned.

Florida's circuit court mediation program historically has been quite successful in facilitating resolutions to civil disputes of $15,000 and greater. For example, in 1991, 10,391 civil disputes were resolved during 16,960 mediation sessions through Florida's circuit court mediation program, resulting in an overall sixty-one percent (61%) settlement record among the participating counties.\textsuperscript{115} Duval County achieved an eighty-one percent (81%) settlement rate as 1088 of the 1345 disputes mediated through its program settled.\textsuperscript{116} In Pinellas County, 1033 cases out of 1599 were resolved through the mediation program, or sixty-five percent (65%).\textsuperscript{117} Dade County saw the most referrals to court-ordered mediation as 6500 cases were assigned to the program.\textsuperscript{118} Of the disputes ordered to mediation, 4000 actually went through a settlement conference of which 2400, or sixty percent (60%), settled.\textsuperscript{119} In Palm Beach County, fifty-eight percent (58%) of the cases that went through mediation settled,\textsuperscript{120} while forty-nine percent (49%) of the disputes mediated in Broward County were resolved.\textsuperscript{121}

During the previous year, the Florida circuit court-ordered mediation program settled nearly 6200 disputes.\textsuperscript{122} In 1990, the Lee County pro-

\begin{itemize}
  \item \textsuperscript{112} Id.
  \item \textsuperscript{113} Id. at 5-1, 5-2.
  \item \textsuperscript{114} Id. at 5-2.
  \item \textsuperscript{115} Id. at 5-8.
  \item \textsuperscript{116} Id.
  \item \textsuperscript{117} Id.
  \item \textsuperscript{118} Id.
  \item \textsuperscript{119} Id.
  \item \textsuperscript{120} Id.
  \item \textsuperscript{121} Id. at 5-5.
  \item \textsuperscript{122} Id. at 5-8.
\end{itemize}
gram settled seventy-nine percent (79%) of its nonbinding mediations.\(^\text{123}\) In Duval County, 632 civil disputes out of 988 were settled through mediation, or sixty-four percent (64%).\(^\text{124}\) The Dade County circuit court referred the most cases to ADR, with 2380 settlements reached out of 3500 mediation sessions, or sixty-eight percent (68%).\(^\text{125}\) Approximately forty-six percent (46%) of the cases ordered to mediation in Palm Beach County were settled through the process.\(^\text{126}\)

It is important to note that these figures are not reflective of the success or volume of voluntary ADR use throughout the state. As the success of Florida's court-annexed system was documented and attorneys and insurers were increasingly exposed to ADR procedures, voluntary use of ADR increased throughout the state. This phenomena will likely be repeated in Wisconsin as well. As Wisconsin attorneys receive favorable results through court-ordered ADR, they will likely begin to consider employing ADR procedures voluntarily to resolve other disputes not in litigation or early in the litigation process.

Florida's ADR program, particularly circuit court-referred mediation, has been very successful. Because Wisconsin's system shares many of the mechanics of Florida's, predicting success is practical. There is, however, one primary difference between the two systems that is noteworthy. Unlike in Florida, Wisconsin's court-ordered ADR law did not create a court-subsidized program. Although Florida uses volunteer neutrals in some jurisdictions, the cost of administering its system is supported by state government. In Wisconsin, on the other hand, no burden has been placed upon the taxpayer to fund the system. Therefore, the state and its residents will receive many of the benefits of court-referred ADR (assuming a large percentage of disputes are resolved) without increasing the tax burden or shifting funding away from other areas. This will likely solidify support for the system as Wisconsin's ADR program will not be the target of legislature budget cuts.

IV. THE ILLINOIS MODEL

The State of Illinois was another early entry into the mandatory ADR arena. In 1985, the Illinois state legislature and governor ap-

\(^{123}\) Id.
\(^{124}\) Id.
\(^{125}\) Id.
\(^{126}\) Id.
proved the Mandatory Arbitration Act. The Illinois Supreme Court then formed a committee to make recommendations on how to implement the Act. The Illinois Supreme Court adopted the committee's recommendations, and the new mandatory arbitration law went into effect June 1, 1987 as Illinois Supreme Court Rules 86 through 95. The law provides that any civil dispute greater than $2,500 but under $15,000 (the Illinois Supreme Court subsequently raised the ceiling to $30,000 in some counties, including DuPage and Cook) will go to nonbinding arbitration.

A. How the Program Works

Illinois' mandatory arbitration program is significantly different from the Florida and Wisconsin models. The principal difference between the two systems is that in Illinois, nonbinding arbitration is the only settlement option available. In addition, claims over $15,000 (or $30,000, depending upon the jurisdiction) are not eligible for arbitration. The Illinois system mandates a tri-panel arbitration procedure as opposed to providing an option for a singular arbiter. The litigants have no control over who serves on the arbitration panel, the arbitrators are appointed by the court. As such, all of the arbitrators are compensated by the state through the Mandatory Arbitration Fund. In this regard, Illinois' court-annexed arbitration system is entirely administered and funded by the state.

All civil disputes meeting the qualifications in each jurisdiction are eligible for court-ordered arbitration, although that does not mean that every eligible civil action will be ordered to arbitration. Once ordered to arbitration, the parties are assigned a panel of arbiters and an arbitration date. At the hearing, the parties make presentations to the arbitra-
tion panel. It is up to each litigant to decide how to present its case. For instance, a party may opt to provide written documentation only, such as hospital bills, medical reports, lost wages statements, tax returns, property damage reports, etc., as evidence at the hearing. If a party elects to submit written evidence only, that party must provide written notice and a copy of the evidence that will be submitted to the opposing party no less than thirty days prior to the hearing. If, on the other hand, a party elects to present its case in the traditional manner of using live expert and other witness testimony, that party is solely responsible for those fees. Under Illinois Supreme Court law, parties ordered to arbitration may subpoena witnesses to appear at the arbitration hearing just as they could in court.

After hearing evidence, the arbitration panel will render a decision on the same day of the hearing. Neither the decision nor the award is binding. However, unlike the Florida or Wisconsin systems, under the Illinois system a party must pay a $200 fee to the court within thirty days of the hearing to reject the award. Failure to pay this fee results in the award becoming binding on all parties subject to the supervising judge entering judgment on the award. If a party fails to appear at the arbitration hearing, the arbitration proceeds as scheduled ex parte, and the absent party waives the right to reject the award and consents to entry of a judgment on the award. If an award is properly rejected, the case is placed on the trial calendar and proceeds accordingly.

B. Success of Illinois' Arbitration Program

When considering the success of Illinois' mandatory arbitration program, it is important to note that the system was designed to not only dispose of cases through arbitration, but to encourage voluntary disposition of cases, as well as dispositions through court dismissals, settlement orders, and default judgments. In this regard, the Illinois model has

137. ILL. SUP. CT. R. 90(e) (1994).
138. QUESTION AND ANSWER, supra note 129, at 7-8.
139. Id. at 9.
140. Id. at 8.
141. Id. at 14.
142. ILL. SUP. CT. R. 93(a).
143. Id.
144. ILL. SUP. CT. R. 92(e).
145. ILL. SUP. CT. R. 91(a).
been successful. For instance, in 1994, Winnebago County reported that eighty-nine percent (89%) of all cases ordered to an arbitration prehearing were disposed of prior to an actual arbitration hearing.\textsuperscript{147} Lake County reported an eighty-eight percent (88%) disposition rate during this same period.\textsuperscript{148} McHenry, DuPage, and St. Clair counties all reported an eighty-five percent (85%) disposition rate.\textsuperscript{149} Cook County's disposition rate was significantly lower than the other participating counties at approximately nineteen percent (19%).\textsuperscript{150} These figures suggest that the arbitration program, outside of the greater Chicago area, is successful in disposing of cases that would otherwise proceed through traditional litigation.

Another measure of the success of the Illinois program is the arbitration award rejection rate. In every arbitration, parties may reject the arbitrators' award as long as they follow the appropriate guidelines. In 1994, of the 10,578 cases arbitrated in Cook County, awards in 4655 or forty-four percent (44%) were rejected.\textsuperscript{151} In Lake County, 103 of the 270 arbitration awards, or thirty-eight percent (38%) were rejected.\textsuperscript{152} The rejection rate in DuPage County was thirty-four percent (34%).

In 1993 in Cook County, 5916 awards out of 12,174 hearings or forty-nine percent (49%) were rejected.\textsuperscript{153} Lake County litigants also rejected forty-nine percent (49%) of the awards during the year.\textsuperscript{154} In DuPage County, thirty-four percent (34%) of the awards were rejected.\textsuperscript{155} During 1992 in these same counties, arbitration awards were rejected forty-eight percent (48%) of the time in Cook County, forty-four percent (44%) in Lake County and thirty-three percent (33%) in DuPage County, with Lake and DuPage counties reporting overall high disposition rates.\textsuperscript{156}

Although the overall disposition rate of disputes without an arbitration hearing was high in most of the counties, Cook County, the most

\begin{itemize}
  \item \textsuperscript{147} Id. at 15-16.
  \item \textsuperscript{148} Id. at 16.
  \item \textsuperscript{149} Id.
  \item \textsuperscript{150} Id.
  \item \textsuperscript{151} Id. at 14.
  \item \textsuperscript{152} Id.
  \item \textsuperscript{153} ILL. SUP. CT., COURT-ANNEXED MANDATORY ARBITRATION ANNUAL REPORT 14 (1993).
  \item \textsuperscript{154} Id.
  \item \textsuperscript{155} Id.
  \item \textsuperscript{156} ILL. SUP. CT., COURT-ANNEXED MANDATORY ARBITRATION ANNUAL REPORT 11 (1992).
\end{itemize}
populous in the state with 5.1 million people,\textsuperscript{157} did not experience a high disposition or arbitration settlement rate. On average, approximately fifty percent (50\%) of the cases going through arbitration were settled. Although this figure represents a large amount of settlements, the Illinois program, particularly in Cook County, would likely enjoy higher settlement rates if there were more procedures to choose from. Nevertheless, the Illinois court-annexed mandatory arbitration program has helped reduce court backlogs and expedite the settlement process throughout the participating counties. Furthermore, the program has increased exposure to arbitration and other ADR procedures within the Illinois legal community. This intangible benefit has resulted in ADR increasingly being employed voluntarily to resolve civil disputes prior to court-mandated arbitration.

V. THE CASE FOR WISCONSIN'S ADR LAW

Across the United States and in Wisconsin, the justice system is increasingly becoming inaccessible to ordinary citizens and businesses due to escalating costs and inefficiencies. The costs of taking or defending legal action are steadily rising in almost every jurisdiction throughout America. The backlog of cases in many state and federal civil courts is widening the gap between injury and recovery for plaintiffs. Protracted litigation consistently jeopardizes long-standing relationships between suppliers and distributors, insurance companies and their policy holders, and manufacturers and dealers. Moreover, the increasing level and scope of civil litigation is draining the U.S. economy and inhibiting American businesses' ability to compete in the global marketplace on equal footing. Evidence abounds regarding how ADR procedures can and have settled civil disputes fairly, efficiently, and cost effectively. Court-ordered ADR in Florida has produced high settlement figures, and the Illinois model has on average resolved over fifty percent (50\%) of the eligible disputes. The Wisconsin ADR law will likely emulate these successes.

Evaluating past successes and the satisfaction level of the participants are important considerations when arguing on behalf of Wisconsin's ADR law as well. Recent research suggests that ADR and the benefits it offers are appreciated within the legal community, as well as by society as a whole. For instance, a 1993 study of outside law firm attorneys and general counsel for Fortune 1000 companies revealed that most attorneys

\textsuperscript{157} ILL. SUP. CT., supra note 146, at 10.
believe that ADR saves time and reduces litigation costs, and that those two reasons are the primary reasons ADR procedures are used. The study also revealed that most of the attorneys were generally satisfied or more than satisfied with ADR. The attorneys surveyed expressed optimism over the potential of ADR to resolve many different types of business disputes. From their experiences, they reported that many of the disputes they took to nonbinding ADR procedures, such as mediation, were settled. Of the attorneys who shied away from using ADR, the primary reasons were lack of understanding and experience. Mandatory ADR laws, such as Wisconsin's, Illinois', and Florida's, help expose attorneys to the ADR process. In Florida and Illinois, this has led to increased ADR use.

In 1994, participants in Illinois' court-ordered arbitration program seemed to be quite pleased with the process. For instance, attorneys representing losing parties in DuPage and Lake counties revealed that most were more satisfied with the outcome and fairness of the arbitration program than in a traditional jury trial. Approximately eighty-five percent (85%) of the attorneys in those same counties recommended that their clients accept the award. The actual plaintiffs and defendants who participated in the arbitration process in all counties indicated that they would first select arbitration as the method for resolving similar disputes in the future. In 1993, sitting judges as well as the participants in the court-mandated arbitration process (i.e., arbitrators, attorneys, and actual plaintiffs and defendants) reported a high level of satisfaction with the process as well. In fact, DuPage County reported that forty-four percent (44%) of losing litigants and seventy-two percent (72%) of losing attorneys believed the arbitration panel's decision was fair. The participants also found the process to be more effective in achieving commonly understood goals of litigation than did litigants using the traditional trial system. Perhaps the best indicator of how satisfied the parties were with the arbitration process is that the majority of

159. *Id.* at 10.
160. *Id.*
161. *Id.* at 14.
162. *Id.* at 8.
164. *Id.*
165. *Id.*
167. *Id.*
168. *Id.*
litigants indicated that arbitration would also be their first choice for resolving a similar dispute in the future.\(^{169}\)

The attitudes toward ADR expressed by the Illinois arbitration litigants are similar to those revealed in the results of a 1992 national public opinion survey. Once ADR was explained to ordinary citizens, an overwhelming majority indicated they would use mediation or arbitration over litigation the next time they were involved in a dispute.\(^{170}\)

Finally, based on Florida's track record and other social science research, the carefully constructed Wisconsin ADR law will likely produce high settlement records as well as high levels of satisfaction among attorney and resident users. Wisconsin's law offers several settlement procedures. Although the Illinois system has been successful for the most part in reducing court backlogs and offering residents a more responsive and economical system for dispute resolution, by offering only arbitration, it is not as successful as it could likely be. The Illinois model does lay a foundation, however, for predicting that Wisconsin's comprehensive ADR program will resolve even a greater percentage of civil disputes.

The Wisconsin Judicial Council's and Wisconsin Supreme Court's approach to ADR is a practical one. By offering litigants many settlement choices, as well as empowering them to make decisions regarding those settlement options and who will provide the service, the state instills confidence in the program. As Wisconsin attorneys become increasingly familiar with the process, they will likely be more apt to consider or even recommend voluntary ADR procedures for the resolution of civil disputes.

VI. CONCLUSION

Clearly, there is a problem with the amount of costly civil litigation in the United States. Although Wisconsin has not experienced the degree of court congestion that other jurisdictions such as Los Angeles, New York City, Chicago, and Seattle have, it nevertheless remains cost-prohibitive for many residents and businesses to consider legal action. As costs increase, parties suffer as more monetary resources are necessary to enter the courtroom. ADR is a fair, viable, and cost effective alternative to traditional litigation. Wisconsin's new ADR law will resolve

---

169. *Id.*

more cases earlier in the litigation process, save participants time and money, and lay the groundwork for increased voluntary ADR use. In the years to come, the benefits of Wisconsin’s court-ordered ADR system will likely be appreciated by most of the state’s residents and attorneys.