ALTERNATIVE DISPUTE RESOLUTION) WHAT IS IT? WHERE IS IT NOW?

Robert E. Wells, Jr.*

I. INTRODUCTION

"The time has come *today*." This has been the mantra of mediators for the last decade. While this warm and fuzzy approach has a place in California, surely it does not belong in the boardrooms and hospitals of Chicago,[1] the hallowed halls of the legislature and courts in Springfield,[2] or the small hamlet of Makanda, the home of our late senator, Paul Simon.[3] Maybe not, but something is in the wind.

A number of forces are coalescing. It may be prudent not only to take notice but to be prepared. While a vigorous jury trial system is the backbone of our system of jurisprudence and should always remain our constitutional right, its effectiveness is dependent upon its cost efficiency, its efficacy, and its ability to handle disputes in a timely manner.

II. ADR) WHAT IS IT?

Before reviewing the developments of Alternative Dispute Resolution (hereinafter "ADR") in Illinois, a preliminary understanding of the myriad of "alternatives" is necessary. ADR is packaged and is described in a vernacular unique to its practitioners. This runs the gamut from the common terms of negotiation, mediation, and arbitration to a number of terms that have evolved

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1. Chicago's Rush-Presbyterian-St. Luke's Medical Center initiated a hospital-based mediation program more than eight years ago. Max Douglas Brown, *Rush Hospital's Medical Malpractice Mediation Program: An ADR Success Story*, 86 LL. B. J. 432, 432-33 (1998).

2. Illinois House Speaker Michael J. Madigan solicited the services of retired Judge Michael Brennan Getty to facilitate the rewriting and passage of the Illinois Telecommunications Act when the existing act was set to expire (sunset) on June 30, 2001. Hon. Michael Brennan Getty, *Legislative Dispute Resolution: Mediation Techniques Can Assist in Drafting Difficult Legislation,* DISP. RESOL. MAG., Winter 2002, at 19.

3. Founder and Director of the Public Policy Institute at S.I.U. Carbondale. The Institute opened its doors in 1997 with the promise "to find new ways of solving some very old problems," according to Illinois' beloved senator, who died December 9, 2003.

over the last several decades. Unfortunately, the terms thought to be understood (negotiations, mediation, and arbitration) are often as misunderstood as are the terms collaborative law, restorative justice, therapeutic jurisprudence, and holistic justice.

ADR is a large umbrella that encompasses numerous alternatives to litigation and contains too many permeations to fully enumerate. Consequently, this article will focus on the most common variations and will try to define the more common terms used to describe the processes utilized to avoid the acrimony, delay, and expense of contested litigation. With these limitations in mind, our journey begins with an effort to define those terms most customarily used by the legal profession.

Negotiation is a decision-making process by which disputes are resolved. It is through negotiations that we attempt to resolve differences that have arisen. Such differences may involve aspects which are evident to the participants, as well as aspects that may lurk beneath the surface of the perceived dispute. To successfully resolve the dispute, the parties will often need to: address differences in power and resources; distinguish needs from interests and wants; distinguish facts from perception; recognize social, economic, and ethnic differences; recognize differences in personalities; test and re-evaluate assumptions; re-evaluate expectations; and determine the value of resolution and the means (mechanism) by which it is obtained. We often equate negotiation with a component of the adversarial legal process. However, often overlooked (or undervalued) are the elements of trust and the benefits of a continuing, positive relationship.

Mediation is often viewed by litigators as a "waste of time," *i.e.*, a waste of the litigators' persuasive talents, a delay in resolution, and akin to arbitration "with no teeth." A sterile definition of mediation would read as follows: Mediation is a non-adversarial, non-binding and cooperative process for privately resolving disputes with the assistance of a trained, neutral third-party whose role is to promote communication between the parties to the dispute and to assist in the negotiation of the terms of resolution of that dispute. While such definition accurately reflects the general concepts of mediation, it is incomplete.

At the present time, a dispute in principle exists between many "mediators" on whether mediation is merely facilitative or includes an evaluative component. While all mediators agree that it is appropriate for a mediator to challenge the assumptions and precepts of each party, a difference of opinion exists whether a mediator may properly inject his or her evaluative opinion. In fact, many mediators find themselves classified as either "facilitative mediators" or "evaluative mediators." Those mediators adhering strictly to the facilitative approach argue that injecting an evaluative opinion is

not only inappropriate, but also dilutes the control of the parties in the negotiation process, which is "fundamental" to the concept of mediation. The use of mediation may be combined with arbitration either by original design or by application.

Mediation-Arbitration is a hybrid of mediation and arbitration in which the parties commence the process through mediation. By agreement, either at the commencement of mediation or upon an impasse developing, the parties decide to allow the mediator to assume the role of arbitrator and continue the dispute-resolving process as an arbitration. The converse of mediation is arbitration. *Arbitration* is the adversarial process stripped of many of the procedural aspects of the judicial system and is intended to result in a more prompt, more economical, and less emotional resolution. The control of the parties in arbitration is generally confined to the terms negotiated at the time of the original agreement to arbitrate. An agreement to arbitrate provides the parties the opportunity to structure their own dispute resolution mechanism in the hopes of providing a means to resolve a future dispute in a manner superior to that provided by the judicial system. The benefits of such an approach are dependent, in large part, upon equality of power in negotiating the original terms of arbitration and in the quality, neutrality, and experience of the arbitrator(s). Arbitration can be contractual, legislative, or judicial. Generally arbitration which is legislative or judicial is considered "court annexed."

Court annexed arbitration is a dispute resolution model controlled by judicially enforced rules and subject to limited (circumscribed) judicial review.

Additional approaches for dispute resolution have taken the form of "mini-arbitration," "minitrial," and "summary jury trial." The typical *minitrial* is a process more formal than mediation and involves the disputants choosing an impartial third-party (often a former judge, law professor, or preeminent lawyer) and involves each party's attorney arguing the merits of their respective position on why they should prevail, while at the same time allowing the adverse attorney to expose the weaknesses of their case to adversarial inquiry. The minitrial approach is designed to combine the elements of adjudication with arbitration since it includes an adversarial presentation of proof and arguments but generally does not involve evidentiary rulings or a formal decision. Rather, a minitrial can be utilized as a more formalized method of evaluative mediation with a neutral party helping advise the parties of what might occur if the matter was to be litigated. The parties may fashion a procedure which can make the outcome of a "minitrial" binding upon the parties and, thus, more closely aligned with arbitration. While such an approach has been utilized in federal courts outside Illinois, current Illinois Supreme Court Rules make no specific provision for such a mechanism. Likewise, the *summary jury trial* developed by several federal court judges

(a variation of the minitrial approach, but involves a mock jury) is neither countenanced nor contemplated by any existing or proposed Supreme Court Rule.

Recently, a number of groups have coined additional terms, including "comprehensive law" and "collaborative law." These approaches are not the primary focus of this article and, thus, discussion will be limited to their generally recognized definitions. *Collaborative law* is a non-litigious process generally limited to dissolution of marriage cases wherein each party's attorney is forbidden by contract from representing their client at trial should the negotiation process fail to result in resolution. In the event the parties fail to reach an agreement, the parties would be required to hire a new and different attorney to litigate their differences.[4] *Holistic justice* is an interdisciplinary process with the primary purpose of encouraging compassion, reconciliation, forgiveness, and healing.[5] *Therapeutic jurisprudence* is intended to incorporate the law's role as a potential therapeutic agent in an attempt to reform legal processes to incorporate the impact of such processes on the emotional life and psychological well being of all parties involved.[6] *Restorative justice* is generally limited to the criminal arena. It is often employed in the United States with reference to juvenile offenders. It is designed to have the victims, communities, and offenders work interactively to bring closure to the victim and deter recidivism.[7] *Preventive law* emphasizes a prophylactic approach involving early intervention and relationship-building mechanisms.[8]

III. ADR) WHERE IS IT NOW?

Developments in ADR are taking place on multiple levels, including: (1) the federal legislative and administrative level, (2) the state legislative and administrative level, (3) the federal and state court level, and (4) the private (non-governmental) sector. This article will focus on how the major developments impact the practice of law in Illinois. Of necessity, it will touch upon the federal developments as they intersect and impact Illinois.

A. State Pre-Trial Conferences

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4. *See* Collaborative Family Law, *at* http://www.collaborativelaw.org/whathappens.html.
5. *See* International Alliance of Holistic Lawyers, *at* http://Iahl.org/what_is.html.
6. *See* International Network on Therapeutic Jurisprudence, *at* http://www.law.arizona.edu/depts/upr-intj/.
7. *See* U. Minn. Sch. of Social Work, Center for Restorative Justice & Peacemaking, *at* http://ssw.che.umn.edu/rjp/.
8. *See* Cal. W. Sch. of Law, National Center for Preventative Law, *at* http://www.preventivelawyer.org.

The first formalized approach to judicial settlements finds its origin in rules relating to pre-trial conferences. In 1941, the Illinois General Assembly added § 58 ½ to the Illinois Civil Practice Act. That section provided general authority to the trial court to compel the attendance of attorneys for the parties in a civil action to appear at a pre-trial conference in order to consider "any matter as may aid in the disposition of the action."[9] The supreme court supplemented § 58 ½ by adoption of Supreme Court Rule 23A, which established certain parameters for such pre-trial conferences.[10] Supreme Court Rule 23A provided that the trial court consider in its pre-trial conference the following: (a) simplification of issues; (b) amendments to pleadings; (c) expediting trials by exploring admissions of facts and admission of documents; (d) limiting the number expert witnesses, and (e) other matters which would aid or expedite the disposition of the pending matter.[11] To encourage such conferences, Supreme Court Rule 23A required trial judges to establish pre-trail calenders to be utilized for such purposes. Finally, Supreme Court Rule 23A mandated that the trial judge "shall make an order which recites the agreements made by the parties and limits the issues for trial to those not disposed of by admissions or agreements of counsel."[12]

In 1955, § 58 ½ of the Illinois Civil Practice Act was replaced by § 58.1 of the Illinois Civil Practice Act. Section 58.1 provided that "the holding of pre-trial conferences shall be in accordance with rules.[13] Supreme Court Rules were supplemented to provide authorization for a trial judge to "compel attendance by individuals necessary to make the conference effective.[14] Additionally, the 1955 revisions to Supreme Court Rules provided that when a pre-trial conference was held "Counsel familiar with the case and authorized to act shall appear, with or without the parties as the court directs."[15] Finally, the 1955 revisions provided the trial judge with authority to impose sanctions for failure to appear or participate in good faith in the pre-trial conference.[16] Both the statute and rule remained substantially unchanged until 1995. During this hiatus of forty years, a debate arose whether pre-trial conferences were the appropriate vehicle for settlement discussions.

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9. Act of July 21, 1941, § 1, 2 Ill. Laws 464, 466.
10. ILL. SUP. CT. R. 23A, 378 Ill. 12 (1942) (repealed).
11. *Id.*
12. *Id.*
13. Act of July 19, 1955, Ill. Laws 2238, 2264 (codified at 735 Ill. Comp. Stat. 5/2-1004 (2004)).
14. ILL. SUP. CT. R. 22 (Illinois Supreme Court Rule 23 was renumbered as Illinois Supreme Court Rule 22).
15. *Id.*
16. *Id.* Available sanctions included dismissal for want of prosecution, or, alternatively, entry of a default judgment.

In 1995, the supreme court amended and revised the applicable Supreme Court Rule, now Rule 218.[17] The revision ended the debate whether settlement talks were appropriate for pre-trial conferences by including the clause that conferences consider "the possibility of settlement and scheduling a settlement conference."[18] While the new rule contemplated settlement conferences, it eliminated the trial judge's authority to compel the attendance of parties and deleted language authorizing the imposition of sanctions. Thus amended, the rule only required "counsel familiar with the case and authorized to act" to appear for pretrial conferences.[19] Supreme Court Rule 218 has not been amended since 1995.[20] Thus, while current Supreme Court Rules contemplate the court's participation in settlement discussions and conferences, the provisions contain no explicit judicial authority to compel the attendance of parties, no guidance as to which judge should preside at the pre-trial conference,[21] and little guidance on the implementation or resolution of post-settlement issues. Instead, the 1995 amendments concentrate more on the administrative goal of case management.

Supreme Court Rule 218 does, however, specifically direct the trial court to consider "the advisability of alternative dispute resolution."[22] The committee comments are silent on the procedure or authority of the court if it finds ADR advisable.[23] As a result, settlement conferences and referrals to ADR under Supreme Court Rule 218 have varied not only from circuit to circuit but from one judge to another. The primary focus of this article is to describe how a number of developments are coalescing to provide a more uniform and consistent approach to ADR

B. Federal Legislative/Administrative Applications of ADR

Congress enacted the Alternative Dispute Resolution Act of 1998,[24] (hereinafter "ADR Act") to address the "problem-high case loads burdening the federal courts," and to provide "a quicker, more efficient method by which

17. ILL. SUP. CT. R. 218; ILL. REV. STAT. Ch. 110A, § 218.
18. ILL. SUP. CT. R. 218.
19. *Id.*
20. Except for technical revisions in 2002 to conform with the terminology in Supreme Court Rule 213.
21. The trial judge (who may be most familiar with the facts and circumstances of the case) versus an independent pre-trial conference judge who will not be adversely influenced by reason of participation and settlement discussions.
22. ILL. SUP. CT. R. 218(a)(7).
23. ILL. SUP. CT. R. 218 (committee comments).
24. 28 U.S.C. §§ 651-58 (2000).

to resolve some federal cases when the parties or the courts so choose."[25] The ADR Act requires that all federal trial courts establish an ADR program, but leaves to each court's discretion whether litigant's participation in certain types of ADR is to be mandatory or voluntary.[26] The courts must offer litigants a choice among multiple ADR processes that include, but are not limited to, mediation, early, neutral evaluation, "minitrial" and arbitration.[27] The court's authority to order mandatory ADR is limited to mediation and early neutral evaluation; no federal court can order parties to participate in an arbitration or minitrial absent an agreement to do so.[28]

Federal legislation concerning the use of ADR includes, but is not limited to, the Federal Arbitration Act of 1925,[29] Federal Dispute Resolution Act of 1980,[30] Equal Access to Justice Act,[31] and the Administrative Dispute Resolution Act.[32]

Application of ADR can be found in the Federal Mediation and Conciliation Service under the Department of Labor.[33] The Equal Employment Opportunity Commission (hereinafter "EEOC"),[34] recently implemented a new ADR program called "RESOLVE,"[35] which commission officials hope will be a model for other agencies and private companies. RESOLVE is available to any EEOC employee, supervisor, or manager across the country and will primarily rely upon mediation to resolve disputes as early as possible. United States Department of Agriculture has turned to private ADR service providers in an attempt to resolve a two-decade backlog of civil rights cases.[36] The USDA Conflict Prevention and Resolution Center is currently screening cases to determine how many can be referred to the ADR process. The EEOC and the U.S. Postal Service are cooperating to launch a joint national mediation initiative.[37] The goal is to increase the use of mediation as a means to resolve work-place complaints. The United States Postal Service (hereinafter "USPS") has reported great success with its redress dispute resolution

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25. H.R. REP. NO. 487, at 5 (1998).
26. 28 U.S.C. § 651 (2000).
27. *Id.* § 652(a).
28. *Id.*
29. 9 U.S.C. §§ 1–307 (2000).
30. Pub. L. No. 96–190, 94 Stat. 112 (codified at 28 U.S.C. App. II).
31. 5 U.S.C. § 504 (2000); 28 U.S.C § 2412 (2000).
32. 5 U.S.C. § 571 (2000).
33. 29 U.S.C. §§ 171-183 (2000).
34. 42 U.S.C. §§ 2000e-2000e-17 (2000) (Title VII of the Civil Rights Act of 1964 is codified as "Subchapter VI-Equal Employment Opportunities) (2000e and 2000e-1 held unconstitutional as applied in Miller v. Bay View United Methodist Church, 141 F. Supp. 2d 1174 (E.D. Wis. 2001)."
35. *EEOC Implements New ADR Program,* DISP. RESOL. TIMES, Sept.-Nov. 2003, at 17.
36. *USDA Looks to ADR to Clear Case Backlog,* DISP. RESOL. TIMES, March-May 2003, at 6.
37. *News in Brief,* DISP. RESOL. TIMES, April-May 2002, at 5.

program begun in 1998. The USPS has reported that in the first twenty-two months of operation, more than 17,000 complaints were mediated, 80% of them to full resolution. On March 6, 2003, U.S. Attorney General John Ashcroft approved the Federal Motor Carrier Safety Administration's proposal to establish a binding arbitration program to determine penalties for commercial carrier safety violations.[38] The Federal Motor Carrier Safety Administration will use the binding arbitration decision to establish both civil penalties for carrier safety violations and to establish the timeframe allowed each offender to bring itself into full compliance. The foregoing examples of federal administrative use of ADR are not intended to be exhaustive but rather are intended to be illustrative of federal procedures that are being employed throughout the country, including Illinois.

The Federal Arbitration Act (hereinafter "FAA") empowers the courts to compel the parties to an agreement to arbitrate in order to carry out that agreement.[39] The FAA provides only four grounds for vacating an arbitrator's award:

> (1) where the award was procured by corruption, fraud, or undue means; (2) where there was evident partiality or corruption in the arbitrators, or either of them; (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or (4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.[40]

The Department of Justice (hereinafter "DOJ") established the Office of Dispute Resolution to coordinate the use of ADR for DOJ. On April 6, 1995, Attorney General Janet Reno issued an order entitled "Promoting the Broader Appropriate Use of Alternative Dispute Resolution Techniques." This order applies to all civil matters under the DOJ's Litigation Divisions. The military services are also under mandates to use ADR initiatives in certain situations.[41] Similar federal mandates for use of ADR initiatives can be found in the following federal agencies: Department of Veteran Affairs;[42] Federal Aviation

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38. Joshua Brodesky, *Third U.S. Arbitration Program OK'd,* DISP. RESOL. MAG., Spring 2003, at 27.
39. 9 U.S.C § 4 (2000).
40. *Id.* § 10(A).
41. 32 C.F.R. § 22.815 (2003).
42. 48 C.F.R. § 833.214 (2003).

Administration;[43] Internal Revenue Services;[44] and Federal Election Commission.[45]

C. State Legislative/Administrative ADR Applications

1. *Uniform Arbitration Act*

The Uniform Arbitration Act (hereinafter "UAA") is designed to encourage the voluntary use of arbitration by providing a uniform set of rules and procedures. The UAA has been adopted by thirty-two states and the District of Columbia.[46] The UAA provides that a written agreement to submit to arbitration "is valid, enforceable, and irrevocable" with two limited exceptions.[47] The first exception is where the underlying circumstances exist for the revocation of a contract.[48] The second exception restricts the use of agreements between a patient and a health-care provider regarding allegations of negligence resulting in injury or death.[49]

The UAA provides: (1) procedures to compel or stay arbitration;[50] (2) mechanics for appointment of arbitrators;[51] (3) that the power of the arbitrators is to be exercised by the majority unless the agreement provides otherwise;[52] (4) a framework and procedure for hearing(s) subject to agreement otherwise;[53] (5) the right to representation, *i.e.*, renders waiver prior to hearing ineffective;[54] (6) empowerment to arbitrators to issue and enforce subpoena;[55] (7) a format for issuance of awards;[56] (8) provides a method and procedure to modify or amend awards;[57] (9) authority to assess arbitrator's fees and expenses;[58] (10) a method to confirm awards;[59] (11) a procedure and time limits to challenge awards;[60] (12) limited authority for a court to modify or

43. 14 C.F.R. §§ 17.31–35 (2003).
44. I.R.C. § 7123 (2000).
45. 2 U.S.C. § 437g(a)(4)(A)(i) (2000).
46. Eight states have adopted the Revised UAA.
47. 710 ILL. COMP. STAT. 5/1 (2002).
48. *Id.*
49. *Id.*
50. *Id.* 5/2.
51. *Id.* 5/3.
52. *Id.* 5/4.
53. *Id.* 5/5.
54. *Id.* 5/6.
55. *Id.* 5/7.
56. *Id.* 5/8.
57. *Id.* 5/9.
58. *Id.* 5/10.
59. *Id.* 5/11.
60. *Id.* 5/12.

correct an award;[61] (13) that a final award shall have the same enforceability as a judgment once confirmed by the court;[62] and (14) general provisions for service, jurisdiction, venue and an appeal procedure.[63]

The Revised Uniform Arbitration Act (hereinafter "RUAA") was developed and endorsed by the National Conference of Commissioners on Uniform State Laws in August 2000 in an effort to codify forty-five years of case law since the UAA. The RUAA, among other things, gives arbitrators new powers to issue subpoenas for witnesses and records, the power to issue interim awards and punitive damages, and attempts to resolve ambiguities and splits in authority.[64] It has been endorsed by the following organizations: American Arbitration Association, American Bar Association, House of Delegates, Judicial Arbitration and Mediation Services, formerly Enddispute, and the American College of Real Estate Lawyers.[65] The RUAA has been adopted by at least eight states.[66]

2. *Mandatory Arbitration Act*

In 1986, the Illinois General Assembly authorized the supreme court to provide for mandatory arbitration by rule.[67] The method of implementation was designed to provide that control over this process rests with the supreme court.[68] The procedure adopted by the supreme court was to permit each circuit to submit proposed procedures for the implementation of mandatory arbitration of monetary disputes within specified dollar limits. Consequently, for a mandatory arbitration program to become effective: (1) it must be for a monetary dispute that does not exceed $50,000;[69] (2) the circuit court must submit procedures for implementation of the provisions of 735 ILCS 5/2–1001A– 1009A (2002) and Supreme Court Rules 86–95; and, (3) the supreme court must approve the process submitted and the procedures to be followed.[70]

Even if a civil claim falls within the jurisdictional limit for mandatory arbitration, a party claiming to have a reasonable basis for removing the matter

61. *Id.* 5/13.
62. *Id.* 5/14.
63. *Id.* 5/15–18.
64. Revised Uniform Arbitration Act, NCCUSL (National Conference of Commissioners on Uniform State Laws).
65. JUST RESOLUTIONS (ABA Newsletter, vol. 7, No. 2), January 2002, at 5.
66. Hawaii, Utah, New Mexico, Nevada, New Jersey, North Dakota, and North Carolina.
67. 735 ILL. COMP. STAT 5/2–1001A (2002).
68. *Id.*
69. Or a lesser sum so established by the respective circuit or county.
70. ILL. SUP. CT. R. 86(a).

from arbitration may move the court for such relief prior to arbitration.[71] Supreme Court Rules further provide that when multiple claims exist, the court may sever those not eligible for arbitration.[72]

A review of Supreme Court Rule 90 provides a clear understanding on how the arbitration hearing is to be conducted.[73] Arbitrators are given the power to determine admissibility of evidence and decide *the law* and facts of the case.[74] Rulings on objections during the hearing are to be made by the chairperson.[75] The Rule provides that established rules of evidence apply.[76] The Rule states that documents are "presumptively admissible" provided that thirty days written notice is given and appropriate procedures followed.[77] Practitioners are reminded that the admissibility of the document does not vitiate the requirement that the document meet the remaining criteria for admissibility, e.g., relevance, etc. The Rule contemplates the admission of written expert opinions, provided written notice is given at least thirty days in advance and is accompanied by any written reports or a statement which includes: identity of the witness, the witness' qualifications, the subject matter, the basis of the conclusions, the expert's opinions, as well as any other information required by Supreme Court Rule 222(d)(6).[78]

Supreme Court Rule 90(g) provides that parties may compel the appearance of witnesses and other persons in the same manner as at trial.[79] A parties' failure to comply with Rule 90(g) may subject a party to sanctions, including an order preventing that party from rejecting the arbitration award.[80] In fact, Supreme Court Rule 91(b) requires "[a]ll parties to the arbitration hearing [to] participate in the hearing in good-faith and in a meaningful manner."[81] When a court is presented with a petition for sanctions, *e.g.*, where a party is given notice and fails to appear, the court may order such sanctions as are provided in Supreme Court Rule 219(c), including, but not limited to, an order debarring that party from rejecting the award and assessing costs and attorney's fees.[82]

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71. ILL. SUP. CT. R. 86(d) (committee comments).
72. *Id.*
73. ILL. SUP. CT. R. 90.
74. ILL. SUP. CT. R. 90(a).
75. *Id.*
76. ILL. SUP. CT. R. 90(b).
77. ILL. SUP. CT. R. 90(c).
78. ILL. SUP. CT. R. 90(d).
79. ILL. SUP. CT. R. 90(g). The court contemplates use of subpoena for compelling attendance of parties pursuant to Illinois Supreme Court Rule 237(b).
80. ILL. SUP. CT. R. 91(b).
81. *Id.*
82. *Id.*

Supreme Court Rule 92 provides that an award is to be determined in favor of the plaintiff or defendant and instructs the panel to make an award promptly upon termination of the hearing, disposing of all claims for relief.[83] The panel is instructed that the award may not exceed the monetary limit authorized by that circuit (for mandatory arbitration), exclusive of interest and costs.[84] In the event that neither party files a notice of rejection of the award within thirty days, either party may thereafter move the court to enter judgment on the award.[85] If the record and award disclose an obvious and unambiguous error in mathematics or language, the court, on application of a party within thirty days of the award, may correct the same.[86]

Within thirty days after the filing of the award with the clerk of the court, a party may reject an award with the clerk of the court. A party seeking to reject an award is required to pay to the clerk of the court the sum of $200 for awards of $30,000 or less, and $500 for awards greater than $30,000.[87] The filing of a single rejection is deemed sufficient to enable "all parties *except a party who has been debarred from rejecting the award* to proceed to trial on all issues of the case without the necessity of each party filing a separate rejection."[88]

Under these Supreme Court Rules, each circuit court has the authority to impose the requirement of mandatory arbitration within its circuit with approval of the supreme court.[89] Supreme Court Rule 86 provides that each claim for arbitration be "exclusively for money in an amount or of a value not in excess of the monetary limit authorized by the [s]upreme [c]ourt for that circuit or county."[90] The maximum limits for mandatory arbitration authorized by the supreme court is $50,000.[91] Supreme Court Rule 87 provides for the appointment, qualification, and compensation of arbitrators.[92] Supreme Court Rules 88–92 provide the procedure for such arbitration and awards.[93] Supreme Court Rule 93 provides a means by which to reject the award in arbitration.[94]

83. ILL. SUP. CT. R. 92(a), (b).
84. *Id.*
85. ILL. SUP. CT. R. 92(c).
86. ILL. SUP. CT. R. 92(d).
87. ILL. SUP. CT. R. 93(a).
88. *Id.* (emphasis added).
89. ILL. SUP. CT. R. 86(a).
90. ILL. SUP. CT. R. 86(b).
91. *See* Rules and General Orders of the Circuit Court for the 17th Judicial Circuit, R. 2.07, R. 1(b). This amount varies in accordance with local rules.
92. ILL. SUP. CT. R. 87.
93. ILL. SUP. CT. Rs. 88–92. Supreme Court Rule 91 provides the consequences of failing to participate in the arbitration hearing in good faith. Ill. Sup. Ct. R. 91(b).
94. ILL. SUP. CT. R. 93(a).

The first application of arbitration under the provisions of the Mandatory Arbitration Act was developed by the Seventeenth Judicial Circuit.[95] This court-annexed program served as a prototype for other circuits to consider in establishing their own arbitration programs under Supreme Court Rule 86.

The supreme court has approved arbitration programs in Cook County, the Eleventh Judicial Circuit,[96] the Twelfth Judicial Circuit,[97] the Fourteenth Judicial Circuit,[98] the Sixteenth Judicial Circuit,[99] the Seventeenth Judicial Circuit,[100] the Eighteenth Judicial Circuit,[101] the Nineteenth Judicial Circuit,[102] and the Twentieth Judicial Circuit.[103] While each circuit's program tracks the general tenants of the model established by the Seventeenth Circuit, differences exist and local rules should be read and followed. For example, the eligibility to participate in mandatory arbitration varies from one circuit to another.

In the Seventeenth Circuit, cases eligible for mandatory arbitration involve monetary disputes between $5,000 and $50,000.[104] Similar eligibility requirements exist in the Fourteenth[105] and the Eighteenth Circuits.[106] In contrast, in the Twelfth[107] and Nineteenth Circuits,[108] eligibility requirements begin at $5,000 but end at $30,000. In Cook County, eligibility begins at $2,500 and ends at $30,000.[109] In the Eleventh Circuit, eligibility begins at $2,500 and ends at $30,000.[110] In the Twentieth Judicial Circuit (St. Clair County), eligibility begins at $2,500 and ends at $20,000.[111]

Cook County has also established a voluntary pilot program for ADR.[112] This voluntary program relies upon pro bono arbitrators and is non-binding. If

95. Boone and Winnebago Counties.
96. Arbitration programs have only been approved in the Eleventh Judicial District in McLean and Ford Counties.
97. Will County.
98. Henry, Mercer, Rock Island, and Whiteside Counties.
99. DeKalb, Kane, and Kendall Counties.
100. Boone and Winnebago Counties.
101. DuPage County.
102. Lake and McHenry Counties.
103. St. Clair County only.
104. Rules and General Order of the Circuit Court for the 17th Judicial Circuit, R. 2.07, R. 1(b).
105. Rules of Practice and Appendix of Forms of the 14th Judicial Circuit of the State of Illinois, Part 24, R. 1(c).
106. Rules of the Circuit Court of the 18th Judicial Circuit, Article 13, R. 13.01(b).
107. Rules of the Circuit Court of the 12th Judicial Circuit, R. 20, § 20.01(B).
108. Rules of Practice of the Circuit Court, 19th Judicial Circuit, State of Illinois, Part 17, R. 17.01(c).
109. Rules of the Circuit Court of Cook County, Illinois, Part 18, R. 18.3(b).
110. Revised Administrative Orders of the Circuit Court of the 11th Judicial Circuit, State of Illinois, Rules Governing Court-Annexed Mandatory Arbitration, R. 1(b).
111. Rules of the Circuit Court of the 20th Judicial Circuit, State of Illinois, Mandatory Arbitration Rules-St. Clair County: Civil Actions Subject to Mandatory Arbitration (c).
112. Rules of the Circuit Court of Cook County, Illinois, Law Division Voluntary Mediation Pilot Project R. 20.1(a).

the parties reject the "non-binding arbitration," the decision is considered by the court for the sole purpose of determining the amount of attorney's fees and expenses, if applicable, in the underlying matter.

Under mandatory arbitration, a party may be debarred from rejecting a claim even though that party was represented by counsel at the arbitration hearing if it is determined that such party failed to present evidence or present a good-faith defense.[113] While parties to a mandatory arbitration agreement have a presumptive right to reject an award, a party can be barred from doing so as a sanction.[114] When a party to mandatory arbitration fails to furnish a transcript of the hearing for sanctions or a certified bystanders report, the appellate court will presume the sanctions imposed under Supreme Court Rule 91(b) were supported by a sufficient factual basis and in conformity with the law.[115] A trial court's imposition of sanctions will only be reversed where such decision was an abuse of discretion.[116] Bad-faith participation may consist of an inept preparation or an intentional disregard for the process.[117]

Challenges that Supreme Court Rule 91(b) is an unconstitutional infringement upon the right to a jury trial have been consistently rejected.[118] The one rationale for rejecting the challenge of unconstitutionality is that "it would be absurd to conclude that the authority of a trial court to debar a party from rejecting an arbitration award as a sanction for failing to comply with arbitration rules is somehow constitutional if imposed under Rule 90(g) but not under Rule 91(b)."[119]

While the trial court has broad discretion in fashioning appropriate sanctions under the Mandatory Arbitration Act, such discretion is not absolute. For example, the appellate court in *Knight v. Guzman*[120] and in *Webber v. Bednarczyk*[121] rejected the imposition of sanctions against a law firm with a "track record" of rejecting numerous arbitration awards. In *Webber,* the court

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113. *See* State Farm Ins. Co. v. Rodrigues, 324 Ill. App. 3d 736, 756 N.E.2d 359 (1st Dist. 2001); Employer's Consortium, Inc. v. Aaron, 298 Ill. App. 3d 187, 698 N.E.2d 189 (2d Dist. 1998).

114. Anderson v. Mercy, 338 Ill. App. 3d 685, 788 N.E.2d 765 (3d Dist. 2003); Amro v. Bellamy, 337 Ill. App. 3d 369, 785 N.E.2d 939 (1st Dist. 2003).

115. Gov't Employees Ins. Co. v. Buford, 338 Ill. App. 3d 448, 453, 788 N.E.2d 90, 95 (1st Dist. 2003).

116. *Amro,* 337 Ill. App. 3d at 371, 785 N.E.2d at 941; Schmidt v. Joseph, 315 Ill. App. 3d 77, 81, 733 N.E.2d 694, 697 (1st Dist. 2000).

117. *Amro,* 337 Ill. App. 3d at 371, 785 N.E.2d at 941 .

118. *Buford*, 338 Ill. App. 3d at 455, 788 N.E.2d at 96) (rejecting argument that Supreme Court Rule 91 violated the disputant's claim to a jury trial under the 7th Amendment to the United States Constitution); *see also* Kellett v. Roberts, 281 Ill. App. 3d 461, 465–66, 667 N.E.2d 558, 561–62, (2d Dist. 1996).

119. *Kellett,* 281 Ill. App. 3d at 466, 667 N.E.2d at 561.

120. 291 Ill. App. 3d 378, 382, 684 N.E.2d 152, 154 (1st Dist. 1997).

121. 287 Ill. App. 3d 458, 464–65, 678 N.E.2d 701, 704–05 (1st Dist. 1997).

opined that it would be unfair to punish a litigant for the wrongful acts of its attorneys and, if such conduct was egregious, the more appropriate course of action would be a disciplinary complaint against the offending attorney.[122]

It is noteworthy that a plaintiff retains the right to dismiss his or her action without prejudice anytime before trial or hearing begins.[123] The Illinois Supreme Court held that "trial or hearing" under § 2–1009 of the Code of Civil Procedure does not include participation in a mandatory arbitration proceeding.[124] Thus, when a defendant files a timely notice of rejection of an award, the plaintiff may seek a voluntary dismissal before the case proceeds to trial.[125] However, once a court enters judgment on an award, there is final disposition of the case, and plaintiff's motion for voluntary dismissal must be denied.[126]

While the mandatory arbitration procedures are similar from circuit to circuit, the practitioner is well advised to consult local rules to insure adherence with the procedural requirements of each circuit.[127]

Statistics compiled by the Illinois Supreme Court for the fiscal year 2002 demonstrate that most circuits participating in the Mandatory Arbitration Program can dispose of 80–90% of the arbitration caseload within one year of filing.[128] Reported state-wide figures indicate that only 2% of the cases processed through arbitration proceeded to trial in fiscal year 2002.[129] Based upon its internal review, the Illinois Supreme Court concluded that:

> Arbitration encourages dispositions earlier in the life of cases, helps the court operate more efficiently, saves the court the expense of costlier proceedings that might have been necessary later, and saves time, energy, and money of the individuals using the court system to resolve their disputes.[130]

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122. *Webber,* 287 Ill. App. 3d at 464, 678 N.E.2d at 705.

123. 735 ILL. COMP. STAT 5/2–1009(a) (2002).

124. Kahle v. John Deere Co., 104 Ill.2d 302, 308–10, 472 N.E.2d 787, 790 (1984).

125. Perez v. Leibowitz, 215 Ill. App. 3d 900, 902–03, 576 N.E.2d 156, 158 (1st Dist. 1991).

126. Ianotti v. Chicago Park Dist., 250 Ill. App. 3d 628, 631, 621 N.E.2d 185, 187 (1st Dist. 1993).

127. For example, the 20th Judicial Circuit (St. Clair County) requires that any party who proposes to use the written statement of an expert, provide written notice of the intention to do so at least thirty days in advance of the hearing and provide a copy thereof (Mandatory Arbitration Rules of the 20th Judicial Circuit, St. Clair County, Conduct of Hearing (d)). For citations to each circuit rules, *see supra* notes 58–66.

128. Court) Annexed Mandatory Arbitration Annual Report, Fiscal Year, 2002 (Report to Illinois General Assembly), statistics, p. 6.

129. Court) Annexed Mandatory Arbitration Annual Report, Fiscal Year, 2002 (Report to Illinois General Assembly), conclusion, p. 1.

130. Court) Annexed Mandatory Arbitration Annual Report, Fiscal Year, 2002 (Report to the Illinois General Assembly), conclusion, p. 1.

3. *Worker's Compensation Act*

In Illinois, the Worker's Compensation Act governs the right of an employee or his survivors to compensation for work-related injuries or death.[131] Under the Illinois Worker's Compensation Act, the negligence of an employee is not a bar to recovery if the injury to the employee arose out of, and in the course of, employment.[132] The Worker's Compensation Act is administered by the Industrial Commission.[133] Although the Worker's Compensation Act employs the term arbitration and its hearing officers are called arbitrators, a worker's compensation proceeding is not truly an alternative method of resolution as much as it is an administrative claims procedure that is adjunct to the judicial process.[134]

4. *Labor Arbitration Services Act*

The Labor Arbitration Services Act enacted in 1986 provides that when a controversy or difference exists between an employer and his employee or the applicable bargaining unit, the Illinois Department of Labor shall, upon written request, provide the necessary arbitration services.[135] The Labor Arbitration Services Act provides that the arbitration procedures shall be conducted in accord with the UAA.[136] However, the Labor Arbitration Services Act authorizes the Illinois Department of Labor to promulgate such further rules as it deems necessary "for the lawful and efficient administration of arbitration."[137]

5. *Healthcare Arbitration Act*

The Healthcare Arbitration Act governs all agreements to arbitrate "claims arising out of the providing of health care services."[138] Except where inconsistent with the Healthcare Arbitration Act, the provisions of the UAA apply.[139] Each healthcare arbitration agreement is subject to the following

131. 820 ILL. COMP. STAT. 305/1–30 (2002).
132. *See* Peoria County Belwood Nursing Home v. Indus. Comm'n, 115 Ill.2d 524, 505 N.E.2d 1026 (1987).
133. 820 ILL. COMP. STAT. 305/13 (2002).
134. The Act provides for detailed procedures, as well as an administrative and judicial review process.
135. 710 ILL. COMP. STAT. 10/1 (2002).
136. *Id.* 10/2.
137. *Id.* 10/3.
138. *Id.* 15/3.
139. *Id.*

conditions: (1) the agreement cannot be made a condition precedent to the rendering of health services; (2) the agreement must be executed at the inception of the term of treatment for services for a specific cause; (3) the agreement to arbitrate must be a separate and independent document; (4) the agreement must not limit or impair substantive rights (including statute of limitations); (5) the agreement must not limit, impair or waive procedural rights; (6) the agreement must not provide for the waiver of the right to be represented by an attorney; and (7) the agreement must be reaffirmed upon discharge or shall be deemed void.[140]

The Healthcare Arbitration Act expressly provides for the inclusion of certain mandatory provisions.[141] The mandatory provisions require: (1) the date of commencement of treatment (hospitalization) must be specified, (2) there must be written specification of the specific cause for which services were rendered, (3) the agreement must include a procedure for cancellation, (4) the agreement must not restrict cancellation within specified periods of time following discharge (or death of a patient), (5) the agreement must include express language specified in the Act,[142] (6) the size and type of print must be in accord with the statutory requirements, and (7) a copy and reaffirmation must be provided to the patient upon discharge.[143]

The Healthcare Arbitration Act outlines the procedure which is necessary to commence arbitration.[144] The Act provides for selection of arbitrators,[145] the right to discovery,[146] the applicability of Rules of Evidence,[147] and the equal assessment of fees and expenses.[148] Arbitrators appointed by the court are to be compensated at the rate of $100 per diem.[149] This meager rate was established in 1976 and has remained unchanged.

6. *International Commercial Arbitration Act*

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140. *Id.* 15/8.
141. *Id.* 15/9.
142. *Id.* 15/9(d) (form for health care arbitration agreement).
143. *Id.* 15/9.
144. *Id.* 15/10. "Arbitration proceedings under this Act shall be commenced by serving a notice of demand for arbitration, together with a statement of the claim and cause of action, on all parties to the health care arbitration agreement from whom damages are sought. The statement of the claim and cause of action shall be substantially in the form of a complaint under the Civil Practice Law." *Id.*
145. *Id.* 15/13.
146. *Id.* 15/11.
147. *Id.* 15/12.
148. *Id.* 15/14.
149. *Id.* 15/14(b).

The International Commercial Arbitration Act was enacted in 1998 and applies to international arbitration.[150] An arbitration is defined as "international" if: (1) the parties to the arbitration agreement were at the time of the execution of the agreement operating places of business in different countries; (2) the parties expressly agreed that the subject matter of the arbitration agreement related to more than one country; or (3) "one of the following places is situated outside the country or countries in which the parties have their places of business: (i) the place of arbitration if determined in, or pursuant to, the arbitration agreement or (ii) the place where the predominant part of the obligations of the commercial relationship is to be performed or the place with which the subject matter of the dispute is most closely connected."[151]

The International Commercial Arbitration Act provides: (1) definition and rules of interpretation,[152] (2) procedures for sending and receiving communication,[153] (3) a provision for waiver of right to object,[154] (4) limitations on court intervention,[155] and the function of a court upon intervention.[156] The Act defines an "arbitration agreement" and specifies the form required.[157] The Act specifies that the agreement must "be in writing," but permits such writing to consist of "an exchange of letters, telex, telegrams or other means of telecommunication that provides a record of the agreement."[158]

If the place of arbitration is in Illinois, the International Commercial Arbitration Act makes the following additional provisions: (1) a court is to refer the matter to arbitration unless the court finds the agreement "null and void, inoperative, or incapable of being performed,"[159] and (2) authorizes the court, upon application, to provide "an interim measure of protection."[160]

The International Commercial Arbitration Act makes provision for the appointment of arbitrators,[161] the grounds to challenge appointment,[162] the withdrawal and substitution of an arbitrator,[163] the competence of the arbitration panel to rule on its jurisdiction,[164] the power to award interim

150. *Id.* 30/1–5.
151. *Id.* 30/1–5.
152. *Id.* 30/1–10.
153. *Id.* 30/1–15.
154. *Id.* 30/1–20.
155. *Id.* 30/1–25.
156. *Id.* 30/1–30.
157. *Id.* 30/5–5(a).
158. *Id.* 30/5–5(b).
159. *Id.* 30/5–10(a).
160. *Id.* 30/5–15.
161. *Id.* 30/10–10.
162. *Id.* 30/10–15, 10–20.
163. *Id.* 30/10–25, 10–30.
164. *Id.* 30/15–5.

measures,[165] and the procedures to be followed in arbitration.[166] The arbitral panel is given the authority to request a court for assistance in taking evidence.[167]

The International Commercial Arbitration Act provides that the parties are free to agree on language *or languages* to be used in arbitration proceedings. If no agreement is reached on language, the arbitral panel determines the language or languages to be used.[168] The International Commercial Arbitration Act provides that unless the parties otherwise agree, the majority of members of the arbitral panel shall be deemed sufficient to enter an award.[169] The International Commercial Arbitration Act finally provides for the form and content of the award,[170] the procedure for terminating proceedings,[171] and the method to correct, interpret, and amend an award.[172]

The United States and approximately ninety other signatory countries have adopted and approved the United Nations Convention on the Recognition and Enforcement of Foreign, Arbitral Awards (the New York Convention of 1958). Under the New York Convention, the grounds under which a court may refuse to enforce an arbitration award rendered in another treaty country are limited.[173]

7. *Restorative Justice for Juveniles*

The Illinois Juvenile Justice Reform Act of 1998, effective January 1, 1999, was the first Illinois statute to address the concept of "restorative justice."[174] This act permits State's Attorneys to divert juveniles from the traditional court process to a restorative justice program, as well as community mediation programs and teen courts.[175]

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165. *Id.* 30/15–10.
166. *Id.* 30/20–5 to –50.
167. *Id.* 30/20–55.
168. *Id.* 30/20–25.
169. *Id.* 30/25–10.
170. *Id.* 30/25–20.
171. *Id.* 30/25–25.
172. *Id.* 30/25–30.
173. United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, (June 10, 1958), 21 U.S.T. 2517.
174. 705 ILL. COMP. STAT. 405/5–101 to –915 (2002).
175. References for restorative justice include the following: Office of Juvenile Justice and Delinquency Prevention, *at* http://ojjdp.ncjrs.org; National Institute of Corrections, *at* http://www.nicic.org; University of Minnesota School of Social Work, Center for Restorative Justice & Peacemaking, *at* http://ssw.che.umn.edu/rjp/; Real Justice, *at* http://www.realjustice.org; Minnesota Department of Corrections, *at* http://www.corr.state.mn.us/aboutdoc/restorativejustice/default.htm.

8. Domestic Relations ADR Program

The Illinois Marriage and Dissolution of Marriage Act provides statutory authority for the courts to order mediation in custody and visitation cases.[176] Under this authority, a circuit court has the ability to adopt rules for the mediation of custody, visitation and removal matters.[177] Additionally, parties seeking approval of a Joint Parenting Agreement are required to include, as a component of their agreement, a dispute resolution mechanism.[178] The most frequently employed mechanism in such agreements is mediation.

Several circuits have created mediation programs for custody and visitation issues in dissolution cases. The mediators are attorneys as well as non-attorneys with advanced degrees in human services. These circuits include the First Circuit (Saline and Williamson Counties), Sixth Circuit (Champaign County), Eleventh Circuit (Livingston, McLean and Woodford Counties), Thirteen Circuit (LaSalle County), Sixteenth Circuit (DeKalb, Kane and Kendall Counties), Seventeenth Circuit (Winnebago and Boone Counties), Eighteen Circuit (DuPage County), Nineteenth Circuit (McKendree County), Twentieth Circuit (St. Clair), Twenty First Circuit (Kankakee County), and Cook County.[179]

The Illinois Marriage and Dissolution of Marriage Act also provides circuit courts with the authority to order the use of ADR in fee disputes between lawyers and their clients. Only two circuits have implemented such procedures under this authorization: Cook County and the Eighteenth Circuit.

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176. 750 ILL. COMP. STAT. 5/602.1(b) (2002); *Id.* 5/607.1(c)(4).

177. *See, e.g.*, Rules of the Circuit Court of Cook County, Illinois, Part 13, Domestic Relations Proceedings, R. 13.4(g).

178. 750 ILL. COMP. STAT. 5/602.1(b) (2002). The Joint Parenting Agreement "shall further specify a procedure by which proposed changes, disputes and alleged breaches may be *mediated* or otherwise resolved . . . ." *Id.* (emphasis added).

179. References for these court-annexed mediation programs are as follows: Rules of the Circuit Court of Cook County, Illinois Rs. 13.4 (g) (Domestic Relations Proceedings), Part 20 (Law Division Voluntary Mediation Pilot Project); Revised Administrative Orders of the Circuit Court of the 11th Judicial Circuit, State of Illinois, R. 111 (Court-Annexed Mediation); Rules of the Circuit Court of the Twelfth Judicial Circuit, R. 21.01 (Court-Annexed Mediation of Civil Cases); Rules of the Circuit Court of the Sixteenth Judicial Circuit, Rs. 12.01 (Actions Eligible for Court-Annexed Mediation), 15.22 (Family Mediation Program); General Orders of the Circuit Court, Seventeenth Judicial Circuit, R. 3.09 (Court-Annexed Mediation); 4.08 (Family Mediation Program) Rules of the Circuit Court of the Eighteenth Judicial Circuit, R. 14.02 (Court-Ordered Mediation for Civil Cases); Rules of Practice of the Circuit Court, Nineteenth Judicial Circuit, Rs. 18.01–15 (Family Mediation Program Rules for Nineteenth Judicial Circuit for McHenry County), Rs. 20.00–06 (Civil Division Mediation Program Rules); Uniform Rules of Practice, Circuit Court of Illinois, Twenty-First Judicial Circuit, Rs. 9.1– .3 (Divorce Mediation Program Rules of Procedure (Kankakee County only)); Standards and Procedures for Champaign County Court-Referred Mediation; Standards and Procedures for McLean County Court-Referred Mediation.

In 1998, Cook County implemented a program giving litigants in a matrimonial fee-dispute matter the option of submitting the dispute to arbitration/mediation.[180]

9. Uniform Mediation Act (UMA)

In 2003, Illinois became the second state to adopt the Uniform Mediation Act. In late July 2003, Governor Rod Blagojevich signed the Uniform Statute proposed and approved by the National Conference of Commissioners on Uniform State Laws. This Act became effective January 1, 2004. The Act's primary purpose is to create a standard, nation-wide framework for protecting the confidentiality of mediation communications and create more certainty for participants in the process. It establishes a privilege for participants to refuse to disclose and prevent others from disclosing protected communication in future legal proceedings. Illinois lawmakers also included language requiring mediators to be impartial unless the parties agree otherwise after a mediator makes required conflict-of-interest disclosures. A more detailed and comprehensive analysis of the Uniform Mediation Act is contained in this volume in an article prepared by Professor Thomas Cavenagh.[181]

A "Mediator Certification Act" was introduced in the Illinois General Assembly but did not pass.[182] Although flawed, the proposed legislation provides a starting point for the development of appropriate standards for certification of mediators.[183]

D. Judicial Trends

The federal bench has rendered a number of opinions revealing certain discernable trends and patterns. On the federal level, one observes the repeated theme of preemption and a strong proclivity in favor of arbitration. While state courts have not embraced arbitration with the same enthusiasm, there has been little hesitancy to enforce a properly-worded arbitration agreement.[184]

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180. Cook County General Order 98–D–3. The program implemented was entitled the "Domestic Relations Fee-Dispute ADR Program." The arbitration option contains a cost of $250. The mediation option is designed to be without charge to the disputants.

181. Developments in Illinois Law: The Uniform Mediation Act.

182. H.B. 1971, 92nd Gen. Assem. (Ill. 2001).

183. *Id.*

184. *See* Salsitz v. Kreiss, 198 Ill. 2d 1, 761 N.E.2d 724 (2001). Justice Freeman authored an opinion which demonstrated a restrained deference to the authority and role of the mediator. Therein, the court found: (1) a party does not lose the opportunity to contest arbitrability of a dispute by failing to take an interlocutory appeal from an order denying a stay of arbitration, (2) an arbitrator's decision whether an issue is arbitral is subject to an ultimate

The most recent trilogy of opinions regarding arbitration handed down by the United States Supreme Court are *Green Tree Financial Corp. v. Bazzle,*[185] *Equal Employment Opportunity Commission v. Waffle House, Inc.*,[186] and *Circuit City Stores, Inc. v. Adams*.[187] While these have not been the only recent Supreme Court decisions on arbitration, they are collectively important in identifying the direction of the court.[188]

In *Green Tree*, homeowners brought a state court action against a commercial lender alleging violations of South Carolina law.[189] The trial court granted class certification and the lender's Motion to Compel Arbitration.[190] The circuit court subsequently confirmed the class-arbitration award.[191] After the Supreme Court of South Carolina affirmed, the United States Supreme Court granted certiorari.[192] The United States Supreme Court held that the arbitration clause in question did not clearly preclude class certification and, therefore, the FAA did not bar or foreclose class arbitration. The Court determined that the issue was one of state-law contract interpretation, thus indicating for the first time that class certification and determination of a class arbitration award were not outside the purview of the FAA.

In *Waffle House*, the EEOC brought an enforcement action against a former employer under the Americans with Disability Act (hereinafter "ADA").[193] The district court denied Waffle House's petition to stay litigation

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determination of arbitrability by the court, (3) the standard of judicial review for arbitrability is *de novo*, and (4) an arbitration agreement will not be extended by construction or implication. *Id.*

185. 539 U.S. 444 (2003).

186. 534 U.S. 279 (2002).

187. 532 U.S. 105 (2001).

188. Other cases include: Hawsam v. Dean Witter Reynolds, Inc., 537 U.S. 79, 83 (2002) (determining that the arbitrator, not the court, should determine whether a claim was time-barred); Citizens Bank v. Alafabco, Inc., 539 U.S. 52 (2003) (determining that a debt-restructuring agreement was a contract "involving commerce" whose arbitration clause was enforceable under the FAA); Pacificare Health Sys., Inc. v. Book, 538 U.S. 401 (2003) (determining that physicians could be compelled to arbitrate RICO claims, despite the potential interpretation of the arbitration agreement which might limit the arbitrator's authority to award treble damages); Major League Baseball Players Ass'n v. Garvey, 532 U.S. 504 (2001) (determining that the Ninth Circuit exceeded its authority in expressing its opinion on the merits and ordering the arbitration panel to enter an award for the player in the amount claimed); C&L Enter., Inc. v. Citizens Band Potawatomi Indian Tribe of Okla., 532 U.S. 411 (2001) (determining that the agreement to arbitrate in a contract constitutes a waiver of the tribe's sovereign immunity against a suit to enforce the arbitration award).

189. *Green Tree*, 539 U.S. at 447-448.

190. *Id.*

191. *Id.* at 449.

192. *Id.* at 445.

193. Equal Employment Opportunity Comm'n v. Waffle House, Inc., 534 U.S. 279, 283 (2002) (The EEOC alleged a violation of Title I of the ADA (42 U.S.C. § 12117(a) (1994)). *Waffle House*, 534 U.S. at 283.

and compel arbitration under the FAA and denied Waffle House's motion to dismiss.[194] The Fourth Circuit Court of Appeals held the arbitration agreement did not foreclose the EEOC enforcement action but precluded the EEOC from seeking victim-specific relief.[195] The United States Supreme Court, in an opinion authored by Justice Stevens, held the arbitration agreement did not bar an administrative agency, such as the EEOC, from not only enforcing its mandate, but also pursuing victim-specific relief on behalf of one of its protected persons.[196]

In *Circuit City,* an employer brought an action under the FAA to enjoin an employee's state-court employment discrimination action and compel arbitration.[197] The district court granted Circuit City's motion to compel arbitration and the employee appealed.[198] The Ninth Circuit Court of Appeals reversed, holding all employee contracts were beyond the reach of the FAA.[199] The United States Supreme Court, in an opinion authored by Justice Kennedy, held only employment contracts of transportation workers were exempted from the FAA,[200] thus abrogating *Craft v. Campbell Soup, Co.*[201]

On the basis of these pronouncements,[202] the Seventh Circuit Court of Appeals has demonstrated a clear bias in favor of enforcing the right to arbitration under the FAA[203] and expansive authority of an arbitrator to fashion

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194. *Id.* at 284.

195. *Id.*; EEOC v. Waffle House, Inc., 193 F.3d 805 (4th Cir. 2001).

196. *Waffle House,* 534 U.S. at 296–97.

197. Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 110 (2001).

198. *Id.*

199. *Id.*

200. *Id.* at 109. Section 1 of the FAA excluded "'contracts of employment of seamen, railroad employees, or any other class of workers engaged in . . . interstate commerce.'" *Id.* (quoting 9 U.S.C. § 1 (2000)).

201. 177 F.3d. 1083 (9th Cir. 1999).

202. Including those cases cited *supra* note 142.

203. *See*, *e.g.*, Stone v. Doerge, 328 F.3d 343 (7th Cir. 2003), wherein the court noted the following: (a) arbitration depends upon the underlying agreement, and nothing beats normal contract law to determine what the parties' agreement entails; (b) nothing in the Federal Arbitration Act overrides normal rules of contractual interpretation (the FAA's goals was to put arbitration on par with other contracts and eliminate any vestiges of old rules disfavoring arbitration); (c) the FAA reflects a strong federal policy favoring arbitration as a means of dispute resolution (any doubts concerning the scope of arbitral issues should be construed in favor of arbitration, whether the problem at hand is construction of contract language itself, or an allegation of waiver, delay, or a like defense to arbitability); (d) state law rather than Federal law governs interpretation of arbitration agreements except for rules of state law giving special treatment to arbitration agreements (Federal Law affects extent to which state law may specify special rules for arbitration. "[A]ny rule of state law disfavoring or prohibiting arbitration for a class of transactions is pre-empted, 'save upon such grounds as exist at law or in equity for the revocation of any contract.'" *Id.* at 345 (citation omitted) (quoting 9 U.S.C. § 2 (2000)); Rosenblum v. Travelbyus.com Ltd., 299 F.3d 657 (7th Cir. 2002), holding: (a) while there is a strong federal policy favoring arbitration embodied in the FAA, arbitration is a matter of contract between relevant parties and no party can be required

an appropriate remedy within the terms of the underlying agreement to arbitrate. Conversely, the Supreme Court made it clear in *Waffle House* that this preference will not be used to emasculate an administrative agency from enforcing their legislative (public policy) mandate.

IV. THE FUTURE

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to arbitrate absent an agreement to do so; (b) to determine whether the contract's arbitration clause applies to a given dispute, Federal courts apply state law principles of contract formation; (c) under Illinois law, an arbitration agreement will not be extended by construction or implication; (d) an arbitration clause in an employment contract between the seller and buyer of a business, does not cover a seller's breach of contract and fraud claims against the buyer under the parties' separate acquisition agreement where a clause, by its express terms, apply to any dispute under the employment contract, but does not purport to cover the acquisition issues; Am. United Logistics, Inc. v. Catellus Dev. Corp. 319 F.3d 921, 929 (7th Cir. 2003) (the Court of Appeals must look at the intent of the party at the time the contract was executed when determining if the parties agreed to arbitrate the dispute in question); Sphere Drake Ins. Inc. v. All Am. Life Ins., Co., 307 F.3d 617 (7th Cir. 2002) ((a) the FAA makes arbitration agreements enforceable to the same extent as other contracts, so courts enforce privately negotiated agreements to arbitrate, like other contracts, in accordance with their terms, and (b) pursuant to an arbitration agreement, the parties are free to choose for themselves to what length they will go in their quest for impartiality of arbitrators); Boomer v. AT&T Corp., 309 F.3d 404 (7th Cir. 2002), holding that a litigant has the right to an appeal the denial of its Motion to Compel Arbitration and/or Stay Proceeding under the FAA and Federal Rules of Civil Procedure; Baxter Int'l, Inc. v. Abbott Laboratories, 315 F.3d 829 (7th Cir. 2003) ((a) arbitrators have completely free rein to decide law as well as facts and are not subject to appellate review; (b) general appeals to "public policy" do not permit a court to upset an arbitral award; (c) mistake of law is not a ground on which to set aside an award under convention of recognition enforcement of foreign arbitral awards; and (d) were arbitrators to conscientiously attempt to apply particular state's law, pursuant to the choice of law provision in the contract, but failed to apply it correctly, the loser has no judicial remedy since there is no judicial review of an arbitration award for legal errors); Belom v. Nat'l Futures Ass'n, 284 F.3d 795, 799 (7th Cir. 2002) (where an individual consents to arbitration, he waives the right under Article III of the Constitution to an impartial and independent adjudication); Anheuser Busch, Inc. v. Local Union No. 744, 280 F.3d 1133, 1137 (7th Cir. 2002) (the concern of the court in reviewing arbitration awards is limited to whether the arbitrator went beyond, or outside the bounds of interpreting the contract before him while fashioning his award). "The question is not whether the arbitrator misinterpreted the agreement, but only whether the arbitrator's inquiry disregarded the very language of the agreement itself." *Id.*; BEM I, L.L.C. v. Anthropologie, Inc., 301 F.3d 548 (7th Cir. 2002) (apparent inconsistency in arbitration award did not provide basis for setting aside award given that there was no doubt as to what relief the arbitrators ordered). Any inconsistencies in their reasoning were un-reviewable errors of law or fact. *Id.* at 556; Smart v. Int'l Bhd. of Elec. Workers, Local 702, 315 F.3d 721, 725 (7th Cir. 2002) (for a court to vacate an arbitrator's award under the FAA, the award must be incapable of being enforced, *i.e.*, so incomplete that it is clear the arbitrator should not complete their assignment or so badly drafted that a party against whom the award runs is unable to determine how to comply with it.

Various ADR programs have been implemented in each of the three United States District Courts located in Illinois. While all three districts have established settlement conference programs, only the Northern District has established more formal procedures for mediation. The Northern District has not only several established models of mediation,[204] but continues to develop pilot programs. Pursuant to 28 USC § 652(d), the Northern District has established a local rule for the confidentiality of all ADR proceedings.[205] Likewise, the Central and Southern District Courts have adopted rules used in ADR, including confidentiality and formalization of the settlement conference procedure.[206]

In addition to district court programs, the Bankruptcy Court for the Northern District of Illinois has adopted separate local rules that establish and maintain ADR programs for use in its bankruptcy cases. The Bankruptcy Court for the Northern District of Illinois has an extensive set of local rules in place for referral of disputes to mediation.[207] Mediation is not mandatory under the court-annexed program, but parties may request by motion the entry of an order referring their dispute to mediation. These rules on ADR include necessary forms and are available on the court's website.[208]

Unlike the Northern District, the Central District requires that the judge conducting the settlement conference be someone other than the judge who will preside at trial. The Central District of Illinois has adopted an extensive local rule to implement the ADR Act. The Central District has made the court-annexed mediation, summary jury trials, and summary bench trial available to litigants in all civil actions within the district, including contested matters and adversary proceedings in bankruptcy. ADR is not mandatory in the Central District, but the rule provides that the presiding judge, "shall encourage the parties to participate in ADR at an appropriate time."[209]

The Southern District of Illinois has provided by local rule that a settlement conference shall take place in almost every type of civil action.[210] Information concerning the settlement conference procedures in the Southern District can be accessed by use of the court's website.[211] These Southern District rules

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204. U.S. DIST. CT., N.D. ILL., R. L.R. 16.1, §§ 2, 5, 7 (Standing Order Establishing Pre-Trial Procedure); *Id.* R. 16.3 (General Provisions Concerning Mediation); Appx. B (Procedure For Voluntary Mediation For Lanham Act Cases).

205. U.S. DIST. CT., N.D. ILL., R. L.R. 83.35.

206. U.S. DIST. CT., C.D. ILL., R. 16.4; U.S. DIST. CT., S.D. ILL., R. 16.3.

207. *See* Bankruptcy Rules for the United States District Court for the Northern District of Illinois, Rs. 9060–1 to 9061–12 (providing the framework for the Bankruptcy Court's mediation program).

208. United States District Court, Northern District of Illinois, *at* http://www.ilnd.uscourts.gov.

209. U.S. DIST. CT., C.D. ILL., R. 16.4.

210. U.S. DIST. CT., S.D. ILL., R. 16.2(a).

211. United States District Court, Southern District of Illinois, *at* http://www.ilsd.uscourts.gov.

require early neutral evaluation in the form of a settlement conference in all civil cases listing only sixteen specified exceptions set forth in Local Rule 16.2(a).[212]

The Seventh Circuit Court of Appeals has also a settlement conference program. The Seventh Circuit program provides for the settlement conference to be conducted by three full-time settlement conference attorneys.[213] The Rule 23 Conferences have been described as a hybrid between a settlement conference and mediation.[214]

The Seventh Circuit's confidential pre-argument conferences in civil appeals are conducted pursuant to Federal Rule of Appellate Procedure[215] and Circuit Rule 33.[216] Most types of civil actions are eligible for a Rule 33 conference. Those proceedings *not* eligible include pro se, immigration, social security disability, prisoner rights and habeas corpus and mandamus appeals.[217] While selection to participate in a Rule 33 conference is not universally required of all eligible cases, once a Rule 33 conference is scheduled, participation is mandatory.[218] For convenience of the parties, telephone conferences are utilized when any of the participants resides outside the Chicago metropolitan area. The Settlement Conference Office of the Seventh Circuit reports that its office "has assisted counsel in settling many appeals without seriously delaying the progress of those appeals which do not yield to

212. "(1) prisoner habeas corpus petitions; (2) prisoner civil rights cases; (3) cases brought in which one of the parties appear pro se and is incarcerated; (4) cases brought by the United States for collection on defaults of government loans such as SBA, FHA and VA and all mortgage foreclosure default loans; (5) land condemnation cases; (6) cases brought by the United States for condemnation or forfeiture against vehicles, airplanes, vessels, contaminated foods, drugs, cosmetics and the like; (7) cases brought to review the decision of administrative agencies such as the Commissioner of Social Security; (8) IRS Enforcement Action; (9) Freedom of Information Act cases; (10) cases brought to collect civil penalties under the Federal Boat Safety Act of 1971; (11) reviews of rulings of a bankruptcy judge or U.S. Magistrate Judge; (12) suits to quash subpoenas; (13) proceedings filed as civil action for admission to citizenship or to cancel or revoke citizenship; (14) labor cases arising our of collective bargaining agreements; (15) ERISA cases except where a participant is claiming benefits under a plan; (16) copyright cases. U.S. DIST. CT., S.D. ILL., R. 16.2(a).

213. Currently serving in this capacity are Joel N. Shapiro, Jillisa Brittan, and Rocco J. Spagna, each of whom were civil litigators prior to appointment. United States Court of Appeals for the Seventh Circuit, The Settlement Conference Procedure for the U.S. Court of Appeals for the Seventh Circuit, *at* http://www.ca7.uscourts.gov/conf_aty/Scoprgm.htm.

214. *See* Center for Analysis of Alternative Dispute Resolution System: Summary of Court-Related ADR in Illinois, (Jennifer E. Stack & Danielle Loevy), *available at* http://www.caadrs.org/studies/adr_summary.htm.

215. FED. R. APP. P. 33.

216. 7th CIR. R. 33.

217. FED. R. CIV. P. 16, 26(A)(1)(e).

218. United States Court of Appeals for the Seventh Circuit, The Settlement Conference Procedure for the U.S. Court of Appeals for the Seventh Circuit, *at* http://www.ca7.uscourts.gov/conf_aty/Scoprgm.htm.

settlement efforts."[219] Participants in Rule 33 conferences are forbidden to impart to any judge or other court personnel what transpired during these conferences.

Illinois Supreme Court Rule 99, adopted in 2001, authorizes circuit courts to propose mediation programs to be implemented under the auspice and with the approval of the Illinois Supreme Court.[220] Any circuit court seeking to implement a court-annexed mediation program is required to propose to the Illinois Supreme Court Rules for approval.[221] Such local rules must, at a minimum, include the following: (1) actions eligible for referral to mediation; (2) appointment, qualifications, and compensation of mediators; (3) scheduling of mediation conferences; (4) conduct of the conferences; (5) discovery; (6) absence of party at conference and sanctions; (7) termination and report of mediation conference; (8) finalization of agreement; (9) confidentiality; and (10) a mechanism for reporting to the supreme court on the mediation program implemented.[222]

The first pilot civil mediation program was started more than ten years ago in Winnebago County (Seventeenth Circuit). The program, while not mandatory, provides the authority to order mediation on a case-by-case basis.[223] Following authorization to allow court fees assessed for mandatory arbitration to be utilized for other forms of ADR,[224] eight additional circuits (or individual counties therein) have adopted rules for the establishment of court-annexed mediation programs,[225] for a total of fifteen counties.[226] According to the Center for Analysis of Alternative Dispute Resolution Systems (hereinafter "CAADRS"),[227] the majority of cases mediated under court-annexed programs are personal injury actions. However, the percentages vary from circuit to circuit. While 80% of the cases mediated in the Seventeenth Circuit

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219. *Id.* According to Joel N. Shapiro, (*supra,* note 213) 45% of the cases noticed to participants in Rule 33 Conferences are resolved or dismissed without the necessity of a judicial ruling by the court.

220. ILL. SUP. CT. R. 99.

221. ILL. SUP. CT. R.99(b).

222. ILL. SUP. CT. R. 99(b)(2).

223. General Orders of the Circuit Court, Seventeenth Judicial Circuit, R. 2.08 (Court-Annexed Mediation).

224. 735 ILL. COMP. STAT 5/2–1007A (2002); 735 ILL. COMP. STAT 5/2–1009A (2002).

225. 1st Circuit; 6th Circuit (Champaign, only); 12th Circuit; 14th Circuit; 16th Circuit; 18th Circuit; and 19th Circuit.

226. Winnebago (pilot); Cook, DuPage and Lake Counties-December 1998; McHenry County-November 2000; St. Clair County-May 1993; Boone and Kane Counties-November 1994; Will County-March 1995; Ford and McLean Counties-March 1996; and Rock Island , Henry, Mercer, and Whiteside Counties-August 2002.

227. Center for Analysis of Alternative Dispute Resolution Systems(CAADRS), *at* http://www.caadrs.org/studies/domrel.htm. CAADRS is a not-for-profit corporation with a mission to encourage effective and efficient use of court-related ADR in Illinois.

are personal injury claims, only 29% of the cases in the Eighteenth Circuit are personal injury claims. Instead, approximately 50% of the claims mediated in the Eighteenth Circuit are contract disputes.[228]

Cook County has formulated and implemented a Major Case Civil Mediation Program, effective April 4, 2004. In the preamble to its proposed rules, it notes that the Circuit Court of Cook County serves 5.1 million people who reside in the Cook County judicial circuit and is comprised of more than 400 judges assigned to 14 divisions and districts. It notes that more than 2.4 million cases are filed currently with the court. The Cook County Major Case Civil Mediation Program has as its expressed purpose "to provide an expeditious and expense-saving alternative to traditional litigation it the resolution of controversies."[229]

Cook County not only defines civil mediation,[230] it describes what actions are appropriate for mediation,[231] the procedure for referral,[232] the process for

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228. CAADRS Fall/Winter Newsletter: Summary of Court-Related ADR in Illinois, *at* http://www.caadrs.org/studies/domrel.htm.

229. Rules of the Circuit Court of Cook County, Illinois, Rs. 20.1–20.9 (enacted pursuant to Supreme Court Rule 99).

230. "Mediation is a confidential process where a neutral third party (the 'Mediator') assists parties to a lawsuit in a good faith effort to resolve their dispute. The mediator conducts confidential settlement talks, focusing on issues in dispute, identifying parties' interests and needs, and generating settlement options throughout the course of negotiations.
Parties to the lawsuit ultimately decide what issues are important to them and whether they can resolve them in mediation. The mediator tries to remain neutral and impartial, while retaining a firm and balanced control of the negotiations. In the court-annexed system, the mediator services the justice system, helping parties gain momentum toward settlement and remain optimistic regarding conflict resolution."

231. "In the Circuit Court of Cook County, major civil cases seeking damages in excess of $30,000 are eligible for referral to the Court-Annexed Civil Mediation Program. Many types of cases have been successfully mediated, including: personal injury litigation; complex contract cases; product and professional liability actions; mechanic's lien claims; probate matters; commercial litigation; cases where parties wish to preserve an ongoing relationship; cases with cooperative parties who have been unable to reach settlement on their own; cases involving highly confidential or proprietary information; cases where quick resolution would avoid serious economic harm to parties; cases where a confidential settlement is desirable or where legal precedent should be avoided."

232. "The Order requires parties to name their selected mediator or to designate a mediator within twenty-one days. If parties cannot agree upon a mediator, the Court will appoint one.
Next, the parties should communicate with the mediator to coordinate all mediation scheduling. The first mediation should take place within eight weeks of the Order of Referral and mediation should be concluded within seven weeks thereafter, unless extended by leave of Court.
Finally, counsel for each party should prepare and submit a Case Summary to the mediator at least ten days prior to the first mediation session, together with copies of any relevant pleadings, unless some other type of summary information is requested by the mediator."

selection of a mediator,[233] the costs[234] and benefits of mediation[235] in lay terms

233. "The mediator may be appointed by the Court or selected by the parties. Local Circuit Rule 20.03(A) allows parties to select and designate a mediator, who may or may not be on the list of court-certified mediators, within three (3) weeks of the Court's Order of Referral. If parties cannot agree upon a mediator, the Court will appoint one from its list of certified mediators.

A number of attorneys have been certified as civil mediators in the Circuit's Court-Annexed Civil Mediation Program. The credentials for becoming a certified mediator are described in these Rules. (Local Circuit Rule 20.03.)

Mediator Resume Books are available in each judge's courtroom, the Arbitration Center and the Courts' website for your reference in selection a court-certified mediator application form."

234. "All fee arrangements should be made directly with the mediator, and should be fully discussed and agreed upon prior to the start of mediation. Unless otherwise agreed to in writing between the parties and the mediator, the mediator is to be compensated at the rate of $250.00 per hour, with each party paying a proportionate share of the total mediation charge. In the event that a person appointed with the assistance of or by the Court declines to accept the appointment at a rate of $250.00 per hour, the Court will appoint or assist in the appointment of an alternate mediator from a list of court-certified mediators who is willing to accept that rate."

235. "The Circuit Court, Law Division Judges implemented the Major Case Civil Mediation Program to offer parties involved in complex litigation an opportunity to explore settlement alternatives with a highly trained and experienced mediator. It is hoped that the mediation process will allow litigations to avoid the cost, expense and drain of a lengthy trial, with no guaranteed outcome. Parties determine their own destiny in mediation and they can often reach accord, with guidance from a skilled and qualified mediator.

> Mediation may prove attractive for your case. It is a private and confidential process. At the first mediation session, all participants sign a Confidentiality Agreement, stating that all discussions and disclosures in mediation remain confidential.

In mediation, parties can present their view of events to other parties, without the traditional constraints of the trial process. They often vent, clear the air and educate opponents as to case strengths and weaknesses, renewing settlement discussions in the process.

Unlike a judge, the mediator is not limited by *ex parte* communication. The mediator can meet ("caucus") with parties and counsel individually, confidentially discussing underlying issues and concerns. In caucus, the mediator can gain insight as to the parties' motivations and goals, then use that information to confidentially explore settlement options with each side, before any formal offer is made.

A successful mediation can salvage an ongoing business relationship between parties who would like to get beyond the present dispute and resume business relations. It can also avoid setting legal precedent, should such an outcome be undesirable.

Mediations typically demonstrate high success rates. Several Circuits have reported that at least 50% – 65% of cases referred to mediation have resulted in either a full or partial agreement. A mediated settlement can save parties significant time, expense, and effort. Even if a settlement cannot be reached in mediation, many mediated cases settle at a subsequent judicial conference, still avoiding the time and expense of a later trial."

but has adopted Local Rule 20 formalizing the procedure[236] and has developed suggested forms.[237]

Supreme Court Rule 99 empowers and encourages other circuits to consider the establishment of similar programs of mediation.[238] Thus, Supreme Court Rule 99 provides a valuable tool which supplements the trial court's authority to consider "the possibility of settlement and scheduling a settlement conference," as contemplated by Supreme Court Rule 218.[239]

V. CONCLUSION

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236. Rules of the Circuit Court of Cook County, Ill., R. 20.1– 20.9.

237. Forms developed by Cook County include: Mediation Application and Self-Certification of Qualifications; Order of Referral to Court-Annexed Mediation; Confidentiality Agreement and Non-representation Acknowledgment, Memorandum of Agreement/No Agreement; Order of Dismissal; Mediation Certification of a Session. Cook County has also developed suggested forms: Mediation Agreement; Mediation Evaluation Form (Attorneys); Mediation Evaluation Form (Mediators); and Mediation Evaluation Form (Parties).

238. ILL. SUP. CT. R. 99. Although several circuits have the development of a Rule 99 Mediation Program under consideration, 12 out of 21 circuits have yet to implement a Rule 99 Mediation Program.

239. ILL. SUP. CT. R. 218(a)(6). However, practitioners are admonished that the confidentiality of settlement conferences under Supreme Court Rule 218 is subject to debate. *See Cleary & Graham's Handbook on Illinois Evidence*, § 408.1 (Aspen 8th 2004), which gives the following analysis of case law:

> Neither an offer to compromise a disputed claim of the opposing party, nor an actual completed compromise is admissible as an admission of liability. Hill v. Hiles, 309 Ill. App. 321, 32 N.E.2d 933 (4th Dist. 1941). . . . The reasons assigned for exclusion are (1) irrelevancy, since the offer of compromise in reality involves a purchase of peace rather than ad admission of liability. Paulin v. Hawser, 63 Ill. 312 (1872); and (2) policy, in that compromises favored by public policy, would be discouraged by admitting the evidence. (Hill,309 Ill. App. 321, 32 N.E.2d 933.)

Either liability or the amount must be disputed. Offers made to settle upon an amount to be paid where liability is admitted fall within the rule of exclusion. Khatib v. McDonald, 87 Ill. App. 3d 1087, 410 N.E.2d 266 (1980). . . . However, only the actual compromise or offer thereof is inadmissible. Admissions of fact are not excluded merely because they are made in the course of negotiations for settlement. Domm v. Hollenbeck, 142 Ill. App. 439 (1908), error in action for dog bite to exclude statement of defendant made during settlement negotiations properly admitted to impeach. (Compare Federal Rule of Evidence 408, making all conduct and statements inadmissible if made in the course of compromise negotiations and defining compromise negotiations to include solely dispute as to an amount.)

Statements made in connection with compromise negotiations may be sheltered by the addition of phrases of qualifications such as 'without prejudice' or 'hypothetically speaking.' McCormick, *Evidence*, § 266 (5th ed. 1999). The reasons underlying the rule of exclusion relating to compromised negotiations, however, do not require the exclusion of relevant evidence otherwise discoverable and/or admissible merely because it is first presented in a qualified fashion in the course of compromised negotiations. A party may not immunize from discovery or admissibility documents otherwise discoverable and/or admissible merely by offering them in a compromise negotiation. . . .No 'fruit of the poisonous" tree doctrine is intended.

ADR has been a vital and integral part of jurisprudence in Illinois. More than 30,000 cases per year have proceeded through mandatory arbitration.[240] The UAA provides parties a framework to adopt an ADR procedure which will be enforced according to its terms.[241] Now, the enactment of UMA provides a clear basis to preserve confidentiality so vital to the precepts of mediation.

Potential benefits from ADR include the following: financial benefits, lower attorney's fees, less pre-trial delay, shorter hearings, expedited and limited discovery, limited pleadings and motions, reduced lost opportunity cost (client's time and energy), financial options to reduce risks, (award limits in general, high and low-end damage limits, limit to specific damage categories), neutrality, early disposition benefits) reduced accumulative damages, damage award accuracy; decision-maker quality and independence: market-based selection, party choice; preserved relationships: less adversarial structure, greater communication, less lingering antagonism; remedies available: mediation generally expands the options of remedies available; privacy: proceedings and award for judgment; labor-management peace: strike prevention, avoidance of judicial intervention, and *control*. Parties maintain control over the structure of the process and in mediation retain full control until an agreement has been reached.

Courts, litigants, and parties would be well served to consider the vast variety of ADR options before assuming that litigation is the best alternative to a negotiated settlement.[242] Likewise, lawyer-mediators would be well served to contemplate whether acting as a mediator or an arbitrator in a jurisdiction outside the Land of Lincoln constitutes the unauthorized practice of law.[243]

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240. Annual Court-Annexed Mandatory Arbitration Fiscal Year 2002 (Annual Report to General Assembly).

241. Absent a contractual basis.

242. A term mediators often euphemize as BATNA.

243. Before addressing the ethical standards involved, consideration must be given to which regulatory body falls the responsibility of administering the ethical requirements of ADR. It is obvious that an attorney, when practicing law, is bound by Rules of Professional Conduct. What is less clear is whether a lawyer, when acting as an arbitrator or mediator, is, in fact, practicing law. While the full scope of this question is beyond the thrust of this article, this issue needs to considered and pondered before an Illinois attorney acts in such capacity. The proposed Illinois Mediation Certification Act, which was introduced in the Illinois legislature as House Bill 1971 in 2001 but never passed, contemplated the certification of non-lawyers. The ABA in its study on interdisciplinary practices contemplated a more fluid portability of unique talents from state-to-state without all of the present impediments of licensure. Nevertheless, the practitioner is reminded that neither approach has been enacted or become law of Illinois or in adjacent jurisdictions. Consequently, any practitioner contemplating a multi-jurisdictional practice must closely examine the practice regulations of the

contemplated jurisdiction before undertaking the duties and obligations of either a mediator or arbitrator. For a more detailed analysis of the dilemmas of a multi-jurisdictional practice. *See* Carol A. Needham, *Multi-jurisdictional Practice Regulations Governing Attorneys Conducting a Transactional Practice*, 2003 U. ILL. L. REV. 1331 (2003).