



*The Ohio State University College of Law  
and*

*The Ohio State Institute for  
Judicial and Legal Education*

**Present:**

**Three Courses** *for*  
***Improving the Quality  
of Dispute Resolution***

- I. JUDGING
- II. MANAGING COMPLEX CIVIL LITIGATION
- III. EXPEDITED CIVIL JURY TRIALS

*by Judge John W. McCormac*



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Justice  
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## **INTRODUCTION**

These courses were offered as law school based programs because the primary emphasis of the instruction was placed on exploring two philosophical issues. The first issue is whether other creative ways of solving legal disputes are needed to better serve the public and to strengthen the system of justice, and the second issue is whether these alternatives to the traditional adversary system advance, rather than detract, from the democratic vision of justice. Although information was transmitted about procedures used to improve the ways in which disputes are handled, it was not the main emphasis as is true in many continuing judicial and legal education courses.

Law schools are designed, by mission and by tradition, to be institutions where new ideas are explored, developed and examined. Law school faculty members were and are at the forefront in developing rules of civil procedure, rules of evidence, alternative dispute resolution methods and other changes regulating the practice and procedure used in all areas of the law. Thus a law school is uniquely suited to educate judges and lawyers to expand their horizons in the way that legal disputes are handled.

The advantages of offering these courses at a law school are many. Those advantages include the atmosphere of learning, the availability of law school faculty members who can participate in teaching courses, the easy accessibility of an excellent law library and the use of rooms designed for classrooms. Judges and lawyers like to come back to law school to learn. Senior law students can participate, in limited number, and both the class and the students gain from their participation and their less jaded look at the process.

The disadvantages are the fixed location that provides less flexibility statewide, the limited access to classrooms that must be subordinated to undergraduate law student use, and, on some campuses, parking. It is also necessary to recruit an influential law school faculty member to be an advocate for the program.

# **I. JUDGING**

**Ohio State Institute for  
Judicial And Legal Education**

## **I. JUDGING**

### **COURSE CURRICULUM**

#### **A. The Learning Objectives**

This course is about the nature of judging within a legal system. The principle objective is to explore the implications of a commitment by judges and by lawyers to reasoned decisions candidly explained. The central premise of the course is that whether or not you are a judge or ever expect to be one, it makes a difference (both to your professional development and to the quality of the legal system) how well you understand judging in our legal system and what you believe about commitment to professionalism and method in judging.

Throughout the course, there is substantial discussion of the choices that a judge must make to arrive at a decision (whatever caliber decision is made and whether the judge is aware of all of the implications). A primary goal is to teach judges to be more aware of all aspects of decision making rather than only the bottom line.

Emphasis is placed upon the role that advocates have in helping the judge to make more informed and better reasoned decisions and how the judge can encourage the advocate to direct the input to assist the court.

Professionalism and ethics are weaved into the course as appropriate.

The course is designed for judges who seek to improve their judging, for lawyers who seek a judicial office, and for lawyers who seek to improve their advocacy.

#### **B. Presentation Methods**

The primary method is a combination of lecture and discussion incorporating application of the principles to real life cases. The quality of discussion is greatly enhanced if the class

members can be encouraged, prior to class, to read the assigned materials carefully. Preparation will reduce lecture time and enable the instructor to concentrate more on discussion and application. Small group discussions should be used regularly to apply the principles to problems which are to be decided. The course is designed to be taught in twenty hours, preferably broken down into periodic sessions of two to five hours to ensure sufficient time to discuss a series of related issues in depth before moving on to new material.

### **C. Sample Agenda Or Schedule**

During the grant period the course was taught two times. The first time it was broken down into eight two- and one-half hour classes, once a week over a ten week period. The second time it was taught in four five-hour days once a week over a four week period. The eight week presentation produced better student preparation and learning. However it is very difficult to schedule a class for judges (particularly those located a distance from the class) over an eight week period since they will lose eight days from their court rather than four days (if the class cannot be taught on Saturdays). Learning and preparation were reasonably good for the four week class and it is probably more practical. The sample schedule is for eight weeks; if taught in four weeks, two segments will be taught each day.

### The Schedule

<u>Sessions</u>	<u>Topic</u>	<u>* Assignment</u>
<u>First</u>	An Introduction to Judicial Decision making	Chapter One
<u>Second</u>	Law and Facts in the Administration of Justice	Chapter Two
<u>Third</u>	Tailoring Tests for Deciding Codes	Chapter Three
<u>Fourth</u>	Values in Reasoned Decision making	Chapter Four
<u>Fifth</u>	Explaining the Decision	Chapter Five
<u>Sixth</u>	Judging Statutes	Chapter Six
<u>Seventh</u>	Judging in Pretrial Procedure	Chapter Seven
<u>Eighth</u>	Conducting Jury and Nonjury Trials	Chapter Eight

- \* The basic text which was used is *Judging* by Robert E. Keeton, West Publishing Company (1990). It contains a supplement to each chapter composed of cases to be used in demonstrating the principles. The cases in the supplement also were assigned reading. Robert E. Keeton has an extensive educational background (Langdell Professor Emeritus of Harvard Law School) and extensive judicial experience (Federal District Court). Additional assignment were made as noted in the appendix where each session is outlined.

#### **D. Suggestions for Replicating the Program; Qualifications of Faculty**

The course should be offered over at least a four week period and preferably a longer period.

There is too much student preparation required and too much to absorb to offer the course in a concentrated three day period. However it would be possible to offer the course on a one week residency basis where four hours per day are spent in class and four hours a day are utilized for homework and preparation. If offered in this way, which may better fit some judge's schedules, it



is strongly recommended that the judges carefully read the Keeton book prior to the beginning of the class.

Faculty members should have strong academic credentials, law school teaching experience, and preferably judicial experience. The course combines the theoretical with the practical. A person with experience in both arenas will be the best presenter. Highly regarded judges who can teach command the most respect in courses where the main theme is judging.

The better participants are judges who have completed at least one year of service. Many of the most enthusiastic participants had been on the bench for over ten years. It is doubtful that a completely new judge who is trying to learn basic procedure is ready for this course. Thus it is not recommended that it be made part of an orientation course for newly selected judges. It is desirable that this course be made available to judges returning for advanced orientation after a year or more of service. Some of our class participants thought that every judge should be required to take the course as they found that their judging was greatly improved as a result of this course.

#### **E. Evaluations**

An evaluation form was submitted to the class immediately after completion to obtain the initial reactions of the class to teaching methods, competency of instructors, value of course, timing of course and adequacy of facilities. Thereafter three month and six month survey forms were submitted to the class. The primary purpose of these surveys was to determine what effect, if any, the course had upon the judge's way of handling litigation. Two surveys were used to help determine whether any changes were temporary or if the changes had become ingrained. Copies of the evaluation and survey forms are included in the Addendum as Exhibits 1, 2 and 3.

Our surveys showed that class attendees were instituting the principles they learned into their

judging immediately and that the use of the new methods produced results that caused them to increase the use so that it became an ingrained part of their judging.

## **APPENDIX**

This is an outline of the principle points in each of the sessions with additional assignments; reference materials and handouts. The outline generally follows the format used in the book, *Judging*, by Robert E. Keeton.

### **Session One: An Introduction to Judicial Decisionmaking**

- A. Goal of course
  - 1. Learn how to make methodical reasoned judgments
- B. Professionalism
  - 1. Substantive legal knowledge - must know enough to sort out good input from bad input
  - 2. Procedure - follow rules
  - 3. Common sense
- C. Personal Qualities of Good Judges
  - 1. Patience
  - 2. Consideration
  - 3. Good manners
  - 4. Thick skin
  - 5. Ability to appreciate stress and not contribute to it
  - 6. Sensitivity
  - 7. Up-to-date
  - 8. Willingness to change
  - 9. Not easily bored or overwhelmed
- D. Commitment to Method
  - 1. Develop a method or procedure that prevents inconsistencies or personal opinions from playing too great a role
- E. What is Judging?
  - 1. Choices
    - a. Limited:
      - (1) by law and
      - (2) by the Ohio Code of Judicial Conduct, Canon 3(A), "A Judge

Should Perform the Duties of His Office Impartially and Diligently (Adjudicative Responsibilities)”

2. Faithful to law
  - a. What if a binding decision offends your personal sense of justice?
  - b. A community sense of justice
- F. Reasoned Decision
  1. Commitment to aim of justice
  2. Commitment to professionalism
  3. Commitment to method
- G. Methods of Reasoning
  1. Deductive
  2. Informative
  3. Analogy
- H. Method of Reasoned Choice
  1. Find facts first
  2. Apply law expressed in community's authoritative sources
    - a. Recognize that there will be choices, and that the choices are value laden

**Session Two: Law and Facts in Administration of Justice**

- A. Who Decides Disputes of Law
  1. See Case 2.1 “An Infant Vaccine Victim”, in *Judging*, p. 31
- B. Who Makes Law
  1. Discuss various “lawmakers”  
See *Judging*, pp. 32-35
- C. Changing Roles of Lawmakers
  1. Increase in complexity creates more choices  
See Shackil v. Lederle Laboratories, in *Judging*, p. 342
- D. Who Decides Disputed Facts
  1. Distinguish between adjudicative facts and legislative or premise facts
  2. See Federal Rules of Evidence 201, “Judicial Notice of Adjudicative Facts”
  3. See Case 2.2 “Knowledge of Asbestos Hazards,” in *Judging*, p. 40
  4. Ethical Implications; see Ohio Code of Judicial Conduct, Canon 3(A)
- E. Truth, Fact and Justice
  1. Truth becoming

- 2. Truth unknown
- 3. Truth and proclamation
- F. Law
  - 1. Law is incomplete, developing
  - 2. Unanswered questions
    - a. Look at objectively manifested purpose
  - 3. Law Often Unknown
    - a. If you can't find it, you must create it
- G. Types of Facts
  - 1. Present
  - 2. Past
- H. Mixed Questions of Law and Fact

### **Session Three: Tailoring Tests for Deciding Cases**

- A. Definitions
  - 1. Test
  - 2. Rule
- B. Types of Tests
  - 1. Bright line
  - 2. Evaluative
  - 3. Multiple choice
  - 4. Subjective and objective
- C. State of mind elements
- D. Case examples
  - 1. Hustler Magazine v. Falwell, in *Judging*, p. 458
  - 2. Sandstrom v. Montana, in *Judging*, p. 470
- E. Instructions to Jury
  - 1. Definitions understandable to lay person
  - 2. Case specific
- F. Role of Burdens of Production, Proof
- G. Findings of Fact and Conclusions of Law
  - 1. See Federal Rules of Civil Procedure 52, "Findings by the Court; Judgment on Partial Findings"

## **Session Four: Values in Reasoned Decisionmaking**

- A. Introduction
  - 1. All legal premises (rules of law) are value laden
  - 2. Judge committed to representing community values, part of which are expressed in authoritative sources
  - 3. Failure to recognize values may result in misapplication
  - 4. Judge has professional obligation to give reasons which should disclose something about values or premises
  - 5. See Case 4.1 "The Adult Vaccine Victim", in *Judging*, p. 114; and Case 4.2 "Gypsy Moths and Honeybees", in *Judging*, p. 115
- B. Probing Premises for Value Implications
  - 1. Derivative by logic
  - 2. By analogy
- C. Deductive and Informative Reasoning
- D. Individual entitlement versus social calculus
  - 1. See Case 4.2 "Gypsy Moths & Honeybees," in *Judging*, p. 115
- E. Lawmaking Choices Affect Who Pays

## **Session Five: A Judge's Writing and Speaking**

- A. Judges Must Explain
- B. When, How Much and How to Write
  - 1. Discuss when to write briefly and when to explain fully
- C. Steps To a Well Written Opinion
  - 1. Plan
  - 2. Write
  - 3. Edit

### **The Plan**

- 1. Method in judging
  - a. Judicial decisionmaking
  - b. Finding the facts
  - c. Choosing the law
  - d. The value of reasoned decisionmaking
  - e. Deciding how to explain the decision

- f. Remember - clear writing follows clear thinking
- g. Resources for further study: *Judging*

### The Opinion

- 1. Opening paragraph
  - a. See Exercise 1 (Addendum)
- 2. Issues on appeal or assignments of error
- 3. Statement of facts
- 4. Body of opinion
  - a. Simple case - abbreviated opinion
    - (1) See Exercises 2 and 3 (Addendum)
  - b. Medium case
  - c. Complex case
  - d. Explain with appropriate authority
- 5. Conclusion
- 6. Directions to court below
- 7. Judgment entry

### Edit

- 1. Ambiguities
- 2. Incomplete or illogical explanations
- 3. Redundancies
- 4. Poor writing style; use plain English
  - a. Principles of plain English
    - (1) Omit surplus words
    - (2) Use familiar, concrete words
    - (3) Use short sentences

### D. Writing With Style

- 1. See Exercise 4 (Addendum)

## **Session Six: Judging Statutes**

### A. Introduction

- 1. Most cases involve statutes
- 2. Statutes often make judge's choices more complex
  - a. See Case 6.1 "Rich, Cabbie, and Luce", in *Judging*, p. 146; Case 6.3 "Wrongful Death and Punitive Damages", in *Judging*, p. 149; and Case 6.4 "Electronic Eavesdropping", in *Judging*, p. 149

### B. Determining Manifested Meaning

- 1. Guidelines
  - a. Apply mandate if clear

- b. Apply principle and policy if ascertainable and relevant and issue not specifically answered
    - c. Otherwise try to resolve issue to produce best total set of rules
  - 2. Cite legislative interpretation rules, if any. (i.e. Ohio Revised Code § 1.42, et seq).
- C. How to Search for Manifested Meaning
  - 1. Use of deductive and informative reasoning
  - 2. Be respectful of lawmakers and their common sense

### **Session Seven: Pretrial Proceedings**

- A. Introduction
  - 1. Objectives and Purpose; see Federal Rules of Civil Procedure 1, "Scope and Purpose of Rules"
  - 2. Flexibility; discretion
- B. Case Management
  - 1. Incentives; sanctions
  - 2. Discovery
- C. Judicial Interventions for Disposition Without Trial
  - 1. Summary judgment
  - 2. Settlement conferences
  - 3. Early neutral evaluation
  - 4. Mediation
  - 5. Arbitration
  - 6. Summary jury trial
- D. When to Use a Pretrial Procedure

### **Session Eight: Conducting Jury and Nonjury Trials**

- A. Incentive Structures and Judicial Management
  - 1. Controls over delay
  - 2. Procedures to use to expedite trials
  - 3. Managerial judging
    - a. Dos and don'ts
- B. Tailored trials
- C. Control by Court
  - 1. See Federal Rules of Evidence 611(a), "Mode and Order of Interrogation and Presentation (Control by Court)"

2. Ethical Implications: See Ohio Code of Judicial Conduct, Canon 3(A)
3. Voir Dire
4. Opening statements
5. Splitting of issues

D. Instructions

1. Preliminary
  - a. Inform jury specifically what their role is and what your role is
2. Final instructions
  - a. Shorten, make clear and make case specific

E. Trial to Court

1. Render decision shortly after trial
2. Ordinarily make separate findings even if not requested. Helps to arrive at reasoned decision.



# **ADDENDUM**

# EXHIBIT 1

## JUDGING EVALUATION

Please respond as candidly and fully as possible as your evaluation will help in determining whether to offer the course again and whether to revise it if we do.

1. Length of course

\_\_\_\_\_ too long  
\_\_\_\_\_ too short  
\_\_\_\_\_ about right

2. Content of course

\_\_\_\_\_ good  
\_\_\_\_\_ insufficient

List any areas that should be excluded:

\_\_\_\_\_

List any areas that should be added or expanded:

\_\_\_\_\_

3. Text: Judging by Robert Keeton

\_\_\_\_\_ helpful, would continue use  
\_\_\_\_\_ not helpful

List any materials that should be considered or substituted:

\_\_\_\_\_

4. Instruction

\_\_\_\_\_ good  
\_\_\_\_\_ average  
\_\_\_\_\_ poor

List any ways presentation could be improved or what aspect, if any, that you particularly liked:

5. Timing of class

\_\_\_\_\_ prefer 4:30 - 6:30 p.m. classes

\_\_\_\_\_ prefer 6:00 - 8:00 p.m. classes

\_\_\_\_\_ prefer Saturday morning classes

6. What part, if any, of the course was particularly helpful to you?

7. Constituency of the class

\_\_\_\_\_ liked the mix of judges, lawyers and students

\_\_\_\_\_ prefer only judges and lawyers (lawyers and Judges)

\_\_\_\_\_ prefer only judges (judges only)

\_\_\_\_\_ prefer only lawyers (lawyers only)

\_\_\_\_\_ prefer only students (students only)

8. Cost of course (students need not answer)

\_\_\_\_\_ too high

\_\_\_\_\_ too low

\_\_\_\_\_ about right

9. General comments

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
(Signature optional)

# **EXHIBIT 2**

## **JUDGING**

### **Three Month Survey**

Explain as specifically as possible any differences in how you performed your judicial duties during the three months after you completed the course. Reference is made to areas covered during the course for comment.

1.     Handling of scheduling, pre-trial motions and procedure
2.     Conduct of trials
3.     Conduct of post-trial proceedings
4.     Consideration of values in reasoned decision-making
5.     Making decisions
6.     Explaining decisions, both orally and in writing
7.     Writing style
8.     Relationship with attorneys, witnesses and parties
9.     Sensitivity to ethical considerations

10. Referral to or use of alternative dispute procedure
11. Any other areas of judging or your judging as a whole
12. What aspects of the course proved to be most useful?
13. What is the most significant way in which your judging has changed or improved?
14. In retrospect, what do you wish that we would have emphasized or covered more completely?
15. How should the course be modified?
16. Would you recommend to other judges that they take a course of this kind?
17. How many years have you been a judge?
18. Any additional comments.

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Signature (optional)

# EXHIBIT 3

## JUDGING Six Month Survey

Explain as specifically as you can now what you learned in this course has had a continuing and long range effect on your performance of your judicial duties. Give specific examples, if possible.

1. Handling of pre-trial procedure.
2. Conduct of Trials.
3. Handling of post-trial proceedings.
4. Rendering and explaining decisions.
5. Consideration of values in reasoned decisionmaking.
6. Improvement of writing style.
7. Referral of cases to referees and reviewing the referee's report.
8. Referral of cases to ADR processes.
9. Any other ways that the course has affected the quality of your judging.

10. As you reflect upon the time spent in taking the course and what you have gained, do you consider your investment to have been wise?
11. Do you recommend the courses to other judges?
12. Should this course be a required study for new judges?
13. Are you interested in taking a follow-up course?
14. If so, what areas would you like covered?
15. From an experience standpoint, what types of instructors are preferable?
16. What is the ideal class size?

# EXERCISE 1

## OPENING PARAGRAPHS

(1) This is an appeal from a judgment entered upon the verdict of a jury, dismissing a petition in an action to recover upon a policy of war risk life insurance. The insured was mustered out on December 31, 1918, and the policy lapsed on January 30, 1919; he died of pulmonary tuberculosis on July 6, 1922, and the question was whether he was permanently and totally disabled when the policy lapsed.

(2) We think it fair to say that the resolution of the case at bar depends upon the judicial stigmatism of the court deciding it. The learned district judge and ourselves are required to appraise facts in relation to, first, causation and, second, a standard of care. Our appraisal happens to differ with his and we find the same difference in the "books." It is an application of facts to a point of view. We should begin, therefore, with a statement of those facts.



## EXERCISE 2

### SAMPLE SHORT DECISIONS

- (1) By judgment entry. [App. R. 11.1(E)]

The judgment of the common pleas court is reversed on authority of Mominee v. Scherbarth (1986), 28 Ohio St. 3d 270. The case is remanded to the trial court.

- (2) By memorandum decision. [State v. Smith]

Defendant appeals from a conviction for attempted rape. The sole issue is whether defendant's rights under the Fourth Amendment to the United States Constitution were violated by the admission into evidence of a coat which belonged to him.

The coat was seized by a law enforcement officer in defendant's apartment after the officer saw the coat lying on the sofa in plain view. The officer entered the apartment by invitation of defendant and the coat matched the description given him by the victim.

Having entered the apartment at defendant's request, the officer was lawfully there. Thus, he could seize, without a warrant, material evidence which was in plain view. Harris v. United States (1968), 390 U.S. 234.

Defendant's assignment of error is overruled, and the judgment of the trial court is affirmed.

## EXERCISE 3

### State v. Smith

The Columbus police answered a call concerning a purported rape which took place at an apartment located at 205 East Main Street, Columbus, Ohio. They arrived at the scene and found Gloria Rowe and a neighbor there. Gloria told her that a white male wearing a brown leather coat with a fur collar had come to her door purportedly to sell magazines. When she allowed him to enter, he then locked the door, grabbed her, and started to remove her clothing. When she screamed and a neighbor banged on the adjoining wall, the defendant left the apartment without completing the rape. The neighbor observed a man wearing a similar coat running down Fourth Street and entering an apartment building about a block away. The officer immediately went to that apartment building, which contained four units. He observed a light on in one of the apartments. He went up to that apartment and the defendant answered the door. The officer asked if he could talk to him and the defendant invited him into the apartment. At that time, the officer saw a coat which matched the description given him by the victim lying on the end of the sofa. The officer seized the coat and arrested defendant and charged him with attempted rape.

Defendant's attorney filed a timely motion to suppress the coat on the ground that it was illegally obtained. The trial court overruled the motion. The coat was subsequently admitted into evidence and defendant was convicted and sentenced to two years imprisonment.

Defendant has appealed, asserting as his only assignment of error that his rights under the Fourth Amendment to the United States Constitution were violated by the admission into evidence of the coat. Your research shows that there is a plain view exception to the requirement to obtain a search warrant in order to search for and seize evidence which is in plain view when the evidence is pertinent to the crime which is being investigated. Harris v. United States (1968), 390 U.S. 234.

Based on these circumstances, write a short memorandum decision.

# EXERCISE 4

## JUDGING

### WRITE WITH STYLE

Resources for help in developing stylish writing:

- (1) Strunk and White, The Elements of Style, MacMillan
- (2) Wydick, Plain English for Lawyers, Carolina Academic Press
- (3) Ray and Ramsfield, Getting It Right and Getting It Written, West Publishing Company

I. Exercises: rewrite the following sentences to improve the English usage and style:

1. There could be heard three shots coming from the bedroom part of the house.

CORRECTION:

2. The plaintiff was bitten by the German Shepherd.

CORRECTION:

3. It is contended by plaintiff that the appeal should be dismissed as untimely.

CORRECTION:

4. He was not very often on time.

CORRECTION:

5. He was not honest.

CORRECTION:

6. He did not remember the trial date.

CORRECTION:

7. A period of unfavorable weather set in.

CORRECTION:

8. He showed satisfaction as he took possession of his well-earned reward.

CORRECTION:

9. All boats at the marina were inspected on a daily basis at the hour of 12:00 noon each day.

CORRECTION:

10. Apparently, this order seems to contradict the previous ruling handed down on the matter earlier.

CORRECTION:

11. In the case cited and quoted at length, the workman was not working on the grounds and premises of the defendant, as in this case.

CORRECTION:

12. After a full and careful consideration of the entire record, the court is firmly and unequivocally of the opinion that the judgment cannot stand as it is absolutely against the manifest weight of all the evidence.

CORRECTION:

13. The optimum result is easy to define.

CORRECTION:

14. In the case sub judice, the plaintiff was not at fault.

CORRECTION:

15. The lease provided, inter alia, that the rent was due on the first day of each month.

CORRECTION:

16. The question is as to whether defendant was at fault.

CORRECTION:

17. Defendant engaged in acts of a hostile character.

CORRECTION:

18. Defendant was very lean and strong.

CORRECTION:

19. It should be a lesson to each and everyone of us.

CORRECTION:

20. She was enthused about her new car.

CORRECTION:

21. The fact is that the victim is dead.

CORRECTION:

22. The thrust of his argument . . . . .

CORRECTION:

23. Formerly law was taught by the lecture method, while now the casebook method is employed.

CORRECTION:

24. It occurs every year in spring, summer, or in winter?

CORRECTION:

25. The whites, blacks and the Mexicans rioted.

CORRECTION:

26. His speech was marked by disagreement and scorn for his opponent's position.

CORRECTION:

27. He noticed a large stain in the rug that was right in the center.

CORRECTION:

28. It was both a long ceremony and very tedious.

CORRECTION:

29. Either you must grant his request or incur his ill will.

CORRECTION:

30. My objections are, first, the injustice of the statute and, second, that it is unconstitutional.

CORRECTION:

31. He only asserted two assignments of error.

CORRECTION:

32. The plaintiff's machine broke while working for the defendant.

CORRECTION:

33. Having obtained a writ of habeas corpus, the court ordered the prisoner's release.

CORRECTION:

34. The foreman of the jury read the verdict in a dispassionate manner, which acquitted the defendant.

CORRECTION:

35. He only died a week ago.

CORRECTION:

36. He was guilty of robbery, murder, and of raping his girlfriend.

CORRECTION:

J. Additional Exercises

1. The ruling by the trial judge was prejudicial error for the reason that it cut off cross-examination with respect to issues which were vital.

CORRECTION:

2. In many instances, insofar as juries are concerned, the jury instructions are not understandable because they are too poorly written.

CORRECTION:

3. In the event that there is a waiver of the attorney-client privilege by the client, the letters must be produced by the attorney for the purpose of inspection by the adversary party.

CORRECTION:

4. In the event of the tenant's default, the lease will terminate.

CORRECTION:

5. At this point in time, the witness cannot recall what the letter was with reference to.

CORRECTION:

6. There can be no doubt but that the statute applies  
. . . .

CORRECTION:



7. The question as to whether there was negligence . . .

CORRECTION:

8. There are three key paragraphs in the pretrial order.

CORRECTION:

9. The trial court denied the defendant's motion, which asked for summary judgment.

CORRECTION:

10. There is nothing to tell us whether this misconduct on the part of counsel influenced the verdict rendered by the jury.

CORRECTION:

11. Totally null and void and of no further force and effect whatsoever.

CORRECTION:

12. The prisoner's aptitude for acclimatization to lack of confinement is one factor which must be taken into account in the deliberations of the Parole Board.

CORRECTION:

13. The object of said conspiracy among said defendants was to fix said retail prices of said product throughout said state of New York.

CORRECTION:

14. While there are instances in which consumer abuse and exploitation result from advertising which is false, misleading, or irrelevant, it does not necessarily follow that these cases need to be remedied by governmental information in the market place because it is possible for consumer's interests to be protected through resort to the courts, either by consumers themselves or by those competing sellers who see their market shares decline in the face of inroads based on such advertising.

15. Rewrite the following words or phrases:

a manly effort

a real sob sister

man's basic liberties

newsman

men and their wives

enjoys his leisure time



## **II. MANAGING COMPLEX LEGAL LITIGATION**

**Ohio State Institute for  
Judicial And Legal Education**

## **II. MANAGING COMPLEX CIVIL LITIGATION** **(The Use of Alternate Dispute Resolution Methods)**

### **COURSE CURRICULUM**

#### **A. Learning Objectives**

The principle goal of the course is to teach judges to assist litigants to evaluate and place complex civil cases into the dispute resolution process that best suits the case. The judges are given basic training in all of the alternate dispute resolution methods that have been used. Those methods include mediation, arbitration (binding and nonbinding), early neutral evaluation, summary jury trial and expedited or bifurcated trial procedure. Information is provided about private judging and dispute resolution entities to whom cases may sometime be referred. Information also is provided about the existence of other programs from which program start-up assistance may be obtained. Judges are encouraged to consider starting applicable programs in their courts.

#### **B. Presentation Methods**

The course involves a combination of lecture, discussion, panel discussion, and question and answer sessions. Experts from academia, courts, dispute resolution commissions and training were used to permit the attendees to obtain the maximum exposure to ADR in a relatively short time. The attendees purchased an excellent book on dispute resolution (see next page) which is required reading to facilitate quicker understanding of the information provided.

#### **C. Sample Agenda or Schedule**

The course was broken down into eleven different sessions totaling twenty hours of instruction offered on two consecutive weekends. Ten hours of class were held each weekend,

consisting of Thursday evening, all day Friday and Saturday morning. While it was a demanding schedule, it worked well because it allowed judges to attend without sacrificing much court time. If offered in such a concentrated fashion, it is essential that different instructors and methods of instruction be provided. Ideally it could be offered as a one week full-time course with four hours instruction and four hours reading and homework each day or as a course extended over four to eight weeks. The order of presentation may be changed without problem following the initial overview of processes.

### The Schedule

<u>Sessions</u>	<u>Topic</u>	<u>*The Assignment</u>
<u>First</u>	Overview of ADR Processes	Chapters 1 and 2
<u>Second</u>	Regulating Mediation, Confidentiality	Chapter 3
<u>Third</u>	Mediation	Chapter 3
<u>Fourth</u>	Negotiation & Mediation	Chapters 2 and 3
<u>Fifth</u>	Other ADR Procedures	Chapters 5 and 6
<u>Sixth</u>	Arbitration	Chapters 4 and 5
<u>Seventh</u>	ADR System Design	Chapter 10
<u>Eighth</u>	Implementation of ADR System	Chapter 11
<u>Ninth</u>	Ohio Supreme Court Assistance	
<u>Tenth</u>	Ohio Commission on Dispute Resolution	Chapter 8
<u>Eleventh</u>	Providers, Immunity	Chapter 8

\* The basic text which was used is *Dispute Resolution* by Stephen B. Goldberg, Frank E.A.

Sanders, and Nancy H. Rogers, Little, Brown and Company (2d ed. 1993 and Supp. 1995). It is an excellent law book written by three of the leading experts in dispute resolution and adopted by many law school professors. Assignments are from that text with a recommendation that the entire book be read prior to the first class. Additional assignments were made as noted in the Appendix where each session is outlined. Also recommended for general study was *Dispute Resolution and Lawyers*, by Leonard L. Riskin and James E. Westbrook, West Publishing Co. (1983).

#### **D. Suggestions for Replicating the Program; Qualifications of Faculty**

It is doubtful that any one person can adequately handle all of the types of education and training necessary to provide a comprehensive course of high quality. It is recommended that faculty members include a law school professor who teaches ADR, a judge who has utilized and is very familiar with the court processes, a person who trains mediators, a member of the state dispute resolution commission, and the Supreme Court staff person working with courts to develop ADR programs.

The course is primarily designed for experienced judges who would like more understanding about ADR and the programs that are producing the desired results. It will be especially helpful to the presiding/administrative judge or a motivated designee who is considering initiating or expanding ADR in the court. It could be presented as a week long course where, in informal sessions, an expert from a court with an effective program can provide answers to practical questions about implementation, operation and budgeting. Session one could be used as part of an orientation for new judges providing an incentive for attending the full course after they get some experience.

#### **E. Evaluation**

Evaluations are essential to obtain input to improve the course. Surveys were used as explained in Section E of the Judging Course Curriculum. Copies of the evaluation and survey

forms are included in the Addendum as Exhibits 4, 5 and 6.

Our surveys showed that skeptical judges usually changed their minds and became converted to the idea that ADR should become an integral part of the adjudicatory system.

## **APPENDIX**

### **Session One: (Two hours)**

- A. Purpose of course
- B. Brief overview of ADR processes
  - 1. See "Alternatives to Trial", Exhibit 7 (Addendum)
  - 2. See "3 Key Conflict Resolution Approaches", Exhibit 8 (Addendum)
- C. Reasons for using ADR
- D. Evaluating the potential effectiveness of an ADR procedure
  - 1. See Stephen B. Goldberg, Frank E.A. Sanders, and Nancy H. Rogers, *Dispute Resolution*, 85, Table 1 (2d ed. Supp. 1995) (in Sanders and Goldberg, "Fitting The Forum To The Fuss: A User Friendly Guide To Selecting An ADR Procedure")
  - 2. See Stephen B. Goldberg, Frank E.A. Sanders, and Nancy H. Rogers, *Dispute Resolution*, 88, Table 2 (2d ed. Supp. 1995) (in Sanders and Goldberg, "Fitting The Forum To The Fuss: A User Friendly Guide to Selecting An ADR Procedure")

### **Session Two: (One hour)**

- A. Regulating mediation, mandatory vs. voluntary mediating, confidentiality
  - 1. See Ohio State Bar Association proposed statute "Privilege for Mediation", Exhibit 9 (Addendum)

### **Session Three: (Two hours)**

- A. An overview of mediation
- B. Who is a mediator?



- C. Mediation training, the seven steps
  - 1. See Scot Dewhirst and Roberta Mitchell, *The Mediator Handbook*, 1990
  - 2. See Roger Fisher and William Ury, *Getting to Yes*, 1981
- D. Standards of conduct for mediators
  - 1. See "Code of Ethics and Standards of Conduct for Mediators", Exhibit 10 (Addendum)
- E. The judge as a mediator

**Session Four: (Three hours)**

- A. Overview of negotiation as related to mediation
  - 1. See chart detailing the principled approach to negotiation in Roger Fisher and William Ury, *Getting to Yes*, Chapter 1.
- B. Special mediation issues and skill requirements
- C. Mediation compared to other ADR methods
- D. Skill building
  - 1. See "Good Listening", Exhibit 11 (Addendum)
  - 2. See Harold Paddock, *Settlement Week, A Practical Manual for Resolving Civil Cases Through Mediation* (BNA, 1990). For further information contact Harold Paddock, Magistrate, Franklin County Court of Common Pleas, 614-462-3152.
  - 3. An excellent video to teach mediation skills is *Mediation: An Effective Way to Settle Cases*, produced by the Ohio State Bar Association

**Session Five: (Two and one-half hours)**

- A. Other procedures to facilitate settlement
- B. Early neutral evaluation
- C. Summary jury trial
  - 1. See Thomas Metzloff, *Reconfigure the Summary Jury Trial*, 41 Duke L.J. 806 (1992)
- D. Mini-trial
- E. Special masters
  - 1. See Federal Rules of Civil Procedure 53, "Masters"

**Session Six: (Two hours)**

- A. Arbitration, binding and nonbinding
  - 1. See Ohio Revised Code Chapter 2711 "Arbitration"
  - 2. See the Uniform Arbitration Act (1955)
  - 3. See Commercial Arbitration Rules of the American Association of Arbitrators (1986)
- B. Selection of arbitrator or arbitrators
- C. Standards of conduct for arbitrators
- D. Arbitration procedure
- E. Enforcement of awards

**Session Seven: (One hour)**

- A. Dispute Resolution Systems design

**Session Eight: (Two hours)**

- A. Implementation issues
- B. Overcoming barriers to use of ADR
- C. Deciding what system you want
- D. Evaluating your system

**Session Nine: (One and one-half hours)**

- A. Activity of the Supreme Court in assisting ADR
  - 1. Discussion of programs in Ohio and the activity of the Ohio Supreme Court and its committees in helping to develop programs. For further information, contact Eileen Pruett, Coordinator, Dispute Resolution Programs, The Supreme Court of Ohio, 614-752-4700.
- B. Types of programs in Ohio
- C. New programs to be developed
- D. How to institutionalize

**Session Ten: (One and one-half hours)**

- A. The Ohio Commission on Dispute Resolution and Conflict Management activities
  - 1. Discussion of role of the Ohio Commission on Dispute Resolution and Conflict Management in working with courts to provide information and help to develop programs. Reference to the Government Assistance Program to train judges and government officials to help mediate conflicts among peers. For further information, contact Christine Carlson, Executive Director, Ohio Commission on Dispute Resolution and Conflict Management, 614-752-9595.
- B. Assistance available to courts
- C. The school program
- D. Handling large public disputes and complex civil litigation

**Session Eleven: (Two and one-half hours)**

- A. Participating as a provider (Judge or Professional)
- B. Liability, immunity, privilege
- C. Outside providers
- D. Use by court or by the retired judge
- E. Private judging
  - 1. Discussion of private judging in Ohio and the utilization of various procedures to make more manageable the very complex civil case that must be tried by a jury. See Ohio Revised Code Chapter 2701.10, "Court of Record - General Provisions (Registration of retired judges; referral of civil action or submission of issue or question)".

## **ADDENDUM**

# EXHIBIT 4

## MANAGING COMPLEX LITIGATION EVALUATION

Please respond as candidly and fully as possible as your evaluation will be helpful in determining whether The Ohio State University College of Law should offer this course again and whether to revise it if we do. The survey will also help us to determine whether other judicial education courses should be offered.

1. Length of course  
\_\_\_\_\_ too long  
\_\_\_\_\_ too short  
\_\_\_\_\_ about right
2. Content of course  
(Rate each category from 5 to 1, with 5 representing the best rating and 1 representing the worst rating).

### Category

- |                                    |       |
|------------------------------------|-------|
| (1) Use of ADR                     | _____ |
| (2) Negotiation                    | _____ |
| (3) Mediation                      | _____ |
| (4) Arbitration                    | _____ |
| (5) Early Neutral Evaluation       | _____ |
| (6) Summary Jury Trial             | _____ |
| (7) Public Disputes                | _____ |
| (8) Private Providers              | _____ |
| (9) Development of Dispute Systems | _____ |
| (10) Overall Increase of Knowledge | _____ |

3. List any areas that should be added or expanded:  
  
\_\_\_\_\_

4. Text: Dispute Resolution by Goldberg, Sander & Rogers

\_\_\_\_\_ helpful, would continue use  
\_\_\_\_\_ not helpful for course, but valuable resource  
\_\_\_\_\_ discontinue

5. Handouts:

\_\_\_\_\_ helpful, would continue use  
\_\_\_\_\_ not helpful

List any materials that should be included or substituted

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6. Instruction (Overall)  
(Rate from 5 to 1 with 5 being best and 1 worst)

Knowledge of subject \_\_\_\_\_  
Method of teaching \_\_\_\_\_  
Preparation \_\_\_\_\_

Individual Instructions  
(Rate from 5 to 1)

McCormac \_\_\_\_\_  
Rogers \_\_\_\_\_  
Doyle \_\_\_\_\_  
Paddock \_\_\_\_\_  
Pruitt \_\_\_\_\_  
Carlson \_\_\_\_\_

How would you change the way the course is taught?

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7. Timing

Is Thursday afternoon through Saturday morning a good time to attend classes?

\_\_\_\_\_ (yes) \_\_\_\_\_ (no)

What time would you prefer if you had a choice? (Describe as fully as possible, giving days of the week and special hours)

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8. Location

Rate The Ohio State University College of Law from 5 to 1 as a suitable place

\_\_\_\_\_

What did you like and what do you not like?

\_\_\_\_\_

Is there another location that you would prefer for presenting course:

\_\_\_\_\_

9. Would you consider attending another course at Ohio State College of Law?

\_\_\_\_\_ (yes)

\_\_\_\_\_ (no)

If your answer is yes, please state the courses or courses that you would be most likely to attend:

\_\_\_\_\_

10. In what way or ways, if any, was the course most helpful?

\_\_\_\_\_

11. In what way or ways, if any, were you disappointed with the course?

\_\_\_\_\_

12. **General comments:**

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**Signature (optional)**



# EXHIBIT 5

**Managing Complex Litigation**  
**(The use of alternate dispute resolution methods)**  
**Three Month Survey**

1. To what extent, if any, has your attitude changed about use of ADR?
2. To what extent, if any, have you increased use of ADR in your court or judicial activities?
3. To what extent, if any, have you talked to others about use of ADR in lieu of trial?
4. To what extent, if any, have you used negotiation principles discussed in the course?
5. To what extent, if any, have you used the mediation techniques discussed in the course?
6. Have you used or considered the use of Early Neutral Evaluation? If so, how?
7. Have you used or considered the use of a Summary Jury Trial? If so, how?
8. Have you considered referring cases, with the parties' consent, to private providers?
9. Have you considered, or are you developing, a dispute system for use in your court?

10. Have you used any of the sources discussed in the course? (i.e. Supreme Court, Ohio Dispute Commission). Explain.
11. Are you more enthusiastic about ADR than before you took the course? Is so, how?
12. What effect do you think the information you gained will have upon the way you handle cases?
13. What future is there for ADR in the system of justice?
14. What additional information would you like to have about ADR?
15. To what extent, if any, have you used the information or techniques in handling complex civil litigation?
16. What aspects of the course have proved to be most useful?
17. In retrospect, what do you wish we would have emphasized or covered more completely?
18. Would you recommend to other judges that they take a course of this kind?

19. How many years have you been a judge?

20. Any additional comments?

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Signature (optional)

# **EXHIBIT 6**

**Managing Complex Litigation**  
**(The use of alternate dispute resolution methods)**  
**Six Month Survey**

- 1. To what extent, if any, have you increased the use of ADR in your court?**
- 2. To what extent, if any, have you talked to others about the use of ADR in lieu of trial?**
- 3. To what extent, if any, have you used negotiation principles?**
- 4. How have you used mediation techniques?**
- 5. Have you used or suggested use of a Summary Jury Trial?**
- 6. Have you suggested the use of an Early Neutral Evaluation?**
- 7. Have you referred any cases to private provider?**
- 8. What aspect of the course has been the most helpful to you?**

9. **Has your consideration or use of ADR lessened or increased with the passage of time?**
10. **What is the right way to incorporate ADR into your court's program?**
11. **What do you wish we would have emphasized or covered more completely?**
12. **Would you like to take another more advanced course on ADR?**
13. **Would you recommend to other judges that they take a course of this kind?**
14. **How many years have you been a judge?**
15. **Any additional comments?**

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**Signature(optional)**

# EXHIBIT 7

## ALTERNATIVES TO TRIAL

**ARBITRATION:** involves the submission of a dispute to a third party who renders a decision after hearing arguments and reviewing evidence. In its most common form, "binding" arbitration, the parties select their trier(s) and are bound by that person or panel's decision, either by prior agreement or by statute.

**COURT-ANNEXED ARBITRATION:** generally, mandatory and non-binding, under this technique, judges refer certain types of civil suits -- usually personal injury and contract matters -- to arbitrators who then render prompt decisions about the case. If a party does not accept an arbitrated award, most court-annexed arbitration systems allow for an appeal and trial.

**EARLY NEUTRAL EVALUATION:** calls for an assessment of the case early in its history by an experienced neutral (usually a volunteer attorney selected by the court) on the basis of brief presentations by both sides.

**MEDIATION:** is a structured dispute resolution process in which a third party neutral assists the disputants to reach a negotiated settlement of their differences. Mediation is generally a voluntary process that aims at a signed agreement defining the future behavior of the parties. The mediator uses a variety of skills and techniques to help parties communicate, negotiate and reach agreements. While mediators may, under certain circumstances, make suggestions to the parties about potential resolutions, they are not empowered to render decisions.

**MINI-TRIALS:** are a privately developed method of helping to bring about a negotiated settlement in lieu of large, high-stakes corporate litigation. A typical mini-trial might entail a period of limited discovery after which attorneys present their best case before managers with authority to settle and, most often, a neutral advisor who may be a retired judge or another lawyer. The managers then enter settlement negotiations. They may call on the neutral advisor if they wish to obtain an opinion on how a court might decide the matter.

**NEGOTIATION:** has been variously defined as "communication for the purpose of persuasion", "a way of solving problems" and "a process for reaching decisions." Negotiation is, in many ways, at the heart of most dispute resolution techniques, in that (a) comparatively few cases in American society are formally adjudicated and (b) most ADR techniques seek -- in one form or another -- to structure and maximize opportunities for productive bargaining.

**RENT-A-JUDGE:** is the popular name given to a procedure, presently authorized by legislation in six states, in which the court can, on stipulation of the parties, refer a pending lawsuit to a private neutral party for trial with the same effect as though the case were tried in the courtroom before a judge. The verdict can be appealed through the regular court appellate system. It is sometimes referred to as "private judging".

**SPECIAL MASTERS:** are judicial adjuncts appointed for the purposes of mediation, arbitration or fact-finding. Most court rules allow judges to make such appointments with the consent of the parties. Special Masters may be called in to help judges streamline discovery, arbitrate certain factual matters involved in larger lawsuits, conduct studies, make recommendations, or to help facilitate and preside over settlement discussions.

**SUMMARY JURY TRIAL:** is an innovation developed by Judge Thomas Lambros (Northern District, Ohio) who adapted the mini-trial technique for certain jury cases. Under the summary jury procedure, lawyers present an abbreviated version of their arguments before a mock jury chosen at random from the jury pool. The jury deliberates for an hour or less and returns a recommended verdict on liability and damages. The lawyers are then free to question the jury about their verdict and are encouraged to engage in direct settlement discussion.

# EXHIBIT 8

## 3 KEY CONFLICT RESOLUTION APPROACHES

You can resolve conflict by:

### 1. Yourself

**Negotiation** = patterned exchange of facts, ideas, and promises to achieve agreement about outcomes that will stick

**Collaborative Problem Solving** = a process through which parties who see different aspects of a problem jointly explore their differences and search for solutions that go beyond their individual visions of what is possible.

### 2. Introducing a Third Party

A third party **facilitator** or **mediator** provides assistance in designing and managing a process in order to help the parties deal with their differences and solve a problem or reach agreement.

### 3. Delegating Decision Making Authority

**Arbitration** = A third party, with decision-making authority, reviews the situation, and makes a decision that is meant to settle the dispute among the parties.

**Litigation** = A third party - judge, referee or jury - reviews the facts of a case by applying rules of evidence and rules of law to make a decision for the involved parties.



# EXHIBIT 9

## Final Draft

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### OSBA Proposed Statute

R.C. \_\_\_\_\_. Privilege for Mediation

- (A) Mediation Communication means any communication made in the course of and relating to the subject matter of any mediation as defined in Paragraph D herein. Mediation communications are confidential and shall not be disclosed in any civil, judicial, or administrative proceeding, or in response to a public records request pursuant to Section 149.43 of the Ohio Revised Code except as provided in division (B) of this section.
- (B) Division (A) shall not preclude disclosure:
  - (1) By any person, of the mediator's communications, if all parties to the mediation and the mediator, consent to disclosure; or
  - (2) By any person other than the mediator, of communications made by any person other than the mediator, if all parties consent to disclosure; or
  - (3) If the communications were made in furtherance of the commission of a crime or as part of a plan to commit a crime; or
  - (4) If a court after a hearing determines that such disclosure does not circumvent evidence rule 408 and is necessary to prevent a manifest injustice of sufficient magnitude in a particular case to outweigh the importance of protecting the principle of confidentiality in mediation proceedings in general.
- (C) This section shall not be construed to prevent or inhibit the discovery or admissibility of any mediation communication that in the absence of mediation would be subject to discovery or admission under applicable law and rules of court, or would be subject to disclosure as a public record under the Public Records Act.
- (D) Mediation, for purposes of this section, is a non-biding process in which a person, the mediator, who is not a party to the dispute, assists the parties in negotiating their dispute, and in which the mediator has been referred or appointed by a judicial, administrative, or public body or has been engaged to mediate by written agreement of the parties.
- (E) This statute does not affect the admissibility, or the status as a public record, of a written settlement agreement signed by the parties.

# EXHIBIT 10

## APPENDIX D

### CODES OF ETHICS AND STANDARDS OF CONDUCT FOR MEDIATORS

#### *STANDARDS OF CONDUCT FOR MEDIATORS<sup>1</sup>*

The initiative for these standards came from three professional groups: the American Arbitration Association, the American Bar Association,<sup>2</sup> and the Society of Professionals in Dispute Resolution.

The purpose of this initiative was to develop a set of standards to serve as a general framework for the practice of mediation. The effort is a step in the development of the field and a tool to assist practitioners in it—a beginning, not an end. The standards are intended to apply to all types of mediation. It is recognized, however, that in some cases the application of these standards may be affected by laws or contractual agreements.

#### *Preface*

The standards of conduct for mediators are intended to perform three major functions: to serve as a guide for the conduct of mediators; to inform the mediating parties; and to promote public confidence in mediation as a process for resolving disputes. The standards draw on existing codes of conduct for mediators and take into account issues and problems that have surfaced in mediation practice. They are offered in the hope that they will serve an educational function and provide assistance to individuals, organizations, and institutions involved in mediation.

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<sup>1</sup> Adopted in 1994 by both the American Arbitration Association and the Society for Professionals in Dispute Resolution.

<sup>2</sup> Editor's Note: At the time this book went to press, the American Bar Association had not yet approved these standards.

Mediation is a process in which an impartial third party—a mediator—facilitates the resolution of a dispute by promoting voluntary agreement (or "self-determination") by the parties to the dispute. A mediator facilitates communications, promotes understanding, focuses the parties on their interests, and seeks creative problem solving to enable the parties to reach their own agreement. These standards give meaning to this definition of mediation.

*I. Self-Determination: A mediator shall recognize that mediation is based on the principle of self-determination by the parties.*

Self-determination is the fundamental principle of mediation. It requires that the mediation process rely upon the ability of the parties to reach a voluntary, uncoerced agreement. Any party may withdraw from mediation at any time.

**COMMENTS:**

- The mediator may provide information about the process, raise issues, and help parties explore options. The primary role of the mediator is to facilitate a voluntary resolution of a dispute. Parties shall be given the opportunity to consider all proposed options.
- A mediator cannot personally ensure that each party has made a fully informed choice to reach a particular agreement, but it is a good practice for the mediator to make the parties aware of the importance of consulting other professionals, where appropriate, to help them make informed decisions.

*II. Impartiality: A mediator shall conduct the mediation in an impartial manner.*

The concept of mediator impartiality is central to the mediation process. A mediator shall mediate only those matters in which she or he can remain impartial and evenhanded. If at any time the mediator is unable to conduct the process in an impartial manner, the mediator is obligated to withdraw.

**COMMENTS:**

- A mediator shall avoid conduct that gives the appearance of partiality toward one of the parties. The quality of the mediation process is enhanced when the parties have confidence in the impartiality of the mediator.
- When mediators are appointed by a court or institution, the appointing agency shall make reasonable efforts to ensure that mediators serve impartially.
- A mediator should guard against partiality or prejudice based on the parties' personal characteristics, background or performance at the mediation.

*III. Conflicts of Interest: A mediator shall disclose all actual and potential conflicts of interest reasonably known to the Mediator. After disclosure, the mediator shall decline to mediate unless all parties choose to retain the mediator. The need to protect against conflicts of interest also governs conduct that occurs during and after the mediation.*

A conflict of interest is a dealing or relationship that might create an impression of possible bias. The basic approach to questions of conflict of interest is consistent with the concept of self-determination. The mediator has a responsibility to disclose all actual and potential conflicts that are reasonably known to the mediator and could reasonably be seen as raising a question about impartiality. If all parties agree to mediate after being informed of conflicts, the mediator may proceed with the mediation. If, however, the conflict of interest casts serious doubt on the integrity of the process, the mediator shall decline to proceed.

A mediator must avoid the appearance of conflict of interest both during and after the mediation. Without the consent of all parties, a mediator shall not subsequently establish a professional relationship with one of the parties in a related matter, or in an unrelated matter under circumstances which would raise legitimate questions about the integrity of the mediation process.

#### COMMENTS:

- A mediator shall avoid conflicts of interest in recommending the services of other professionals. A

mediator may make reference to professional referral services or associations which maintain rosters of qualified professionals.

- Potential conflicts of interest may arise between administrators of mediation programs and mediators and there may be strong pressures on the mediator to settle a particular case or cases. The mediator's commitment must be to the parties and the process. Pressures from outside of the mediation process should never influence the mediator to coerce parties to settle.

*IV. Competence: A mediator shall mediate only when the mediator has the necessary qualifications to satisfy the reasonable expectations of the parties.*

Any person may be selected as a mediator, provided that the parties are satisfied with the mediator's qualifications. Training and experience in mediation, however, are often necessary for effective mediation. A person who offers herself or himself as available to serve as a mediator gives parties and the public the expectation that she or he has the competency to mediate effectively. In court-connected or other forms of mandated mediation, it is essential that mediators assigned to the parties have the requisite training and experience.

#### COMMENTS:

- Mediators should have available for the parties information regarding their relevant training, education and experience.
- The requirements for appearing on a list of mediators must be made public and available to interested persons.
- When mediators are appointed by a court or institution, the appointing agency shall make reasonable efforts to ensure that each mediator is qualified for the particular mediation.

*V. Confidentiality: A mediator shall maintain the reasonable expectations of the parties with regard to confidentiality.*

The reasonable expectations of the parties with regard to confidentiality shall be met by the mediator. The parties' expectations of confidentiality depend on the circumstances of the mediation and any agreements they may make. A mediator shall not disclose any matter that a party expects to be confidential unless given permission by all parties or unless required by law or other public policy.

**COMMENTS:**

- The parties may make their own rules with respect to confidentiality, or the accepted practice of an individual mediator or institution may dictate a particular set of expectations. Since the parties' expectations regarding confidentiality are important, the mediator should discuss these expectations with the parties.
- If the mediator holds private sessions with a party, the nature of these sessions with regard to confidentiality should be discussed prior to undertaking such sessions.
- In order to protect the integrity of the mediation, a mediator should avoid communicating information about how the parties acted in the mediation process, the merits of the case, or settlement offers. The mediator may report, if required, whether parties appeared at a scheduled mediation.
- Where the parties have agreed that all or a portion of the information disclosed during a mediation is confidential, the parties' agreement should be respected by the mediator.
- Confidentiality should not be construed to limit or prohibit the effective monitoring, research, or evaluation of mediation programs by responsible persons. Under appropriate circumstances, researchers may be permitted to obtain access to statistical data and, with the permission of the parties, to individual case files, observations of live mediations, and interviews with participants.

*VI. Quality of the Process: A mediator shall conduct the mediation fairly, diligently, and in a manner consistent with the principle of self-determination by the parties.*

A mediator shall work to ensure a quality process and to encourage mutual respect among the parties. A quality process requires a commitment by the mediator to diligence and procedural fairness. There should be adequate opportunity for each party in the mediation to participate in the discussions. The parties decide when and under what conditions they will reach an agreement or terminate a mediation.

**COMMENTS:**

- A mediator may agree to mediate only when he or she is prepared to commit the attention essential to an effective mediation.
- Mediators should only accept cases when they can satisfy the reasonable expectations of the parties concerning the timing of the process. A mediator should not allow a mediation to be unduly delayed by the parties or their representatives.
- The presence or absence of persons at a mediation depends on the agreement of the parties and mediator. The parties and mediator may agree that others may be excluded from particular sessions or from the entire mediation process.
- The primary purpose of a mediator is to facilitate the parties' voluntary agreement. This role differs substantially from other professional-client relationships. Mixing the role of a mediator and the role of a professional advising a client is problematic, and mediators must strive to distinguish between the roles. A mediator should therefore refrain from providing professional advice. Where appropriate, a mediator should recommend that parties seek outside professional advice, or consider resolving their dispute through arbitration, counselling, neutral evaluation, or other processes. A mediator who undertakes, at the request of the parties, an additional dispute resolution role in the same matter

assumes increased responsibilities and obligations that may be governed by the standards of other professions.

- A mediator shall withdraw from a mediation when incapable of serving or when unable to remain impartial.
- A mediator shall withdraw from the mediation or postpone a session if the mediation is being used to further illegal conduct, or if a party is unable to participate due to drug, alcohol, or other physical or mental incapacity.
- Mediators should not permit their behavior in the mediation process to be guided by a desire for a high settlement rate.

*VII. Advertising and Solicitation: A mediator shall be truthful in advertising and solicitation for mediation.*

Advertising or any other communication with the public concerning services offered or regarding the education, training, and expertise of the mediator shall be truthful. Mediators shall refrain from promises and guarantees of results.

**COMMENTS:**

- It is imperative that communication with the public educate and instill confidence in the process.
- In an advertisement or other communication to the public, a mediator may make reference to meeting state, national, or private organization qualifications only if the entity referred to has a procedure for qualifying mediators and the mediator has been duly granted the requisite status.

*VIII. Fees: A mediator shall fully disclose and explain the basis of compensation, fees, and charges to the parties.*

The parties should be provided sufficient information about fees at the outset of a mediation to determine if they wish to retain the services of a mediator. If a mediator charges fees, the fees shall be reasonable considering, among other things, the mediation service, the type and complexity of the matter, the expertise of the mediator, the time required, and



the rates customary in the community. The better practice in reaching an understanding about fees is to set down the arrangements in a written agreement.

**COMMENTS:**

- A mediator who withdraws from a mediation should return any unearned fee to the parties.
- A mediator should not enter into a fee agreement which is contingent upon the result of the mediation or amount of the settlement.
- Co-mediators who share a fee should hold to standards of reasonableness in determining the allocation of fees.
- A mediator should not accept a fee for referral of a matter to another mediator or to any other person.

**IX. *Obligations to the mediation process.***

Mediators have a duty to improve the practice of mediation.

**COMMENTS:**

- Mediators are regarded as knowledgeable in the process of mediation. They have an obligation to use their knowledge to help educate the public about mediation; to make mediation accessible to those who would like to use it; to correct abuses; and to improve their professional skills and abilities.

***THE AMERICAN BAR ASSOCIATION'S STANDARDS  
OF PRACTICE FOR LAWYER MEDIATORS IN FAMILY  
DISPUTES<sup>3</sup>***

For the purposes of these standards, family mediation is defined as a process in which a lawyer helps family members resolve their disputes in an informative and consensual manner. This process requires that the mediator be qualified by training, experience, and temperament; that the mediator be impartial; that the participants reach decisions voluntarily;

<sup>3</sup> Adopted by the House of Delegates of the American Bar Association in August 1984. American Bar Association, Summary of the Actions of the House of Delegates, Report of §§ 22-23 (Aug. 1984).

that their decisions be based on sufficient factual data; and that each participant understands the information upon which decisions are reached. While family mediation may be viewed as an alternative means of conflict resolution, it is not a substitute for the benefit of independent legal advice.

**I. The mediator has a duty to define and describe the process of mediation and its cost before the parties reach an agreement to mediate.**

*Specific Considerations:*

Before the actual mediation sessions begin, the mediator shall conduct an orientation session to give an overview of the process and to assess the appropriateness of mediation for the participants. Among the topics covered, the mediator shall discuss the following:

A. The mediator shall define the process in context so that the participants understand the differences between mediation and other means of conflict resolution available to them. In defining the process, the mediator shall also distinguish it from therapy or marriage counseling.

B. The mediator shall obtain sufficient information from the participants so they can mutually define the issues to be resolved in mediation.

C. It should be emphasized that the mediator may make suggestions for the participants to consider, such as alternative ways of resolving problems, and may draft proposals for the participants' consideration, but that all decisions are to be made voluntarily by the participants themselves, and the mediator's views are to be given no independent weight or credence.

D. The duties and responsibilities that the mediator and the participants accept in the mediation process shall be agreed upon. The mediator shall instruct the participants that either of them or the mediator has the right to suspend or terminate the process at any time.

E. The mediator shall assess the ability and willingness of the participants to mediate. The mediator has a continuing duty to assess his or her own ability and will-

ingness to undertake mediation with the particular participants and the issues to be mediated. The mediator shall not continue and shall terminate the process, if in his or her judgment, one of the parties is not able or willing to participate in good faith.

F. The mediator shall explain the fees for mediation. It is inappropriate for a mediator to charge a contingency fee or base the fee on the outcome of the mediation process.

G. The mediator shall inform the participants of the need to employ independent legal counsel for advice throughout the mediation process. The mediator shall inform the participants that the mediator cannot represent either or both of them in a marital dissolution or in any legal action.

H. The mediator shall discuss the issue of separate sessions. The mediator shall reach an understanding with the participant as to whether and under what circumstances the mediator may meet alone with either of them or with any third party. **Commentary:** The mediator cannot act as lawyer for either party or for them jointly and should make that clear to both parties.

I. It should be brought to the participants' attention that emotions play a part in the decision-making process. The mediator shall attempt to elicit from each of the participants a confirmation that each understands the connection between one's own emotions and the bargaining process.

**II. The mediator shall not voluntarily disclose information obtained through the mediation process without the prior consent of both participants.**

*Specific Considerations:*

A. At the outset of mediation, the parties should agree in writing not to require the mediator to disclose to any third party any statements made in the course of mediation. The mediator shall inform the participants that the mediator will not voluntarily disclose to any third party any of the information obtained through the mediation process, unless such disclosure is required by law, without the prior consent of the

participants. The mediator also shall inform the parties of the limitations of confidentiality such as statutory or judicially mandated reporting.

B. If subpoenaed or otherwise noticed to testify, the mediator shall inform the participants immediately so as to afford them an opportunity to quash the process.

C. The mediator shall inform the participants of the mediator's inability to bind third parties to an agreement not to disclose information furnished during the mediation in the absence of any absolute privilege.

### **III. The mediator has a duty to be impartial.**

#### *Specific Considerations:*

A. The mediator shall not represent either party during or after the mediation process in any legal matters. In the event the mediator has represented one of the parties beforehand, the mediator shall not undertake the mediation.

B. The mediator shall disclose to the participants any biases or strong views relating to the issues to be mediated, both in the orientation session, and also before these issues are discussed in mediation.

C. The mediator must be impartial as between the mediation participants. The mediator's task is to facilitate the ability of the participants to negotiate their own agreement, while raising questions as to the fairness, equity and feasibility of proposed options for settlement.

D. The mediator has a duty to ensure that the participants consider fully the best interests of the children, that they understand the consequences of any decision they reach concerning the children. The mediator also has a duty to assist parents to examine the separate and individual needs of their children and to consider those needs apart from their own desires for any particular parenting formula. If the mediator believes that any proposed agreement of the parent does not protect the best interests of the children, the mediator has a duty to inform them of this belief and its basis.

E. The mediator shall not communicate with either party alone or with any third party to discuss mediation issues without the prior consent of the mediation participants. The mediator shall obtain an agreement from the participants dur-

ing the orientation session as to whether and under what circumstances the mediator may speak directly and separately with each of their lawyers during the mediation process.

**IV. The mediator has a duty to assure that the mediation participants make decisions based upon sufficient information and knowledge.**

*Specific Considerations:*

A. The mediator shall assure that there is full financial disclosure, evaluation and development of relevant factual information in the mediation process, such as each would reasonably receive in the discovery process, or that the parties have sufficient information to intelligently waive the right to such disclosure.

B. In addition to requiring this disclosure, evaluation and development of information, the mediator shall promote the equal understanding of such information before any agreement is reached. This consideration may require the mediator to recommend that either or both obtain expert consultation in the event that it appears that additional knowledge or understanding is necessary for balanced negotiations.

C. The mediator may define the legal issues, but shall not direct the decision of the mediation participants based upon the mediator's interpretation of the law as applied to the facts of the situation. The mediator shall endeavor to assure that the participants have a sufficient understanding of appropriate statutory and case law as well as local judicial tradition, before reaching an agreement by recommending to the participants that they obtain independent legal representation during the process.

**V. The mediator has a duty to suspend or terminate mediation whenever continuation of the process would harm one or more of the participants.**

*Specific Considerations:*

A. If the mediator believes that the participants are unable or unwilling to meaningfully participate in the process or that reasonable agreement is unlikely, the mediator may suspend or terminate mediation and should encourage the parties to seek appropriate professional help. The mediator

shall recognize that the decisions are to be made by the parties on the basis of adequate information. The mediator shall not, however, participate in a process that the mediator believes will result in harm to a participant.

B. The mediator shall assure that each person has had the opportunity to understand fully the implications and ramifications of all options available.

C. The mediator has a duty to assure a balanced dialogue and must attempt to diffuse any manipulative or intimidating negotiation techniques utilized by either of the participants.

D. If the mediator has suspended or terminated the process, the mediator should suggest that the participants obtain additional professional services as may be appropriate.

**VI. The mediator has a continuing duty to advise each of the mediation participants to obtain legal review prior to reaching any agreement.**

*Specific Considerations:*

A. Each of the mediation participants should have independent legal counsel before reaching final agreement. At the beginning of the mediation process, the mediator should inform the participants that each should employ independent legal counsel for advice at the beginning of the process and that the independent legal counsel should be utilized throughout the process and before the participants have reached any accord to which they have made an emotional commitment. In order to promote the integrity of the process, the mediator shall not refer either of the participants to any particular lawyers. When an attorney referral is requested, the parties should be referred to a Bar Association list if available. In the absence of such a list, the mediator may only provide a list of qualified family lawyer attorneys in the community.

B. The mediator shall inform the participants that the mediator cannot represent either or both of them in a marital dissolution.

C. The mediator shall obtain an agreement from the husband and the wife that each lawyer, upon request, shall be entitled to review all the factual documentation provided by the participants in the mediation process.

D. Any memo of understanding or proposed agreement which is prepared in the mediation process should be separately reviewed by independent counsel for each participant before it is signed. While a mediator cannot insist that each participant have separate counsel, they should be discouraged from signing any agreement which has not been so reviewed. If the participants, or either of them, choose to proceed without independent counsel, the mediator shall warn them of any risk involved in not being represented, including where appropriate, the possibility that the agreement they submit to a court may be rejected as unreasonable in light of both parties' legal rights or may not be binding on them.

**THE ASSOCIATION OF FAMILY AND CONCILIATION  
COURTS' MODEL STANDARDS OF PRACTICE FOR  
FAMILY AND DIVORCE MEDIATION**

*Preamble*

Mediation is a family-centered conflict resolution process in which an impartial third party assists the participants to negotiate a consensual and informed settlement. In mediation, whether private or public, decision-making authority rests with the parties. The role of the mediator includes reducing the obstacles to communication, maximizing the exploration of alternatives, and addressing the needs of those it is agreed are involved or affected.

Mediation is based on principles of problem-solving which focus on the needs and interests of the participants, fairness, privacy, self-determination, and the best interests of all family members.

These standards are intended to assist and guide public and private voluntary and mandatory mediation. It is understood that the manner of implementation and mediator adherence to these standards may be influenced by local law or court rule.

**I. INITIATING THE PROCESS**

**A. Definition and Description of Mediation**

The mediator shall define mediation and describe the differences and similarities between mediation and other procedures for dispute resolution. In defining the process, the

mediator shall delineate it from therapy, counseling, custody evaluation, arbitration, and advocacy.

**B. Identification of Issue**

The mediator shall elicit sufficient information from the participants so that they can mutually define and agree on the issues to be resolved in mediation.

**C. Appropriateness of Mediation**

The mediator shall help the participants evaluate the benefits, risks, and costs of mediation and the alternatives available to them.

**D. Mediator's Duty of Disclosure**

**1. Biases**

The mediator shall disclose to the participants any biases or strong views relating to the issues to be mediated.

**2. Training and Experience**

The mediator's education, training, and experience to mediate the issues should be accurately described to the participants.

**E. Procedures**

The mediator shall reach an understanding with the participants regarding the procedures to be followed in mediation. This includes but is not limited to the practice as to separate meetings between a participant and the mediator, confidentiality, use of legal services, the involvement of additional parties, and conditions under which mediation may be terminated.

**F. Mutual Duties and Responsibilities**

The mediator and the participants shall agree upon the duties and responsibilities that each is accepting in the mediation process. This may be a written or verbal agreement.

**II. IMPARTIALITY AND NEUTRALITY**

**A. Impartiality**

The mediator is obligated to maintain impartiality toward all participants. Impartiality means freedom from favoritism or bias either in word or action. Impartiality implies a commit-



ment to aid all participants, as opposed to a single individual, in reaching a mutually satisfactory agreement. Impartiality means that a mediator will not play an adversarial role.

The mediator has a responsibility to maintain impartiality while raising questions for the parties to consider as to the fairness, equity, and feasibility of proposed options for settlement.

### **B. Neutrality**

Neutrality refers to the relationship that the mediator has with the disputing parties. If the mediator feels or any one of the participants states that the mediator's background or personal experiences would prejudice the mediator's performance, the mediator should withdraw from mediation unless all agree to proceed.

#### **1. Prior Relationship**

A mediator's actual or perceived impartiality may be compromised by social or professional relationships with one of the participants at any point in time. The mediator shall not proceed if previous legal or counseling services have been provided to one of the participants. If such services have been provided to both participants, mediation shall not proceed unless the prior relationship has been discussed, the role of the mediator made distinct from the earlier relationship and the participants have been given the opportunity to freely choose to proceed.

#### **2. Relationship to Participants**

The mediator should be aware that post-mediation professional or social relationships may compromise the mediators continued availability as a neutral third party.

#### **3. Conflicts of Interest**

A mediator should disclose any circumstance to the participants which might cause a conflict of interest.

## **III. COSTS AND FEES**

### **A. Explanation of Fees**

The mediator shall explain the fees to be charged for mediation and any related costs and shall agree with the participants on how the fees will be shared and the manner of payment.

**B. Reasonable**

When setting fees, the mediator shall ensure they are explicit, fair, reasonable, and commensurate with the service to be performed. Unearned fees should be promptly returned to the clients.

**C. Contingent Fees**

It is inappropriate for a mediator to charge contingent fees or to base fees on the outcome of mediation.

**D. Referrals and Commissions**

No commissions, rebates, or similar forms of remuneration shall be given or received for referral of clients for mediation services.

**IV. CONFIDENTIALITY AND EXCHANGE OF INFORMATION**

**A. Confidentiality**

Confidentiality relates to the full and open disclosure necessary for the mediation process. A mediator shall foster the confidentiality of the process.

**1. Limits of Confidentiality**

The mediator shall inform the parties at the initial meeting of limitations on confidentiality such as statutorily or judicially mandated reporting.

**2. Appearing in Court**

The mediator shall inform the parties of circumstances under which mediators may be compelled to testify in court.

**3. Consequences of disclosure of facts between parties**

The mediator shall discuss with the participants the potential consequences of their disclosure of facts to each other during the mediation process.

**B. Release of Information**

**1.** The mediator shall obtain the consent of the participants prior to releasing information to others.

**2.** The mediator shall maintain confidentiality and render anonymous all identifying information when materials are used for research or training purposes.

**C. Caucus**

The mediator shall discuss policy regarding confidentiality for individual caucuses. In the event that a mediator, upon the consent of the participants, speaks privately with any person not represented in mediation, including children, the mediator shall define how information received will be used.

**D. Storage and Disposal of Records**

The mediator shall maintain confidentiality in the storage and disposal of records.

**V. FULL DISCLOSURE**

The mediator shall require that there is disclosure of all relevant information in the mediation process as would reasonably occur in the judicial discovery process.

**VI. SELF-DETERMINATION**

**A. Responsibilities of the Participants and the Mediator**

The primary responsibility for the resolution of a dispute rests with the participants. The mediator's obligation is to assist the disputants in reaching an informed and voluntary settlement. At no time shall a mediator coerce a participant into agreement or make a substantive decision for any participant.

**B. Responsibility to Third Parties**

The mediator has a responsibility to promote the participants consideration of the interests of children and other persons affected by the agreement. The mediator also has a duty to assist parents to examine, apart from their own desires, the separate and individual needs of such people. The participants shall be encouraged to seek outside professional consultation when appropriate or when they are otherwise unable to agree on the needs of any individual affected by the agreement.

**VII. PROFESSIONAL ADVICE**

**A. Independent Advice and Information**

The mediator shall encourage and assist the participants to obtain independent expert information and advice when such information is needed to reach an informed agreement or to protect the rights of a participant.

**B. Providing Information**

A mediator shall give information only in those areas where qualified by training or experience.

**C. Independent Legal Counsel**

When the mediation may affect legal rights or obligations, the mediator shall advise the participants to seek independent legal counsel prior to resolving the issues and in conjunction with formalizing an agreement.

**VIII. PARTIES' ABILITY TO NEGOTIATE**

The mediator shall assure that each participant has had an opportunity to understand the implications and ramifications of available options. In the event a participant needs either additional information or assistance in order for the negotiations to proceed in a fair and orderly manner or for an agreement to be reached, the mediator shall refer the individual to appropriate resources.

**A. Procedural**

The mediator has a duty to assure balanced negotiations and should not permit manipulative or intimidating negotiation techniques.

**B. Psychological**

The mediator shall explore whether the participants are capable of participating in informed negotiations. The mediator may postpone mediation and refer the parties to appropriate resources if necessary.

**IX. CONCLUDING MEDIATION**

**A. With Agreement**

**1. Full Agreement**

The mediator shall discuss with the participants the process for formalization and implementation of the agreement.

**2. Partial Agreement**

When the participants reach a partial agreement, the mediator shall discuss with them procedures available to resolve the remaining issues.

**B. Without Agreement**

**1. Termination by Participants**

The mediator shall inform the participants of their right to withdraw from mediation at any time and for any reason.

**2. Termination by Mediator**

If the mediator believes that participants are unable or unwilling to meaningfully participate in the process or that a reasonable agreement is unlikely, the mediator may suspend or terminate mediation and should encourage the parties to seek appropriate professional help.

**3. Impasse**

If the participants reach a final impasse, the mediator should not prolong unproductive discussions that would result in emotional and monetary costs to the participants.

**X. TRAINING AND EDUCATION**

**A. Training**

A mediator shall acquire substantive knowledge and procedural skill in the specialized area of practice. This may include but is not limited to family and human development, family law, divorce procedures, family finances, community resources, the mediation process, and professional ethics.

**B. Continuing Education**

A mediator shall participate in continuing education and be personally responsible for ongoing professional growth. A mediator is encouraged to join with other mediators and members of related professions to promote mutual professional development.

## **XI. ADVERTISING**

A mediator shall make only accurate statements about the mediation process, its costs and benefits, and about the mediator's qualifications.

## **XII. RELATIONSHIPS WITH OTHER PROFESSIONALS**

### **A. The Responsibility of the Mediator Toward Other Mediators**

#### **1. Relationship with Other Mediators**

A mediator should not mediate any dispute which is being mediated by another mediator without first endeavoring to consult with the person or persons conducting such mediation.

#### **2. Co-mediation**

In those situations where more than one mediator is participating in a particular case, each mediator has a responsibility to keep the others informed of developments essential to a cooperative effort.

### **B. Relationship with other Professionals**

A mediator should respect the complementary relationship between mediation and legal, mental health, and other social services and should promote cooperation with other professionals.

## **XIII. ADVANCEMENT OF MEDIATION**

### **A. Mediation Service**

A mediator is encouraged to provide some mediation service in the community for nominal or no fee.

### **B. Promotion of Mediation**

A mediator shall promote the advancement of mediation by encouraging and participating in research, publishing, or other forms of professional and public education.

***ETHICAL STANDARDS OF PROFESSIONAL RESPONSIBILITY FOR THE SOCIETY OF PROFESSIONALS IN DISPUTE RESOLUTION<sup>4</sup> (Adopted by the Board of Directors, June 2, 1986)***

**INTRODUCTION**

The Society for Professionals in Dispute Resolution (SPIDR) was established in 1973 to promote the peaceful resolution of disputes. Members of the society believe that resolving disputes through negotiation, mediation, arbitration and other neutral interventions can be of great benefit to disputing parties and to society. In 1983 the SPIDR Board charged the Ethics Committee with the task of developing ethical standards of professional responsibility. The Committee membership represented all the various sectors and disciplines within SPIDR. This document, adopted by the Board on June 2, 1986 is the result of that charge.

The purpose of this document is to promote among SPIDR members and associates ethical conduct and a high level of competency among SPIDR members, including honesty, integrity, impartiality, and the exercise of good judgment in their dispute resolution efforts. It is hoped that this document also will help to (1) define the profession of dispute resolution, (2) educate the public and (3) inform users of dispute resolution services.

**APPLICATION OF STANDARDS**

Adherence to these ethical standards by SPIDR members and associates is basic to professional responsibility. SPIDR members and associates commit themselves to be guided in their professional conduct by these standards. The SPIDR Board of Directors or its designee is available to advise members and associates about interpretation of these standards. Other neutral practitioners and organizations are welcome to follow these standards.

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**SCOPE**

It is recognized that SPIDR members and associates resolve disputes in various sectors within the disciplines of dispute resolution and have their own codes of professional conduct. These standards have been developed as general guidelines of practice for neutral disciplines represented in the SPIDR membership. Ethical considerations relevant to some, but not to all, of these disciplines are not covered by these standards.

**GENERAL RESPONSIBILITIES**

Neutrals have a duty to the parties, to the profession, and to themselves. They should be honest and unbiased, act in good faith, be diligent, and not seek to advance their own interests at the expense of the parties.

Neutrals must act fairly in dealing with the parties, have no personal interest in the terms of the settlement, show no bias toward individuals and institutions involved in the dispute, be reasonably available as requested by the parties, and be certain that the parties are informed of the process in which they are involved.

**RESPONSIBILITIES TO THE PARTIES**

1. *Impartiality.* The neutral must maintain impartiality toward all parties. Impartiality means freedom from favoritism or bias either by word or by action, and a commitment to serve all parties as opposed to a single party.

2. *Informed Consent.* The neutral has an obligation to assure that all parties understand the nature of the process, the procedures, the particular role of the neutral, and the parties' relationship to the neutral.

3. *Confidentiality.* Maintaining confidentiality is critical to the dispute resolution process. Confidentiality encourages candor, a full exploration of the issues and a neutral's acceptability. There may be some types of cases, however, in which confidentiality is not protected. In such cases, the neutral must advise the parties, when appropriate in the dispute resolution process, that the confidentiality of the proceedings cannot necessarily be maintained. Except in such instances, the neutral must resist all attempts to cause him or her to



reveal any information outside the process. A commitment by the neutral to hold information in confidence within the process also must be honored.

4. *Conflict of Interest.* The neutral must refrain from entering or continuing in any dispute if he or she believes or perceives that participation as a neutral would be a clear conflict of interest. The neutral also must disclose any circumstance that may create or give the appearance of a conflict of interest and any circumstance that may reasonably raise a question as to the neutral's impartiality.

The duty to disclose is a continuing obligation throughout the process.

5. *Promptness.* The neutral shall exert every effort to expedite the process.

6. *The Settlement and Its Consequences.* The dispute resolution process belongs to the parties. The neutral has no vested interest in the terms of a settlement, but must be satisfied that agreements in which he or she has participated will not impugn the integrity of the process. The neutral has a responsibility to see that the parties consider the terms of a settlement. If the neutral is concerned about the possible consequences of a proposed agreement, and the needs of the parties dictate, the neutral must inform the parties of that concern. In adhering to this standard the neutral may find it advisable to educate the parties, to refer one or more parties for specialized advice, or to withdraw from the case. In no case, however, shall the neutral violate section 3 above, Confidentiality, of these standards.

#### **UNREPRESENTED INTERESTS**

The neutral must consider circumstances where interests are not represented in the process. The neutral has an obligation, where in his or her judgment the needs of the parties dictate, to assure that such interests have been considered by the principal parties.

#### **USE OF MULTIPLE PROCEDURES**

The use of more than one dispute resolution procedure by the same neutral involves additional responsibilities. Where the use of more than one procedure is initially contemplated,

the neutral must take care at the outset to advise the parties of the nature of the procedures and the consequences of revealing information during any one procedure which the neutral may later use for decision making or may share with another decision maker. Where the use of more than one procedure is contemplated after the initiation of the dispute resolution process, the neutral must explain the consequences and afford the parties an opportunity to select another neutral for the subsequent procedures. It is also incumbent upon the neutral to advise the parties of the transition from one dispute resolution process to another.

#### **BACKGROUND AND QUALIFICATION**

A neutral should accept responsibility only in cases where the neutral has sufficient knowledge regarding the appropriate process and subject matter to be effective. A neutral has a responsibility to maintain and improve his or her professional skills.

#### **DISCLOSURE OF FEES**

It is the duty of the neutral to explain to the parties at the outset of the process, the bases of compensation, fees and charges, if any.

#### **SUPPORT OF THE PROFESSION**

The experienced neutral should participate in the development of new practitioners in the field and engage in efforts to educate the public about the value and use of neutral dispute resolution procedures. The neutral should provide *pro bono* services, as appropriate.

#### **RESPONSIBILITIES OF NEUTRALS WORKING ON THE SAME CASE**

In the event that more than one neutral is involved in the resolution of a dispute, each has an obligation to inform the others regarding his or her entry in the case. Neutrals working with the same parties should maintain an open and professional relationship with each other.

***ADVERTISING AND SOLICITATION***

A neutral must be aware that some forms of advertising and solicitation are inappropriate and in some conflict resolution disciplines, such as labor arbitration, are impermissible. All advertising must honestly represent the services to be rendered. No claims of specific results or promises which imply favor of one side over another for the purpose of obtaining business should be made. No commissions, rebates or other similar forms of remuneration should be given or received by a neutral for the referral of clients.

# EXHIBIT 11

## Good Listening:

### A good tool to have in a conflict situation

#### Rules for Being a Good Listener:

1. Listen as if you were in the other person's place to better understand what the person is saying and how he or she is feeling.
2. Show you understand and care with verbal and nonverbal behavior:
  - tone of voice
  - facial expression
  - gestures
  - eye contact
  - posture
3. Summarize: restate the person's most important thoughts and feelings.
4. Do not blame, interrupt, offer advice, give suggestions or begin to talk about problems you have. Usually, it is best not to bring up similar experiences of your own.

Information taken from *Conflict Resolution*, The Philadelphia Inquirer, November 19, 1991



### **III. EXPEDITED CIVIL JURY TRIALS**

**Ohio State Institute for  
Judicial And Legal Education**

## **EXPEDITED CIVIL JURY TRIALS**

### **COURSE CURRICULUM**

#### **A. The Learning Objectives**

The main purpose of the course is to train judges to use expedited procedures to shorten civil jury trials by half or more without sacrificing the strengths and safeguards provided by the jury system. The expedited civil jury trial provides a much needed alternative to the full length jury trial and fits well into the court's busy schedule. Much of the procedure is borrowed from summary jury trial procedure, but the result is binding rather than nonbinding.

The training consists of educating judges about proper ways to shorten the procedure from jury selection to final instructions so that they in turn can explain confidently the changes to attorneys. A goal is to eliminate unfocused advocacy and to direct advocacy to the issue or issues that are at the heart of the dispute. For smaller or one issue cases, one day jury trials can be the norm rather than the exception. The expedited civil jury trial is an alternative that preserves and supports the traditional trial process.

This curriculum enables judges to apply all or part of the expedited procedures in their courts, with the result of saving expense and time while litigants have the opportunity to obtain a verdict by a jury of their peers.

#### **B. Presentation Methods**

The primary method of presentation is discussion and problem solving led by the instructor. Faculty and participants will compare the techniques used by most judges with expedited processes developed by the instructor and class. There is a stress upon the need to be flexible; the goal is to save time and expense without sacrificing quality.

### C. Sample Agenda or Schedule

The course is scheduled for twenty hours of class. It may be scheduled for four sessions of five hours each, with time for considering discussion questions before each session. It also can be offered on a weekly schedule of eight sessions of 2-1/2 hours each or on a week long basis with equal time distributed between class and study.

#### The Schedule

<u>Sessions</u>	<u>Topic</u>	<u>* Assignment</u>
<u>First</u>	History of Jury Trial; Selection of Jury; Opening Statements	The list of required readings for each session is contained in the Appendix.
<u>Second</u>	Rules of Evidence; Modifications	
<u>Third</u>	The Expedited Civil Jury Trials	
<u>Fourth</u>	Pretrial; Development of the Plan	

- \* The course started with an analysis of the historical reasons for trial by jury and the continuing validity of those reasons. The instructor then proceeded, with the class, to examine all phases of a civil jury trial to determine where times can be shortened while still permitting the jury to be fully informed about the disputed factual issues in order to enable them to return a fair verdict. A flexible expedited civil jury trial rule was developed for experimental use in court room settings.

### D. Suggestions for Replicating the Program; Qualifications of Faculty

The participants for the initial program in a jurisdiction should be a group of highly regarded and motivated trial court judges together with a few good civil trial lawyers who represent both plaintiffs and defendants. The faculty members should have practical and theoretical knowledge of the civil rules, the rules of evidence and trial procedure. Preferably at least one of the faculty



members should be a highly regarded judge. He or she may want to team teach with a law school professor. They should use the rules applicable in that jurisdiction.

Some, but not all, of the proposed or possible changes in procedure are allowable within the discretion of the court under current federal and state rules of civil procedure. However, other proposed changes, such as elimination of preremptory challenges or modification of rules of evidence, can be accomplished only by agreement of the parties. Current rules of practice need to be amended, if necessary, to allow flexibility to use expedited procedures. A starting place is to experiment with modified procedures for civil cases of less than \$25,000. If the results are favorable, the changes may be expanded to a broader range of cases.

The course is very well adapted to a one-week residential program because the class discussions engender spirited discussion and controversy about the changes that are proposed and considered. These discussions will continue as participants work in small groups to develop plans for shortening trial time in half for cases assigned to them. Serious and meaningful discussions, and often changes of opinion, result as the participants consider what is proper advocacy and where advocacy may be out of control.

A one day course can be developed, using a proposed flexible rule, to educate a broad group of lawyers and judges about the utility of the procedure and to arouse interest in and support for the rule's use in expedited civil jury trials. Instructors should include judges and trial lawyers who have completed the entire course and who have been involved in actual expedited civil jury trials. Class participants are very interested in how the modifications work in practice.

#### **E. Evaluations**

An evaluation form was submitted to the class immediately after completion to obtain the

initial reactions of the class to teaching methods, competency of instructors, value of course, timing of course and adequacy of facilities. Thereafter three month and six month survey forms were submitted to the class. The primary purpose of these surveys was to determine what effect, if any, the course had upon the judge's way of handling litigation. Two surveys were used to help determine whether any changes were temporary or if the changes had become ingrained. Copies of the evaluation and survey forms are included in the Addendum as Exhibits 12, 13 and 14.

Our surveys showed that judges were instituting the expedited procedures into practice to a substantial extent, particularly where it was within their discretion under current rules. At pretrial judges were discussing ways to shorten the trial and, with proper explanation, were frequently obtaining an agreement by the attorneys for the parties. Generally trials were shorter in these judges' courts and generally participants were quite satisfied with the process.

## **APPENDIX**

### **Session One: (Five Hours) Discussion Topics**

#### **A. Jury Trial of Civil Cases**

1. Does it serve a valid purpose?
2. What threatens its use?
3. What parts of our trial procedure are necessary or constitutionally required?
4. In what ways can it be altered without violating the right?
5. Should time limits be set for the length of trials?
6. Exercise: To demonstrate the desirability of trial by jury rather than judge, the largely undisputed facts of a liability case were orally related. The out-of-pocket damages (consisting of medical expense and loss-of-earnings) were conceded to be \$12,500. There was no anticipated future loss of earnings or shortening of life expectancy. The only permanent disability was occasional stiffness and an inability to play golf well. Prior to the accident resulting in a severely fractured elbow, plaintiff, an accountant, was a scratch golfer. When the case was "tried" to our court of experienced trial judges, verdicts varied from \$30,000 to \$126,000. When submitted to two panels of the class acting in concert as jurors, the verdicts were \$55,000 and \$65,000.

#### **B. Selection of the Jury**

1. How can the selection process be broadened to allow a greater range of jurors to serve?
2. What is the purpose of peremptory challenges?
3. What constitutional restrictions are there on their use thereof?
  - (a) Most judges favored elimination of preemptory challenges combined with a more liberal challenge for cause of jurors who have personal experiences involving an important issue in the case.
4. Should challenges for cause be broadened?
5. Who should question the prospective jurors?
  - (a) An almost unanimous consensus was that the judge should conduct most, if not all of the voir dire, but that she should be sensitive about using leading questions. She should allow follow-up that is proper and non-repetitive.
6. How can juror questionnaires be improved?
7. List in order of importance the ten most important bits of information (for civil trials) to be obtained from juror questionnaires.
8. What questions cannot be covered by a questionnaire?
9. Attached as Exhibits 15 and 16 (Addendum) are copies of the Franklin County and Union County Juror Questionnaires. Consider which is best and how they might be improved.
10. Exercise: Class members should bring their own jury questionnaires to court

and, in a break-out session, worked upon the improvements discussed in class.

C. Opening Statement

1. What are its proper purposes?
2. What are improper purposes?
3. Are opening statements by adversaries an essential part of the process?
4. Could the trial court give an "opening statement," perhaps combined with preliminary instructions, that would better serve the same purpose?
  - (a) Opening statements are too frequently argumentative and the parties might agree on a short and objective opening statement that the judge could present.
5. If so, how could this best be accomplished?
6. Should preliminary instructions be given prior to opening statements?
  - (a) Educative preliminary instructions add to a jury's ability to do its job.
7. Exercise: Experiment with the court giving the opening statements combining a brief discussion of the procedure and issues with brief preliminary instructions about the role of the jury and judge. That works well, at least where the issues are clear and lawyer input is obtained.
8. How specific should those instructions be? What should be included?

D. Required readings for the first session

1. John Kendall Few, *In Defense of Trial by Jury*, American Jury Trial Foundation (1993), two volumes
2. Raymond J. Broderick, *Why The Peremptory Challenge Should Be Abolished*, 65 Temp. L. Rev. 369 (1992)
3. Kevin M. Clermont and Theodore Eisenberg, *Trial By Jury Or Judge: Transcending Empiricism*, 77 Cornell L. Rev. 1124 (1992)
4. *The Jury-Selection Ordeal*, Wall Street Journal, Dec. 7, 1994, Exhibit 17 (Addendum)
5. Stephen A. Adler, *The Jury, Trial and Error in the American Courtroom*, Time Books (1994)
6. *Speeding up Voir-Dire*, National Law Journal, July 10, 1995

**Session Two: (Five hours) Discussion Topics**

The second session is used to discuss the rules of evidence and modifications that could expedite the trial.

Exercise: Have class members bring the Ohio Rules of Evidence to the session. Consider

the possible modification of those rules in accordance with the possible variations and the purported reasons for their promulgation.

The primary issues considered include the following:

1. What purposes do rules of evidence serve?
2. In what ways, if any, are evidence rules inconsistent with the jury system?
3. Which, if any, of the evidence rules should be preserved without change to prohibit juries from being unfairly prejudiced?
4. In what ways can evidence rules be simplified and still fulfill the designed purposes?
5. Specifically analyze the Ohio Rules of Evidence to be able to discuss changes that could or should be made.
6. Consider which changes; if any, can be ordered by the court and which alterations must be by agreement of parties.

Assign the following required reading for the second session:

1. Ronald L. Carlson, Edward J. Imwinkelried, Edward J. Kionka, *Materials For the Study of Evidence*, "The Philosophy of American Evidence Law", Chapter 2 (1983)
2. Jack H. Friedenthal and Michael Singer, *The Law of Evidence*, "Introduction" (1985)
3. "Possible Variations In Evidence Rules To Expedite Civil Litigation", Exhibit 18 (Addendum)

### **Session Three: (Five hours) The Modified Civil Jury Trial**

The background for a modified (or summary) civil jury trial came from the use of nonbinding summary jury trials. Required reading are the following articles:

1. Thomas D. Lambros, *The Summary Jury Trial - An Alternative Method of Resolving Disputes*, *Judicature*, Vol. 69, Number 5, February-March, 1986
2. Thomas B. Metzloff, *How To Improve The Summary Jury Trial*, *Trial*, June, 1994

Discuss all aspects of The Proposed Court Rule for Modified Civil Jury Trials and Comments, Exhibits 19 and 20 (Addendum). Discuss all segments of a civil jury trial. The discussion should include how to shorten presentation times and maintain fairness to both sides.

Also discuss jury instructions and closing argument. The pros and cons of shorter case specific instructions in contrast to more lengthy general instructions also should be considered.

Closing arguments should be discussed in terms of content and length, and how the judge best exercises discretion in controlling this phase of the trial.

**Session Four: (Five hours) Pretrial; Development of the Plan**

The instructor may use the attached Pretrial Form, Exhibit 21 (Addendum), for a modified civil jury trial for discussion purposes. Divide the class into role play groups, each composed of a judge and attorneys for plaintiff and defendant. Distribute the two attached cases marked, Exhibits 22 and 23 (Addendum), and, in conjunction with The Proposed Rule For Modified Civil Jury Trials, ask each group to arrive at a pretrial agreement which will shorten jury trial time by one half to two thirds. Stress the importance of flexibility since different attorneys may agree to different ways to shorten the trial fairly. The judge should mediate differences.

After development of the pretrial agreement, the same group should be asked to prepare a pretrial order to be filed to govern further proceedings in the case

# **ADDENDUM**

# EXHIBIT 12

## EXPEDITED CIVIL JURY TRIALS EVALUATION

Please respond as candidly and fully as possible as your evaluation will be helpful in determining whether The Ohio State University College of Law should offer this course again and whether to revise it if we do. The survey will also help us to determine whether other judicial education courses should be offered.

1. Length of course  
\_\_\_\_\_ too long  
\_\_\_\_\_ too short  
\_\_\_\_\_ about right

2. Content of course  
(Rate each category from 5 to 1, with 5 representing the best rating and 1 representing the worst rating).

### Category

- (1) Trial by Jury \_\_\_\_\_
- (2) Selection of Jurors \_\_\_\_\_
- (3) Opening Statements \_\_\_\_\_
- (4) Presentation of Evidence \_\_\_\_\_
- (5) Revision of Evidence Rules \_\_\_\_\_
- (6) Closing Arguments \_\_\_\_\_
- (7) Instructions \_\_\_\_\_
- (8) Development of the Modified Civil Jury Trial \_\_\_\_\_

3. List any areas that should be added or expanded:
- 

4. Text: In Defense of Trial by Jury

\_\_\_\_\_ helpful, would continue use  
\_\_\_\_\_ not helpful for course, but valuable resource  
\_\_\_\_\_ discontinue



5. Handouts:

\_\_\_\_\_ helpful, would continue use  
\_\_\_\_\_ not helpful

List any materials that should be included or substituted

---

6. Instruction (Overall)  
(Rate from 5 to 1 with 5 being best and 1 worst)

Knowledge of subject \_\_\_\_\_  
Method of teaching \_\_\_\_\_  
Preparation \_\_\_\_\_

How would you change the way the course is taught?

---

7. Timing

Is Friday and Saturday morning a good time to attend classes?

\_\_\_\_\_ (yes) \_\_\_\_\_ (no)

What time would you prefer if you had a choice? (Describe as fully as possible, giving days of the week and special hours)

---

---

8. Location

Rate The Ohio State University College of Law from 5 to 1 as a suitable place

\_\_\_\_\_

What did you like and what do you not like?

---

Is there another location that you would prefer for presenting course:

---

9. Would you consider attending another course at Ohio State College of Law?

\_\_\_\_\_ (yes)

\_\_\_\_\_ (no)

If your answer is yes, please state the course or courses that you would be most likely to attend:

---

10. In what way or ways, if any, was the course most helpful?

---

11. In what way or ways, if any, were you disappointed with the course?

---

12. Do you have any suggestions for attracting more judges to our continuing judicial education courses?

---

13. Do you prefer classes with only judges or ones where attorneys may also attend?

---

14. General comments:

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\_\_\_\_\_  
Signature (optional)

# EXHIBIT 13

## EXPEDITED CIVIL JURY TRIALS THREE MONTH SURVEY

1. To what extent, if any, has your attitude changed about the desirability of trial of civil cases by a jury rather than to the court?
2. What advantages do you see in trial by jury rather than by the court?
3. To what extent, if any, is the civil jury trial process hampered by existing rules?
4. What changes can be made to improve the process?
5. Have you made any changes in your jury questionnaires? If so, what are they?  
(Please attach a copy of your current jury questionnaire).

6. What changes, if any, have you made in the way you conduct the voir dire?
7. What additional changes should be made?
8. Have you modified your rules or expectations about the manner in which opening statements are presented? If so, how?
9. Have you modified or worked with trial attorneys to modify the way that evidence is presented? If so, how?
10. Was the course helpful in providing practical insight into how a civil jury trial may be expedited without unfair or adverse effect upon the jury verdict? If so, how?
11. In what manner, if any, have these observations been put into practice? If specific examples can be given, it would be helpful.

12. In what manner, if any, has closing arguments been improved or changed in your court?
13. In what manner, if any, have you modified the way in which you instruct the jury?
14. Are you interested in further and more formal development or approval of a rule for a modified civil jury trial?
15. How should that be done?
16. Have you modified any of your civil jury trials, with or without the approval of the trial attorneys? If so, describe what you did and what the reaction was?
17. Would you recommend that other judges take this course?

18. How long have you been a judge?

19. Any additional comments?

---

Signature (optional)

# EXHIBIT 14

## Expedited Civil Jury Trials Six Month Survey

1. Please indicate whether you have used any of the following procedures to expedite the time necessary to fairly try a civil jury trial. Note also the extent of use and the reception of the litigants.
  - a. Voir dire exclusively by the court
  - b. Voir dire principally by the court
  - c. Elimination or reduction of peremptory challenges
  - d. Agreement to use shorter opening statements
  - e. Opening statement by the court
  - f. Preliminary instructions
  - g. Agreement as to time available for presentation of the evidence
  - h. Modification of the rules of evidence

- i.     **Authentication of documents decided prior to trial**
  - j.     **Use of affidavits in lieu of live testimony**
  - k.     **Stipulations of evidence**
  - l.     **Marking of exhibits prior to trial**
  - m.     **Agreement to shorter time for argument**
  - n.     **Abbreviated, case specific instructions**
  - o.     **Use of high-low verdicts**
- 
- 2.     **Have you been more aware of possibilities for shortening civil jury trials since taking the course?**
  - 3.     **Have your civil jury trials been shorter?**
  - 4.     **Has the quality of justice been adversely affected?**



5. Do you advocate to lawyers and judges that civil trials can be shortened without affecting the quality of justice?
6. What is the best method for increasing the use of modified civil jury trials?
7. What should be done to educate more judges and lawyers about modified civil jury trials?
8. Would you recommend that other judges or lawyers take this course?
9. If the course is offered again, what changes should be made?
10. Additional comments?

---

Signature (optional)

**EXHIBIT 15**  
**COURT OF COMMON PLEAS OF FRANKLIN COUNTY, OHIO**  
**JUROR QUESTIONNAIRE**

**PLEASE PRINT**

Date \_\_\_\_\_

1. Name \_\_\_\_\_ Age \_\_\_\_\_  
                    (First)                                      (Middle Initial)                                      (Last)

2. Zip Code \_\_\_\_\_

3. Years of Residence in Franklin County \_\_\_\_\_

Place of Birth \_\_\_\_\_

4. Education (Indicate completion by "X" or incompleting by years attended):

Grade School \_\_\_\_\_ High School \_\_\_\_\_

College \_\_\_\_\_ Grad. School \_\_\_\_\_

5. Your Occupation and Employer (If retired, write "retired" and give last occupation and employer):

6. If you are a widow or a widower, give last spouse's occupation and employer:

7. Marital Status: \_\_\_\_\_ Number of Children \_\_\_\_\_

Married \_\_\_\_\_ Separated \_\_\_\_\_ Widow \_\_\_\_\_

Single \_\_\_\_\_ Divorced \_\_\_\_\_ Widower \_\_\_\_\_

8. List living members of your family (Spouse and children only):

Name	Relationship	Age	Living With You (Yes or No)	Occupation	Employer
------	--------------	-----	--------------------------------	------------	----------

_____	_____	_____	_____	_____	_____
_____	_____	_____	_____	_____	_____
_____	_____	_____	_____	_____	_____
_____	_____	_____	_____	_____	_____

9. Do you have any physical difficulties, including uncorrected vision problems or hearing problems, which would create difficulty for you during jury service? If yes, please explain:

\_\_\_\_\_

10. Are you presently taking any medication(s)? If so, what:

\_\_\_\_\_

11. Have you or anyone related to you, or a close friend, ever been convicted of any crime or traffic offense?  
Yes \_\_\_\_\_ No \_\_\_\_\_

(If yes, describe who and nature of the offense) \_\_\_\_\_

\_\_\_\_\_

12. Have you ever been a witness in a case? (If yes, please state the nature of the case)

13. Have you served as a juror prior to this term? Yes \_\_\_\_\_ No \_\_\_\_\_ Where? \_\_\_\_\_

14. Have you, or any member of your family listed above, been sued, or sued another person?  
Yes \_\_\_\_\_ No \_\_\_\_\_

(If yes , complete the following) Type of lawsuit: \_\_\_\_\_

When \_\_\_\_\_ What Court \_\_\_\_\_

15. Have you, or any member of your family listed above, ever suffered any bodily injury?

Yes \_\_\_\_\_ No \_\_\_\_\_

16. Have you, or any member of your family listed above been a victim of a crime?

Yes \_\_\_\_\_ No \_\_\_\_\_

17. Has a claim for personal injury ever been made against you or your family NOT INVOLVING A LAWSUIT?

Yes \_\_\_\_\_ No \_\_\_\_\_

18. Do you own any firearms? Yes \_\_\_\_\_ No \_\_\_\_\_

19. Please list the social, fraternal, professional, community, and religious organizations you belong to.

20. Are you related to, or a close friend of, any law enforcement officer? Yes \_\_\_\_\_ No \_\_\_\_\_

21. Do you drive an automobile? Yes \_\_\_\_\_ No \_\_\_\_\_

22. Have you ever been involved in any accidents? Yes \_\_\_\_\_ No \_\_\_\_\_

23. Are you or any member of your immediate family stockholders in any insurance casualty company, automobile or otherwise, or are they employed by any automobile liability insurance or casualty company?

Yes \_\_\_\_\_ No \_\_\_\_\_

24. Are you or any member of your immediate family connected in any way with the insurance agency that sells automobile liability or casualty insurance? If so, name the company and the member of your family and the agency.

25. Are you or any members of your immediate family employed by the Ohio Bureau of Workers' Compensation and Industrial Commission? If so, name such member of the family.

26. Are any members of your immediate family connected in any way with any health and accident insurance company, such as Blue Cross or any other similar company that sells health and accident insurance? (If so, name the company and the member of the family.

27. I am exempt from Jury Duty because:

STATE OF OHIO;  
FRANKLIN COUNTY, SS:

I do hereby assert that the answers to the foregoing questions are true and correct to the best of my knowledge and belief.

Dated: \_\_\_\_\_

Signature \_\_\_\_\_

# EXHIBIT 16

## UNION COUNTY COURT OF COMMON PLEAS QUESTIONNAIRE FOR JURY SERVICE

Please fill out this questionnaire and return in the enclosed envelope. If any questions need expanding, use the reverse side.

1. Name \_\_\_\_\_
2. Address \_\_\_\_\_
3. Telephone (if you have no phone, give the number of someone who will take a message for you). \_\_\_\_\_
4. Age: \_\_\_\_\_ years. Sex: Male \_\_\_\_\_ Female \_\_\_\_\_ Marital status \_\_\_\_\_
5. How long have you lived in Union County? \_\_\_\_\_
6. List living members of your family - spouse and children only.  

<u>Name</u>	<u>Relationship</u>	<u>Age</u>	<u>occupation</u>	<u>employer</u>
_____	_____	_____	_____	_____
_____	_____	_____	_____	_____
_____	_____	_____	_____	_____
_____	_____	_____	_____	_____
7. Education (highest grade completed). \_\_\_\_\_
8. Your occupation, employer (if retired, indicate from where).  
\_\_\_\_\_
9. If you are a widow or widower, give late spouse's name, occupation and employer. \_\_\_\_\_  
\_\_\_\_\_
10. Have you or any member of your immediate family been convicted of a crime, other than a traffic offense consisting of a minor misdemeanor (penalty more than \$100.00 fine)? If so, state who and the nature of the offense. \_\_\_\_\_
11. Have you or any member of your family listed in No. 6 been the victim of a crime? Yes \_\_\_\_\_ No \_\_\_\_\_
12. Have you ever been excused from jury service? If so, why? \_\_\_\_\_
13. Do you have any physical difficulties, including uncorrected vision problems or hearing problems, which would create difficulty for you during jury service? If yes, please explain.  
\_\_\_\_\_

14. Are you presently taking any medication(s)? If so, what: \_\_\_\_\_

15. Have you ever been a witness in a case? If yes, please state the nature of the case. \_\_\_\_\_

16. Have you served as a juror prior to this term? If yes, please state what type case (criminal, civil, grand jury). \_\_\_\_\_

17. Have you, or any member of your family listed in 6 above, been sued or sued another person? Yes\_\_\_\_ No\_\_\_\_ If yes, state type of lawsuit, when, and where sued. \_\_\_\_\_

18. Has a claim for personal injury ever been made by you or against you or any member of your family listed in 6 above not involving a lawsuit? Yes\_\_\_\_ No\_\_\_\_

19. Are you related to or a close friend of any law enforcement officer? Yes\_\_\_\_ No\_\_\_\_

20. Do you drive an automobile? Yes\_\_\_\_ No\_\_\_\_

21. Do you own your own home? Yes\_\_\_\_ No\_\_\_\_

22. Have you ever been involved in any motor vehicle accidents? Yes\_\_\_\_ No\_\_\_\_

23. Are you or any member of your immediate family stockholders or employed by any insurance casualty company, insurance agency, automobile liability insurance or casualty company? Yes\_\_\_\_ No\_\_\_\_

24. Are you or any member of your immediate family employed by the Ohio Bureau of Workers' Compensation and Industrial Commission? Yes\_\_\_\_ No\_\_\_\_

25. Are you or any member of your immediate family employed by or connected in any way with a company or agency that sells health and accident insurance? Yes\_\_\_\_ No\_\_\_\_

26. Have you had any legal training? Yes\_\_\_\_ No\_\_\_\_

27. Have you had any medical training? Yes\_\_\_\_ No\_\_\_\_

28. Have you received any other special training? If so, please describe. \_\_\_\_\_

29. Do you have a second job? If yes, please describe. \_\_\_\_\_

30. Have you had other employment in a field different from that in which you are currently occupied? If so, what? \_\_\_\_\_

31. Do you own a firearm currently? Yes\_\_\_\_\_ No\_\_\_\_\_ Type:\_\_\_\_\_

32. Have you fired a gun? Yes\_\_\_\_\_ No\_\_\_\_\_

33. Please list significant hobbies.\_\_\_\_\_

34. Have you any special training or experience involving real estate, its valuation or sale? Yes\_\_\_\_\_ No\_\_\_\_\_

35. Are you currently treating for a serious physical disease or injury? Yes\_\_\_\_\_ No\_\_\_\_\_

36. Have you previously been hospitalized for an injury? If yes, for what injury?\_\_\_\_\_

37. Have you previously been hospitalized for a serious illness? Yes\_\_\_\_\_ No\_\_\_\_\_

38. Are you or any member of your immediate family listed on (6) above employed by the State, a county or municipality? Yes\_\_\_\_\_ No\_\_\_\_\_ If yes, by whom?\_\_\_\_\_

39. Do you have an attorney? Yes\_\_\_\_\_ No\_\_\_\_\_ If yes, please specify the individual or firm.\_\_\_\_\_

40. Is there anything else which you feel should be brought to the Court's attention which may bear upon your ability to sit as a fair and impartial juror, whether that be in a criminal or a civil case? If yes, please explain.\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_.

STATE OF OHIO, UNION COUNTY, SS:

I do hereby assert that the answers to the foregoing questions are true and correct to the best of my knowledge and belief.

Dated:\_\_\_\_\_ Signature:\_\_\_\_\_

# The Jury-Selection Ordeal

The jury is the Queen Bee of the American legal system, reputedly all-powerful but in practice immobilized, groomed and force-fed by a swarm of functionaries. And one of the most irrational and expensive steps in the process, as the O.J. Simpson case reminds us, is the ritual of jury selection. A popular consensus is fast shaping up for a drastic overhaul of the way juries are picked—a cause that fits comfortably into the wider movement for reform of our legal system.

The goal of jury selection these days, to all apparent purposes, is to make sure that a panel in no way reflects the views and

## Rule of Law

By Walter Olson

expertise that might be found in a random cross-section of the population. If medical testimony is likely to be important at trial, anyone who can tell a tibia from a tympanum is apt to be sent home.

In the Oliver North case, more than 200 potential jurors got bounced for knowing too much about the intensely publicized events leading up to the trial. ("I don't like the news," said the eventual forewoman. "I don't like to watch it. It's depressing.") In the Cincinnati prosecution over the Robert Mapplethorpe exhibit, the only prospect who regularly attended museums was dismissed for cause, it being felt that familiarity with those institutions put an "unnecessary burden" on her objectivity.

In cases that have been front-page news for months, hundreds of potential jurors (1,017 in the Menendez double trial) must be screened in search of the few, the humble, the ill-informed. As rows of prospects fill out vast questionnaires (75 pages in the Simpson case, 45 pages for the trial of Reginald Denny's attackers), the

process takes on the air of a giant standardized test on awareness of current events, albeit with reverse scoring.

Privacy is another casualty of the process, as prospective juror Dianna Brandborg learned this past February. Ms. Brandborg, a Dallas office manager, was handed a form curtly demanding information about her religion, political views, income, membership in controversial organizations, reading and TV-viewing habits, what make of car she owned, and so forth. Ms. Brandborg declined to answer some of the questions, asking for a chance to argue that these matters were irrelevant to her ability to serve as an impartial juror. Instead the judge summarily found her in contempt of court and sentenced her to three days in jail and a \$200 fine, a ruling upheld on appeal. "We can't let jurors decide what questions [the court] will ask and won't ask," a local law professor explained.

Some lawyers have hired private detectives to ride through prospective jurors' neighborhoods "interviewing acquaintances about marital problems, drinking problems, and treatment of minorities," Jeffrey Abramson observes in his new book "We the Jury: The Jury System and the Ideal of Democracy" (Basic). Personal facts about jurors can make their way onto the public record, or elsewhere.

The same week Dianna Brandborg lost her case, a criminal defense lawyer in nearby Fort Worth was apologizing in court to a woman who had been considered (but not chosen) for jury service for having allowed his client access to personal data from her file. The client, an accused robber, proceeded to call her at her home number and inform her that he was "impressed with her," a declaration that was apparently not met with pleasure, because he went on to make "some threatening remarks." After a trial, jurors often remark that the defendant wound up knowing a lot more about them

than they ever came to know about him.

Shrewd lawyers sometimes use the process of grilling jurors before trial to plant assumptions about what the case will turn out to be about. Jurors "must not be aware that an attempt is being made to persuade them" during voir dire, suggests a how-to book for lawyers. "They are convinced that they have changed their minds by themselves." Some states even let lawyers extract commitments from prospective jurors that they will hand out a large award if the lawyer proves certain propositions, a

*If medical testimony is likely to be important at trial, anyone who can tell a tibia from a tympanum is apt to be sent home.*

technique known as "getting a promise." New York, amazingly, does not even require a judge to be present during lawyers' screening of jurors, a situation reformers there are hoping to change.

Many of these tidbits are taken from another new book on the jury system, "The Jury: Trial and Error in the American Courtroom" (Times Books), by Stephen Adler, legal affairs editor of this newspaper. Mr. Adler's solution to jury-selection abuses is simple, logical, and sure to send litigators into conniptions: Abolish peremptory challenges, as Britain has done.

Such a reform might help kill off the \$200 million-a-year jury consulting industry, which has sprung up to help lawyers figure out who needs to be kicked off their panels; a favorite target is engineers, booted for being "too analytic." The "impartial juror" is nothing but a fiction, declares an ad for a selection primer that "shows you how to assemble your winning

jury, step-by-step." Consultants advise that "logic plays a minimal role" in the courtroom and the trick is to identify the jurors' "psychological anchors."

Litigators who defend the peremptory challenge may be fighting against the temper of the times, since the whole point of its use in most cases is to discriminate. Jury selection affords lawyers an occasion for a veritable frenzy of group stereotyping on such grounds as age, religion, national origin and so forth.

Such generalizations are the stock in trade of jury consultants and selection manuals. Women "are often prejudiced against other women they envy, for example, those who are more attractive," is one groaner from "The Art of Selecting a Jury," published as recently as 1988. Although the Supreme Court has lately ordered a halt to race and sex bias in jury-picking, lawyers still enjoy a much more indulgent enforcement regime than, say, employers or landlords; in general, they need only produce some neutral-sounding grounds for their decision, and of course they're unlikely to pay damages even for a knowing misstep.

Eager to correct everyone else's behavior, our law has made it much easier and more lucrative than it used to be to sue private parties for such offenses as invasion of privacy and, of course, discrimination of every kind. Then, to hear the resulting cases, it hauls jurors in by compulsory process, forces them to cough up details of their lives they might not tell their own mother, and then sends them packing if it has formed a negative hunch about them, based on their age, surname or religion. It's another way our legal system casually inflicts on bystanders the kind of treatment it would never tolerate from anyone else.

*Mr. Olson is a fellow at the Manhattan Institute. This is adapted from a longer article in the February Reason magazine.*

# EXHIBIT 18

## **\* POSSIBLE VARIATIONS IN EVIDENCE RULES TO EXPEDITE CIVIL LITIGATION**

**General Proposition:** all of the rules of evidence do not need to be technically applied in every case to ensure integrity of the process.

It is suggested that valuable time and costs can be saved by varying the rules of evidence in respect to part or all of most trials, without sacrificing the integrity of the jury verdict.

Some of the possible variations that should be considered on a case-by-case, issue-by-issue, witness-by-witness basis are as follows:

- (1) Use summaries of noncontroversial evidence or evidence relating to peripheral materials. (Summaries should be fair; if necessary the information therein should be backed up by sworn affidavits, depositions or admissible documents).
- (2) Use summaries, as above, of all the testimony where there is no serious dispute about what witnesses will say, even if it is important and disputes. Each side will summarize as aids its case.
- (3) Resolve problems concerning authentication of documents prior to trial, unless there is a genuine issue which relates to the validity of the document rather than its admissibility (which is a matter for the court).
- (4) Allow properly noticed depositions, either oral or video, to be used for any witness at the option of the proponent.



- (5) Allow evidence to be presented by affidavit where cross-examination is of little value.
- (6) Encourage parties to enter into stipulations of introductory material or material where there is no real possibility of dispute.
- (7) Reduce the Rules of Evidence to Ev. R. 402 which makes all relevant evidence (as defined by Ev. R. 401) admissible and all irrelevant evidence inadmissible. The provision excepting constitutionally or statutorily inadmissible evidence would still apply, but not that prohibited by other evidence rules with the exception of Ev. R. 403. Ev. R. 403 would provide the safeguard against evidence whose probative value is substantially outweighed by the dangers of an unfair prejudice, confusion of the issues or misleading the jury.
- (8) Add an additional safeguard to Item 7 by adding the requirement of advance notice and determination if the admissibility of the evidence would be substantially in conflict with the Evidence Rules. Upon objection, this type of evidence would be inadmissible where there are not equivalent circumstantial indicia of reliability. In making this discretionary determination the court should consider the importance and necessity of the evidence and whether it is more probative on the point for which it is offered than other evidence that can be procured through reasonable means. This determination, designed to enforce the general purposes of evidence rules and the interests of justice, should be made prior to trial.

- (9) Determine whether a witness is qualified as an expert prior to trial.
- (10) Provide that certain evidence is presumptively inadmissible in violation of Ev. R. 403(A) unless the proponent can establish that it has substantial proper substantive value that can not be reasonably provided by evidence that is not unfairly prejudicial, confusing or misleading. Examples might be: (1) criminal convictions of a witness that does not relate to truth or honesty (even felonies); (2) admissions made in conjunction with settlement negotiations; (3) liability insurance; (4) payment of medical and similar expenses; and (5) subsequent remedial measures.
- (11) Use any combination of those variations or the Rules of Evidence as fits the justice of the given case.

# EXHIBIT 19

## **\* PROPOSED COURT RULE** **MODIFIED CIVIL JURY TRIAL**

Upon consent of all of the parties, the court may order the use of modified civil trial procedures as agreed upon by the parties and approved by the court in the interest of justice.

This rule is designed to enable the court and parties to agree upon expedited or summary procedure to eliminate some of the expense and delay caused by the use of usual civil jury trial procedure without sacrificing the integrity of the process. Procedure may be flexibly designed to suit the needs of the particular case with the goal of a 50% to 75% reduction in time of trial.

The order for a modified civil jury trial shall describe the manner of procedure. It may contain variations and limitations in the following parts of the trial:

- (1) Variations in the method of selecting jurors;
- (2) Limitations upon the use of or time expended for opening statements and closing arguments;
- (3) Limitations upon the time expended for presenting evidence;
- (4) Limitations upon the methods or rules for presenting evidence;
- (5) Limitations upon the length of instructions;
- (6) Limitations upon the binding affect of the verdict and the use of post-trial procedure; and
- (7) Any other matters that would contribute to the fair and efficient resolution of the dispute.

# EXHIBIT 20

## \* COMMENT

This rule is particularly designed for cases where the one or more major issues can be succinctly presented to a jury and the remaining parts of the case which are in significant dispute can be summarily presented. A good example would be a money damage where liability is conceded, but the parties desire a jury determination of the disputed amount. It is anticipated that the time for trial and the expenses thereof could be reduced by 50-75% without any significant reduction in the justice of the verdict. In fact the verdict may be improved as the jury is able to focus more clearly upon the issue or issues that are important.

One of the attractive aspects of the rule is its flexibility. All cases do not require the use of the same procedure to meet the objectives of Civ. R. 1(B), which is to effect just results by eliminating delay, unnecessary expense and all other impediments to the expeditious administration of justice.

Time for jury selection can be reduced substantially by use of an improved jury questionnaire and the conduct of the remaining voir dire by the court with an opportunity for the parties to suggest additional questions. The parties could agree to waive the use of preemptory challenges. To offset this waiver, the court could liberalize challenges for cause where a strong possibility of bias exists; i.e. the injury is to the low back and one of the prospective jurors has a low back problem. The United States Supreme court has greatly reduced the use of preemptory challenges based upon group or general characteristics; the goal is solely a fair and impartial jury, not one tailored to the interests of any party.

Since the trial will be limited in scope and of short duration, orienting the jurors as to what will follow will be much easier. One manner of procedure to consider is for the court

to perform this role by briefly explaining the nature of the case and the issues in controversy with opening statements waived by the parties. The court could then intertwine preliminary instructions on a case specific basis into this type of opening, putting the juries in the best informed position to appreciate from the onset what their role is and how they are to perform it. If the parties choose to give opening statements, they should be brief with an agreement as to maximum time.

The trial can be substantially shortened by using different methods for presenting evidence than is traditionally used. By agreement, much of the evidence could be presented by summary presented by counsel. This would be particularly true when the evidence is noncontroversial or does not involve major issues. Documentary evidence should be agreed upon as authenticated unless there is a bona fide dispute about admissibility. The parties may agree that medical reports or hospital reports can be summarized without the requirement of a live witness. If the testimony of an important witness is to be summarized, it should be backed by a deposition to ensure integrity. The testimony of less important witnesses could be backed only by an affidavit if parties are unwilling to agree upon what the witness would say.

It is recommended that there be agreement upon the amount of time each party would take in presenting its case, i.e. two hours. That time could be used by a combination of summaries, depositions or live testimony.

The parties should agree upon the rules of evidence that will be applicable. There are many possibilities that can be flexible to insure trust in and comfort with the process by the parties and the court. A possible solution is to reduce the technical rules of evidence to

Evidence Rule 401, 402 and 403. This agreement would make all relevant evidence admissible except that prohibited by constitution or statute (i.e. privileges). Reference to other rules of evidence in Ev. R. 402 would be eliminated. Ev. R. 403 protects against the use of evidence whose probative value is substantially outweighed by unfair prejudice, etc. Another possibility is to waive the rules of evidence except as to certain key witnesses.

The parties should agree upon a limited time for oral argument following which the trial court would give an abbreviated, but clear, instruction that would adequately cover the verdict to be rendered by the jury. The jury should ordinarily be able to decide the case in a relatively short period of time. In many instances, the entire procedure can be fairly completed in one day. Jurors could be summoned on a one case, one or two day basis, which should eliminate a great many of the hardship excuses, thus opening the panel to a much larger diversity of people.

Risk conscious parties could agree to a high/low limitation upon the jury's verdict. The parties could also agree to relinquishing appeal rights (reversal would probably be rare anyway) to further reduce delay and cost. Post-trial remedies could be reduced to the granting of a new trial where there is a gross abuse of the procedure.

# EXHIBIT 21

## MODIFIED CIVIL JURY TRIAL PRETRIAL FORM

1. What are the claims and defenses?
2. What is the principal issue in dispute?
3. What other matters are in dispute?
4. What issues are not in dispute?
5. What discovery has been conducted? What additional discovery is needed?
6. How can the need for additional discovery be reduced or eliminated?
7. What matters can be stipulated?
8. What documents will be submitted?
9. Is there any dispute about the documents? If so, how can it be resolved?
10. How long will it take to try the case using traditional methods?
11. Would you like to develop a plan to substantially shorten that time?

### DEVELOPMENT OF THE PLAN

- A. Selection of the jury
- B. Opening statements
- C. Presentation of the evidence
- D. Closing arguments

### THE PRETRIAL ORDER

Having agreed upon a specific method of trial, both as to times and method of presenting evidence, it should be spelled out accurately, approved by the parties and made a binding order to control subsequent proceedings subject to change only for good cause.

# EXHIBIT 22

## CASE NO. ONE

The attorneys for plaintiff and defendant are interested in exploring the possibility of using the newly adopted Modified Civil Jury Trial procedure. They have explored settlement but are far apart in offer and demand. Plaintiff is unwilling to waive trial by jury but is very interested in a speedy and less expensive trial. Defendant is also interested in a less costly procedure.

Plaintiff was injured in an automobile accident three years ago. The accident occurred as a result of defendant running a red light; liability is not in issue. Plaintiff suffered a compound fracture of his left leg and cuts and bruises to his face. He was transported by emergency squad to the hospital where he remained for five days. Steel pins were placed in the leg and a cast was placed on it. Twenty five stitches were used to close the cuts in his face. He still has a rather prominent scar on his chin although the wounds are otherwise healed. The cast was removed in eight weeks and the pins have been removed. He has a slight limp as a permanent result of the accident. His total hospital and medical expenses to date are \$8000.00, all of which defendant concedes are reasonable and necessary. A cosmetic surgeon has told plaintiff that he can cover the scar on his face for a cost of \$4,000.00 in outpatient surgery. Although self-conscious about the scar, plaintiff is not sure that he wants to have the surgery. Defendant's sources tell him that the \$4,000.00 fee is in the ball park.

Plaintiff is 28 years of age and single. He is employed as a warehouse foreman making \$500.00 per week. His work entails some heavy lifting. He was off work for three months after the accident on doctor's orders at a total loss of \$6500.00. He states that he sometimes has some pain in his injured leg when he does heavy lifting. He also says the first year after the accident was rough as he had a lot of pain. Plaintiff's deposition was taken and he complained repeatedly about his inability to run well, which was his main hobby. He brought records showing very poor times in races when he returned to running a year after the accident. He said that, because of the fact that he was now running much slower and some pain that he has quit running.

Plaintiff's orthopedic surgeon, Dr. Bones, has rendered a comprehensive written report which has been provided to defendant. In his report Dr. Bones stated that the operation was successful, but that plaintiff will have a permanent limp, albeit slight. He says that he also advised plaintiff to quit running. He says plaintiff was very distressed at that advice as he was a good marathoner. Plaintiff initially ignored his advice but had to quit when he started having pains. Bones says plaintiff can perform his job if he is careful and he does not anticipate the necessity of further treatment.

Defendant is a busy traveling salesman who is well insured. He does not want to attend the trial as he will lose money. He says he knows nothing about the injuries and has nothing to add. Defense counsel had plaintiff examined by Dr. Tibia, also an orthopedic surgeon. Dr. Tibia



says that plaintiff's leg is as good as new, except for an almost unnoticeable limp. He sees no reason why he can't do anything he did before except that he probably won't run quite as fast.

Both doctors have good credentials; both have rendered comprehensive reports; both were deposed by video and testified in accordance with their reports without any significant impeachment.

See if you can work out a plan for a modified civil jury trial.

## EXHIBIT 23

### CASE NUMBER TWO

Ralph Rich has filed suit against Hurry Homes, Inc., alleging that he entered into a written contract with Hurry whereby Hurry agreed to build a residence for him according to exact specifications for payment of \$400,000.00. Rich alleges that Hurry breached the contract by building a shoddy house which did not comply with the agreed specifications, and that he will be required to spend \$200,000.00 to bring it up to specs. He seeks that amount in damages.

Hurry has countered, alleging that he properly constructed the house with the exception of a few very minor matters that he was not given the opportunity to correct. Hurry claims that he was only paid \$300,000.00 and that he is owed the remaining \$100,000.00 minus the \$4,000.00 that it would take to correct the minor defects. He seeks judgment for \$96,000.00.

The parties have requested that the case be placed on the modified civil jury trial track. There has been no discovery completed as yet.

Conduct the pretrial hearing.