MEMO TO: PETER B. BRADFORD, CHAIRMAN, AND CHIEF JUDGE RALPH G. THOMPSON
FROM; Ann Dudley Marshall, ADR Law Clerk and ADM
CJRA Advisory Group Resource Person
DATE; July 11, 1991
RE: Questionaire of July 2, 1991 to CJRA Advisory Group Members

As an additional tool or at least food for thought when evaluating the Advisory Group's survey responses, here are some comments on questions 1-4 dealing with our court's current and proposed dispute resolution programs.

When a court contemplates these types of programs, their purposes and goals must be considered. Proponents of ADR believe that the purpose for developing these programs is first and formost to insure quality justice and to provide a variety of forums so that the most appropriate one may be selected for a particular case. To this end, these programs should be as accessible as possible to all disputants and not favor one group or segment, should protect the legal rights of all involved, should provide a fair and competent mechanism for resolving the dispute, should encourage the confidence and respect of the litigants and the general public in the the fairness, integrity and justness of the process, should be an effective forum for the enforcement of law, including formulating outcomes in terms that are conducive to subsequent enforcement when necessary, and should be as efficient as possible in terms of the cost and time required of both the court system and the litigants.

Statutes, local rules, etc., along with some central coordination/court administration of program management and adequate education and experience of ADR professionals are necessary components to assure these goals. And obviously, as with all our current programs, any party dissatisfied with the result of ADR should have recourse to the court.

Although the overall purpose for including any ADR tools in our CJRA plan is to reduce cost and delay, each should pass muster of the above mentioned ADR goals as well as have its own clear-cut purpose and goals, be identifiable in relationship to the other programs we have so that the most appropriate process can be applied for any particular case at the appropriate time for that case and any unnecessary duplication of effort or cost be avoided.

1. Court-annexed Arbitration should be continued on a mandatory as well as a voluntary/consensual basis in our court at least for the time being:

a. Current pilot court status - still only 10 courts utilize mandatory arbitration and the experiment should run its course. Section 906 (the sunset provision) of the 1988 Judicial Improvements and Access to Justice Act would "repeal" the "experiment" in 1993.

b. Money for arbitrator fees and a court clerk staff person have been allocated to this program.

c. It is in place in our court system and counsel and many litigants have become familar with it and many request its use.

d. It allows a decision by a neutral third party attorney arbitrator and thus differs in process and purpose from any mediation program and our settlement conference and summary jury trial as well. Its decision is intended to be non-binding but parties can and more frequently are waiving their right to trial de novo and using this program as a binding forum. I attribute this to increasing attorney and client involvement with private binding arbitration outside the courts.

e. The Federal Judicial Center has concluded that purely voluntary court-annexed arbitration programs do not work - some form of judicial mandate, either by local rule or court order, is necessary to get sufficient numbers of cases into these programs. They also conclude that these programs do provide increased options for litigants, provide procedural fairness, can reduce the cost of litigation and can reduce disposition times.

We could still identify cases for mandatory arbitration but at the status/schedueling conference give counsel the option to discuss which ADR tool is most appropriate for the case. At least the lower dollar/less complex cases can be identified and, if differiental case management is to be applied, we would have a leg up.

2. Court-annexed Mediation. If instituted by our court, the following factors should, at least initially, be considered:

a. This court's definition of mediation or form of mediation program:

- pure mediation: a multi stage process requiring a highly trained and skilled mediator in which a hearing could last at least one full business day and could go longer. (see description in appendix I of our CJRA Advisory Group Report.) This kind of program/process can be found in AAA Mediation, the Dallas County and Oklahoma County programs and is similar to the Northern District of Oklahoma's settlement conferences.

- some form of abbreviated or hybrid "mediation" program, more akin to a moderated settlement conference. (District of Kansas, Southern District of California Bankruptcy Court, Western District of Washington and Western and Eastern Districts of Michigan (really more evaluation programs in Michigan)). A program could be designed to incorporate the true mediation concepts and could train mediators how to conduct the mediation in a shorter period of time- 2 1/2 to 3 hours. Some Dallas mediators could help with this.

- no formal definition or form mandated by the court. Keep process flexible as to needs of case, cost considerations, so counsel and parties can choose which format would work best for them and their case and with the training/experience of the "mediator" selected. (see Western District of Washington).

b. Mandatory and/or voluntary. I would presume that this court would like the option of being able to order parties into

mediation as well as allow for application or agreement to mediate. I should be made clear in the plan/local rule that mediation will not stay any other scheduled dates of the case unless the court so orders.

c. Amount of control court would like over the program:

- does the court want a true "court-annexed" program similar to our arbitration program with staff to handle administration and clerical functions (could use staff already in place)? Under this set-up, the court could certainly control the pool of mediators-their quality, qualifications and training, and the timing of the process within each chamber's litigation timeline. Also the length of the session, conduct of parties and counsel and attendance requirements as well as cost aspects of the process generally and mediator fees in particular could be overseen.

- does the court want a "court-referred" system similar to Dallas County which is utilized by some judges in the Northern District of Texas and now becomming popular by local rule in Oklahoma County? This could involve less overall court control of the process but at less cost to the court system in terms of staff time and paperwork. With this type of program, the time for holding the mediation could be controled by court order i.e. within 30 days of the Order for Mediation. If we were to utilize our Oklahoma County growing mediation program with a growing number of trained mediators, there would be less control over quality and qualifications and training, virtually no control over the pool of mediators and their fee schedules. Although the Oklahoma County Bar Association does monitor the non-exclusive list of mediators who meet certain hourly training requirements, they do not control the actual training as does the Dallas County Bar nor can they address the fee charges.

-- Certain legal issues would need resolving prior to our utilizing our Oklahoma County Bar mediation program fully. A few things that come to mind are that there are no Oklahoma Statutes or Supreme Court Rules in place, only local rules in Oklahoma and Canadian counties. Some Judges in the N.D. Texas feel there are diversity/federal question jurisdiction issues regarding use of a state court program and Texas even has a state statute governing their procedures. Mediator immunity and mediation fee issues would need examination.

-- N.B. The Board of Directors of the Oklahoma Bar Professional Liability Insurance Company decided recently to extend coverage to include activities by an insured as a mediator and as an arbitrator.

Fortunately we can design our own program to fit our needs. Some of these basics need up front attention and discussion prior to a myriad of other design questions. We truly must balance many interests in designing the program most useful to both bench and bar with cost and delay containment as a given. The process of mediation is nationally becomming the alternative of choice and should be added to our procedures.

3. The Settlement Conference, whether called mandatory or not, as currently in place should be continued. The judge-hosted

settlement conference in our court, held before a well-respected judge at the end of the litigation process is truly our most liked, most successful and most often used tool for resolving disputes. I believe it has become institutionalized in our court and is accepted and expected in any case before trial. Attorneys say that resolution of outstanding summary judgment motions prior to settlement discussions with Judge Irwin would be a tremendous cost and time savings.

Judge Irwin cautions that an early settlement conference before him when adequate discovery is not done, is often not that productive in terms of actually settling the case but we all know there is a benefit in just getting the parties together early. Any mediation procedure you choose could be designed to help or address the need for an early facilitated negotiotion session if the parties desire and could be an option for arbitration cases where this process would be more case appropriate.

4. The Summary Jury Trial should not be completely eliminated as an option or choice of counsel. Some attorneys tell me that it is useful for certain specific cases and have requested one when deemed appropriate. Some of our judges really like the procedure for the right case. All our current judges use it sparingly as well they should but still better analysis of a case with judge or magistrate and counsel as to case appropriateness and preparation for and structure of any particular SJT should occur. It is a process that must be used wisely and infrequently due to its high cost to litigants and should only be "court-ordered" after evaluation with counsel.

By keeping the programs we have and fine-tuning them and adding the excellent and beneficial process of mediation to the menu or repetoire we can easily satisfy congressional requirements and go a long way toward completing our CJRA plan.

cc: Robert D. Dennis, Clerk of Court
and CJRA Reporter