UNDERSTANDING MEDIATION AS AN ALTERNATIVE TO LITIGATION

The most common form of alternative dispute resolution (ADR) is mediation. During a mediation, a neutral third party (often a retired judge or experienced attorney) works with the parties to try to reach a settlement of their dispute. The mediator does so by focusing on the disputed issues and exploring possible options for settlement. Mediation generally is considered “informal,” unlike litigation or arbitration. It is a non-binding, private process, in which the mediator acts as a neutral intermediary or “deal broker.”

Unlike arbitration or trial, the mediator has no power to require the parties to settle their dispute, insist on a particular result or issue a decision. The parties must come to any agreement themselves. If a settlement cannot be reached, the parties are free to try another form of ADR or go to trial.

Mediation offers a number of advantages. Most mediations take no more than a day or two to complete. Since the mediation process moves quickly and requires significantly less preparation than does litigation or arbitration, mediation generally is cost-effective.

A settlement reached at mediation is final and binding. Unlike a court judgment, the details of a mediated settlement can be kept private, allowing the parties to resolve their dispute while keeping the details of that resolution out of the public eye.

The advantages of mediation, however, do conceal certain weaknesses. Since mediation is non-binding, a mediation that ends with no agreement can feel like “wasted time.” And unless both parties are motivated to settle the dispute and demonstrate a willingness to work together to reach a compromise, mediation is unlikely to succeed.

If you have any question, please contact Grant Killoran at grant.killoran@wilaw.com or 414-276-5000.

WHAT DOES IT MEAN TO LITIGATE A CIVIL CASE?

Alternative dispute resolution (ADR) is so named because it provides an “alternative” to litigating a civil dispute before a court in a bench or jury trial. The most popular forms of ADR are mediation and arbitration, although other options exist.

Litigation is when a lawsuit is filed in a court of law. A lawsuit typically involves a dispute over a particular state of affairs: a contract breach, an injury suffered in an accident, or some other dispute situation.

Litigation offers certain advantages. Access to the decision-maker, whether judge or jury, is free of charge, except for minimal filing fees. Discovery is part of the litigation process, and can be wide-ranging, allowing the parties to gather a great deal of information. Third parties can be added to a law suit, if appropriate. The rules of evidence and procedure are well-defined. The final decision can be enforced by the court. If a party loses, that party has the right to appeal. And, litigation does not prevent the parties from attempting ADR or negotiating a settlement before, during or even after trial.

Despite these benefits, litigation also has certain disadvantages. The large case load faced by judges, as well as the demands of discovery and procedural issues, can make litigation both slow and expensive. The broad discovery allowed in litigation and the inherently public nature of litigation can expose damaging or embarrassing details, creating brand or reputation management concerns. Highly technical or complex disputes can be difficult to present to a judge or jury in an efficient and accessible manner, as judges and juries may lack the specialized knowledge needed to fully grasp the issues involved in the dispute. Litigation decisions can be appealed, adding additional expense and extending the duration of the dispute.

If you have any question, please contact Grant Killoran *at grant.killoran@wilaw.com or 414-276-5000.*

UNDERSTANDING ALTERNATIVE DISPUTE RESOLUTION IN WISCONSIN: AN OVERVIEW

Alternative dispute resolution (ADR) offers a way for parties to resolve business disputes without going through a civil trial. ADR may take place before or after a lawsuit is filed. Many contracts, including construction, securities and Internet terms-of-service contracts, increasingly require ADR before or instead of trial. Generally speaking, courts have found these provisions enforceable.

The phrase “alternative dispute resolution” is an umbrella term covering several different types of proceedings. Direct negotiation, mediation and arbitration are the most popular forms of ADR. Although the rules differ for each, all three are intended to try to resolve a civil legal dispute without going to trial.

In Wisconsin, courts can order parties to participate in ADR. Wisconsin Statute Section 802.12(2) empowers Wisconsin Circuit Court judges to require ADR prior to trial. The parties generally are free to choose the type of ADR they wish to utilize and the ADR service provider, although the judge may make these decisions for the parties if they cannot agree.

Wisconsin judges cannot, however, require that the parties participate in the more expensive types of ADR, including non-binding arbitration, summary jury trials, or multiple facilitated ADR processes (such as both mediation and arbitration), without the parties consent.

Also, while a Wisconsin judge can require the parties to participate in ADR, he or she cannot require them to settle their dispute. In *Gary v. Eggert*, the Wisconsin Supreme Court held that while Section 801.12 allows a judge to require some form of ADR before trial in appropriate cases, it does not allow the judge to require that the parties resolve the dispute, abandon one or more legal positions or settle out of court. The right to trial must remain available to the parties even if they are sent to ADR prior to trial.

Federal courts, including those in Wisconsin, also can order parties to participate in ADR. 28 U.S.C. 651(b) allows federal district court judges to authorize the use of ADR in civil actions and bankruptcy adversary proceedings. In the United State District Court for the Eastern District of Wisconsin, Local Rule 16(d) governs ADR considerations. In the United State District Court for the Western District Local Rule 3 (LR 16.6CJ) governs ADR.

If you have any questions, please contact attorney Grant C. Killoran at grant.killoran@wilaw.com or 414-276-5000.

LOCAL COURT RULES IN WISCONSIN

While litigators most likely are familiar with the various state and federal local court rules impacting courtroom practice in their geographic areas, they may not be as familiar with the local rules for courts in other areas in which they do not usually practice but have a case.

Wisconsin's state courts have various different sets of local rules. To assist attorneys in complying with these differing local rules, the State Bar of Wisconsin maintains a page on its website—www.wisbar.org—with links to them.

Milwaukee County is the most populous county in Wisconsin, and its Circuit Court has its own local rules which can be found here:

The Circuit Courts for the various counties outside Milwaukee comprising the greater Milwaukee metropolitan area also have their own local rules, including:

- The Kenosha County Circuit Court which can be found here.
- The Ozaukee County Circuit Court which can be found here.
- The Racine County Circuit Court which can be found here.
- The Sheboygan County Circuit Court which can be found here.
- The Washington County Circuit Court which can be found here.
- The Waukesha County Circuit Court which can be found here.

Wisconsin's federal courts also have their own local rules.

- The local rules for the United States District Court for the Eastern District of Wisconsin can be found here.
- The local rules for the United States District Court for the Western District of Wisconsin can be found here.
- The local rules for the Wisconsin Bankruptcy Courts can be found:
    - Here for the U.S. Bankruptcy Court for the Eastern District of Wisconsin;
    - Here for the U.S. Bankruptcy Court for the Western District of Wisconsin.

In addition, various Wisconsin federal court judges, particularly those in the Eastern District of Wisconsin, have their own practice preferences, some of which can be found:

    - Here for the U.S. District Court for the Eastern District of Wisconsin; and
    - Here for the U.S. Bankruptcy Court for the Eastern District of Wisconsin.

Local rules are subject to periodic modification, so it is advisable to review the local rules at the beginning of each case and thereafter as necessary.

For more information about Wisconsin's state or federal local court rules, please contact Grant Killoran at 414.291.4733

GRANT KILLORAN AND PATRICK MCBRIDE SELECTED TO THE 2015 IRISH LEGAL 100

Grant Killoran and Patrick McBride, shareholders in the Litigation Practice Group at O'Neil, Cannon, Hollman, DeJong and Laing S.C., recently were selected by the *Irish Voice Newspaper* to the 2015 Irish Legal 100.

First introduced in 2009, the Irish Legal 100 is a listing of leading legal figures across the United States and honors accomplished and distinguished lawyers of Irish descent from law

schools, law firms, the judiciary and industry around the country. Past honorees have included United States Supreme Court Chief Justice John Roberts and United States Supreme Court Associate Justice Anthony Kennedy, and honorees have been invited to meet with Ireland's Ambassador to the United States.

For information about the Irish Legal 100, visit www.irishlegal100.com.

For more information about O'Neil, Cannon, Hollman, DeJong and Laing S.C., including Attorneys Killoran and McBride, visit www.wilaw.com.

KILLORAN RE-APPOINTED TO THE MERITAS U.S./CANADIAN LITIGATION GROUP STEERING COMMITTEE

Grant Killoran, the Chair of the O'Neil, Cannon, Hollman, DeJong and Laing's Litigation Practice Group, recently was re-appointed to serve on the Meritas U.S./Canadian Litigation Group Steering Committee.

O'Neil, Cannon, Hollman, DeJong and Laing is a member of Meritas, a global alliance of over 7,000 lawyers from 170 full-service law firms across more than 70 countries. For more information about Meritas, please visit the Meritas website at www.meritas.org or contact us at 414.276.5000.

AN UPDATE ON DEVELOPMENTS REGARDING THE WISCONSIN AND FEDERAL RULES GOVERNING E-DISCOVERY

It has been estimated that more than 90% of all information created today is stored electronically. This electronically stored information, or ESI, is crucial information in most business disputes.

The Federal Rules of Civil Procedure were amended in 2006 to address ESI, and additional amendments to these federal e-discovery rules have been proposed that could go into effect

in late 2015. The Wisconsin Rules of Civil Procedures were amended in January, 2011, and again in January, 2013, to address ESI too. The state and federal e-discovery rules significantly broaden the concept of what constitutes a "document" for purposes of discovery and confirm that discovery of ESI in civil lawsuits stands on equal footing with discovery of paper documents.

The Wisconsin e-discovery rules for the most part parallel the federal e-discovery rules, making it easier for federal authority to be used in discovery disputes in the Wisconsin courts. But the Wisconsin rules differ slightly from the federal rules. For example, unlike Fed. R. Civ. P. 26(a), Wisconsin documents have a rule requiring mandatory initial disclosures. The drafters of the Wisconsin rules decided that certain portions of the federal e-discovery rules would be better addressed by substantive law rather than procedural rules changes.

Highlights of the January 2013 amendments to the Wisconsin e-discovery rules include:

• Wis. Stat. § 804.01(2)(c), which provides that the trial materials privilege is not automatically forfeited because of the inadvertent disclosure of ESI and that claims of forfeiture of this privilege must be considered under Wis. Stat. § 905.03(5) as if they involved privileged attorney-client communications.
• Wis. Stat. § 804.01(7), which creates a Wisconsin "clawback" rule allowing for the recovery of privileged ESI inadvertently produced in discovery and establishes the procedure to be followed in order to recover such information.
• Wis. Stat. § 805.07(2)(d), which adds ESI to the materials which may be discovered by subpoena and permits subpoenas for inspection, copying, testing or sampling of ESI.
Highlights of the proposed amendments to the federal e-discovery rules include:
• A proposed amendment to Fed. R. Civ. P. 1 which would encourage cooperation by the parties as to the efficient determination of a case, including e-discovery issues.
• A proposed amendment to Fed. R. Civ. P. 26 which would add a new "proportionality" test to the scope of allowable discovery.
• A proposed amendment to Fed. R. Civ. P. 30 which would reduce the limit on the number of depositions in a case from 10 to 5 and would reduce the maximum length of a deposition from 7 hours to 6 hours.
• A proposed amendment to Fed. R. Civ. P. 33 which would reduce the limit on the number of written interrogatories from 25 to 15.
• A proposed amendment to Fed. R. Civ. P. 36 which would limit the number of requests to admit to 25.
• A proposed amendment to Fed. R. Civ. P. 37 which would provide a uniform national standard for evaluating discovery preservation efforts and for the imposition of sanctions for failures to preserve discovery.

The public comment period for the proposed federal amendments runs until February 15, 2014. If approved, the federal amendments currently are expected to go into effect on

December 1, 2015.

For more information about the state and federal e-discovery rules or ESI issues, please contact Grant Killoran at 414.276.5000, or at grant.killoran@wilaw.com.

THE SUMMER 2013 EDITION OF THE ABA SECTION OF LITIGATION'S HEALTH LAW LITIGATION NEWSLETTER IS PUBLISHED BY CO-EDITOR GRANT KILLORAN

The American Bar Association Section of Litigation has published its Summer 2013 Edition of the *Health Law Litigation Newsletter*. This edition contains articles on a number of topics, including recent developments of interest to practitioners who handle health care disputes, including articles on the False Claims Act, HIPAA, life sciences training and health care compliance issues. An electronic version of this edition of the *Health Law Litigation Newsletter* can be found at https://www.americanbar.org/groups/litigation.

Grant Killoran, the Chair of O'Neil, Cannon, Hollman, DeJong and Laing's Litigation Practice Group, is a former Co-Chair of the American Bar Association Section of Litigation's Health Law Litigation Committee and currently serves as the Co-Editor of its *Health Law Litigation Newslett*er.

NEW WISCONSIN RULES OF CIVIL PROCEDURE GOVERNING E-DISCOVERY AND ELECTRONICALLY STORED INFORMATION

It is estimated that more than 90% of all information created today is stored electronically.

The Federal Rules of Civil Procedure were amended in 2006 to address such electronically stored information, or "ESI". Effective January 1, 2011, the Wisconsin Rules of Civil Procedures also are being amended to address ESI and confirm that discovery of ESI stands on equal footing with discovery of paper documents.

The Wisconsin rules have been changed to parallel the federal e-discovery rules and make it easier to utilize existing federal authority in discovery disputes in the Wisconsin courts. But Wisconsin did not adopt the 2006 federal amendments in their entirety. The new Wisconsin rules take a slightly different approach than the federal amendments in two ways: First, some federal rules do not have Wisconsin counterparts. For example, unlike FRCP Rule 26(a), Wisconsin's new rules make no provision for mandatory disclosure. Second, the drafters of the new Wisconsin rules thought some portions of the federal amendments should be addressed by substantive Wisconsin law, rather than by a procedural rules change.

The new Wisconsin ESI rules are:

- Wis. Stat. § 802.10(3)(jm) (the Wisconsin counterpart to FRCP 16)

This rule is being enacted to encourage courts to be more active in managing electronic discovery. It adds the need for discovery of electronically stored information to the issues that a trial court may address in issuing a scheduling order.

- Wis. Stat. § 804.01(2)(e) (the Wisconsin counterpart to FRCP 26)

This rule is being enacted to help manage the costs of discovery of ESI. It creates a "meet and confer" obligation, and states that no requests for production or inspection of ESI under Wis. Stat. § 804.09 (or responses to interrogatories by production of ESI under Wis. Stat. § 804.08(3)) can be issued until after the parties confer on a number of discovery issues. However, it does not require parties to confer before commencing other types of discovery.

- Wis. Stat. § 804.08(3) (the Wisconsin counterpart to FRCP 33(d))

This rule gives parties the option to produce electronic business records in lieu of an answer to an interrogatory. It specifies that ESI is among the types of business records that a business may provide in response to an interrogatory. But, this is an option; it is not mandatory.

- Wis. Stat. §§ 804.09(1) and (2) (the Wisconsin counterpart to FRCP 34)

These rules are the heart of the new electronic discovery rules. They govern the formulation of electronic discovery requests and responses and establish the scope and procedures regarding the discovery of ESI. They treat ESI the same as paper documents.

- Wis. Stat. § 804.12(4m) (the Wisconsin counterpart to FRCP 37)

This rule provides a "safe harbor" for the good faith, routine deletion of ESI and gives limited "immunity" from certain spoliation sanctions.

- Wis. Stat. § 805.06 (the Wisconsin counterpart to FRCP 53)

This is not a new rule, but rather its use in ESI matters is suggested by the comments to the new Wisconsin rules. It allows for the use of discovery referees or “special masters” to handle complex and/or expensive discovery issues, including those involving ESI.

- Wis. Stat. § 805.07 (the Wisconsin counterpart to FRCP 45)

This rule adds ESI to the types of materials which may be discovered by subpoena.

For more information about these new amendments to the Wisconsin Rules of Civil Procedure, contact Grant Killoran at O’Neil Cannon at 414.291.4733 or grant.killoran@www.wilaw.com.