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May 11, 2006

Penny Miller
Clerk of ND Supreme Court
600 E. Boulevard Avenue; Dept 180
Bismarck, ND 58505-0530

Dear Ms. Miller:

Please accept this letter in response to the April 12, 2006, notice of comment, allowing the submission of comments on the proposed amendments to rule 8.8 of the North Dakota Rules of Court. My practice is in the area of civil litigation with an emphasis in product liability defense, insurance defense, and commercial law. I fully support the position paper of the North Dakota Defense Lawyers, and write to emphasize some of those points.

In my experience, the use of ADR to resolve disputes has been increasing steadily. It now seems that cases in which ADR is not used are the exception rather than the rule. I fully support ADR when all parties agree to its use, since it can lead to reductions in litigation expenses, and economies in judicial administration. I am opposed, however, to forced mediation, which the proposed amendments allow. Parties who do not agree to participate in ADR generally have legitimate reasons for their position. For example, the case may involve a matter of principle, or earlier settlement negotiations may indicate that ADR would be fruitless. If fewer than all parties agree to ADR, the prospects for settlement generally are poor. Yet, all parties must incur the cost of preparing for, and attendance at, the ADR session. Those costs can be substantial, particularly in complex cases, and when out-of state parties or representatives are required to incur traveling and lodging expenses to attend.

I am also opposed to the portion of the rule requiring parties to make a decision about ADR within 90 days of the filing of an answer. Often times, a defendant has no knowledge of the case until service of the summons and complaint. For example, in a product liability case, a manufacturer may have no knowledge of an accident involving its product until years later, when the plaintiff starts litigation. Under North Dakota's generous statute of limitations, that could be as many as six years later. The manufacturer must then play catch-up to learn about the accident, and to learn what the plaintiff's allegations of defect are. Understandably,

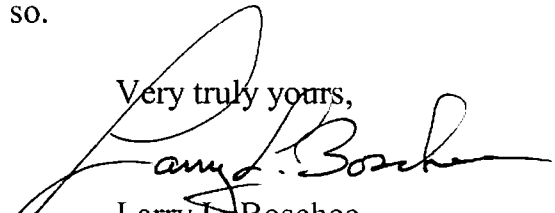
manufacturers are often unwilling to make a decision about mediation until they have done sufficient discovery to appraise their risk and exposure. More often than not, manufacturers ultimately do agree to ADR, but only after they have a full understanding of the case. In complex cases that turn upon expert testimony, that may not happen until after the depositions of the experts. Parties should not have to spend resources defending an early decision not to participate in ADR, when later they may agree to it anyway.

The proposed amendments not only allow a district court judge to force mediation, but to determine its timing as well. The timing of ADR can give the side with more complete knowledge of the case an unfair negotiating advantage. I have had the experience of representing parties who have resisted early ADR in cases that looked problematic, and then discovered an item of evidence that turned the case completely around in their favor. In at least one of those cases, the opposing party had to have known of this item of evidence, but apparently wanted to have the case resolved through mediation before the evidence could be discovered.

Finally, I am opposed to the requirement that a party certify that it has taken an ADR educational session before it may state that it does not wish to participate. Many business entities and insurers have full knowledge of ADR, and its advantages and disadvantages, because they use it when it is appropriate. I believe that representatives o these companies would be offended by a requirement that they read written materials or watch a videotape about ADR.

Thank you for your attention to this matter. If you have any questions, please contact me. If you would like me to testify at any hearing or meeting regarding the proposed amendments, I would be happy to do so.

Very truly yours,



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LLB/ef
Enclosure