

Eastern District of New York

IN BRIEF

Process summary

Arbitration. The Eastern District of New York is one of ten districts authorized by 28 U.S.C. §§ 651–658 to provide mandatory, nonbinding court-annexed arbitration in cases involving money damages only of \$100,000 or less. See below.

Early neutral evaluation (ENE). Under the district's CJRA plan, adopted December 17, 1991, the court has established a mandatory early neutral evaluation program. See below.

Mediation. The CJRA plan also authorizes a voluntary mediation program. See below.

Magistrate judge settlement conferences. Settlement conferences with judges are held in most civil cases. A settlement conference may be initiated at the request of a party, by the assigned judge, or by the magistrate judge to whom the case was referred. A settlement conference may be held at any time during the case. Most settlement conferences are conducted by magistrate judges.

Of note

Obligations of counsel. Counsel are required to read the district's ADR brochure and be prepared to discuss ADR and settlement with the judge at any pretrial conference, including the initial case management conference.

Information from court. An ADR brochure, *Dispute Resolution in the Eastern District of New York*, is distributed to counsel and litigants.

Plans. The court is considering amending its voluntary mediation program to authorize mandatory referral of cases to mediation by the assigned judge.

Evaluation. The court's ADR staff monitors the mediation and early neutral evaluation programs by requesting that mediators and evaluators complete a questionnaire after every case. The arbitration program in the Eastern District of New York was included in the Federal Judicial Center's study of the mandatory arbitration courts. See Barbara Meierhoefer, *Court-Annexed Arbitration in Ten District Courts* (Federal Judicial Center 1990). As one of the ten comparison districts under the CJRA, the court is also part of the RAND study of pilot and comparison districts, which will be reported to Congress by the Judicial Conference in 1996.

For more information

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IN DEPTH

Arbitration in New York Eastern

Overview

Description and authorization. The Eastern District of New York is one of ten districts authorized by 28 U.S.C. §§ 651–658 to provide mandatory, nonbinding court-annexed arbitration in cases involving money damages only of \$100,000 or less. Under the pro-

gram, which was implemented in January 1986, eligible cases are automatically referred to arbitration by the clerk's office after the answer is filed. Cases above the monetary limit may be referred to arbitration with the consent of all parties and approval of the court. In addition, cases not originally designated for mandatory arbitration may be referred later if the assigned judge determines they are eligible.

Most arbitration hearings are held within six months of the filing of the answer. A single arbitrator presides unless a panel of three is requested by the parties. The arbitrator is compensated by the court at court-set rates. In addition to federal statutory authorization, the program is authorized by the Local Arbitration Rule and the district's CJRA plan, adopted December 17, 1991.

Number of cases. Between January and September 1994, 527 cases were referred to arbitration.

Case selection

Eligibility cases. Eligible cases are those seeking money damages only of \$100,000 or less, exclusive of interest and costs. All civil cases are presumed by the court to involve money damages under the \$100,000 cap unless counsel file a certificate stating otherwise. Civil cases seeking more than \$100,000 in money damages may opt into the arbitration program by stipulation of the parties and with court approval. Excluded from arbitration are Social Security cases, tax matters, prisoner civil rights cases, constitutional claims, and claims arising under 28 U.S.C. § 1343.

Referral method. Cases eligible for automatic referral are referred to arbitration after the answer is filed. The arbitration clerk sends a notice of referral to counsel. Cases above the monetary limit may be referred with party consent. Cases not initially designated may be referred later if the assigned judge finds them eligible.

Opt-out or removal. To remove a case that has been automatically referred to arbitration, counsel must file a certificate with the court stating that the damages exceed the arbitration limit.

Scheduling

Referral. After an answer is filed in an eligible case, the arbitration clerk issues a notice of referral to counsel.

Discovery and motions. The notice of referral to arbitration advises counsel that they have ninety days to complete discovery unless the assigned district or magistrate judge varies the period by court order. All case activities go forward during the arbitration period and are handled by the assigned district or magistrate judge. The arbitration hearing date may be delayed by the trial court to permit rulings on timely filed dispositive motions or motions to join necessary parties.

Written submissions. No written submissions are required before the arbitration hearing.

Arbitration hearing. The hearing must be scheduled to take place within 120 days of the filing of the answer. Most hearings take place within 6 months of the answer. The arbitration hearing is held at the courthouse, and logistical arrangements are made by the court staff.

Length of hearing. Most arbitration hearings last about four hours.

Program features

Party roles and sanctions. In addition to counsel, all parties, corporate representatives,

or necessary claims professionals with full settlement authority are generally required to attend the hearing. If parties do not participate in the arbitration process in a meaningful manner, the court may impose appropriate sanctions, including but not limited to the striking of any demand for a trial de novo filed by that party.

Filing of award. The arbitration award is filed with the court and is entered as the judgment of the court if a request for trial de novo is not filed.

De novo request. A request for trial de novo must be filed within thirty days of the filing of the arbitration award. The requesting party must deposit with the court the amount of the fees paid to the arbitrator, which is returned if the party receives a more favorable award at trial than was rendered by the arbitrator.

Confidentiality. The arbitration award may not be disclosed to the trial judge until after the action has been terminated. No evidence concerning the arbitration hearing or award may be admitted at trial. Additionally, the court prohibits any contact between the arbitrator and the assigned judge before, during, or after the arbitration hearing.

Neutrals

Qualifications and training. To be certified as an arbitrator, candidates must be attorneys admitted to practice in the Eastern District of New York, must have at least five years of law practice, and must be determined competent to serve as an arbitrator by the court. No additional training is required.

Selection for case. One arbitrator presides at the hearing, unless the parties request a panel of three. The arbitrator is assigned to the case by the arbitration clerk, who selects an arbitrator with subject matter expertise from the court's roster of arbitrators.

Disqualification. Arbitrators are disqualified for bias or prejudice as provided in 28 U.S.C. § 144 and must disqualify themselves in any action in which they would be required to do so under 28 U.S.C. § 455 if they were a justice, judge, or magistrate judge.

Immunity. This issue is not addressed in the court's rules.

Fees. The court sets and pays the arbitrator fees. A single arbitrator receives \$250 per case. If three arbitrators are requested, each arbitrator receives \$100 per case.

Program administration

The clerk of court supervises the management of the ADR programs under the direction of the chief judge. The director of courtroom services and two arbitration deputy clerks manage the arbitration program. In addition, a district judge oversees the arbitration program.

Early Neutral Evaluation in New York Eastern

Overview

Description and authorization. Under its CJRA plan, adopted December 17, 1991, the Eastern District of New York has authorized mandatory referral of specified case types to early neutral evaluation. The program, which was implemented on June 30, 1992, is experimental. Mandatory referrals are permitted for certain categories of contract, tort, property, and statutory civil cases and are made by the assigned judge on a case-by-case basis. Voluntary referrals based on the consent of all parties are also permitted. ENE referrals may be made at the initial case management conference or at any time during the litigation.

The court's ENE program is aimed at early settlement and improved case planning. The neutral-evaluator identifies the primary issues in the dispute, as well as areas of agreement, explores the possibility of settlement if the parties desire, and provides an assessment of the relative strengths and weaknesses of the parties' positions and the value of the case. With the consent of the parties, private caucusing is permitted. The neutral-evaluator is an attorney with subject matter expertise and is selected by the ADR administrator from the court's roster of attorney-evaluators. The program is governed by the court's *Program Procedures for Early Neutral Evaluation*.

Number of cases. Between January and November 1994, ninety-three cases were referred to ENE.

Case selection

Eligibility of cases. Cases eligible for mandatory referral to ENE are those seeking damages over \$100,000 (the arbitration ceiling) and involving contracts, torts, civil rights, property rights, and specified other statutes. If qualified evaluators are available, individual judges are authorized to refer cases in other subject matter categories. In addition, parties in any civil case, other than those referred to the district's mandatory arbitration program, may participate in ENE by consent. Not eligible for referral are cases designated for mandatory arbitration and case categories not enumerated above.

Referral method. The assigned judge may refer an eligible case to ENE without party consent. When a case is designated for ENE, the clerk's office sends counsel copies of the judge's designation order, the notice of the appointment of the evaluator, and a copy of the ENE program procedures. Parties may also volunteer to participate in ENE.

Opt-out or removal. A case may be removed from ENE by the assigned judge.

Scheduling

Referral. The referral to ENE may be made at the initial status conference or at any time during the litigation.

Written submissions. At least ten days before the ENE session, each party must submit a statement of ten pages or less to the evaluator and, with the agreement of the evaluator and counsel, to opposing counsel. The statement names the party representative with decision-making authority who will attend the ENE session with counsel, indicates whether settlement would be aided if specified issues were resolved, and states whether additional discovery is needed before the session. Counsel may also identify persons from the other side whose presence at the ENE session might improve the session's productivity. Key case documents may also be submitted.

ENE session. The initial ENE session is held within forty-five days of the appointment of an evaluator by the clerk's office. The evaluator contacts all attorneys and sets the date and place of the ENE session. Sessions are usually held at the evaluator's office. The ENE process must be completed within sixty days of the clerk's notice of evaluator, unless additional time is granted. Time limits are monitored by the clerk's office.

Number and length of sessions. ENE sessions are generally two to three hours, and one to three sessions may be held.

Program features

Discovery and motions. All other case activities proceed during the ENE process. Parties may not use ENE to avoid or postpone any obligation imposed by the referring judge.

Party roles and sanctions. If counsel does not have full settlement authority, the party or party representative with full power to settle the case must attend. The court's plan does not specify whether or what type of sanctions might be imposed for failure to comply with the attendance and other requirements.

Outcome. The clerk's office advises the court whether or not the case has settled.

Confidentiality. Parties are asked to sign a confidentiality agreement at the start of the first evaluation session, which provides that

1. all written and oral communications made in connection with or during any ENE session are confidential;
2. no communication made in connection with or during any ENE session may be disclosed or used for any purpose in any pending or future proceeding; and
3. privileged and confidential status is afforded all communications made in connection with ENE sessions, including matters emanating from parties and counsel and evaluators' comments, assessments, and recommendations concerning case development, discovery, and motions.

In addition, evaluators must guarantee the confidentiality of all information provided to or discussed with them, and the clerk of court and the ADR administrator must also maintain strict confidentiality of all ENE information. No contact is permitted between the evaluator and the assigned judge, and no papers generated by the evaluation process are included in court files.

Neutrals

Qualifications and training. To be a member of the court's roster of neutrals, a candidate must have practiced law for at least five years; be admitted to practice in the district; and be determined by the court to be competent to perform the duties of a neutral. Evaluators must view a video about ENE. Some evaluators also attended a court-sponsored mediation/ENE training involving role plays and simulations.

Selection for case. When the clerk's office receives a copy of the order designating a case for ENE, it assigns an evaluator with expertise in the subject matter of the lawsuit from the court's roster of mediators and evaluators.

Disqualification. Evaluators are required to disqualify themselves in any action in which they would be required to do so under 28 U.S.C. § 455 if they were a justice, judge, or magistrate judge. If an evaluator is concerned that a potential conflict exists, the evaluator is required to promptly disclose the circumstances to all counsel in writing. If a party who believes that the assigned evaluator has a conflict of interest does not bring this concern to the attention of the clerk's office in writing within ten days of learning of the potential conflict, the objection is waived.

Immunity. This issue is not addressed in the court's rules.

Fees. Evaluators serve without compensation.

Program administration

The clerk of court supervises the management of the ADR programs under the overall direction of the chief judge. Within this structure, the ADR administrator manages the early neutral evaluation program. In addition, a district judge in each court location serves as liaison judge for ENE.

Mediation in New York Eastern

Overview

Description and authorization. In addition to its mandatory programs for ENE and arbitration, the Eastern District of New York has instituted a voluntary mediation program under its CJRA plan. The experimental program, which was implemented on June 30, 1992, authorizes use of mediation in all civil cases except those eligible for mandatory arbitration. Referral requires consent of all parties. Parties select a mediator from the court's roster or from another source and pay the mediator at market rates. The mediation program is governed by the court's *Program Procedures for Mediation*.

Number of cases. Between January and November 1994, seven cases were referred to mediation.

Case selection

Eligibility of cases. Any civil case, except one referred to the court's mandatory arbitration program, is eligible for referral to mediation, with the consent of all parties and the assigned judge.

Referral method. With the consent of all parties, a case may be referred to mediation by the assigned district or magistrate judge. The clerk's office provides counsel with copies of the judge's order, the notice of appointment of mediator if applicable, and a copy of program procedures.

Opt-out or removal. A party may withdraw from the mediation referral or mediation at any time.

Scheduling

Referral. A case may be referred to mediation at any stage in the litigation if the parties and the assigned judge approve.

Written submissions. At least seven days before the first mediation session, each party must submit a ten-page position paper to the mediator outlining key facts and legal issues in the case and describing any pending motions.

Mediation session. The first mediation session takes place within three weeks of the mediator's appointment. Logistical arrangements for the mediation session are made by the mediator, and the mediation session is held at the mediator's office.

Number and length of sessions. More than one mediation session is generally held in each case. Each session lasts about two to three hours.

Program features

Discovery and motions. All other case activities, including discovery, motion practice, and trial preparation, go forward during the mediation.

Party roles and sanctions. Client attendance at the mediation session is required only if counsel lacks full settlement authority. The court's plan does not specify whether or what type of sanctions might be imposed for failure to comply with the attendance and other requirements.

Outcome. If settlement is reached, the accord is put in writing and counsel file a stipulated dismissal or other appropriate termination. If the case does not settle, the mediator notifies the clerk's office and the case continues in the litigation process.

Confidentiality. At the start of the initial mediation session, the parties sign a confidentiality agreement to protect all written and oral communications made in con-

nection with or during any mediation session from disclosure or use in any pending or future proceeding or otherwise. The confidentiality agreement also provides that “privileged and confidential status is afforded all communications” of the parties, counsel, and mediator. In addition, mediators must guarantee the confidentiality of all information provided to or discussed with them, and contact between the assigned judge and mediator is prohibited. Papers generated by the mediation process are not included in court files, and information about what occurs during the mediation sessions may not at any time be made known to the court.

Neutrals

Qualifications and training. To be a member of the court’s roster of mediators and evaluators, candidates must have practiced law for at least five years, be admitted to practice in the Eastern District of New York, and be deemed competent by the court to perform the duties of an ADR neutral. Mediator candidates must also complete a minimum of two days of mediation training, using either the court’s training program or a program sponsored by a recognized ADR organization.

Selection for case. Parties have three options for selecting a mediator. They may ask the court’s ADR administrator to select a mediator with or without subject matter expertise from the court’s roster of mediators and evaluators; they may select a mediator from the roster; or they may seek the assistance of a private ADR provider.

Disqualification. Mediators are required to disqualify themselves in any action in which they would be required to do so under 28 U.S.C. § 455 if they were a justice, judge, or magistrate judge. If a mediator is concerned that a potential conflict exists, the mediator is required to promptly disclose the circumstances to all counsel in writing. A party who believes that the assigned mediator has a conflict of interest must bring this concern to the attention of the clerk’s office in writing within ten days of learning of the potential conflict or the objection is deemed waived.

Immunity. This issue is not addressed in the court’s rules.

Fees. The parties and the mediator agree on the mediator’s fee at the outset of the mediation. Mediators customarily receive their professional hourly rate for legal services, and fees generally are shared equally by the parties.

Program administration

The clerk of court supervises the management of the ADR programs under the overall direction of the chief judge. The ADR administrator manages the mediation program. In addition, a district judge in each court location serves as liaison judge for mediation.

Northern District of New York

IN BRIEF

Process summary

Arbitration. The Northern District of New York is one of ten courts authorized by 28 U.S.C. §§ 651–658 to offer voluntary, nonbinding court-annexed arbitration to civil litigants. See below.

Other ADR. On occasion a judge has conducted a summary jury trial or appointed a special master for settlement purposes.

Magistrate judge settlement conferences. Each civil case is referred to a magistrate judge for pretrial discovery and settlement discussions. Each party must provide the court and all parties with a settlement conference statement five days before the conference. The settlement statement is not filed with the court.

Of note

Obligations of counsel. Attorneys must discuss the voluntary arbitration program with their clients and opposing counsel and must be prepared to discuss arbitration with the assigned judge at the initial case management conference. Counsel must also address the case's suitability for arbitration and settlement in their proposed case management plan.

Information from court. Information about the arbitration program is issued by the court at filing and served by the plaintiff on all parties. Additionally, the court participates in bar gatherings throughout the district to explain its case management and ADR approaches.

Plans. The court is considering adoption of early neutral evaluation, mediation, and settlement week and has surveyed the bar about the court's ADR approaches.

Evaluation. The court's voluntary arbitration program was studied by the Federal Judicial Center as part of its evaluation of the voluntary arbitration programs. See David Rauma & Carol Krafka, *Voluntary Arbitration in Eight Federal District Courts: An Evaluation* (Federal Judicial Center 1994).

For more information

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IN DEPTH

Arbitration in New York Northern

Overview

Description and authorization. The Northern District of New York is one of ten districts authorized by 28 U.S.C. §§ 651–658 to provide voluntary, nonbinding court-annexed arbitration. This experimental program, which is governed by Local Rule 83.7, was implemented on April 30, 1991. Parties in eligible cases are informed of the court's arbitration program at filing and at the initial case management conference. If parties consent to arbitration, they may elect to proceed before a single arbitrator or a panel of

three arbitrators. Parties who are not satisfied with the arbitration award may file a request for trial de novo within thirty days of the filing of the award. The court pays the arbitrator's fees.

Number of cases. No cases were referred to arbitration between January and September 1994.

Case selection

Eligibility of cases. All civil cases are eligible for voluntary arbitration except pro se prisoner civil rights cases, habeas corpus cases, Social Security appeals, bankruptcy appeals, forfeitures and foreclosures, debt collection cases, and cases in which legal issues predominate.

Referral method. A case is referred to arbitration by consent of all parties and a judicial referral order. The plaintiff, using the court's forms, is responsible for securing the consent of all parties to arbitrate.

Opt-out or removal. Any party to the arbitration may request removal from arbitration at any time by filing a motion with the assigned judge. The assigned judge may also exempt a case from arbitration on his or her own motion.

Scheduling

Referral. Cases may be referred to arbitration at any time if the parties consent. Referrals generally occur at the initial case management conference. If a motion to dismiss or join parties is pending, the referral to arbitration is delayed until the motion is decided.

Discovery and motions. Parties have 120 days to complete discovery unless the referral order issued by the assigned judge grants more or less time. Arbitration is suspended if a dispositive motion is filed. All time frames set by the court's referral order are monitored by the court.

Written submissions. The plaintiff's attorney sends the arbitrator copies of all pleadings when the arbitrator is appointed. At least ten days before the arbitration hearing, each attorney sends the arbitrator and the opposing party copies of all exhibits that will be used at the hearing.

Arbitration hearing. The arbitration clerk sets the date of the hearing, which is held in a courtroom and takes place within six months of the arbitration referral order.

Length of hearing. Arbitration hearings generally last about four hours.

Program features

Party roles and sanctions. The arbitrator may order the parties to attend the arbitration hearing. If a party fails to participate in a meaningful manner, the arbitrator must notify the clerk in writing. The assigned judge will conduct a hearing on the issue and impose appropriate sanctions, including but not limited to the striking of any demand for a trial de novo filed by the offending party.

Filing of award. The arbitration decision must be issued within ten days of the hearing. The decision is filed under seal and becomes the final judgment unless a party files a timely request for trial de novo.

De novo request. Parties desiring trial de novo must file a request within thirty days of the arbitration decision. The party requesting trial de novo must deposit a sum equal to the arbitrator's fees with the clerk. If the requesting party fails to obtain a judgment more favorable to that party than the arbitration decision, the deposited funds are kept by the court.

Confidentiality. The hearing is closed to the public and the decision is placed under seal and may not be made known to any judge unless (1) the assigned judge is asked to decide whether to assess costs; (2) the court has entered final judgment or the action has been terminated; or (3) the judge needs the information for the purpose of preparing the report required by § 903(b) of the Judicial Improvements and Access to Justice Act. At trial de novo, the court may not admit any evidence regarding the arbitration.

Neutrals

Qualifications and training. To serve as an arbitrator, a candidate must be admitted to practice in the district; must have a minimum of five years' experience as a practicing attorney; and must have devoted at least 50% of his or her practice in the past five years to litigation or dispute resolution. Arbitrators are also charged with familiarizing themselves with the court's arbitration procedure manual.

Selection for case. The parties may select a single arbitrator or a panel of three arbitrators from the court's roster. If the parties prefer, the clerk will prepare a short list of arbitrator candidates from the full roster.

Disqualification rules. No party may serve as an arbitrator in an action in which any of the circumstances specified in 28 U.S.C. § 455 exist or in good faith are believed to exist.

Fees. The court compensates arbitrators at a rate of \$100 per day for each member of a panel of three arbitrators or \$250 per day for a single arbitrator.

Immunity. This issue is not addressed in the local rules.

Program administration

The program is administered and monitored by the arbitration clerk. A CJRA subcommittee consisting of the court's CJRA attorney, chief deputy clerk, and local attorneys reviews the program and recommends changes. Procedural problems are handled by the arbitration clerk; legal issues are referred to the district or magistrate judge assigned to the case.

Southern District of New York

IN BRIEF

Process summary

Mediation. With the adoption of its CJRA plan on December 12, 1991, the Southern District of New York established in its Manhattan Division a mandatory mediation program for civil cases involving only money damages. Lawyer-neutrals trained and assigned by the court serve as mediators without pay. Between January and September 1994, 582 cases were found eligible for mediation. See following description.

Judicial settlement conferences. A judge-hosted settlement conference is usually held in every civil case.

Of note

Obligations of counsel. Counsel must discuss ADR with their clients and be prepared to discuss ADR and settlement with the court.

Information from court. A guide to the court's mediation program and other aspects of the district's CJRA plan is available from the clerk's office.

Evaluation. The court's CJRA advisory group conducted an evaluation of the mediation program. In addition, as one of ten pilot courts under the CJRA, the Southern District of New York is part of the RAND study of the pilot and comparison districts, which will be reported to Congress by the Judicial Conference in 1996.

For more information

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IN DEPTH

Mediation in New York Southern

Overview

Description and authorization. Under its CJRA plan, adopted December 12, 1991, the Southern District of New York established in its Manhattan Division a mandatory mediation program for civil cases that involve money damages only. Social Security, prisoner, tax, and pro se cases are excluded. Under the system, eligible cases are reviewed by the CJRA staff attorney and the assigned judge for suitability for mediation. Lawyer-neutrals trained and assigned by the court serve as mediators without pay.

Number of cases. From January through September 1994, 582 cases were found eligible for mediation. During this time period, two new cases were scheduled for mediation each business day.

Case selection

Eligibility of cases. All cases seeking only money damages are eligible for mandatory referral to mediation except cases seeking relief other than money damages and Social Security, tax, prisoner civil rights, and pro se cases. The parties in any ineligible case may ask the court by written stipulation to refer the case or any part of it to mediation.

Referral method. All cases are reviewed by the CJRA staff attorney and the assigned judge for eligibility for mediation. At the initial case management conference, the judge discusses mediation with the parties, and the judge and parties decide whether the entire case or parts of it should be referred. A general time frame for the mediation is set and the judge then prepares an order referring the case.

Opt-out or removal. Parties may ask the court to remove a case from the mediation process.

Scheduling

Referral. Referral to mediation occurs at the initial case management conference or at any other appropriate time.

Written submissions. At least seven days before the mediation conference, the parties give the mediator copies of their pleadings and a memorandum of ten pages or less stating their positions regarding liability and damages. If the parties agree, copies of the

memorandum are exchanged with opposing parties.

Mediation session. The mediation session should occur within 150 days of the last responsive pleading. The court's CJRA staff counsel schedules the sessions, which are held at the courthouse.

Number and length of sessions. The mediation session continues as long as the mediator and the parties make progress toward resolution. Mediation sessions last about three to four hours, and generally three or four sessions are required to resolve a case.

Program features

Discovery and motions. Other case activities, such as discovery, go forward as scheduled during the mediation process.

Party roles and sanctions. In addition to the attorney primarily responsible for the case, the mediator may require a party representative with settlement authority to attend the mediation sessions. Refusal of a party to attend is reported to the assigned judge and may result in sanctions. In addition, the court will take whatever action is appropriate when noncompliance with any other aspect of the court's referral order is reported.

Outcome. If settlement is reached, a written agreement is prepared, along with a stipulation of discontinuance. The stipulation is presented to the assigned judge for approval, and the action is dismissed with prejudice. If settlement is not reached, the mediator files a statement with the CJRA staff counsel stating that no settlement was reached. Thereafter, the case is treated as if the mediation process had not occurred.

Confidentiality. Nothing said at the mediation conference may be reported, recorded, or made known to the assigned judge or construed as an admission. No party is bound by anything said or done at a mediation conference unless settlement is reached.

Neutrals

Qualifications and training. To become a member of the court's roster of mediators, a candidate must have been a member of any state's bar for five years, be admitted to practice in the district, have completed the court's two-day mediation training, and be certified by the chief judge as competent to perform the duties of mediator.

Selection for case. Within ten days of the mediation referral order, the CJRA staff attorney assigns a mediator from the court's panel of mediators and notifies the parties of the appointment.

Disqualification. A mediator is required to disqualify himself or herself in any action in which he or she would be required to do so under 28 U.S.C. § 455 as a justice, judge, or magistrate judge. Any party may submit a written request to the CJRA staff counsel within ten days of the notice of mediator appointment to seek disqualification of the mediator for bias or prejudice under 28 U.S.C. § 144. Denial of the disqualification request is reviewable by the assigned judge.

Immunity. The court's advisory group takes the position that "a person serving as a volunteer mediator and acting under an order of a Judge of this Court would be entitled to absolute quasi-judicial immunity as are other governmental officials who play an integral part in the implementation of the judicial function." Memorandum from Robert W. Sweet to Volunteer Court Mediators (July 17, 1992).

Fees. Mediators are not compensated for their services. They are eligible, however, to receive credit for pro bono service.

Program administration

The mediation program is administered by the CJRA staff counsel. Changes to the basic structure of the program are reviewed by the court's CJRA advisory group and must be approved by the board of judges.

Western District of New York

IN BRIEF

Process summary

Arbitration. The Western District of New York is one of ten courts authorized by 28 U.S.C. §§ 651–658 to establish a voluntary, nonbinding court-annexed arbitration program. See below.

Other ADR. In the fall of 1995, the Erie County Bar Association worked with the court to sponsor a pilot settlement week. The program was considered a success, and the court is now considering whether to establish regular settlement weeks or some other form of ADR.

Judicial settlement conferences. The court authorizes mandatory settlement conferences. Local Rule 16.1 provides that in all civil cases (other than pro se prisoner, habeas corpus, and Social Security cases) an initial settlement conference will be set for no later than ninety days after the issuance of a Rule 16 scheduling order. In addition, the court's CJRA plan, adopted September 1, 1993, provides that "Judges and Magistrate Judges will take an active role in encouraging the settlement of cases by bringing the parties together to discuss settlement in the presence of the Court."

Of note

Information from court. After the last responsive pleading is filed in any civil case other than a habeas corpus case or a Social Security appeal, the arbitration clerk sends information to all parties about the voluntary arbitration program.

Plans. Under the court's CJRA plan, additional court ADR programs are being considered.

Evaluation. The court's arbitration program is part of a study reported in David Rauma & Carol Krafka, *Voluntary Arbitration Programs in Eight Federal District Courts: An Evaluation* (Federal Judicial Center 1994).

For more information

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IN DEPTH

Arbitration in New York Western

Overview

Description and authorization. The Western District of New York is one of ten pilot courts authorized by federal statute to provide voluntary, nonbinding court-annexed arbitration under 28 U.S.C §§ 651–658. The program was implemented in October 1992 under Local Rule 16.2, which authorizes arbitration in any civil case at any time before trial if all parties consent. One arbitrator or a panel of three arbitrators may be requested by the parties. Arbitrators may be appointed by the court from its roster of certified attorney-arbitrators, or the parties may select an arbitrator from another source. The arbitrators are paid by the court. If a noncourt arbitrator’s fees exceed the court’s rate of compensation, the parties are responsible for the difference.

Number of cases. Between January and September 1994, one case was referred to arbitration.

Case selection

Eligibility of cases. Nearly every civil case type may use arbitration with consent of all parties except Social Security cases and habeas corpus petitions.

Referral method. After the last responsive pleading is filed, the clerk notifies the parties that they may consent to arbitration at any time before trial. To trigger referral to arbitration, a consent form signed by all parties must be filed with the court. The arbitration clerk then notifies the parties in writing of the date, time, and place of the arbitration hearing.

Opt-out or removal. The local rules do not specify a procedure for removing a case from arbitration after it has been referred.

Scheduling

Referral. Parties may consent to arbitration at any time before trial. After the last responsive pleading and the arbitration consent form are filed, the arbitration clerk sends a notice to counsel setting the date, time, and location for the arbitration hearing.

Discovery and motions. All case activities go forward during the arbitration process and are handled by the assigned judge.

Written submissions. Once the order designating the arbitrators is filed, the arbitration clerk sends each arbitrator copies of all the pleadings, the court docket sheet, and the *Guidelines for Arbitrators*. At least ten days before the arbitration hearing, counsel submit to the arbitrators and opposing counsel copies of all exhibits to be used at the hearing and a list of all witnesses who will testify.

Arbitration hearing. If the parties file a request for an immediate hearing, one is scheduled within 30 days of the filing of the request. If no immediate hearing is requested, an arbitration hearing is scheduled no later than 180 days from the date the last responsive pleading was filed. Notwithstanding these rules, the arbitration proceeding does not commence until 30 days after the court disposes of any motion to dismiss the complaint, for judgment on the pleadings, or to join parties, if the motion was filed and served within 20 days of filing the last responsive pleading. Arbitration hearings are scheduled by the clerk’s office and are held at the courthouse.

Length of hearing. Most arbitration hearings are concluded in less than a day.

Program features

Party roles and sanctions. Parties are required to attend the arbitration hearing. If a party fails to appear after being notified, the arbitration hearing proceeds without the absent party. The court's rule does not specify whether or what type of sanctions might be imposed for failure to comply with the attendance and other requirements.

Filing of award. The arbitrator must file the award with the clerk within ten days of the hearing. The clerk serves copies on the parties. If there is no request for trial de novo within thirty days of filing the award, the clerk enters the award as the judgment in the case.

De novo request. The party demanding trial de novo must do so within thirty days of the filing of the award and must deposit with the clerk an amount equal to the cost of the arbitrator's services. If that party fails to obtain a judgment in an amount that, exclusive of costs and interest, is more favorable to that party, the clerk pays the deposited sums to the U.S. Treasury. If the party obtains an equivalent or more favorable result, the party is reimbursed for its prepaid costs.

Confidentiality. The contents of the arbitration award are not made known to any judge who might preside at trial or rule on dispositive motions until the clerk has entered final judgment or the action has otherwise terminated. No evidence may be admitted at trial indicating that an arbitration proceeding has occurred, the nature or amount of the award, or any other matter concerning the arbitration proceeding.

Neutrals

Qualifications and training. An individual may be certified to serve as an arbitrator if he or she is a member of the bar of the State of New York; is admitted to practice before the Western District of New York; and is determined by the certifying judge to be competent to perform the duties of an arbitrator. No training is required for arbitrators.

Selection for case. The parties may proceed before one arbitrator or a panel of three arbitrators selected randomly by the clerk from the court's list of certified arbitrators. Alternatively, they may ask the court's permission to select an arbitrator from another source.

Disqualification. An arbitrator must inform all parties in writing as to whether the arbitrator or any firm or member of the firm with which the arbitrator is affiliated has, either as a party or as an attorney, at any time within the past five years been involved in litigation with or represented any party to the arbitration or any agency, division, or employee of such party. Furthermore, on motion made to the court not later than twenty days before a scheduled arbitration hearing, the court may disqualify an arbitrator for bias or prejudice as provided in 28 U.S.C. § 144. Arbitrators must disqualify themselves if they could be required to do so under 28 U.S.C. § 455 if they were a justice, judge, or magistrate judge.

Immunity. This subject is not addressed in the local rule.

Fees. Single arbitrators are compensated at the rate of \$250 per case. Arbitrators who serve on a panel are compensated at a rate of \$100 each per case. The court pays the fees of arbitrators selected from the court's roster. Outside arbitrators' fees must be paid by the parties to the extent that they exceed the approved rate of compensation.

Program administration

The court's arbitration program is administered by the clerk's office with the assistance of a liaison judge.

Eastern District of North Carolina

IN BRIEF

Process summary

Mediation. Under its CJRA plan, effective December 1, 1993, and Local Rule 32, the Eastern District of North Carolina has authorized a mediation program. See below.

Magistrate judge settlement conferences. Magistrate judges preside over settlement conferences when a conference is directed by the court or requested by all parties. District judges rarely participate in settlement conferences. Authorized representatives with full settlement authority must attend. The conferences are confidential.

Summary jury and bench trials. On occasion the court will refer a case to a summary jury or bench trial. Two of the court's magistrate judges conduct these advisory trials.

Of note

Information from court. The court intends to establish a process for sending ADR information to all parties when their case is four months old.

For more information

David W. Daniel, Clerk of Court, 919-856-4407

Carol Manning Morgan, CJRA Staff Attorney, 919-856-4370

IN DEPTH

Mediation in North Carolina Eastern

Overview

Description and authorization. Under its CJRA plan, effective December 1, 1993, and Local Rule 32, the Eastern District of North Carolina has established a mediation program. The program, which was implemented in February 1994, authorizes the court on its own motion or at the request of the parties to refer any case to mediation. A single mediator chosen by the court from the court's roster or selected by the parties with court approval meets with the parties in an effort to reach settlement. The mediator is permitted to meet privately with both sides, and all statements made by the participants are confidential. The mediator is paid by the parties at a court-set fee or at market rates approved by the court.

Number of cases. No cases were referred to mediation between February 1994, when the program was adopted, and September 1994.

Case selection

Eligibility of cases. Any civil case is eligible for referral to mediation. No case types are excluded or assumed inappropriate.

Referral method. The court may on the request of all parties or on its own motion order any action or portion thereof to mediation.

Opt-out or removal. A party may move within ten days of the court's order referring an action or portion thereof to mediation to dispense with or defer the mediation conference. The court may grant the motion only for good cause shown.

Scheduling

Referral. A referral to mediation is made when the parties request it or the court believes it is appropriate.

Written submissions. At any time after the appointment of the mediator a party may send the mediator a memorandum presenting its contentions and positions. It does not need to send the memorandum to the other parties.

Mediation session. Unless otherwise ordered by the court, the mediation session must begin within sixty days of the court's referral order and be completed within thirty days of the first session. The mediator is responsible for making all arrangements for the sessions, which should generally be held at the courthouse, and for notifying parties and counsel.

Number and length of sessions. The length of a mediation session depends on the complexity of the case.

Program features

Discovery and motions. Other case activities, including discovery, motions, and trial preparation, proceed during the mediation process unless stayed by judicial order.

Party roles and sanctions. The mediation session must be attended by all individual parties; any person having authority to settle on behalf of a corporate party; a governmental representative with full authority to settle; the parties' counsel; and, for insurance companies, a representative other than outside counsel who has full authority to settle. All parties must be prepared to discuss in detail and good faith all liability and damages issues and their positions relative to settlement. If a party fails to attend or to participate in good faith in a mediation conference, the court may impose sanctions, including attorneys' fees, mediator fees and expenses, and expenses incurred by parties attending the conference; a contempt order; or any other sanction authorized by Fed. R. Civ. P. 37(b).

Outcome. The mediator must file a report with the court in writing within five days of the close of the mediation session indicating who attended the conference and whether settlement was reached. If an agreement was reached, the report states whether the action will conclude by consent judgment or voluntary dismissal and identifies the person designated to file these papers. If agreement was not reached, the report indicates whether there has been compliance with the court's mediation requirements.

Confidentiality. The entire mediation proceeding is confidential. All proceedings and any statements made by any party, attorney, or other participant are privileged and may not be reported, recorded, placed in evidence, made known to the trial court or jury, or construed for any purpose as an admission. No party is bound by anything done or said at the conference unless a settlement is reached.

Neutrals

Qualifications and training. An individual may be certified by the chief judge to be a mediator if he or she (1) is a former state judge who presided in a court of general jurisdiction and was also a member of the bar in the state in which he or she presided; (2) is a retired federal judge; (3) has been certified as a mediator by the North Carolina Administrative Office of the Courts pursuant to the Rules Implementing Court-Ordered Mediated Settlement Conferences adopted by the Supreme Court of North Carolina (which requires forty hours of training); or (4) has been a member of the North

Middle District of North Carolina

Carolina Bar for at least ten years and is currently admitted to the bar of this court.

Selection for case. The judge's order of referral either appoints a mediator or directs the parties to notify the judge of their selection within fourteen days. Mediators are selected from the court's roster. If the judge finds that the mediator selected by the parties is not qualified, the judge may select another mediator.

Disqualification. Any person selected as a mediator may be disqualified for bias or prejudice as provided in 28 U.S.C. § 144 and must be disqualified in any case in which such action would be required by a justice, judge, or magistrate judge governed by 28 U.S.C. § 455. Any party may move the court to enter an order disqualifying a mediator for good cause. Mediators have a duty to disclose any fact bearing on their qualifications that would be grounds for disqualification. If the court rules that a mediator is disqualified from hearing a case, an order will be entered setting forth the name of a qualified replacement. Nothing in this provision precludes mediators from disqualifying themselves or refusing any assignment. The time for mediation is tolled during any periods in which a motion to disqualify is pending.

Immunity. Local Rule 32 states, "A mediator appointed by the Court pursuant to these rules shall have judicial immunity in the same manner and to same extent as a judge."

Fees. The order of referral either adopts the court-set rate of compensation for neutrals or directs the parties to agree on a rate with the neutral and to notify the court within fourteen days. If the parties cannot agree, the court will set the rate of payment for the mediator. The fee is borne equally by the parties unless they agree to another arrangement. Mediators may not accept any other compensation without written approval of the court.

Program administration

The program is administered by the clerk's office. Any problems that may arise are referred to the clerk of court.

Middle District of North Carolina

IN BRIEF

Process summary

Mediation. Under its CJRA plan, effective December 1, 1993, the Middle District of North Carolina established a mediation program for specified types of cases. See below.

Arbitration. The court suspended its mandatory, nonbinding court-annexed arbitration program for cases of \$150,000 or less on December 1, 1993. Under the program, established in 1985 and authorized by 28 U.S.C. §§ 651-658 and Local Rules 601-608, the court automatically referred all civil cases seeking money damages of \$150,000 or less to arbitration. The local rule on arbitration has been superseded by the new rule authorizing mediation.

In suspending the arbitration program, the court reported that the arbitration program's potential for cost and time savings were hindered by Congress' adoption of 28 U.S.C. § 653(b) forbidding arbitration "until 30 days after the disposition of the dis-

Middle District of North Carolina

trict court of any motion to dismiss the complaint, motion for judgment on the pleadings, motion to join necessary parties, or motion for summary judgment” Delaying arbitration until resolution of dispositive motions prevented the cost and time savings anticipated by the court. Subsequently, arbitration has been used only in cases designated for that process before December 1, 1993, and no other cases have been referred to arbitration.

Judicial settlement conferences. The judges conduct settlement conferences in all cases set for trial during four master calendar trial sessions conducted each year pursuant to the court’s CJRA plan. About twenty-five to thirty-five cases are set on each trial calendar, and of these about half settle at a judicial settlement conference. Another 40 percent settle after receiving notice of the trial date, and the remainder are tried.

Of note

Evaluation. Evaluations of the court’s arbitration program are reported in Barbara Meierhoefer, *Court-Annexed Arbitration in Ten District Courts* (Federal Judicial Center 1990), and E. Allan Lind, *Arbitrating High-Stakes Cases—An Evaluation of Court-Annexed Arbitration in a United States District Court* (The Institute for Civil Justice, RAND, 1990).

For more information

J. P. Creekmore, Clerk of Court, 910-333-5198
Jean Maloyed, Mediation Coordinator, 910-333-5347

IN DEPTH

Mediation in North Carolina Middle

Overview

Description and authorization. Under its CJRA plan and Local Rules 601–607, both effective December 1, 1993, the Middle District of North Carolina has established a mandatory mediation program. Specified case types, including contract, tort, and civil rights, are automatically referred to mediation at filing. The purpose of the program is to provide parties with early settlement assistance from an experienced attorney-mediator. The parties share the mediator’s fee equally, which is set by the court at \$125 an hour.

Number of cases. From January through December 1994, 292 cases were referred to mediation.

Case selection

Eligibility of cases. The court has designated certain case types as eligible for automatic referral to mediation, including specified categories of contract, tort, civil rights, labor, property rights, and antitrust cases; cases involving banks and banking and securities, commodities, and exchange; and environmental matters. In any case not automatically referred, the court may in its discretion order mediation, or the parties may stipulate to mediation. Unless specifically assigned by a judge, cases ineligible for mediation include pro se, specified contract and real property, prisoner, forfeiture/penalty, bankruptcy, Social Security, and federal tax cases, as well as cases under other specified statutes.

Referral method. Eligible cases are referred to mediation automatically at filing. Notice is sent to the parties, along with a list of mediators.

Opt-out or removal. Parties may move individually or jointly for exemption for good cause.

Scheduling

Referral. Notice of referral is sent shortly after the case is filed.

Written submissions. No later than five business days before the scheduled date of the mediation conference, any party may submit a confidential position paper to the mediator to familiarize the mediator with the case.

Mediation session. The mediation session is held as early as possible in the case unless the court specifically orders otherwise.

Number and length of sessions. The number and length of sessions are at the discretion of the mediator and parties.

Program features

Discovery and motions. Discovery is not tolled during the mediation process.

Party roles and sanctions. Individual parties, corporate representatives, or insurance representatives with full authority to settle the claim must attend the mediation session with counsel. If a person fails to attend without good cause, the court may impose sanctions, including but not limited to attorney's fees, the mediator's fees, and expenses incurred by those attending the session.

Outcome. At the end of the session, the mediator must immediately submit to the clerk a status report. If the parties reach a settlement agreement, they must put it in writing and prepare a stipulation of dismissal or consent judgment for presentation to the court.

Confidentiality. The proceedings are confidential. The mediator's report is not included in the case file but is placed in a separate, confidential file.

Neutrals

Qualifications and training. Attorneys may serve on the court's roster if they have been certified as mediators pursuant to the rules of the North Carolina Supreme Court and have at least eight years of civil trial practice or membership on the faculty of an accredited law school. Attorneys who were on the court's panel of arbitrators as of December 1, 1993, may also serve. The North Carolina Supreme Court requires forty hours of mediation training through a program supervised by the North Carolina Bar Association.

Selection for case. Parties are encouraged to select their own mediator by agreement and to notify the court of their selection within twenty days of the initial pretrial order. They may choose a mediator from the court's roster or elsewhere, but mediators not on the court's roster must agree to be bound by the court's rules. If the parties do not file a timely selection, the clerk selects the mediator from the court's roster and notifies the parties.

Disqualification. Up to twenty days before a scheduled mediation conference, the court may disqualify a mediator for bias or prejudice as provided in 28 U.S.C. § 144. A mediator must disqualify himself or herself if the mediator would be required to do so under 28 U.S.C. § 455 if he or she were a justice, judge, or magistrate judge.

Immunity. The court has not addressed this issue.

Fees. The mediator is compensated by the parties at an hourly rate set by the chief judge (currently \$125 an hour) and shared equally by the parties. Parties who cannot pay may seek relief from the obligation by filing a motion and affidavit of financial standing. If the party is excused from payment, the mediator's service is provided pro bono.

Program administration

The mediation program is administered by the clerk's office.

Western District of North Carolina

IN BRIEF

Process summary

ADR generally. Under the CJRA plan as amended on December 16, 1994, litigants in almost all civil cases filed in the Western District of North Carolina after January 1, 1995, are required to participate in mediation or another form of ADR. Other ADR forms authorized by the court include arbitration, early neutral evaluation, minitrial, and summary jury trial. Litigants must notify the court of their ADR choice within thirty days of the close of discovery by filing an ADR stipulation. If the parties do not select an ADR option or if they cannot agree on a process, the court refers the case to its mediation program. If the parties select a process other than mediation, they must provide the court with proposed procedural rules for the process.

Mediation. Mediation is one of several ADR options authorized by the court's CJRA plan as amended on December 16, 1994. See below.

Judicial settlement conferences. Under the CJRA plan as amended on December 16, 1994, the assigned judge may refer any case to a mandatory settlement conference, or a party may request a settlement conference at any time. A client with full settlement authority must attend the settlement conference with counsel.

Of note

Obligations of counsel. Attorneys are required to meet and confer about case management issues, including the suitability of ADR; they must certify to the court they have met, and if possible, submit a joint proposed case management plan. Counsel must also be prepared to discuss settlement and ADR with the court at all case conferences.

Information from court. At filing, counsel receive a copy of the district's CJRA plan, which describes the district's differentiated case management system and ADR initiatives.

For more information

Frank G. Johns, Clerk of Court, 704-344-6203

IN DEPTH

Mediation in North Carolina Western

Overview

Description and authorization. Under the CJRA plan as amended on December 16, 1994, litigants in almost all civil cases filed in the Western District of North Carolina after January 1, 1995, must participate in mediation or another form of ADR. If parties do not select an ADR process, the court refers the case to the court-based mediation program. Referral occurs after the close of discovery. The mediation sessions are conducted by trained attorney-mediators selected from the court's roster or, with court approval, from the private sector. Parties who select their own mediator must reach agreement with the mediator regarding the fee. Mediators appointed by the court receive the court-set fee, while parties found indigent by the court pay no fee. The process is governed by the CJRA plan and by the Rules Governing Mediated Settlement Conferences in Superior Court Civil Actions promulgated by the North Carolina Supreme Court.

Number of cases. Information on the number of cases referred to mediation is not yet available.

Case selection

Eligibility of cases. Almost all civil cases filed on or after January 1, 1995, will be referred by the court to mediation, or another form of ADR selected by the litigants, except habeas corpus proceedings or other actions for extraordinary writs; appeals from rulings of administrative agencies; forfeitures of seized property; and bankruptcy appeals. Other cases may be excluded from mandatory ADR by the assigned judge on a case-by-case basis, based on a determination that the case is not suited to ADR.

Referral method. Referral to some form of ADR is required in almost every civil case. Litigants in civil cases filed after January 1, 1995, are required to notify the court of their choice by written stipulation for alternative dispute resolution within thirty days of their discovery deadline. If no stipulation is filed, the court refers the case to mediation, and an ADR order is entered.

Opt-out or removal. Within ten days of the court's order of referral, a party may file a motion with the referring judge to dispense with or defer the mediation for good cause.

Scheduling

Referral. The assigned judge issues the ADR referral order after receiving the parties' ADR stipulation, which must be filed within thirty days of the discovery deadline in the case.

Written submissions. No submissions are required.

Mediation session. Mediation sessions are generally held at the courthouse, and logistical arrangements are made by the mediator. The mediation session (or other selected ADR process) must be completed within ninety days of the entry of the ADR referral order or by the trial date, whichever is earlier.

Number and length of sessions. This information is not yet available.

Program features

Discovery and motions. All case activities must go forward during the mediation process unless stayed by judicial order.

Party roles and sanctions. In addition to counsel, the party or a representative with full settlement authority must attend the mediation session. If a government agency is party to the suit, a representative of the agency with full authority to negotiate on behalf of the agency and to recommend settlement to the appropriate agency decision maker must attend. For an insured party, a settlement-empowered insurer representative other than outside counsel must attend. If the participant lives more than 200 miles from the location of the mediation session, attendance may be by telephone with prior consent of the assigned judge. Monetary or other sanctions may be imposed for failure to comply with the attendance requirements.

Outcome. Within seven days of the conclusion of the mediation session, the mediator must file a report with the court indicating whether the case settled.

Confidentiality. ADR proceedings and information relating to or disclosed during the proceedings are protected by Fed. R. Evid. 408. A neutral may not be deposed or called as a witness to testify at any subsequent proceeding concerning anything said or done in an ADR proceeding. The neutral's notes are privileged and not subject to discovery. No record is made of the mediation session, and ex parte communication between the neutral and litigants is prohibited without party consent, except for scheduling purposes.

Neutrals

Qualifications and training. To be certified, a mediator must be a member of the North Carolina Bar, have five years of experience as a judge, attorney, law professor or mediator, and have completed at least forty hours of mediation training in a program certified by the state. In addition, candidates must pay an administrative fee and must agree to mediate indigent cases without compensation.

Selection for case. Mediator selection is governed by the mediation rules promulgated by the North Carolina Supreme Court, which also govern the state court mediation programs. See Rules Governing Mediated Settlement Conferences in Superior Court Civil Actions, (Rule 2: Selection of Mediator). Under these rules, litigants must select a mediator within twenty-one days of the court's order of referral or must notify the court of their inability to agree on a mediator, whereupon the assigned judge appoints a mediator. The parties may select any mediator certified under the state rules, or the parties may ask the assigned judge to approve a mediator who is not state certified. The court makes a directory of certified mediators available to litigants.

Disqualification. The mediator has a duty to advise all parties of any circumstances bearing on possible bias, prejudice, or partiality.

Immunity. The court believes that neutrals acting pursuant to the court's ADR procedures have judicial immunity in the same manner and to the same extent as a judge of the district court.

Fees. When the mediator is selected by the parties, the mediator's fee is determined by the parties and the mediator. When the mediator is appointed by the court, the mediator is compensated at a court-set rate. Parties usually pay the mediator's fees in equal shares. Parties found indigent by the court have no payment obligations, and the neutral's fee is reduced by the indigent party's share.

Program administration

The program is administered by the clerk's office, and the assigned judge handles individual case management matters relating to mediation or other ADR in that judge's cases.

District of North Dakota

IN BRIEF

Process summary

ADR and settlement generally. In the District of North Dakota, the CJRA plan, effective December 1, 1993, encourages parties in all civil cases, except foreclosures, Social Security, and prisoner cases, to explore voluntary ADR options early in the pretrial process. The purpose of the court's ADR program is to enhance opportunities for early resolution of the dispute. The court's form scheduling/discovery plan alerts counsel to the following options: court-hosted early settlement conference; early neutral evaluation with a judge other than the trial judge, a neutral technical expert, or a neutral attorney; private mediation, arbitration, or other ADR forms specified by the parties; or no ADR. If the parties select an early ADR procedure at the Rule 16(b) conference, the assigned judge issues an order confirming the ADR time table and explaining the court's requirements for participation. Between January and September 1994, parties in thirty-four cases selected early court-hosted settlement conferences (see below); three chose early neutral evaluation, and seven chose not to participate in ADR. No parties selected referral to private mediation or arbitration.

Magistrate judge settlement conferences. The dispute resolution approach most frequently selected by parties is a settlement conference with the magistrate judge. If a case will be tried by the magistrate judge, a different judge conducts the settlement conference. If a case has not settled by the close of discovery, the court automatically schedules a mandatory settlement conference with the magistrate judge at the time of the final pretrial conference. Other case activities are not stayed during the settlement process.

Before the settlement conference, each party must file a settlement statement to familiarize the magistrate judge with the case. The statements assess the case's strengths and weaknesses, report settlement efforts made to date, and present settlement offers. These statements are confidential and are not served on other parties. Parties and insurance representatives must attend the settlement conference or, with leave of the court, be available by telephone.

The magistrate judge begins the conference with a joint session, then holds private caucuses with each side. The magistrate judge presents to each side only the information authorized by the other side and discusses with each side the strengths and weaknesses of their case. Settlement conferences are scheduled for a half-day, although some require a full day. At the end of the settlement conference, the magistrate judge reports to the assigned judge only whether the case has settled. Nothing is filed unless the parties want to put a settlement agreement on the record.

Of note

Obligations of counsel. In preparing a scheduling/discovery plan, counsel are required to discuss ADR among themselves and to explore ADR with their clients.

Plans. The CJRA advisory group is reviewing the district's experience with voluntary ADR and will continue to monitor the effectiveness of the program.

For more information

Karen K. Klein, U.S. Magistrate Judge, 701-239-5277

Sheila Beauchene, Assistant Supervisor, Clerk's Office, 701-239-5377

District of Northern Mariana Islands

IN BRIEF

Process summary

Judicial settlement conferences. Under its CJRA plan, effective December 1, 1993, the District of the Northern Mariana Islands authorizes judicially hosted settlement conferences. The presiding judge may refer any civil case to a settlement conference without party consent or at the request of any one party. Participating attorneys are required to have full settlement authority, and the judge may require the attendance or availability of parties. The assigned judge in this one-judge district is also authorized to conduct settlement conferences.

Summary jury trials (SJT). The district's CJRA plan authorizes summary jury trials. A case may be selected for a summary jury trial at the case management conference or at any other appropriate time by the court on its own motion, by motion of one party, or by stipulation of all parties. Summary jury trials are generally held after the close of discovery and about sixty days before trial. Earlier use is also authorized.

Other ADR. The district's CJRA advisory group recommended against development of other dispute resolution programs "because of the small number of practicing attorneys, the lack of experience and unavailability of training, and the small case load of the court."

Of note

Obligations of counsel. Counsel must be fully prepared to discuss ADR and settlement prospects with the court.

For more information

Chief Judge's Law Clerk, 011-670-233-3293, (fax) 011-670-234-6292

Northern District of Ohio

IN BRIEF

Process summary

ADR and differentiated case management. The Northern District of Ohio was selected by Congress to serve as a demonstration district for an experiment with differentiated case management (DCM) under the Civil Justice Reform Act of 1990. The district's DCM plan became effective January 1, 1992. Section 7 of the Local Rules sets forth a menu of ADR options that are key components of the district's DCM system and that are designed to provide litigants with quicker, less expensive, and more satisfying alternatives to traditional litigation, including early neutral evaluation, mediation, arbitration, summary jury trial, and summary bench trial.

Arbitration. The Northern District of Ohio is one of ten district courts authorized under 28 U.S.C. §§ 651–658 to establish a voluntary, nonbinding court-annexed arbitration program. See below.

Mediation. Any civil case may be referred to mediation by the court upon its own motion, on the motion of a party, or by agreement of all parties. See below.

Early neutral evaluation (ENE). Any civil case may be referred to early neutral evaluation by the court on its own motion, on the motion of a party, or by agreement of all parties. See below.

Summary bench and jury trials. The summary jury trial was created by former U.S. District Judge Thomas Lambros of this district court in the early 1980s. The summary jury trial, as well as a variant, the summary bench trial, are used by the judges in the Northern District of Ohio. Between January and September 1994, twenty-two cases were referred to summary jury trials and two cases were referred to summary bench trials.

Settlement week. The court held a settlement week in 1994 to expedite resolution of a substantial number of short trial-ready cases.

Of note

Obligations of counsel. Attorneys are required to discuss the court's ADR options with their clients and must be prepared to discuss at the case management conference whether the case is suitable for ADR.

Information from court. The court provides to all counsel the brochure *Differentiated Case Management and Alternative Dispute Resolution*.

Evaluation. The court's arbitration program was examined as part of a study of the voluntary arbitration courts—David Rauma & Carol Krafka, *Voluntary Arbitration in Eight Federal District Courts: An Evaluation* (Federal Judicial Center 1994). As one of the five demonstration districts under the CJRA, the Northern District of Ohio is part of the Federal Judicial Center study of the demonstration districts, which will be reported to Congress by the Judicial Conference in 1996.

For more information

Peggy N. Daniels, ADR Administrator, 216-522-7580

IN DEPTH

Arbitration in Ohio Northern

Overview

Description and authorization. The Northern District of Ohio is authorized by 28 U.S.C. §§ 651–658 to establish a voluntary, nonbinding court-annexed arbitration program. The court established its program, which is experimental, on December 13, 1991, through Local Rule 7.4 and its CJRA plan. Judges may refer any case to arbitration on their own motion, on request of a party, or on stipulation by all parties. Because the court's arbitration program is voluntary, any party may decline to participate by filing a statement with the ADR administrator within twenty days of the notice of referral. Referral generally occurs after most discovery has been completed. A panel of one or three arbitrators is selected by the parties from the court's roster. Within thirty days of the filing of an arbitration award, any party may file a demand for trial de novo. The case will then be treated as if it had not been referred to arbitration, except that no additional pretrial discovery is permitted without leave of the court for good cause.

Number of cases. Between January and September 1994, four cases were referred to arbitration.

Case selection

Eligibility of cases. Any civil case may select or be referred to arbitration. No case types are presumed ineligible or inappropriate.

Referral method. A case may be referred to arbitration by the judge sua sponte, at the request of one party, or on stipulation by all parties with court approval. When arbitration is selected, the assigned judge issues an order referring the case. The ADR administrator provides written notice and a list of the appropriate number of proposed arbitrators to counsel and any unrepresented party.

Opt-out or removal. Within twenty days of the written notice of selection, any party may decline to consent to arbitration by filing a written notice of nonconsent with the ADR administrator. The identity of the nonconsenting party is not disclosed to the judge. A judge may also exempt a case from arbitration if the objectives of arbitration would not be realized.

Scheduling

Referral. A case may be selected for arbitration at the case management conference or at any time thereafter.

Discovery and motions. Whether case activities proceed during arbitration depends on the assigned judge.

Written submissions. At least five days before the arbitration hearing, each party must submit to each arbitrator and to each other party a set of relevant pleadings, a short memo stating its legal and factual positions, and exhibits.

Arbitration hearing. Promptly after receiving the notice designating the arbitrators, the arbitrators schedule the arbitration hearing. The hearing may not be more than 30 days from the date of the notice of designation and not more than 180 days from the date of the filing of the answer or the date of the filing of a reply to a counterclaim. Unless the parties consent or the assigned judge orders, no hearing may begin for 30 days after disposition of motions to dismiss, for judgment on the pleadings, to join

parties, or for summary judgment. Hearings may be held at any location in the district that is convenient for all involved.

Length of hearing. Arbitration hearings generally last from a half to a full day.

Program features

Party roles and sanctions. In addition to counsel, individual parties and corporate or insurer representatives with full settlement authority must attend the arbitration hearing. The court's rule does not specify whether or what type of sanctions might be imposed for noncompliance, but the court is not aware of sanctions having been imposed in any of the ADR processes.

Filing of award. The arbitrator(s) must file the award with the ADR administrator within ten days of the hearing. The award must state the name of the prevailing party, the party against whom it is rendered, and the amount of the monetary award if any. The award must also specify which party is to pay the costs as provided in 28 U.S.C. § 1920 and whether interest is awarded. The award becomes the final judgment in the case unless trial de novo is requested.

De novo request. Parties desiring trial de novo must file a request within thirty days of the filing of the arbitration award. The party requesting trial de novo must deposit with the ADR administrator a sum equal to the arbitrator(s)' fees as advance payment for costs (excluding parties proceeding in forma pauperis or the United States, its officers, or agencies). Any sum deposited is returned to the party demanding trial de novo if the party obtains a final judgment more favorable than the arbitration award or if the judge determines that the demand for trial de novo was made for good cause. The assigned judge may assess costs of the trial against the party demanding trial de novo if the party fails to obtain a judgment more favorable than the arbitration award or if the demand for trial de novo was taken in bad faith.

Confidentiality. The content of any arbitration award is not made known to any judge unless (1) the assigned judge is asked to decide whether to assess costs regarding trial de novo requests; (2) the court has entered final judgment or the action has been otherwise terminated; or (3) the judge needs the information to prepare the 28 U.S.C. § 903(b) report required by the Judicial Improvements and Access to Justice Act. The assigned judge may not admit at the trial de novo any evidence that there has been an arbitration proceeding or the nature and amount of the award.

Neutrals

Qualifications and training. Those appointed to the court's roster are lawyers who have been admitted to the practice of law for at least five years and are currently either members of the bar of the Northern District of Ohio or members of the faculty of an accredited Ohio law school. The court may waive these requirements to appoint other qualified persons with special expertise in particular substantive fields or experience in dispute resolution processes. Training for the court's neutrals includes an introduction and explanation of each of the court's ADR methods, model simulations with critiques, and refresher training involving judges and neutrals experienced in ADR.

Selection for case. The court maintains a panel of neutrals approved by the court to serve in cases referred to arbitration, mediation, or early neutral evaluation. When a case is referred to arbitration, the ADR administrator randomly selects from the panel five potential arbitrators with expertise in the subject matter of the case. If there are multiple parties not united in interest, the ADR administrator adds an additional poten-

tial arbitrator for each party. The parties are provided with biographical information about each potential arbitrator. The parties must confer and select three arbitrators using a series of strikes spelled out in the local rule. If all parties agree in writing, they may select a single arbitrator. The parties are required to submit their final selection to the ADR administrator within ten days of the written notice of referral. If for any reason they fail to submit their selection, the ADR administrator selects the arbitrators from the five names selected by computer, after considering their expertise as it relates to the case and the geographical location of the panel member, counsel, and parties.

Disqualification. If at any time an arbitrator becomes aware of or a party raises an issue with respect to the arbitrator's neutrality, the arbitrator must disclose the facts with respect to the issue. If a party requests that the arbitrator withdraw, the arbitrator may do so. If the arbitrator determines that withdrawal is not warranted, the arbitrator may continue, and the objecting party may then request the ADR administrator to remove the arbitrator. The ADR administrator makes the final determination.

Immunity. The court has not addressed this issue.

Fees. There is no cost to the parties for arbitration. The court compensates the neutrals at a rate of \$250 per day or per case for a single arbitrator, or \$100 per case or per day for each member of a panel of three arbitrators.

Program administration

The ADR administrator directs the administration and implementation of the court's ADR programs.

Mediation in Ohio Northern

Overview

Description and authorization. Mediation is one of several ADR options offered by the Northern District of Ohio under Local Rule 7.3 and the CJRA plan, effective December 13, 1991. Cases are selected for mediation after the parties have conducted sufficient discovery to understand the strengths and weaknesses of the case, although mediation may be used earlier if the parties agree and the court approves. A case may be referred by the court on its own motion, on motion of one of the parties, or by stipulation of all parties with court approval. An attorney-mediator meets with the parties to facilitate settlement discussions and may hold both joint and private caucuses. If the parties fail to reach agreement or if the parties request, the mediator may submit a settlement proposal, which the parties may discuss with the mediator. The entire process is confidential.

Number of cases. Between January and September 1994, 182 cases were referred to mediation.

Case selection

Eligibility of cases. Any civil case may be referred to mediation. To date, case types referred to mediation have included marine; negotiable instruments; stockholders suits; contracts; land condemnation; foreclosure; personal injury; product liability; antitrust; civil rights, including prisoner; RICO; labor; ERISA; copyright, patent, and trademark; securities; tax; and environmental matters. No case types are presumed ineligible or inappropriate for mediation.

Referral method. A case may be referred by the court on its own motion, on motion of one of the parties, or by stipulation of all parties with court approval. Upon selection, the assigned judge issues an order referring the case to mediation. The ADR administrator provides written notice to counsel and any unrepresented parties, along with a list of proposed mediators.

Opt-out or removal. For good cause, a party may object to a referral to mediation when it is made by the court on its own motion. The party must file a written request for reconsideration within ten days of the court's order. The mediation process is stayed pending a decision on the request for reconsideration unless otherwise ordered by the court.

Scheduling

Referral. Referral may be made at the initial case management conference, after discovery has been completed, or at any time that seems appropriate for the case.

Written submissions. At least five days before the mediation session, the parties must submit to the mediator copies of relevant pleadings and motions, a short memo stating the legal and factual positions of each party, and any other material each party believes would be beneficial to the mediator. The parties' memos are not filed or shown to the judge.

Mediation session. Promptly after receiving the notice of designation, the mediator schedules the mediation session, which must occur within thirty days of the date of the notice. The mediator notifies all parties and the ADR administrator of the date, time, and location of the mediation session, which is generally held at the mediator's office.

Number and length of sessions. Although most cases participate in only one session that lasts four hours or less, some cases require several sessions and can take many hours.

Program features

Discovery and motions. Whether other case activities proceed during the mediation process depends on the assigned judge.

Party roles and sanctions. The attorneys who are primarily responsible for the case must personally attend the mediation session and must be authorized to discuss all relevant issues, including settlement. The parties must also be present. When a party is not an individual or is represented by an insurance company, an authorized representative of such party or insurance company with full settlement authority must attend. Willful failure to attend must be reported by the mediator to the ADR administrator for transmittal to the assigned judge, who may impose sanctions.

Mediator settlement proposal. If the parties fail to reach agreement, or if at any time they request a settlement proposal, the mediator may give them a settlement proposal. Parties are requested to consider the settlement proposal carefully and discuss it with the mediator.

Outcome. The mediator must report the results of the mediation to the ADR administrator within ten days of the close of the mediation session. If a settlement is reached, the mediator, or one of the parties at the mediator's request, must prepare a written settlement agreement signed by the parties, which is filed with the ADR administrator for approval by the court. If a settlement is not reached, the mediator must report in writing to the ADR administrator that the mediation was held, whether any agreements

were reached by the parties, and the mediator's recommendation, if any, as to future processing of the case.

Confidentiality. The mediation process is confidential. The parties and the mediator may not disclose information regarding the process, including settlement terms, to the court or to any third person unless all parties otherwise agree. There is no contact between the judge and the neutral, but the judge is advised of the report of the mediator.

Neutrals

Qualifications and training. Members of the court's panel are lawyers who have been admitted to law practice for at least five years and are currently either members of the bar of this court or members of the faculty of an accredited Ohio law school. The court may waive these requirements to appoint other qualified persons with special expertise in particular substantive fields or experience in dispute resolution processes. The court trains the panel members, providing them with an introduction and explanation of each ADR method, model simulations with critiques, and refresher training sessions involving judges and neutrals experienced in ADR.

Selection for case. With the written notice of referral, the ADR administrator provides the parties with a list of proposed mediators selected from the court's panel. Each party must rank the proposed mediators in order of preference and return the list to the ADR administrator within ten days. Once the ADR administrator receives all the lists, he or she selects a list at random and strikes the least preferred name, then moves to the next list and strikes the least preferred name. The remaining name is the selected mediator. The ADR administrator contacts the selected mediator and requests a conflict check. If no conflict exists, a written notice designating the mediator is sent to the mediator, counsel, and parties. If the parties fail to submit their rankings within the time specified, the ADR administrator selects the mediator from the proposed names, considering the panel members' expertise as it relates to the case and the geographical location of the panel member, counsel, and parties.

Disqualification. The ADR administrator confers with the selected mediator concerning possible conflicts before sending the notice of designation. If the mediator or the parties later become aware of an issue regarding the mediator's neutrality, the mediator must disclose the facts to all parties. If a party requests that the mediator withdraw, the mediator may withdraw and the ADR administrator will appoint another mediator. If the mediator decides withdrawal is not warranted, the mediator may continue and the objecting party may then ask the ADR administrator to remove the mediator. The ADR administrator makes the final decision on the issue.

Immunity. The court has not addressed this issue.

Fees. Mediators receive no compensation for the first four and one half hours of service. Thereafter, the parties are equally responsible for the mediator's compensation at the rate of \$150 an hour.

Program administration

The ADR administrator directs the administration and implementation of the court's ADR programs.

Early Neutral Evaluation in Ohio Northern

Overview

Description and authorization. The ENE program in the Northern District of Ohio is authorized by the court's CJRA plan and Local Rule 7.2, both effective December 13, 1991. The judge may refer a case to ENE on his or her own motion, on the motion of one party, or by stipulation of all parties. Under the program, a neutral-evaluator meets with counsel and the parties early in the case to help them clarify issues, identify strengths and weaknesses of the case, agree to stipulations, plan discovery, and realistically assess the litigation costs and probable outcome of the case. The neutral-evaluator provides the parties with an evaluation of the legal and factual issues, to the extent possible at the early stage of the case. Early neutral evaluation is not generally a settlement tool, but settlement may be effected as a result of the session.

Number of cases. Between January and September 1994, eighty-nine cases were referred to early neutral evaluation.

Case selection

Eligibility of cases. Any civil case may be selected for ENE. No case types are presumed ineligible or inappropriate.

Referral method. The judge may refer a case to ENE on his or her own motion, on the motion of one party, or by stipulation of all parties. After the judge issues the order referring the case to ENE, the ADR administrator provides written notice to counsel and to unrepresented parties, along with a list of potential neutral-evaluators.

Opt-out or removal. There are no formal provisions in the local rule governing ENE removal. However, the parties may file a request with the judge to remove the case from ENE.

Scheduling

Referral. Referral to ENE is made before or at the initial scheduling conference, or at any time that seems appropriate. Generally, referral occurs early in the case.

Written submissions. At least five days before the evaluation session, each party must submit to the evaluator and serve on all other parties a written evaluation statement of no more than ten pages. The statement must identify the person, in addition to counsel, who will attend the session as a representative of the party with decision-making authority; identify any legal or factual issues whose early resolution might reduce the scope of the dispute or contribute to settlement; describe the discovery that is contemplated; and include as exhibits copies of all pleadings filed by the party submitting the written statement. The statement may include any other information the parties believe would be useful in preparing the evaluator and other parties for a productive session. In addition to the evaluation statement, the parties must prepare to respond to questions by the evaluator concerning estimated costs to that party, witnesses, damages, and plans for discovery.

ENE session. The evaluator must schedule the ENE session promptly after receiving the notice of designation. The session must be held within thirty days of receipt of the notice unless otherwise ordered by the court. A request for postponement of a scheduled evaluation session must be presented to the ADR administrator, not to the evaluator. The session is held at the evaluator's office.

Number and length of sessions. The majority of the ENE sessions are completed in one session lasting four hours or less.

Program features

Discovery and motions. The assigned judge determines whether other case activities proceed during the early neutral evaluation process.

Party roles and sanctions. Individual parties must attend the ENE session. When a party's interests are being represented by an insurance company, an authorized representative of the company with full authority to settle the case must attend. Willful failure to attend the ENE conference must be reported by the evaluator to the ADR administrator for transmittal to the assigned judge, who may impose sanctions.

Outcome. Within ten days of the close of the ENE conference, the evaluator must report in writing to the ADR administrator that the ENE process was completed, any agreements reached by the parties, and the evaluator's recommendation, if any, as to future ADR processes that might resolve the dispute.

Confidentiality. The entire ENE process is confidential. The parties and the evaluator may not disclose information regarding the process, including settlement terms, to the court or to third persons unless all parties agree otherwise.

Neutrals

Qualifications and training. Neutrals appointed to the court's roster are lawyers who have been admitted to the practice of law for at least five years and are currently either members of the bar of this court or members of the faculty of an accredited Ohio law school. The court may waive these requirements to appoint other qualified persons with special expertise in particular substantive fields or with experience in dispute resolution processes. Training includes an introduction and explanation of each of the court's ADR methods, model simulations with critiques, and refresher training involving judges and neutrals experienced in ADR.

Selection for case. Within ten days of the written notice of referral, the parties must agree on and advise the ADR administrator, in writing, of three proposed neutrals from the court's panel of neutrals. If the parties fail to advise the ADR administrator of their selection, the ADR administrator selects the neutral from the court's panel. After receiving the parties' selection, the ADR administrator contacts the proposed neutral and requests a conflict check. If no conflict exists, a written notice designating the neutral is sent to the neutral, counsel, and unrepresented parties.

Disqualification. The ADR administrator makes an initial determination that the evaluator has no conflict of interest. If at any time after appointment, the evaluator or a party becomes aware of a conflict of interest and a party asks the evaluator to withdraw, the evaluator may do so. If the evaluator declines, the objecting party may request review by the ADR administrator.

Immunity. The court has not addressed this issue.

Fees. Evaluators receive no compensation for the first four and one half hours of service. Thereafter, the parties are equally responsible for the evaluator's compensation at the rate of \$150 per hour.

Program administration

The ADR administrator directs the administration and implementation of the court's ADR programs.

Southern District of Ohio

IN BRIEF

Process summary

Settlement week. The Southern District of Ohio has established a settlement week program in which settlement-ready cases are referred to mediation conferences hosted by attorney-mediators during designated settlement weeks. See below.

Other ADR. Under Local Rule 53.1, the court may assign any civil case to a summary jury trial, nonbinding arbitration, settlement week conference, or other alternative dispute resolution method. The court encourages litigants to use the court's ADR services and to fashion dispute resolution processes suited to their needs. One judge uses a standard pretrial order listing a menu of ADR options. In appropriate cases, judges encourage litigants to consider private dispute resolution services available in the community.

Settlement masters and summary jury trials are used in appropriate cases, particularly in complex litigation. A mandatory, nonbinding court-annexed arbitration program was used at one time in the Cincinnati Division, but has been discontinued.

Judicial settlement conferences. Local Rule 53.1 and General Order 88-5 authorize the district and magistrate judges to conduct settlement conferences for most civil cases that appear ready for settlement. Referral may occur on the request of the parties or by order of the judge.

Of note

Information from court. The court has prepared a brochure—*What is Settlement Week?*—that explains for counsel and parties the settlement week program in the Columbus Division.

For more information

Norah McCann King, U.S. Magistrate Judge, 614-469-2191

Jack Sherman, U.S. Magistrate Judge, 513-684-3855

IN DEPTH

Settlement Week in Ohio Southern

Overview

Description and authorization. The primary ADR approach in the Southern District of Ohio is settlement week, a program in which settlement-ready cases are referred to mediation with volunteer attorney-mediators during designated weeks each year. Cases are selected for referral on a case-by-case basis after review by the assigned judge. Referral is mandatory and does not require party consent. The settlement week mediation conferences are conducted by experienced federal litigators trained in mediation. Magistrate judges may conduct additional conferences in cases not resolved during settlement week. The settlement week program is authorized by Local Rule 53.1, Eastern Division General Order 91-4, and Western Division General Order on Settlement Week Mediation.

The use of settlement week mediation is most extensive in the Columbus Division,

where the program has been established for almost a decade and where the twice-annual settlement weeks are scheduled to coincide with a similar state court program. In the Cincinnati Division, a “continuous settlement week” was recently instituted, in which settlement-ready cases are referred to mediation throughout the year. The program, which is similar to mediation programs in other districts, has had limited use so far. In the Dayton Division, establishment of a settlement week program has been proposed but not yet implemented.

Number of cases. Between January and September 1994, 141 cases were referred to settlement week; 131 were referred in the Columbus Division, and 10 in the Cincinnati Division.

Case selection

Eligibility of cases. Almost all civil trial-track cases are eligible for referral to settlement week except prisoner litigation and Social Security appeals.

Referral method. The judge who handles pretrial matters selects cases for mandatory referral to settlement week. Party consent is not required. In Columbus, the magistrate judges generally assign cases to a specific settlement week at the initial Rule 16 conference. Parties may also request referral to settlement week mediation.

Opt-out or removal. Counsel may request removal from settlement week by written memorandum to the assigned judge, after conferring with the client and opposing counsel. If the request is based on insufficient discovery, the moving party must describe the status of discovery and indicate when parties will be prepared for settlement. If the request asserts that the parties’ settlement positions are too far apart to justify the expense of mediation, the memorandum must state each party’s settlement position and the factual and legal bases underlying it.

Scheduling

Referral. In Columbus, cases are selected for referral to settlement week by the assigned magistrate judge, often at the initial Rule 16 conference. Formal notice of referral is then sent to counsel by the court staff.

Written submissions. Court staff give the mediators relevant portions of the case file. At least two weeks before the settlement week mediation conference, each plaintiff must submit a written demand to opposing counsel, and no later than one week before the conference, each opposing party must respond in writing. The mediator receives copies of all offers and responses.

Settlement week sessions. In Columbus, settlement week occurs each year in the third week of June and the first week of December, which coincides with the large settlement week program in the state courts in Columbus. Settlement week mediation conferences are held at the courthouse, and scheduling is handled by court staff. Most cases are sent to settlement week after discovery and motions practice have been completed, although earlier settlement week participation is increasing.

Number and length of sessions. During settlement week, each case is allotted a one-and-a-half-hour conference. Frequently, the mediator and parties will agree to continue negotiations beyond the time scheduled.

Program features

Discovery and motions. In most cases referred to settlement week, discovery and mo-

tions practice have been completed. In the cases in which discovery has not been completed, the judge may stay further discovery until the settlement week process has ended.

Party roles and sanctions. The trial attorney for each party and the principal with settlement authority must attend the settlement week mediation session. Failure to negotiate openly and honestly about the case may result in sanctions.

Outcome. When the mediation concludes, the mediator files a short report with the court, addressing whether or not the case settled, whether parties and counsel complied with the court's attendance requirements and exchanged offers and demands as required, and whether additional discovery, motions, or judicial settlement conferences would be productive. The district or magistrate judge uses the report to schedule further proceedings if appropriate.

Confidentiality. Settlement week mediations are covered by Fed. R. Evid. 408.

Neutrals

Qualifications and training. The court has established a mediation panel of experienced litigators. Those who want to be on the panel must complete a mediation training course sponsored by the bar association.

Selection for case. The court staff randomly assigns a mediator to the case from the court's panel of approved mediators.

Disqualification. The court staff checks to see that the assigned mediator is not affiliated with either counsel. The mediator is expected to conduct a conflicts review and advise the court of any problems.

Immunity. This issue has not arisen in the district, but the court believes that mediators would enjoy quasi-judicial immunity, under *Mills v. Killebrew*, 765 F.2d 69 (6th Cir. 1985), and *Wagshal v. Foster*, 28 F.3d 1249 (D.C. Cir. 1994) (court-appointed mediator or neutral case evaluator has absolute quasi-judicial immunity when performing official duties).

Fees. The mediators serve without compensation.

Program administration

In Columbus and Cincinnati, the settlement week program is supervised by a magistrate judge in each division. The magistrate judges' courtroom deputies provide all clerical support.

Eastern District of Oklahoma

IN BRIEF

Process summary

Mandatory magistrate judge settlement conference. Under the Eastern District of Oklahoma's CJRA plan, effective December 1, 1993, most civil cases are set for a mandatory settlement conference with the district's magistrate judge (often referred to as the settlement judge). Prisoner pro se petitions, Social Security cases, and bankruptcy appeals are excluded from referral. Referral generally occurs after completion of discov-

ery, although it may occur at any time appropriate for the case. An order of referral is issued by the assigned judge.

The settlement conference order requires each party to provide the magistrate judge and other parties with a settlement conference statement setting forth its positions, demands, and offers. In addition, twenty-five days before the conference, the plaintiff must submit a written settlement offer to the defendant and file a copy with the magistrate judge. The defendant must respond within fifteen days of the settlement conference.

The settlement conference is generally held thirty to sixty days before the scheduled trial date, although the conference may be held earlier if it would be helpful. All other activities in the case go forward during the settlement process. In addition to counsel, parties with full settlement authority must attend the settlement conference. The attendance requirement applies to insurance companies and corporations as well as individuals, but governmental entities and corporations whose board of directors must approve a settlement may be granted permission to proceed with more limited authority. Failure by counsel or parties to comply with any aspect of the settlement conference order or procedure is subject to sanctions by the court.

During the conference, the magistrate judge hears an overview of the case from each party and then attempts to facilitate settlement. Depending on the nature of the case, the magistrate judge uses a variety of techniques, including private caucuses before or after the overview presentation or evaluation followed by private caucuses and shuttle diplomacy. Settlement conference discussions are confidential. At the conclusion of the settlement conference, the magistrate judge files a minute order with the court indicating only whether the case settled. Although only one conference of two to four hours is generally conducted in a case, the magistrate judge will conduct a follow-up conference by telephone if necessary.

The mandatory settlement conference with the magistrate judge is a long-standing procedure in this district. From January through September 1994, 163 cases were referred to magistrate judge settlement conferences.

Summary jury trial (SJT). Under Rule 16 and the court's inherent authority to control its docket, judges may refer cases scheduled for more than five days of trial to a magistrate judge for summary jury trial. The summary jury trial procedure and counsel's obligations under it are described in the order of referral to summary jury trial and in the court's *Handbook and Rules for Summary Jury Trial Proceedings*. From January through September 1994, two cases were referred to summary jury trial.

Of note

Obligations of counsel. Attorneys are required to discuss their ADR options with each other and their clients and to demonstrate to the court that they have done so. They must also address the case's ADR suitability in their case management statement and must be prepared to discuss ADR's use in the case with the assigned judge.

Plans. The court plans to refine and expand the use of the summary jury trial procedure by January 1997.

For more information

James H. Payne, U.S. Magistrate Judge, 918-687-2434

Northern District of Oklahoma

IN BRIEF

Process summary

Evaluative mediation (Adjunct Settlement Judge Program). The Northern District of Oklahoma offers litigants a variety of settlement and ADR processes under Local Rule 16.3. The most frequently used settlement approach is the court's Adjunct Settlement Judge Program, also referred to as evaluative mediation. See below.

Summary jury trial (SJT). The court holds summary jury trials when witness credibility is an issue, when settlement talks have stalled over differing perceptions of the amount a jury is likely to award, and when the procedure can be completed in one day. The court's summary jury trial format calls for opening statements, evidentiary presentations, and closing arguments, and permits a limited number of key witnesses to testify in person. The consent of all parties is generally a prerequisite to summary jury trial use.

With the parties' consent, cases may be referred to summary jury trial by a judicial settlement judge or by an adjunct settlement judge. The parties may elect an advisory or binding verdict. If a binding result is sought, a high/low split technique is usually used. For this process, which is authorized by Local Rule 16.3(I), the parties set settlement brackets as the high and low boundaries. Between January and September 1994, one case was referred to summary jury trial. See also Executive Summary Jury Trial.

Minitrial. In business disputes, where communication with or among the decision makers is seen as a problem, and the parties consent, the minitrial is occasionally used to facilitate settlement. It involves a summary presentation of the case to the chief executive officers of the companies or corporations involved in the dispute. The minitrial takes place at the courthouse, and the executives are robed and join the settlement judge on the bench. After the evidentiary presentation is completed, the settlement judge assists settlement discussions. The process is authorized by Local Rule 16.3 (I). Between January and September 1994, no cases were referred to minitrial.

Executive summary jury trial. This process for business disputes combines elements of the summary jury trial, the minitrial, and evaluative mediation into a one-to-two-day settlement process. Use is generally contingent on party consent. The case is tried in summary form before both a jury and a three-“judge” panel consisting of the settlement magistrate judge and the two chief executive officers of the corporations involved in the dispute. The resultant evaluation of the case by advisory verdict is then used to further settlement discussions. The process is authorized by Local Rule 16.3(I). Between January and September 1994, no cases were referred to executive summary jury trial.

Settlement conferences. The court promotes settlement efforts at the earliest possible stage in the case and authorizes mandatory judicially hosted settlement conferences under Local Rule 16.3(A). Referral practices differ from judge to judge; some judges schedule settlement conferences in all eligible cases, and other judges order settlement conferences only with party consent. If a judicially hosted settlement conference is ordered, a district judge other than the judge assigned the case or a magistrate judge generally presides. Parties may also elect to pursue settlement through the Adjunct Settlement Judge Program. In large part, the same settlement techniques—a combination of

facilitative and evaluative mediation—are used by judges and adjunct settlement judges in the settlement conferences.

Of note

Obligations of counsel. The Northern District of Oklahoma requires attorneys to read an ADR brochure provided by the court, to discuss the court’s ADR options with their clients and with each other, and to be prepared to demonstrate to the court that they have done so. Attorneys must also discuss in their case management statement the case’s suitability for ADR and must be prepared to discuss ADR with the assigned judge at the initial case management conference.

Information from court. The court has prepared a brochure for counsel and clients describing its settlement procedures and ADR options.

Plans. The court is considering expanding the size of the adjunct settlement judge roster and requiring more sophisticated initial and continuing training.

Evaluation. The court maintains statistics on settlement rates.

For more information

John Leo Wagner, U.S. Magistrate Judge, 918-581-7976

IN DEPTH

Evaluative Mediation (Adjunct Settlement Judge Program) in Oklahoma Northern

Overview

Description and authorization. The most frequently used settlement approach in the Northern District of Oklahoma is the court’s Adjunct Settlement Judge Program. Instituted in 1989 by Local Rule 16.3, the program offers parties the option of selecting a settlement conference with a volunteer attorney, called an adjunct settlement judge (ASJ), in lieu of a judicially hosted settlement conference. The program is also referred to as evaluative mediation because the hybrid process combines aspects of mediation, settlement conferences, and case evaluation. If prolonged settlement assistance is required, Local Rule 16.3(G) authorizes the court to appoint the adjunct settlement judge as a “special project settlement or discovery judge” and to order the parties to compensate the neutral at a reasonable fee.

In the settlement process, each party first presents its side of the case, and then holds private caucuses with the ASJ. During the first phase, the ASJ uses facilitative techniques to help the parties reach agreement. If an impasse is reached, the ASJ assumes an evaluative role, offers an evaluation of the case, and explores settlement options. The settlement judge may then offer a settlement proposal privately to each party.

If both sides accept the proposal, the settlement is formalized. If one or all sides reject the proposal, the ASJ may, with the parties’ consent, restate the proposal as a “take-it-or-leave-it deal” and direct each side to accept or reject the proposal within a set period, usually of several days. Each party conveys its decision confidentially by telephone to the supervising magistrate judge. Alternatively, if settlement is not achieved, the ASJ may help parties consider other ADR tools offered by the court, including summary jury trial, minitrial, or an executive summary jury trial. The consent of all parties is generally required before referral to another ADR process is made.

Number of cases. Between January and November 1994, 416 cases were referred to the Adjunct Settlement Judge Program.

Case selection

Eligibility of cases. Most civil cases are eligible for referral to the Adjunct Settlement Judge Program except cases in which a case management conference is not typically held, including Social Security appeals, bankruptcy appeals, other administrative review cases, routine governmental foreclosures, student loan cases, or prisoner cases.

Referral method. Referral to the Adjunct Settlement Judge Program occurs after a case is referred to a settlement conference by judicial order, party agreement, or at the request of one party. Once the settlement conference referral has been made, the parties may elect referral to the Adjunct Settlement Judge Program, in lieu of participating in a judicially hosted settlement conference. The two-step referral process begins at the initial case management conference. The assigned district judge and parties discuss settlement plans, and the parties generally agree to participate in a future settlement conference. If a party objects to the settlement conference, the court reserves the right to require participation, but most judges rarely do. More often, if parties do not agree to participate in a court-sponsored settlement conference, the assigned district judge orders them to submit a settlement report by a certain date and advises the parties that a settlement conference will be ordered at the request of any party.

Opt-out or removal. A joint motion to strike the settlement conference or to reschedule for a later date is usually favorably considered.

Scheduling

Referral. Referral to the Adjunct Settlement Judge Program may occur at the initial case management conference or at any time appropriate to the case. When the referral is made, the court sends all parties a settlement conference order setting the date of the settlement event.

Written submissions. Before the settlement process, each party must submit a settlement conference statement of five pages or less to all parties and the adjunct settlement judge. The statement sets forth the parties' legal and factual positions and describes the case's settlement history, including any specific offers and demands.

Settlement session. The arrangements for the settlement session are made by court staff and the adjunct settlement judge. The settlement sessions may be held at the courthouse or at the ASJ's office. Settlement sessions are scheduled at the time deemed optimal to the case.

Number and length of sessions. Settlement sessions rarely take more than one day. The sessions usually begin at 1:30 p.m. and continue for several hours until the case is settled or deadlocked. Usually only one session is held in a case.

Program features

Discovery and motions. Other case activities go forward during the settlement process.

Party roles and sanctions. In addition to an attorney who is fully familiar with the case, a person with full settlement authority must attend the settlement session. Other interested parties, such as insurers, must attend through fully authorized representatives. A governmental entity may, with written application and explicit permission only, proceed with a representative with limited authority. An application filed in bad faith or to impair settlement may be sanctioned. The adjunct settlement judge may permit a

party to be available by telephone. The parties and their representatives must be completely candid with the adjunct settlement judge, who is authorized to meet with the parties without counsel if that would benefit the case. Failure to appear or to participate in good faith may result in sanctions. The ASJ may certify such behavior in writing, which is served on all parties, and may recommend an appropriate action.

Outcome. For program monitoring, the ASJ submits a short report to the supervising magistrate judge regarding the results of the settlement session. Dismissals, consent judgments, confidentiality orders, and the like are filed in the case file. Other mediation documents, such as mediation conference statements, exhibits received during the conference, and draft settlement agreements, are kept in a separate, nonpublic mediation conference file.

Confidentiality. Parties and counsel are expected to be completely candid with the settlement judge during the conference. Thus, confidentiality must be assured. Anything communicated during the conference may not be disclosed to any third party or to the assigned judge.

Neutrals

Selection for case. After parties elect to participate in the Adjunct Settlement Judge Program, the supervising magistrate judge selects a volunteer lawyer from the roster of twenty-five trained neutrals. The magistrate judge matches the ASJ's area of expertise to the needs of the case.

Qualifications and training. The court has recruited and trained the attorneys who serve as adjunct settlement judges. ASJs are selected by the court from among members of the bar in good standing and are chosen for their expertise, experience, impartiality, reputation for fairness, training, and temperament. They are unpaid, appointed for a year, and commit to conducting one session per month. Most ASJs are reappointed. Candidates must attend a daylong training seminar taught by the supervising magistrate judge and experienced ASJs.

Disqualification. ASJs will be disqualified if any colorable challenge to their impartiality is made. Any party may confidentially contact the supervising magistrate judge and request the disqualification of the ASJ. Requests are reviewed with a presumption in favor of disqualification.

Immunity. Local Rule 16.3(F) provides that “[n]o adjunct settlement judge may be called as a witness, except in an action to enforce the settlement agreement. In that instance, the ASJ shall not be deposed and shall testify as the court’s witness.”

Fees. There is no fee for the adjunct settlement judge process. However, if the settlement effort is expected to be extensive, or in connection with discovery matters, the court may appoint an adjunct settlement judge as a “special project judge” and order the parties to pay for his or her time at a reasonable hourly rate. The fee is allocated among the parties as agreed to by the parties, or as ordered by the court.

Program administration

The program is administered by a magistrate judge and courtroom deputy. The ASJs, the district judges, and members of the bar generally take any significant problem regarding the ASJ program to the magistrate judge for resolution. The courtroom deputy handles routine scheduling issues. The court has established a permanent bench-bar case management and ADR advisory committee, which is responsible for monitoring current case management and ADR practices and making suggestions for modification.

Western District of Oklahoma

IN BRIEF

Process summary

Magistrate judge settlement conferences. The primary settlement tool in the Western District of Oklahoma is the settlement conference program in which a full-time magistrate judge serves as the court's settlement judge. Instituted in 1983 and authorized by Local Rule 17(i), settlement conferences are usually held after discovery is completed and trial preparation is underway. Mandatory referral is authorized and customary. Party consent is required for settlement conferences scheduled before the close of discovery.

Under the program, every civil case set on a published trial docket is scheduled for a settlement conference before the settlement magistrate judge (or another judge other than the trial judge if the settlement judge is not available). Several judges also refer bankruptcy appeals to the program. Settlement conferences generally last about two and a half hours and involve private caucuses with each party. More than one session is often held. Between January and September 1994, approximately 500 cases were referred to the magistrate judge settlement program.

Arbitration. The Western District of Oklahoma is one of ten districts authorized by 28 U.S.C. §§ 651–658 to provide mandatory, nonbinding court-annexed arbitration in cases of \$100,000 or less. See below.

Mediation. A court-wide mediation program aimed at early settlement was initiated under the court's CJRA plan, adopted December 31, 1991. See below.

Summary jury trial (SJT). The summary jury trial has been used since 1983 for selected cases by almost all the judges. In the late 1980s as many as twenty to fifty cases a year were referred to summary jury trial. Mandatory referral by the assigned judge is permitted and customary; consensual referral has occurred but is rare. The SJT is generally used in trial-ready cases where trial is predicted to last five days or more and the expense of the SJT is justified by the likelihood of settlement. A magistrate judge presides over the hearing, which takes a half to full day. The court's procedures are outlined in its *Handbook and Rules for Summary Jury Trial*. Between January and September 1994, two cases were referred to summary jury trial.

Special masters. The use of special masters for settlement and other case management tasks is an established, but rarely used, method of the court. Referrals are made only in complex cases.

Of note

Obligations of counsel. Attorneys must address ADR in their case management statement and be prepared to discuss ADR options with the court at the initial case management conference. In their joint status reports, counsel must certify whether the case is eligible for mandatory nonbinding arbitration, state whether they would consent to nonbinding arbitration, and indicate whether they would like to participate in the court's early mediation program.

Information from court. The court distributes to all counsel an ADR fact sheet and handbooks on arbitration, mediation, and summary jury trials.

Plans. As part of its revision of local rules, the court is condensing all ADR and settlement rules into an ADR plan as an appendix to the revised rules. The Bankruptcy Court for the Western District of Oklahoma recently adopted a local rule on ADR. The court's ADR administrator is also working with the State Attorney General's Office and the State Department of Corrections to create a mediation program for prisoner grievances. The three federal districts in Oklahoma are discussing ways of sharing ADR resources.

Evaluation. The district's arbitration program has been studied by the Federal Judicial Center. See Barbara Meierhoefer, *Court-Annexed Arbitration in Ten District Courts* (Federal Judicial Center 1990). As one of the ten pilot courts established under the CJRA, the Western District of Oklahoma is part of the RAND study of the pilot and comparison districts, which will be reported to Congress by the Judicial Conference in 1996.

For more information

Ann Dudley Marshall, ADR Program Administrator and Law Clerk to Settlement Magistrate Judge, 405-231-5821

IN DEPTH

Arbitration in Oklahoma Western

Overview

Description and authorization. The Western District of Oklahoma is one of ten districts authorized by 28 U.S.C. §§ 651-658 to provide mandatory, nonbinding court-annexed arbitration in cases involving money damages only of \$100,000 or less. The program, also authorized by Local Rule 43 and the district's CJRA plan, effective December 31, 1991, is described in the court's *The Arbitration Handbook*. Under the program, which was implemented in 1985, eligible cases are designated for mandatory arbitration by the assigned judge at the initial pretrial scheduling conference. Parties may also participate in the program by consent. The arbitration hearing is typically held shortly before the scheduled discovery cutoff date, usually no more than 180 days from the date the last answer was filed. The arbitrators' fees are set and paid by the court. Counsel participate in choosing either one arbitrator or a panel of three.

The court encourages its arbitrators to play varied settlement roles in addition to the traditional role of rendering an award based on law and facts. Arbitrators may discuss the case's strengths and weaknesses, and they occasionally conduct a settlement conference if appropriate.

Number of cases. Between January and September 1994, eighty-six cases were referred to arbitration; seventy-five were mandatory referrals and eleven were referrals on consent of the parties.

Case selection

Eligibility of cases. Eligible cases are those involving primarily money damages of \$100,000 or less, exclusive of interest and costs. In addition, if the United States is a party and does not have monetary interest in the claim, arbitration is permitted in cases arising under the Federal Tort Claims Act, the Longshoreman's and Harbor Worker's Act, the Admiralty Act, or the Miller Act. Civil actions may also be referred to nonbind-

ing arbitration if the parties consent. Consensual referrals are common in non-complex tort and contract cases involving claims over \$100,000 as well as in employment cases. Ineligible cases include administrative reviews, prisoner cases, constitutional claims, bankruptcy appeals, and claims based on 28 U.S.C. § 1343 jurisdiction.

Referral method. Eligible cases are identified at filing by the ADR administrator. Cases are mandatorily referred to arbitration by the assigned judge after review of the joint status report filed by counsel for the initial status conference. Parties may also participate in the program by consent. Formal notice of referral is provided by court order.

Opt-out or removal. Eligible cases may be exempted from mandatory arbitration in two ways. First, at the initial pretrial scheduling conference, one or all counsel may request to have the case referred to an early settlement conference or mediation in lieu of arbitration. Second, within twenty days of an order referring the case to arbitration, a party may seek removal from arbitration on the grounds that the matter involves complex or novel legal issues, legal issues predominate over factual issues, or for other good cause.

Scheduling

Referral. Eligible cases are generally referred to mandatory arbitration at the initial pretrial scheduling conference, although referral may also be made at any other appropriate time. Formal notice of referral is provided by court order.

Discovery and motions. Streamlined discovery is encouraged. Case activities directed toward trial proceed during the arbitration process and any trial deadlines remain in effect unless suspended or continued by court order. Any issue relating to the arbitration of the case is directed to the assigned judge. If certain dispositive motions are filed before the initial pretrial conference, arbitration proceedings may be deferred pending the result. However, such motions filed after referral do not stay the procedure without order of the court.

Written submissions. Ten days before the hearing, the parties must submit to the arbitrators and to the arbitration coordinator a joint statement listing all disputed and undisputed facts and legal issues. In addition, each party must submit to the arbitrators, opposing counsel, and the arbitration coordinator, a position statement of no more than five pages.

Arbitration hearing. At the initial case conference, the arbitration hearing date is set after consultation with the assigned judge, counsel, and the court's arbitration staff. The arbitration hearing is typically held before the close of discovery and at least thirty days before the scheduled trial date. Logistical arrangements are made by the court's arbitration coordinator, and the hearing is generally held at the courthouse.

Length of hearing. Although each party is permitted up to an hour to present its case, hearings typically last less than an hour and a half.

Program features

Party roles and sanctions. In addition to counsel, clients or representatives with settlement authority are required to attend the arbitration hearing. Sanctions may be imposed for failure to appear by a person required to be present or other failures to participate in good faith. Such violations may also be treated as a default.

Filing of award. At the conclusion of the arbitration hearing, the arbitration coordinator docket an order indicating that the hearing was held. The arbitrator must submit

the arbitration award to the clerk's office within ten days of the hearing. Copies are mailed to the parties and the award is filed under seal. If a demand for trial de novo is not made, the award is entered as the judgment in the case.

De novo request. A demand for trial de novo must be made within thirty days of the filing of the arbitration award. When requesting a trial de novo, the moving party is required to submit a fee equal to the arbitrators' fees. On motion, the deposited fee may be returned if the final judgment is more favorable than the award or if good cause is shown.

Confidentiality. The court's confidentiality rules protect against disclosure of the arbitration award to the trial judge and prohibit admission of evidence regarding the arbitration at trial. Contact between the arbitrator and the assigned district judge is prohibited. The arbitration summary and the joint stipulations are not made part of the case file. At the trial de novo, the court prohibits admission into evidence of any arbitration hearing transcript or other evidence regarding arbitration. The award is kept under seal until the action has been terminated. If trial de novo is requested, however, the results of the arbitration may be disclosed by the parties to the settlement conference magistrate judge at a mandatory settlement conference held shortly before trial.

Neutrals

Qualifications and training. To become a member of the court's arbitration roster, candidates must have at least five years of law practice, be admitted to practice in the Western District of Oklahoma, and be determined by the court en banc competent to perform the duties of arbitrator. When the roster was formed in 1985 and expanded in 1989, training sessions were held for the arbitrators.

Selection for case. The court's ADR staff provides a list of ten arbitrators drawn randomly from the court's roster. If an arbitrator with subject matter expertise is requested, a list of ten candidates with the requisite skills is prepared. Counsel confer to select a single arbitrator or, if all the parties request in writing, a panel of three. The court's ADR staff determines the candidates' availability and ascertains potential conflicts of interest. If counsel do not make a timely selection, the court staff selects the arbitrator.

Disqualification. Arbitrators are required to disqualify themselves if any of the circumstances specified in 28 U.S.C. § 455 exist or may in good faith be believed to exist.

Immunity. Because arbitrators are appointed by the court to the roster and to the specific case, the court believes case law would support immunity protection.

Fees. The court sets and pays the arbitrator fees in both mandatory and consensual referrals. A single arbitrator receives \$150 per case. When a panel of three is appointed, each arbitrator receives \$100 per case.

Program administration

The program is managed and administered by an ADR administrator, who is a permanent law clerk in the chambers of the settlement magistrate judge. The clerk's office provides one deputy clerk, who serves as arbitration and mediation coordinator. The coordinator does all the necessary paper work to schedule the hearing, monitors the case through the hearing stage, and keeps the judge's staff informed about the status of the case. The ADR administrator identifies all cases eligible for mandatory or consensual arbitration and discusses the appropriateness of the process with counsel and the

assigned judge. The ADR administrator also coordinates training for arbitrators in conjunction with the clerk's office and deals initially with problems, conferring with the assigned judge as appropriate.

Mediation In Oklahoma Western

Overview

Description and authorization. The Western District of Oklahoma established a mediation program under its CJRA plan, effective December 31, 1991, and Local Rule 46. Under the program, which was implemented in April 1992, mandatory referral is permitted, but in practice mediation referrals are usually made only with the consent of all parties. Court-certified mediators are selected and compensated by the parties.

Mediation is used in this district as an early settlement device. At the initial pretrial scheduling conference, the assigned judge, ADR administrator, and counsel usually discuss whether mediation is appropriate for the case. If mediation is chosen or ordered, the initial session is generally held within thirty to sixty days of the conference. If litigants are interested in using mediation before the initial pretrial scheduling conference, they may seek assistance from the court's ADR administrator.

Number of cases. Between January and September 1994, ninety-seven cases were referred to mediation.

Case selection

Eligibility of cases. Any civil case, except administrative reviews and prisoner cases, is eligible for mediation. The process is most often used in personal injury disputes, contract disputes involving businesses, and employment discrimination disputes.

Referral method. The customary practice of the court is to refer cases to mediation only with the consent of all parties. One district court judge occasionally orders mediation without party consent, as permitted by local rule. Referrals are made on a case-by-case basis after discussion among counsel and the assigned judge, often at the initial case management conference.

Opt-out or removal. A case can be withdrawn from mediation by application to the assigned judge on the grounds that the case is not suitable for mediation. Joint applications for withdrawal are preferred.

Scheduling

Referral. Cases are generally referred to mediation at the initial pretrial scheduling conference, but referrals can be made at any time. At the time of referral, the court enters orders referring the case, setting a mediation schedule, and appointing a mediator.

Written submissions. At least two days before the mediation session, each party must submit to the mediator and all other parties a case summary of five pages or less. The summary is not made part of the case file.

Mediation session. The judge's referral order sets a date by which mediation must be completed. The order's time limits are monitored by the mediation coordinator. Most mediation sessions occur within sixty days of the initial pretrial scheduling conference. The timing and location of the mediation session are arranged by the mediator and the parties. Sessions are generally held at the offices of the mediator or parties.

Number and length of sessions. Mediation sessions generally last from a half day to a

full day. One session is typically held per case, although additional sessions are held if necessary.

Program features

Discovery and motions. All other case activities go forward during the mediation. Litigation activities are not suspended without a specific order of the court. The court promotes discovery plans directed toward early settlement discussions.

Party roles and sanctions. In addition to counsel, parties with settlement authority are required to attend the mediation. Sanctions are authorized under local rule for unexcused failure to attend or to participate in the mediation session in good faith. Opposing counsel may bring instances of noncompliance to the court's attention by motion; if appropriate, the ADR administrator may advise the court of problems by memo.

Outcome. The mediator files a report with the mediation coordinator and the assigned judge's courtroom deputy indicating whether the case settled. For computer deadline tracking, the mediation coordinator also prepares an order indicating that the mediation was held as scheduled.

Confidentiality. The court's local rules protect the privacy of the mediation process and prohibit testimony by the mediator. No participant may disclose, without consent, any confidential information acquired during the mediation. No stenographic or electronic record is permitted. The mediator may not be required to testify in any proceedings relating to or arising out of the matter in dispute or be required to disclose confidential information or data relating to or arising out of the matter in dispute.

The mediator is prohibited from communicating with the assigned judge except to inform the judge in the mediator's report whether the case settled.

Neutrals

Qualifications and training. Mediators are appointed by the court for a five-year period. To be eligible to serve on the court's roster, candidates must be professional mediators or attorneys with at least five years of practice, admitted to practice in the district, and found competent to serve in these roles by the court.

All mediator candidates must complete at least twenty-four hours of classroom training in mediation, two observations of mediation sessions, and two actual mediation sessions. The mediation training, which is not offered by the court, must include simulated mediation exercises and address a variety of specific topics, such as mediation process, roles and responsibilities of the mediator and participants, confidentiality, ethics, and caucusing. In addition to the formal training, the court also holds periodic continuing educational sessions for the mediators on its roster.

Selection for case. Within ten days of the referral order, the parties must select a neutral from the court's roster of mediators. If the parties cannot agree on a mediator, the mediation clerk makes the selection.

Disqualification. Mediators are disqualified for bias or prejudice as provided in 28 U.S.C. § 144 and must disqualify themselves in any action in which they would be required to do so under 28 U.S.C. § 455 if they were a justice, judge, or magistrate judge. Any member of the bar who is certified and designated as a mediator pursuant to the court's rule is not for that reason disqualified from appearing or acting as counsel in any other case pending before the court.

Immunity. Because arbitrators are appointed by the court to the roster and to the specific case, the court believes case law would support immunity protection.

District of Oregon

Fees. The mediator is compensated by the parties according to the mediator's fee schedule, which is filed with the court. Mediator fees usually range between \$250–\$900 per mediation and are normally shared evenly by the parties. When the government is a party, Justice Department guidelines restrict the government's share of the mediator's fee to \$250.

Program administration

The program is managed and administered by an ADR administrator, who holds a permanent law clerk position in the chambers of the settlement magistrate judge. The clerk's office provides one deputy clerk who serves as arbitration and mediation coordinator. The coordinator does all the necessary paper work to schedule the mediation, monitors the mediation deadlines, and keeps the judge's staff informed about the status of the case.

The ADR administrator identifies cases for the mediation program by reviewing joint status reports in which counsel have consented to mediation and by discussing the program with counsel at initial case management conferences. In conjunction with the training arm of the clerk's office, the ADR administrator plans the continuing education sessions for mediators. The ADR administrator initially handles all problems, conferring with judges as needed.

District of Oregon

IN BRIEF

Process summary

Mediation. Under Local Rule 240-2, the District of Oregon has authorized a mediation procedure for cases involving monetary damages. See below.

Other ADR. In appropriate cases, judges may appoint a special master for settlement purposes. One judge has also used the summary jury trial.

Judicial settlement conferences. Under Local Rule 240-1, a judge may order or a party may request a settlement conference at any time. On request, another judge will host the conference. All pending discovery schedules and trial dates remain in effect during the settlement negotiations, unless altered by court order. In complex cases, settlement conferences may last several days or extend over a period of time.

Of note

Obligations of counsel. Attorneys must address ADR suitability in their case management statement, demonstrate that they have discussed ADR options with opposing counsel and clients, and be prepared to discuss ADR options with the judge.

Plans. In accordance with a recommendation of the CJRA advisory committee and the court's mediation advisory group, the court is considering an early neutral evaluation program.

For more information

Donald M. Cinnamond, Clerk of Court, 503-326-6388

Camile S. Hickman, Portland Division Manager, 503-326-6388
Roger Jacobs, Eugene Division Manager, 503-465-6940

IN DEPTH

Mediation in Oregon

Overview

Description and authorization. Since 1987, the District of Oregon has provided a mediation procedure for specified case types. Under Local Rule 240-2, parties in cases involving money damages may request referral to mediation or may be ordered by the assigned judge into mediation. Mediators are selected by the parties from the court's list of trained mediators; a judge makes the selection if the parties cannot agree. There is no fee for mediation.

Number of cases. No figures are available on the number of cases referred to the mediation program.

Case selection

Eligibility of cases. Local Rule 240-2 does not specify case eligibility, but in practice only cases involving monetary damages are considered eligible for mediation. Cases involving matters of principle are generally excluded from mediation.

Referral method. The assigned judge may order a case to mediation, or a party may request mediation.

Opt-out or removal. The rule does not specify a procedure by which parties can ask to have their case removed from the mediation process.

Scheduling

Referral. Referral to mediation occurs at any time that seems appropriate for the case.

Written submissions. The mediator generally requires each party to submit a short case summary.

Mediation session. The mediator sets the time and place for the session and notifies the parties. By local rule, the mediator is also authorized to recommend and schedule a preliminary conference with the assigned judge. These premediation conferences are held in most cases. Most mediation sessions currently are held in law offices, but mediation rooms are included in plans for the district's new courthouse.

Number and length of sessions. Generally, one one-day mediation session is held per case. Additional sessions are held if needed.

Program features

Discovery and motions. All case activities go forward during mediation, unless stayed by court order.

Party roles and sanctions. Party attendance is required at the premediation conferences with the assigned judge, unless the judge excuses the parties. Sanctions are available for nonattendance. The mediator decides if clients are to be present at subsequent sessions and how they are to participate. Even if clients are not required to attend, they must be available by telephone. Parties represented by an insurer need not be present, but if an insurer representative is present in the district, a representative with full settle-

ment authority must attend the mediation. Willful failure to attend is reported to the court and may result in sanctions.

Outcome. If a settlement is reached, the parties put the agreement in writing. If no settlement is reached, the mediator promptly informs the court. If the mediator believes the intervention of a settlement judge would resolve the matter, he or she informs the court.

Confidentiality. All proceedings, including any statements made by any participant and any memoranda or written submissions, are confidential and are not to be reported, recorded, placed in evidence, made known to the court or jury, or construed for any purpose as an admission. No party will be bound by anything said or done in mediation unless settlement is reached.

Neutrals

Qualifications and training. Mediator candidates must apply to the court for admission to the roster and attend a court-sponsored mediation training seminar. The court's training provides an overview of the mediation process, describes the techniques used for settlement and case evaluation, and discusses development of good communication skills.

Selection for case. Within ten days of notice of referral to mediation, the parties must select a mediator from the court's list of volunteer mediators. If they cannot agree, counsel for plaintiff must promptly notify the court and the assigned judge selects the mediator.

Disqualification. Standards for mediator disqualification are not addressed by the local rule.

Immunity. Local Rule 240-2 states that "[d]uring their service, mediators act as officer of the court and are clothed with judicial immunity."

Fees. There is no fee for mediation.

Program administration

The program is administered on a case-by-case basis by each judge.

Eastern District of Pennsylvania

IN BRIEF

Process summary

Arbitration. The Eastern District of Pennsylvania is one of ten district courts authorized by 28 U.S.C. §§ 651–658 to establish a mandatory, nonbinding court-annexed arbitration program. See below.

Mediation. Local Rule 53.2.1 authorizes the district's mandatory early mediation program for selected civil cases. See below.

Other ADR. The court's CJRA plan, effective December 31, 1991, allows a judge or any party to suggest use of ADR procedures other than arbitration or mediation.

Judicial settlement conferences. The court authorizes mandatory settlement conferences.

Of note

Plans. An ADR committee is currently considering other ADR options.

Evaluation. Evaluations of the court's mediation and arbitration programs have been conducted. See *Court-Annexed Early Mediation Program: Questionnaire Findings* (U.S. District Court for the Eastern District of Pennsylvania December 1992). See also Barbara Meierhoefer, *Court-Annexed Arbitration in Ten District Courts* (Federal Judicial Center 1990). As one of the ten pilot courts under the CJRA, the Eastern District of Pennsylvania is also part of the RAND study of pilot and comparison districts, which will be reported to Congress by the Judicial Conference in 1996.

For more information

Michael E. Kunz, Clerk of Court, 215-597-9221

IN DEPTH

Arbitration in Pennsylvania Eastern

Overview

Description and authorization. The Eastern District of Pennsylvania is one of the ten districts authorized by 28 U.S.C. §§ 651–658 to provide mandatory, nonbinding court-annexed arbitration in cases involving money damages only of \$100,000 or less. Referral to arbitration, which is automatic by case type, is generally made after the answer is filed. A panel of three arbitrators hears presentations by each party and makes a ruling, which becomes binding unless the parties request a trial de novo. Arbitrators are not permitted to discuss settlement with the parties or their counsel or to participate in any settlement discussions concerning the case. The fee of \$100 per arbitrator per case is paid by the court. Local Rule 53.2 governs the program, which was established in 1978.

Number of cases. Between January and September 1994, 1,453 civil cases were referred to arbitration.

Case selection

Eligibility of cases. Eligible cases are those in which money damages of \$100,000 or less are sought, excluding the following case types: Social Security appeals, cases in which a prisoner is a party, cases involving violation of a constitutional right, and actions in which jurisdiction is based in whole or in part on 28 U.S.C. § 1343.

Referral method. All eligible cases are automatically referred to arbitration after an answer is filed.

Opt-out or removal. The assigned judge may, on his or her own motion or pursuant to a party motion filed before appointment of the arbitrators, exempt the case from arbitration on grounds that it involves complex legal issues, legal issues predominate over factual issues, or for other good cause.

Scheduling

Referral. After an answer is filed, the arbitration clerk sends parties notice of referral, including the date and time of the arbitration hearing.

Discovery and motions. Other case activities must go forward during the arbitration referral. Parties have ninety days from the date the answer is filed to complete discovery, unless the assigned judge specifies otherwise.

Written submissions. Only submissions requested by the arbitrators or required by order of the court in a particular case must be made before the arbitration hearing. The clerk sends the arbitrators a copy of all pleadings.

Arbitration hearing. The arbitration hearing is held within 120 days of the filing of the answer. Thirty days before the hearing date, the assigned judge issues an order setting the date and time of the hearing and the names of the arbitrators. If a party has filed a motion to dismiss, a motion for summary judgment, a motion for judgment on the pleadings, or a motion to join parties, the judge does not issue the order until the motions are decided. Arbitration hearings are arranged by court staff and are held at the court house.

Length of hearing. Arbitration sessions generally last one day, but can range from a half day to several days.

Program features

Party roles and sanctions. Parties must attend the arbitration hearing. If a party fails to participate in the hearing in a meaningful way, the court may impose sanctions, including striking the demand for trial de novo filed by that party.

Filing of award. The arbitration clerk enters on the docket only the date and the statement “arbitration award filed.” The award is placed in a separate file in the clerk’s office. If no request for trial de novo is made, the arbitration award is entered on the docket as the judgment of the court and is placed in the case file.

De novo request. Within thirty days of entering the arbitration award on the docket, any party may request a trial de novo. When a party makes a demand for trial de novo, it must, unless permitted to proceed in forma pauperis, deposit with the clerk a sum equal to the arbitration fees of \$100 for each arbitrator. This sum is returned to the party if it obtains a final judgment more favorable than the arbitration award. If the party does not obtain a more favorable judgment, the sum is forfeited.

Confidentiality. The arbitration hearing is confidential, and no evidence of the hearing may be introduced at a trial de novo.

Neutrals

Qualifications and training. To be on the court’s roster, an arbitrator must be a member of the bar for at least five years, admitted to practice in the district, and determined by the chief judge to be competent. No training is required.

Selection for case. The court randomly assigns three arbitrators from the court’s roster—one plaintiff’s attorney, one defense attorney, and one attorney who specializes in neither area.

Disqualification. Arbitrators must disqualify themselves for bias or prejudice as provided in 28 U.S.C. § 144 and in any action in which they would be required under 28 U.S.C. § 455 to disqualify themselves if they were a justice, judge, or magistrate judge.

Immunity. The court believes that arbitrators have judicial immunity.

Fees. The court pays each arbitrator \$100 per case. Arbitrators are not reimbursed for actual expenses incurred in the performance of their duties.

Program administration

The program is administered by the clerk’s office.

Mediation in Pennsylvania Eastern

Overview

Description and authorization. In the Eastern District of Pennsylvania, Local Rule 53.2.1 authorizes a mandatory early mediation program. Since January 1, 1991, all civil cases assigned odd civil action numbers have been required to participate in a mediation conference conducted by an attorney-mediator early in the litigation process, except Social Security cases, cases in which a prisoner is a party, cases eligible for arbitration, asbestos cases, or any case a judge determines is not suitable for mediation. The mediation conference is a facilitated negotiation process and is provided pro bono by attorneys selected from the court's roster of neutrals.

Number of cases. Between January and September 1994, 101 civil cases were scheduled for mediation.

Case selection

Eligibility of cases. Cases eligible for early mediation are those randomly assigned odd civil case numbers at filing, excluding the following case types: Social Security cases, cases in which a prisoner is a party, cases eligible for arbitration, asbestos cases, cases appealed, withdrawn, or transferred from a bankruptcy judge, cases on the Special Management Track, or any case that a judge determines is not suitable for mediation.

Referral method. All eligible cases are automatically referred. After the first appearance of a defendant, the mediation clerk sends notice to counsel and any unrepresented party.

Opt-out or removal. A judge may determine sua sponte or on application by a party or a mediator that a case is not suitable for mediation.

Scheduling

Referral. After the first appearance by the defendant, the court's mediation clerk sends notice to counsel and any unrepresented party setting the date, time, and location of the mediation conference and the name, address, and telephone number of the mediator.

Written submissions. When the notice of mediation is mailed to the parties, the mediation clerk mails the mediator copies of the complaint and any motions or pleadings filed to date. At least three days before the mediation session, each party must give the mediator and other parties a memorandum no longer than two pages, summarizing the nature of the case and the party's position on the issues, the relief sought, and settlement.

Mediation session. The mediation conference is held within sixty days of the first appearance by the defendant. Court staff schedule the mediation hearing, which is generally held at the courthouse.

Number and length of sessions. Mediation sessions generally last one hour, and only one session is usually held.

Program features

Discovery and motions. Other case activities go forward during the mediation process.

Party roles and sanctions. Counsel primarily responsible for the case and each unrepresented party must attend the mediation conference. Counsel must arrange for their

clients to be available by telephone or in person to discuss settlement. Willful failure to attend or be available is reported to the court and may result in sanctions.

Outcome. If no settlement is reached, the mediator files a statement with the mediation clerk and the assigned judge that the parties have complied with the requirements of the process but have not reached settlement. If settlement is achieved, the mediator files a report with the mediation clerk and the assigned judge stating that a settlement was reached.

Confidentiality. All proceedings at a mediation conference are confidential and may not be reported, recorded, placed in evidence, made known to the trial judge or jury, or construed for any purpose as an admission. No party is bound by anything done or said at the mediation conference unless a written settlement is reached and signed by parties and counsel.

Neutrals

Qualifications and training. Those listed on the court's roster must be members of the bar for at least fifteen years, admitted to practice before the court, and determined by the chief judge to be competent. There is no training requirement for the neutrals.

Selection for case. The clerk or other court staff randomly selects a neutral from the court's roster.

Disqualification. Mediators may be disqualified for bias or prejudice as provided by 28 U.S.C. § 144 or in any action in which they would be required by 28 U.S.C. § 455 to disqualify themselves if they were a justice, judge, or magistrate judge.

Immunity. The court believes mediators have judicial immunity because they are assisting the court in performing its judicial function.

Fees. The attorney-neutrals serve pro bono.

Program administration

The mediation program is administered by the clerk's office. A joint committee of the court and the Philadelphia Bar Association Federal Courts Committee handles problems and makes evaluations.

Middle District of Pennsylvania

IN BRIEF

Process summary

Mediation. The Middle District of Pennsylvania established a mediation program under its CJRA plan, effective January 1, 1994. See below.

Summary jury trial. The summary jury trial has been authorized by local rule since 1988. One judge refers cases on a regular basis. Twelve cases were referred between January and September 1994.

Judicial settlement conferences. At least one pretrial/settlement conference is held in each civil case. A judge other than the assigned judge conducts the conference. With the approval of the court, the parties may select the settlement officer, who may be a senior judge, a magistrate judge, or another neutral of the parties' choosing.

Of note

Obligations of counsel. Attorneys are required to discuss ADR options with their clients and with opposing counsel and must be prepared to discuss ADR with the judge. They must also discuss in their case management statement or plan whether ADR is suitable for the case.

Information from court. A brochure about the court's mediation program is available to counsel and litigants.

Evaluation. As one of the ten comparison districts established by the CJRA, the Middle District of Pennsylvania is included in the RAND study of the pilot and comparison districts, which will be reported to Congress by the Judicial Conference in 1996.

For more information

Mary D'Andrea, Clerk of Court, 717-347-1795

IN DEPTH

Mediation in Pennsylvania Middle

Overview

Description and authorization. The Middle District of Pennsylvania established a mediation program under its CJRA plan, effective January 1, 1994. Under the program, which was implemented in April 1994, every civil case is eligible for mediation. Referrals are made by the assigned judge on a case-by-case basis, either at the judge's initiative or by request of the parties. Party consent is not required. Attorney-neutrals trained in mediation techniques meet with the parties for in-depth settlement negotiations. The process is confidential and provided pro bono.

Number of cases. Nineteen cases were referred between April and September 1994.

Case selection

Eligibility of cases. Almost every civil case is eligible for mediation, although prisoner and pro se cases are generally not considered candidates for mediation. The assigned judge may also exclude cases on his or her own initiative or by party motion.

Referral method. Cases are referred to mediation by the assigned judge on a case-by-case basis. The referral may be made on the judge's initiative or at the request of all parties. Party consent is not required.

Opt-out or removal. The court's plan does not address this issue.

Scheduling

Referral. The mediation referral is generally made after parties have engaged in or nearly completed discovery. An order of referral is entered setting the date, time, and place for the mediation session and appointing a mediator.

Written submissions. When the order of referral is mailed, the clerk of court sends the mediator a copy of the docket sheet. The clerk provides copies of any documents in the case file requested by the mediator.

Mediation session. The mediation session should take place within thirty days of the date of the order of referral. The mediator is authorized to change the date and time for the mediation session, provided the new date is within fifteen days of the date set in the

order of referral. The mediation session takes place in a neutral setting designated by the mediator.

Number and length of sessions. The duration and number of the mediation sessions vary with the case and mediator.

Program features

Discovery and motions. Other activities in the case are suspended during the mediation process.

Party roles and sanctions. Counsel primarily responsible for the case and any unrepresented party must attend the mediation session unless permitted by the mediator to participate by telephone. Willful failure to attend is reported to the court and may result in sanctions. Parties must be prepared to discuss all liability and damages issues, all equitable and declaratory remedies requested, and their settlement positions.

Outcome. The mediator submits a statement to the assigned judge indicating whether the court's mediation requirements have been met and whether settlement was reached.

Confidentiality. Information from the mediation session may not be used by any adverse party for any reason in the litigation.

Neutrals

Selection for case. The mediator is randomly selected by the clerk of court from the roster established by the court.

Qualifications and training. The chief judge certifies neutrals as necessary. Requirements to be certified include membership of the bar of the highest court of one's state for ten years; admission to practice in the district; determination by the chief judge of competence to serve as a mediator, and successful completion of the court's mediation training. A mediator may not be called on to serve more than twice a year without prior approval of the mediator. Mediators must attend a two-day training session in mediation process and skills sponsored by Dickinson College Law School.

Disqualification. Mediators may be disqualified for bias or prejudice as provided by 28 U.S.C. § 144 and must disqualify themselves in any action in which they would be required to do so under 28 U.S.C. § 455 if they were a justice, judge, or magistrate judge.

Immunity. The court has not addressed this issue.

Fees. Mediators serve without compensation.

Program administration

The program is administered by the clerk's office.

Western District of Pennsylvania

IN BRIEF

Process summary

Arbitration. The Western District of Pennsylvania is one of ten federal district courts authorized by 28 U.S.C. §§ 651–658 to offer voluntary, nonbinding court-annexed arbitration to civil litigants. See below.

Neutral evaluation (mediation/neutral evaluation). By local rule, the court instituted a program for neutral evaluation by volunteer lawyers. See below.

Judicial settlement conferences. Settlement conferences are held as needed by district and magistrate judges.

Of note

Evaluation. An evaluation of the voluntary arbitration program in the Western District of Pennsylvania is reported in the Federal Judicial Center's study of the voluntary arbitration programs: David Rauma & Carol Krafka, *Voluntary Arbitration in Eight Federal Districts: An Evaluation* (Federal Judicial Center 1994).

For more information

Alfred L. Wilson, Clerk of Court, 412-644-3550

Diane Gunn, Clerk's Secretary and Arbitration Clerk, 412-644-3530

IN DEPTH

Arbitration in Pennsylvania Western

Overview

Description and authorization. The Western District of Pennsylvania is one of ten federal district courts authorized by 28 U.S.C. §§ 651–658 to offer voluntary, nonbinding court-annexed arbitration to civil litigants. It is one of four districts (see D. Ariz., M.D. Ga., and N.D. Ohio) using an opt-out system. Instituted in 1991 as an experimental program, the arbitration process is governed by Local Rule 16.2 and is open to almost all civil cases seeking only money damages. Eligible cases are referred to arbitration automatically, but any party may opt out of the referral without explanation. If the parties consent to arbitration (by not opting out), they may proceed before one arbitrator or a panel of three arbitrators selected from the court's roster. The arbitrators receive a small fee from the court.

Number of cases. Between January and September 1994, 266 cases were referred to arbitration.

Case selection

Eligibility of cases. Cases eligible for arbitration include almost all civil cases in which money damages only are sought. Excluded from participation are Social Security cases, cases in which a prisoner is a party, cases alleging a violation of a constitutional right, and actions in which jurisdiction arises under 28 U.S.C. § 1343.

Referral method. All eligible cases are automatically referred to arbitration by notice from the arbitration clerk after answer is filed. Because this is a voluntary program and all parties must consent to arbitrate, any party may opt out of the arbitration program without explanation by filing an opt-out notice.

Opt-out or removal. Any party may opt out of the arbitration referral for any reason by filing a notice with the clerk of court within ten days of filing the answer. Later in the case, the assigned judge may, sua sponte or on motion of a party before appointment of the arbitrators, exempt a case from arbitration.

Scheduling

Referral. Eligible cases are referred to arbitration after answer is filed.

Discovery and motions. Parties have 120 days from the date answer is filed to complete discovery, unless the assigned judge alters this time period. The assigned judge retains authority to conduct status conferences, hear motions, and otherwise supervise the progress of the case.

Written submissions. After completion of discovery, counsel for the plaintiff must file a pretrial statement within ten days, the defendant must file within ten days of the plaintiff's filing, and third-party defendants must file within ten days of the defendant's filing. When counsel for the plaintiff receive the notice scheduling the hearing, they must send the arbitrator all pleadings and all pretrial statements.

Arbitration hearing. After pretrial statements are filed, the assigned judge issues an order setting the date and time of the arbitration hearing and naming the arbitrators. If certain motions are pending, the court will withhold the order until the motions are decided. The hearing, which is held at the courthouse and arranged by the arbitration clerk, should occur within 150 days of the last answer.

Length of hearing. Arbitration hearings usually last about three hours.

Program features

Party roles and sanctions. The hearing may go forward in the absence of any party who, after notice, fails to be present. If a party fails to participate in a meaningful manner, the court may impose appropriate sanctions, including striking any demand for trial de novo filed by that party.

Filing of award. The arbitration award must be filed promptly with the court after the hearing. To shield the court from the award, the arbitration clerk retains the award in a separate file and notes only "arbitration award filed" on the docket. If a timely request for a trial de novo is not made, the award is entered as the judgment of the court.

De novo request. A party desiring trial de novo must file a request within thirty days of the filing of the arbitration decision.

Confidentiality. At the trial de novo, the court may not admit evidence of the arbitration, the nature or amount of the award, or any other matter concerning the arbitration proceeding. The arbitration decision is not entered on the docket and is kept in a separate file in the clerk's office until and if it becomes the final judgment in the case.

Neutrals

Qualifications and training. To be eligible for appointment to the court's roster of arbitrators, an attorney must have been admitted to practice for at least ten years; be admitted in this district or be a member of the faculty of an accredited Pennsylvania law school; be recommended by the court's committee on arbitration; and be determined by the chief judge competent to perform the duties of an arbitrator. The court does not require training for the arbitrators.

Selection for case. The parties may elect to proceed before a single arbitrator or a panel of three arbitrators and may select their arbitrators. If the parties are unable to agree on arbitrators from on or off the court's roster, the arbitration clerk randomly selects the arbitrators from the court's roster. To use arbitrators not certified by the court, approval by the chief judge is required.

Disqualification. The court has no disqualification rules for arbitrators.

Immunity. The court has not addressed this question.

Fees. The court pays the arbitrators' fees. For single arbitrators, the rate is \$250 per day. For members of a three-person panel, the rate is \$100 per day per arbitrator.

Program administration

The program is administered by the clerk's office. The court's arbitration committee handles problems arising out of the program.

Neutral Evaluation (Mediation/Neutral Evaluation) in Pennsylvania Western

Overview

Description and authorization. On January 1, 1995, the Western District of Pennsylvania instituted a neutral evaluation process for civil cases. Under Local Rule 16.3, cases are referred to this nonbinding ADR process on a case-by-case basis by the assigned judge on his or her own motion or on motion of a party. The sessions are conducted by volunteer lawyers called adjunct settlement judges, who have expertise in the subject matter of the dispute. A principal purpose of the settlement session is to give litigants an opportunity to articulate their positions, to hear their opponent's version of the matters in dispute, and to receive a neutral assessment of the relative strengths of the opposing positions. The court calls this program mediation/neutral evaluation. The adjunct settlement judges serve without compensation.

Number of cases. Caseload information is not available.

Case selection

Eligibility of cases. All civil actions are eligible for the program, including adversary proceedings in bankruptcy and actions in which a trial de novo has been requested after arbitration. No case types are presumed ineligible or inappropriate.

Referral method. The assigned district judge or magistrate judge may, sua sponte or on motion of a party, order any civil action to this process. A judicial order of referral is entered.

Opt-out or removal. The local rule does not address this subject.

Scheduling

Referral. A case may be referred to the process at any appropriate time. After the referral order is entered, counsel are notified of the adjunct settlement judge appointed in the case and the date of the session.

Written submissions. Once counsel receive the notice of referral, they are required to send copies of all pleadings to the adjunct settlement judge. In addition, if pretrial statements have not been filed, each party is required to submit an evaluation statement to the adjunct settlement judge and opposing counsel ten days before the session. The statement identifies the parties with decision-making authority who will attend the session, describes the substance of the suit, and notes whether there are legal or factual issues whose resolution might facilitate settlement. Documents may also be submitted.

Mediation/evaluation session. The date of the mediation/evaluation session is set by the assigned judge in the referral order. The session may be rescheduled by the adjunct settlement judge to take place within fifteen days of the original date. Other changes in dates must be approved by the assigned judge. The session may be held at the court-

house or at another location agreeable to the adjunct settlement judge and the parties.

Number and length of sessions. This information is not available.

Program features

Party roles and sanctions. In addition to counsel, clients are required to attend the session unless excused for good cause by the adjunct settlement judge. In litigation involving a corporation or other association, a settlement-empowered representative of the party, other than outside counsel, must attend the session. Willful failure to attend may result in sanctions.

Outcome. The adjunct settlement judge must send a report to the clerk and the assigned judge indicating that there has been compliance with the requirements of the rule and noting whether settlement has been achieved.

Confidentiality. The mediation/evaluation session is confidential, and all information arising from the settlement event is shielded from the trial judge. Other than the brief report filed at the session's conclusion, communication between the adjunct settlement judge and the assigned judge is prohibited.

All proceedings, including any statements made by a party, counsel, the adjunct settlement judge, or other participants, may not be reported or recorded or disclosed to the trial judge. All counsel and parties must treat as confidential all written and oral communications made in connection with or during any conference. These communications may not be disclosed to anyone not involved in the litigation and may not be used for any purpose (including impeachment) in the litigation or in any other proceedings. Except for a written settlement agreement or any written stipulations executed by the parties or counsel, no party or counsel is bound by anything done or said at any of the conferences.

Neutrals

Qualifications and training. To be selected for the court's roster of adjunct settlement judges, a candidate must have practiced law for at least ten years, be a member of the court or a law professor in the state, be recommended by the court's committee on mediation/neutral evaluation, and be approved by the chief judge. Candidates must also complete training requirements set by the court committee and take the oath of affirmation prescribed in 28 U.S.C. § 453.

Selection for case. The adjunct settlement judge is appointed by the assigned judge and the clerk from the roster of certified volunteer attorneys. Where possible, a neutral with subject matter expertise is selected. Alternatively, the parties may select an adjunct settlement judge from another source, with the approval of the chief judge.

Disqualification. Adjunct settlement judges are disqualified for bias or prejudice as provided in 28 U.S.C. § 144 and must disqualify themselves in any action in which they would be required to do so under 28 U.S.C. § 455 if they were a justice, judge, or magistrate judge.

Immunity. The court has not addressed this question.

Fees. Adjunct settlement judges serve without compensation. In unusual cases and at the request of the parties, an adjunct settlement judge selected by the parties and approved by the court may be compensated by the parties.

Program administration

The program is administered by the clerk's office.