ALTERNATIVE DISPUTE RESOLUTION

In the United States District Courts

A Wide Variety of Procedural Choices

Alternative dispute resolution (ADR) mechanisms can be public (initiated by and involving the court) or private (initiated and controlled by the parties). Some of the public ADR mechanisms used in civil disputes in U.S. federal district (trial-level) courts include:

- Court-annexed mediation (where a neutral third party facilitates discussion between the parties to resolve the case);
- Court-annexed arbitration (where a neutral third party hears presentations by the parties' lawyers and issues a non-binding written decision);
- Early neutral evaluation (ENE) (neutral third party hears presentations by the parties' lawyers and provides the parties with an evaluation of the strengths and weaknesses of their claims and defenses);
- Summary jury or summary bench trial (where the lawyers present their case in summary form to a jury or a judge and the decision maker issues an advisory decision);
- Settlement week (where a court sets aside hearings for a week and allows parties who are ready for trial to use the courtrooms to mediate disputes with the help of experienced mediators); and
- Special masters (where a judge appoints an experienced lawyer, academic, former judge, or magistrate judge to mediate a dispute under Rule 53 of the Federal Rules of Civil Procedure).

In addition to these ADR procedures, many judges conduct settlement conferences under the authority of Rule 16 of the Federal Rules of Civil Procedure. Mediation and judge-hosted settlement conferences are the most commonly used methods for assisting parties with settlement negotiations.

Authority for ADR in the U.S. District Courts

- The Alternative Dispute Resolution Act of 1998 requires every federal district court to implement an ADR program that offers at least one form of ADR to parties in civil cases. The Act authorizes the courts to require cases to participate in ADR, but limits this requirement to mediation and ENE.
- The ADR Act of 1998 leaves most decisions about how to provide ADR to the discretion of each district court—for example, decisions about what type of ADR to provide, what types of cases to refer to ADR, what qualifications ADR neutrals should have, and whether neutrals will be compensated. Consequently, ADR programs vary considerably from court to court.

Types of Providers and Fees in Court-Annexed ADR

- In some courts, judges serve as mediators, although many judges prefer not to conduct mediations in their own cases because the dispute may proceed to trial. To avoid conflict between their mediator and trial roles, judges may refer cases to a colleague for mediation.
- In other courts, a private entity or individual – often a lawyer – provides skilled, neutral assistance in resolving disputes. Many of these courts have established panels of neutrals, who must meet specified training requirements, to provide ADR services for cases referred to ADR. Some courts require the parties to compensate the neutral; others require the neutrals to provide the ADR service for no compensation.

How Court Cases are Referred to ADR

- Some courts require all civil cases to attempt some form of ADR prior to trial. Although participation in the ADR process is mandatory, the parties are not required to reach binding resolution of the matter. If the parties fail to reach an agreement, the dispute continues through the regular litigation process.
- Some courts refer only certain disputes to ADR. Cases are chosen either as a result of the parties' willingness to use ADR voluntarily or after a determination by the judge or an ADR administrator working in the court that a particular dispute is appropriate for ADR.
- Parties may also engage in private forms of ADR at any time prior to judgment.

Benefits of ADR

- Courts can decrease case backlogs, ensuring efficient use of judicial resources.
- Parties can obtain speedy resolution of their disputes, often in a less formal setting than court. ADR can also provide procedures and outcomes that are more closely tailored to the parties' individual needs.
- Parties are often more satisfied with the outcomes and processes available in ADR than in litigation.
- Lawyers diversify their skills by acting either as counsel in ADR processes or as ADR neutrals. Lawyers using ADR can also provide clients with dispute resolution services that are more appropriate to the types of issues at stake.

When to Use ADR

Not every dispute is suitable for ADR. Mediation may be most effective in situations where:

- Parties want to preserve an ongoing relationship between themselves;
- The primary issue involves monetary damages rather than liability;
- There is no need or intention to create legal precedent;
- The emotional or monetary stakes are high;
- The case is complex or technical in nature;
- The dispute would benefit from a creative solution; and
- Both parties are represented by counsel or neither party is represented by counsel.

Enforcing ADR

- Court-annexed ADR decisions and agreements are non-binding in every form of ADR, unless the parties agree to make the outcome binding.
- If the parties agree that an outcome is binding, their signatures on the agreement create a contract that is enforceable in the same way as any other contract.

Factors Leading to a Successful Court-Annexed ADR Program

- An ADR program must have a reliable method for referring cases to ADR, whether through the judge talking with the parties, a staff person screening cases for eligibility, or some other method that ensures that appropriate cases will go to ADR. A program without cases will not inspire confidence.
- ADR processes that provide ADR neutrals must provide well-trained and respected neutrals. Parties will not use an ADR process if they do not trust the neutrals or the process. Program designers should consider how to identify qualified neutrals, whether the neutrals should be compensated for their time, and, if so, who is to pay.
- An ADR program needs supporters who are respected in the legal community, such as prominent judges, who will champion the program and promote its use. For the same reason, an ADR program needs someone in the court to manage and oversee the program.
- ADR processes should be designed with empirically identified "best practices" in mind. Experience suggests, for example, that ADR works best when a party with decision-making authority attends the procedure. Courts should therefore indicate whether and to what extent parties (as opposed to their lawyers or representatives) must attend ADR sessions.
- The rules for the ADR process – particularly the rules that define the process and describe case selection, neutral selection, compensation, timing, and how to file a settlement – should be readily accessible to parties who file in the court and who are referred to ADR.

Further Resources

A resource directory of all state mediation and ADR programs has been compiled by the Center for Appropriate Dispute Resolution in Special Education (CADRE). *See* http://www.directionservice.org/cadre/pdf/State%20ADR-Mediation%20Directory.pdf. Information on the use of ADR by the U.S. federal government is available through the U.S. Department of Justice. *See* http://www.justice.gov/olp/adr/doj-statistics.htm. A compendium of U.S. federal district court rules on ADR is also available through the U.S. Department of Justice. *See* http://www.justice.gov/olp/adr/compendium.html. The Federal Judicial Center also has a variety of resources available online. *See* http://www.fjc.gov.