

ADR and Settlement in the Federal District Courts

a sourcebook for judges & lawyers

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Preface

Dramatic changes in ADR and settlement practices in the federal courts have created a great need for information about related rules and procedures. This new resource guide will help fill that need. The sourcebook is the result of a two-year collaboration by the Federal Judicial Center and the CPR Institute for Dispute Resolution. Authors Elizabeth Plapinger, director of the CPR Judicial Project, and Donna Stienstra, senior researcher at the Federal Judicial Center, analyzed ADR and settlement practices in each of the ninety-four federal district courts. They offer a comprehensive overview of dispute resolution approaches used in each district, plus an in-depth description of each court-managed ADR program in the districts that have them.

Their study reveals that most of the ninety-four federal districts have authorized or established at least one court-wide ADR program. The grafting of ADR onto federal court processes raises many questions for judges, lawyers, policy makers, and researchers. Do judges have the resources to identify and refer cases to different types of ADR? Will a court's ADR or settlement approaches influence a litigant's choice of forum or affect other key litigation decisions? Should lawyers learn negotiation as well as litigation skills? Is the development of rules for court ADR programs good or bad for a dispute resolution process that has relied in the past on flexibility and, in many instances, informality? Has ADR eclipsed the role of judges in settlement, or have trial courts become primarily settlement forums? Are national rules needed to bring uniformity and good standards of practice to the array of innovations now found in the district courts? Should there be ethical rules or guidelines for court-connected ADR neutrals? This guide will help judges, lawyers, and policy makers begin to answer these questions.

Based on a survey of the courts and analysis of their rules, the sourcebook describes in detail how each court's ADR and settlement procedures function. It also provides information for judges who design and refer cases to dispute resolution programs, for lawyers and clients who face increasingly complex dispute resolution choices and requirements in the federal district courts, and for policy makers who study programs and make recommendations for the future.

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Part I
Introduction and Analysis

Introduction

Over the past several years, the use of alternative dispute resolution (ADR) techniques has been growing in significance and popularity, having served parties in disputes both large and small, from international conflicts to neighborhood arguments. Because ADR techniques are used with increasing frequency in such everyday settings as schools, churches, and workplaces, many people are now becoming acquainted with these new approaches to problem solving.

Courts and members of the legal community have been part of the movement seeking means other than litigation for resolving disputes. Someone filing a case today in federal court is far more likely than ten or even five years ago to be asked to consider some form of settlement assistance, and at all levels of the courts ADR is increasingly a part of discussions about how to manage litigation.

These recent developments should not be misread as suggesting that ADR is new to the federal courts. Experimentation with ADR—which in the federal courts encompasses arbitration, mediation, early neutral evaluation, settlement week, case valuation, and summary jury trials—began more than twenty years ago. In the district courts, the first mediation and arbitration programs date from the 1970s. Innovations of the 1980s include the summary jury trial and early neutral evaluation. Additional expansion of ADR occurred in 1988 when Congress authorized ten district courts to implement mandatory arbitration programs and an additional ten to establish voluntary arbitration programs (28 U.S.C. §§ 651–658).

A further impetus to ADR came with passage of the Civil Justice Reform Act of 1990 (CJRA), which requires all district courts to develop, with the help of an advisory group of local lawyers, scholars, and other citizens, a district-specific plan to reduce cost and delay in civil litigation (28 U.S.C. §§ 471–482). ADR is one of the six civil case management principles recommended by the statute. Today, five years into the CJRA experiment, most district courts have authorized or established some form of ADR.

With this expansion of court-based ADR, a great need has arisen for information about the federal court programs. This sourcebook is a response to that need. It provides a district-by-district compendium of current ADR and settlement procedures in the district courts. Written for several audiences, the guide provides key information for judges who design and refer cases to dispute resolution programs; for lawyers and litigants who face increasingly complex dispute resolution choices and obligations; and for policy makers and researchers at local and national levels who evaluate current programs and make recommendations for the future.

The district-by-district descriptions can be found in Part II of the sourcebook, where we also define each type of ADR technique used in the federal courts, describe the sources of our information, and note several decisions we made in

compiling the great amount of material we received from the courts. Before proceeding to the information about the courts' programs, though, we want to step back from the details and sketch out some of the patterns we've come to see in the courts' approaches to ADR.

Patterns in Federal District Court ADR

Our discussion in this section relies in part on a set of tables we prepared to help make system-wide comparisons and to illuminate features that are common across courts. The tables may be found at page 14, along with a note explaining how courts were classified for purposes of the tables. For this discussion, it is sufficient to note that we are focusing on court-based ADR programs—those that are managed by the court, are based in most instances on formal rules and procedures, and rely (with a few exceptions) on attorney-neutrals to provide the ADR service. We should also note that the information in the tables and discussed below was derived from a survey we sent to the courts and our review of court rules and other written court materials.

Court-Based ADR Programs: How Many, What Kind, and How Old?

Mediation has emerged as the primary ADR process in the federal district courts (see Table 1). In marked contrast to five years ago when only a few courts had court-based programs for mediation, over half of the ninety-four districts now offer—and, in several instances, require—mediation. Most mediation offered in the federal courts is administered wholly by the courts; only a few districts provide mediation through referral to bar groups or private ADR provider organizations.

Arbitration is the second most frequently authorized ADR program, but falls well short of mediation in the number of courts that have implemented it. In addition to eighteen statutorily authorized courts, two others (Northern District of Alabama and Eastern District of Washington) offer arbitration as the second step of a combined mediation/arbitration procedure. Several others authorize use of arbitration but have not established court-annexed programs.¹

1. 28 U.S.C. §§ 651–658 authorizes ten courts to require participation in arbitration, hence the designation “mandatory,” and ten to offer arbitration, which the parties may use at their option, hence the designation “voluntary” (two courts designated as voluntary arbitration courts have not implemented programs). Mandatory arbitration involves an “automatic” referral process; that is, cases meeting the eligibility requirements, such as case type and dollar amount, are automatically referred to ADR. (See page 7 for a more complete discussion of these referral methods.) The statutory arbitration programs are funded by congressional appropriations.

The infrequent adoption of arbitration may be in part the result of uncertainty over whether courts other than those authorized by statute may establish arbitration programs.²

Use of early neutral evaluation (ENE) has increased from two courts five years ago, but still is used in only fourteen courts. Limited ENE adoption under the CJRA may reflect uncertainty about the nature of this relatively new form of ADR or about its relation to mediation. Recently, one of the first two courts to use ENE—the District of Columbia—disbanded its program, finding it unnecessary in light of the court’s substantial mediation program.

Settlement week and case valuation, the last two forms of court-wide ADR programs, are found in even fewer courts, with three offering a settlement week program and two offering case valuation. Both case valuation programs are in Michigan, where the federal court programs are based on a state program.

Just over half the courts report authorization or use of the summary jury trial. With little information about past practices, we do not know whether this represents a change, but our guess is that, as with other forms of ADR, the number of courts authorizing summary jury trial has grown substantially over the past five years. The level of usage reported by most courts is, however, very low—generally around one or two cases a year.

Also noteworthy is the number of courts that now offer a variety of ADR options. During the past several years, most of the ten courts authorized to establish mandatory arbitration programs in the 1980s have added mediation to their offerings. It is not uncommon today to find at least two ADR procedures available in many federal courts, and at least six courts now offer a full array of options, including arbitration, mediation, early neutral evaluation, and summary jury trial.

The range and number of federal district court ADR programs is particularly noteworthy in light of their recency: most have been implemented since 1990 (see Tables 3 through 7, second column). Although there are some long-standing programs, in particular several arbitration and mediation programs that date from the 1970s, and despite the 1983 authorization provided by amendments to Federal Rule of Civil Procedure 16, use of “extra-judicial procedures to resolve the dispute” did not fully emerge until the 1990s.³

2. Although the Civil Justice Reform Act of 1990 recommends that courts consider authorizing referral of appropriate cases to ADR (28 U.S.C. § 473(a)(6)), the statute does not include arbitration among the ADR methods it lists, leading some to conclude that arbitration remains limited to those courts authorized by 28 U.S.C. §§ 651–658. *See, e.g.*, Memorandum from William R. Burchill, Jr., general counsel, Administrative Office of the U.S. Courts (AO), to Abel J. Mattos, Court Administration Division, AO (July 5, 1991) (the CJRA does not appear to authorize arbitration in other courts) (on file with the Research Division of the Federal Judicial Center).

3. In 1993, further amendment of Rule 16 altered the language to “use of special procedures to assist in resolving the dispute.”

For a complete picture of each court's approach to settlement, we must also look at Table 3, which attests to the continuing viability of judicial settlement efforts and the expanding role of magistrate judges in settlement. Most courts, even those with substantial ADR programs, provide judicial settlement assistance. Particularly noteworthy in Table 3 are the many courts—at least a third—that have designated magistrate judges as the court's primary settlement officers. While in-depth study of judicially hosted settlement procedures was beyond the scope of this project, our work demonstrates continuing experimentation in the courts to determine the best mix of judicial and nonjudicial settlement programs.

How Many Cases in ADR?

Of great interest to many is the number of cases going into these ADR programs. Tables 3 through 7 report the number of cases referred to each of the principal forms of court-based ADR. For several reasons, these numbers should be used cautiously. First, the courts were asked for the number of cases *referred* to ADR, not how many cases actually participated in or were resolved by ADR. Second, because ADR caseloads are not reported nationally, and in many courts the procedures for recording ADR information are rudimentary, the courts themselves frequently offered their ADR figures as only approximations. Third, large numbers should not be equated with a successful program and smaller numbers with a less successful one. A mediation program that targets complex cases, for example, may be a great success in the court's and litigants' eyes if it resolves two dozen cases a year, whereas a voluntary arbitration program that is available for all civil cases but attracts only a few each year may be a great disappointment.

It seems safe, nonetheless, to say that courts with automatic referral by case type, as in the mandatory arbitration programs and a few mediation programs, have fairly substantial ADR caseloads—for example, 1,235 arbitration cases in New Jersey, 292 mediation cases in the Middle District of North Carolina. The voluntary arbitration courts with opt-out instead of opt-in procedures also have significant caseloads—for example, 266 cases in the Western District of Pennsylvania.⁴ Mandatory referral is not, however, essential for moving large numbers of cases into mediation, as we can see from the 414 cases in the Northern District of Oklahoma and the 580 cases in the Northern District of Texas. Early neutral evaluation also draws a good number of cases in several districts, as shown by the 89 cases in the Northern District of Ohio.

It is almost impossible at this time to draw any conclusions about the effectiveness of ADR from these ADR caseload figures. The tables show the substan-

4. In opt-out procedures, cases eligible for arbitration are automatically referred but then may opt-out of the process with no questions asked. In opt-in programs, cases enter the arbitration process only at the initiative of the parties.

tial variation across courts, but close examination of referral processes, local attitudes toward ADR, the nature of the caseload, and other variables is needed before this variation can be explained. Fortunately, several courts are planning evaluations of their ADR programs, and two national studies required by the CJRA will also contribute to our understanding.⁵

Referring Cases to ADR: The Shift from Referral by Case Type to the Judge as ADR Catalyst and Educator

During the past several years, there has been substantial attention in the federal courts to the issue of *how* cases are referred to ADR, a debate centered largely on the pros and cons of mandatory versus voluntary referral to arbitration. With the emergence of mediation as the primary ADR process, however, and the abandonment of several mandatory arbitration programs,⁶ the principal referral mechanisms used today are notably different from those used a few years ago.

Few of the mediation programs refer cases mandatorily and automatically by case type. Most leave to the judge or parties the identification of cases suitable for ADR.

Whether the referral is made *sua sponte* or at the request of one or more parties (both of which are authorized in most programs), the judge has become the focal point for identifying cases appropriate for ADR and for educating attorneys and parties about it. Rather than remaining in the background, as in the mandatory arbitration programs, the newer forms of ADR expect the judge to be very much at the center of ADR use.

Even within the arbitration programs, the picture is much more nuanced than the terminology suggests. In the so-called mandatory programs, for example, the referral is only presumptively mandatory. Courts with these programs provide mechanisms for seeking removal from arbitration, and some courts readily grant such removal. Variation is also found in the voluntary programs, with several courts adhering to the textbook model of participation only if the parties voluntarily come forward, but with several others automatically referring cases on the basis of objective criteria and then permitting unquestioned opt-out by the parties.⁷

5. The study of the ten pilot and ten comparison districts, being conducted by the Rand Corporation, and the study of the five demonstration districts, being conducted by the Federal Judicial Center, will be reported to Congress by the Judicial Conference of the United States in December 1996.

6. Two mandatory arbitration courts (Western District of Michigan and Western District of Missouri) have decided to make arbitration one of several ADR options offered by the court, and one (Eastern District of North Carolina) has ended its program.

7. Participation rates in three of the four voluntary courts with opt-out procedures are similar to participation rates in courts with presumptively mandatory referral. See David Rauma & Carol Krafka, *Voluntary Arbitration in Eight Federal District Courts: An Evaluation* (Federal Judicial Center 1994).

Nonetheless, a significant change has taken place with the advent of mediation, which places greater emphasis on judicial involvement in the ADR referral than arbitration has.

ADR Obligations of Attorneys and Litigants

Along with the increased ADR responsibility that rests with the judge, a similar responsibility now falls on attorneys and parties. Courts expect attorneys to be knowledgeable about ADR in general and about the court's ADR programs in particular (see in-brief descriptions in Part II). Many courts' local rules now require attorneys to discuss ADR with their clients and opponents, to address in their case management plan the appropriateness of ADR for the case, and to be prepared to discuss ADR with the judge at the initial Rule 16 scheduling conference.

These rules indicate the extent to which the courts now expect attorneys to work with the judge to determine whether ADR should be used in a case and, if so, what kind of ADR should be used. The attorneys' and judge's responsibilities merge at the initial case management conference, which in many courts has become the critical event—or the first of several—in determining how and when ADR will be used in the case.

In the ADR event itself—that is, the mediation session, the ENE conference, or the summary jury trial—clients are generally required to attend.⁸ Most courts have not, however, defined the level or kind of participation required by parties and their counsel.

Timing of the ADR Session and Integration into Case Management

With the emphasis on case-by-case screening for ADR and the importance of the Rule 16 conference has come a shift in the timing of ADR—or perhaps a recognition that ADR can be used earlier in the case has prompted the emphasis on the Rule 16 conference. In any event, whereas in the past many considered ADR appropriate only for trial-ready cases, now ADR is more often integrated into a court or judge's overall case management practices and is considered much earlier in the case.

This is and has been particularly true of ENE, which was designed to provide an early evaluation of a case's merits and was not originally intended as a settlement device. Even for settlement-oriented procedures such as mediation the process is now likely to occur earlier in the case. It occurs very early in some courts, such as the Western District of Missouri, where the first mediation session is held within thirty days of filing of the answer, and the Eastern District of Pennsylvania, where the conference is held as soon as possible after the first appearance of the defendant. Across all courts, it is not uncommon today for

8. In many courts, cases involving unrepresented parties are not referred to ADR.

discovery planning to be linked to the mediation process and for the mediation session to take place before discovery has been completed.

The Central Role of Attorney-Neutrals and Court Rosters

Although some courts provide mediation or early neutral evaluation through judges or magistrate judges, most of the courts' ADR programs rely on nonjudicial neutrals. Tables 3 through 7 show that most of the mediators, arbitrators, and other neutrals used by the courts are attorneys, with other professionals occasionally authorized to serve in that role.

Not only are attorneys the mainstay of most ADR programs, but in nearly every district the court has created its own roster rather than relying on an already-established list of neutrals or turning to private-sector ADR providers for these services.⁹ For example, of the forty-three mediation programs that use nonjudge neutrals, only three rely on an outside organization, such as a bar association or state mediation program, to provide the ADR services. In contrast, one court (Western District of Missouri) has brought one of its ADR processes fully in-house by hiring an experienced litigator to serve as the court's neutral in cases referred to mediation.

Most courts set eligibility criteria for inclusion on the roster, and a significant number of courts include on the roster any person certified as an ADR neutral by a bar association or state court system. This is true for training as well, with some courts accepting as sufficient the training neutrals have received from other court systems or organizations. On the other hand, some courts completely control the training of their neutrals, either by conducting the training themselves or by screening and hiring trainers.

The emergence of court-managed rosters has brought with it a number of new questions for the courts. One of the most obvious is the question of training. Given the great range of approaches courts take to training—including requiring none—can litigants have confidence in the courts' ADR processes? Should minimum national training standards be established? A less obvious but also important question is whether neutrals have judicial immunity. Few of the courts' rules speak to this question (perhaps in a belief that the question is more appropriate for case law).¹⁰ Only slightly more address the question of conflicts of interest between the neutral attorney's role as mediator and his or

9. The bright line between court rosters and private ADR providers is becoming less clear as increasing numbers of lawyers participating in court ADR programs also provide ADR services in the private sector, either in law firms or as part of ADR provider organizations.

10. A number of courts cite a recent District of Columbia Circuit decision on this question. *See Wagshal v. Foster*, 28 F.3d 1249 (D.C. Cir. 1994) (granting mediators and neutral evaluators in the District of Columbia Superior Court absolute quasi-judicial immunity when performing their official duties).

her role as counsel. When and under what circumstances, for example, is an attorney-neutral barred from serving as counsel in future disputes?¹¹

As these issues become more urgent, a few individual federal courts (and some state court systems) are developing ethical guidelines or standards of practice for the neutrals on their rosters.¹² Several professional organizations of lawyers and ADR neutrals are also engaged in efforts to define ethical standards for ADR practice.¹³ These issues are prompting commentators to ask an even more fundamental question: Are rosters of attorneys the optimum method for providing ADR services or should judges, court staff, or private sector ADR providers deliver these services instead?

Fees for ADR: Parties Generally Must Pay

In a significant shift from past practice, most courts now require parties to pay a fee to the neutral (except in the arbitration programs, where arbitrator fees are paid from congressional appropriations). In the first mediation programs, the neutrals generally provided their services pro bono. Today, of the forty-one courts offering attorney-based mediation, only nine provide that service pro bono (and one, as already mentioned, provides mediation through a staff mediator). Three others generally offer mediation without fees, although in some circumstances the parties may be required to pay the mediator. The remaining courts—that is, two-thirds of the courts with mediation programs—require that parties pay a fee (see Tables 3-7).

The courts generally use one of four different approaches to determine the fee: market rate, court-set rate, pro bono, or court-set fee after a specified number of pro bono hours. A market-rate fee, found in ten courts, is the most com-

11. In a recent decision in the District of Utah, an attorney who had mediated between two parties was disqualified, along with his firm, from representing one of the parties in subsequent litigation involving both. *See Poly Software Int'l, Inc. v. Yu Su*, 880 F.Supp. 1487 (D. Utah 1995). *See also Cho v. Superior Ct. of La.; Cho Hung Bank, Real Party in Interest* (95 C.D.O.S. 8237, Oct. 19, 1995) (entire law firm disqualified when retired judge who had conducted mediation-like meetings involving two parties joined law firm representing one of the parties).

12. *See District of Utah Manual on Alternative Dispute Resolution for Court-Appointed Arbitrators and Mediators*. Section IV contains the Code of Ethics for Court-Appointed Arbitrators and Mediators; Section V contains Information Regarding Court-Appointed Arbitrator and Mediator Liability Issues. The Northern District of Oklahoma is also developing a code of ethics for its neutrals. *See also Florida Rules for Certified and Court-Appointed Mediators* (adopted by the Florida Supreme Court, May 1992) and *Ethical Guidelines for Mediators* (adopted by the Alternative Dispute Resolution Section of the State Bar of Texas in 1994).

13. The CPR Institute for Dispute Resolution, in conjunction with the Georgetown University Law Center, is developing ethical guidelines and standards of practice for attorneys in ADR. *See also the proposed Joint Standards of Conduct for Mediators* drafted by the American Bar Association Section of Dispute Resolution, the American Arbitration Association, and the Society for Professionals in Dispute Resolution.

mon; a number of these courts, however, reserve the right to review the reasonableness of the fee. Eight courts specify a set fee, which may be either an amount per hour (for example, \$150 per hour) or an amount per session (for example, \$250 per session). Five courts authorize both a market-rate and court-set fee, reserving to the judge the discretion to determine which type of fee arrangement is best for each case. In four courts the neutral must serve pro bono for a specified number of hours, ranging from one to six, before the parties must pay either a court-set or market-rate fee.

In recognition that some parties cannot afford to pay a fee, a number of courts—e.g., nine of the forty-three attorney-based mediation programs—include special provisions in their rules regarding low-income or indigent parties, generally waiving the fee altogether. To provide this service, some courts require those selected from the court's roster to serve pro bono for a specified number of hours or cases.

Interestingly, there appears to be little relationship between whether fees are assessed and whether the referral to ADR is mandatory or made only with party consent. While some voluntary programs assess a fee and some do not, most of the courts that require participation in ADR also require payment of a fee.

Increasing Formalism and Institutionalization of ADR

With the Civil Justice Reform Act and its encouragement of district-wide examination, ADR has taken on a programmatic character, rather than relying on the initiatives of individual judges as in earlier ADR efforts.¹⁴ Evidence for the growing institutionalization of ADR within the courts can be seen in the formal rules and procedures adopted by the courts, which usually apply to the court as a whole and replace the individual judge-based procedures of the past. While generally leaving to the judge's discretion whether ADR should be used in an individual case, the rules spell out the procedures to be followed once a case has been referred. Additionally, a number of courts have developed ADR brochures that are given to parties at filing to alert them to the court's ADR options. A body of judicial decisions about various components of these ADR programs is also emerging.¹⁵

14. As is true with most of the patterns discussed here, arbitration stands apart. As statutory programs funded from appropriations, these programs have been programmatic and court-wide from their inception.

15. See, e.g., *supra* notes 10 & 11. See also *Cincinnati Gas & Elec. Co. v. General Elec. Co.*, 854 F.2d 900 (6th Cir. 1988) (summary jury trial may be ordered closed to the public); *GTE Directory Serv. Corp. v. Pacific Bell Directory*, 135 F.R.D. 187 (N.D. Cal. 1991) (disclosure of privileged documents for use in an ENE session does not, by itself, waive privilege, as long as the party states its intention to retain the privilege); *Kimbrough v. Holiday Inn*, 478 F. Supp. 566 (E.D. Pa. 1979) (upholding mandatory arbitration program in one of the ten pilot courts and rejecting Seventh Amendment challenge); *Hume v. M & C Management*, 129 F.R.D. 506 (N.D. Ohio 1990) (federal

Further evidence of ADR's institutionalization is the emergence of specialized staff. Nearly a dozen courts have appointed an ADR administrator or director whose full-time responsibility is to manage and monitor the court's ADR programs. The administrator's duties are often broad and include recruitment and training of the court's neutrals, assistance in identifying cases appropriate for ADR, and ongoing evaluation of program quality. While some courts have created these positions because they have special funding as experimental courts under the CJRA, others support such positions from their general budget. Even when courts have not been able to or have not wanted to fund a full-time, high-level position, many have assigned part-time ADR responsibilities to a member of the clerk's office staff.

ADR Quality and Court Resources

Quality ADR programs require dedicated management and ongoing monitoring, especially in districts where participation in ADR is required or where parties are strongly encouraged to use neutrals from the court's roster only. With the rapid expansion of ADR in the district courts, critical questions arise: Do the courts have the resources and capability to run these programs and ensure the quality of their ADR services? Will the courts' resources be further strained if Congress decides to encourage or require greater use of ADR?¹⁶ If courts do not have the resources, should they be in the ADR business at all?

As this sourcebook shows, ADR is a growing presence in the district courts, and questions of how to ensure its quality will only become more urgent. As a matter of policy, the judiciary has spoken in support of a variety of alternatives to litigation and has recognized the importance of well-designed and funded programs.¹⁷ Within a year, Congress will presumably consider again whether to

courts have no authority to summon citizens to serve as jurors in summary jury trials). *And see* *Strandell v. Jackson County*, 838 F.2d 884 (7th Cir. 1988), and *In re NLO, Inc.*, 5 F.3d 154 (6th Cir. 1993) (judge cannot order parties to participate in a summary jury trial); *cf. McCay v. Ashland Oil Co.*, 120 F.R.D. 43 (E.D. Ky. 1988), and *Arabian Am. Oil Co. v. Scarfone*, 119 F.R.D. 448 (M.D. Fla. 1988).

16. *See, e.g.*, H.R. 1443, 104th Cong. 1st Sess. (1995), the Court Arbitration Authorization Act of 1995, which would require all district courts to offer arbitration. The Judicial Conference has opposed extension of the authority to adopt mandatory court-annexed arbitration beyond the ten currently authorized districts. JCUS Report, March 1993, at 12, and Sept. 1993, at 45.

17. Recommendation 39 of the Long Range Plan for the Federal Courts states, "District courts should be encouraged to make available a variety of alternative dispute resolution techniques, procedures, and resources to assist in achieving a just, speedy, and inexpensive determination of civil litigation." *See* pp. 70–71 for the recommendation and its supporting language. Judicial Conference of the United States, Long Range Plan for the Federal Courts (December 1995).

ADR Quality and Court Resources

continue authorization for the twenty arbitration courts and may consider as part of that authorization whether all courts should offer a variety of ADR methods.¹⁸ For those who will initiate and design future ADR programs—as well as for those who wish to examine and revise existing programs—we offer this sourcebook as a guide and resource.

18. Pub. L. No. 103-420 extended the arbitration programs through 1997. In hearings on H.R. 1443 (Court Arbitration Authorization Act of 1995), held May 11, 1995, testimony by the Department of Justice suggested the bill be amended to require federal district courts to offer an array of ADR options. See *Court Arbitration Authorization Act of 1995: Hearings on H.R. 1443 Before the Subcomm. on Courts and Intellectual Property of the House Committee on the Judiciary, 104th Cong., 1st Sess. 65-67 (1995)* (testimony of Paul R. Friedman, deputy associate attorney general, U.S. Department of Justice).

A Note on Tables 1–7

In the following tables we identify the principal ADR programs adopted by the federal district courts. The tables include only ADR processes that we have labeled “court-based programs,” by which we mean those that are managed by the courts and, in most instances, are based on formal rules and procedures that apply court-wide. While most of the procedures classified this way use attorney neutrals to provide the ADR service, we also include in the table the several mediation and ENE programs that rely on judges. Selecting which of the growing number of magistrate judge settlement programs to classify as mediation is risky at best; we selected only those where a court specifically mentioned that it follows a mediation model or has trained its magistrate judges in mediation techniques. As more magistrate judges receive such training, the line between magistrate judge settlement programs and mediation programs will blur even further.

In Table 1, we report the range and number of court-based ADR programs established in the district courts through the summer of 1995. We categorize all ADR programs according to generally accepted terminology; footnotes indicate where different program names are used by the court. The table identifies the courts that have established programs for arbitration, mediation, early neutral evaluation, settlement week, and case evaluation, as well as the courts that authorize or use the summary jury trial.

To get a complete picture of each courts’ approaches to ADR and settlement, the reader should also consult Table 2, which describes other case resolution procedures reported to us by the courts. The table provides information about the courts’ judicial settlement practices. It also identifies courts that have authorized ADR use but have not established procedures for referring and managing cases; courts that have decided to refer cases to private ADR providers rather than to implement their own program; and courts that have decided not to authorize or use any form of ADR.

Tables 3 through 7 report selected features of the five main forms of court-managed ADR—arbitration (Table 3), mediation (Table 4), early neutral evaluation (Table 5), settlement week (Table 6), and case valuation (Table 7). Only courts identified in Table 1 as having ADR programs are included in Tables 3 through 7. The tables provide information on the date the courts’ ADR programs were established, the methods by which cases are referred to ADR (including whether referral is mandatory), the types of neutrals on the courts’ rosters, whether parties must pay fees, and how many cases were referred to the ADR program in the first nine months of 1994.

Table 1: ADR in the Federal District Courts

District	Court ADR Programs					Summary Jury Trial	District
	Arbitration	Mediation	Early Neutral Evaluation	Settlement Week	Case Valuation		
M.D. Ala.							M.D. Ala.
N.D. Ala.	• ¹	•					N.D. Ala.
S.D. Ala.		•				•	S.D. Ala.
D. Alaska							D. Alaska
D. Ariz.	•						D. Ariz.
E.D. Ark.							E.D. Ark.
W.D. Ark.							W.D. Ark.
C.D. Cal.							C.D. Cal.
E.D. Cal.			•				E.D. Cal.
N.D. Cal. ²	•	•	•			•	N.D. Cal.
S.D. Cal.	•	•	• ³			•	S.D. Cal.
D. Colo.		• ⁴				•	D. Colo.
D. Conn.						•	D. Conn.
D. Del.		• ⁵					D. Del.
D. D.C.		•					D. D.C.
M.D. Fla.	•	•					M.D. Fla.
N.D. Fla.		•					N.D. Fla.
S.D. Fla.		•				•	S.D. Fla.
M.D. Ga.	•						M.D. Ga.
N.D. Ga.							N.D. Ga.
S.D. Ga.							S.D. Ga.
D. Guam							D. Guam
D. Haw.							D. Haw.
D. Idaho	•	•					D. Idaho
C.D. Ill.						•	C.D. Ill.
N.D. Ill.						•	N.D. Ill.
S.D. Ill.						•	S.D. Ill.
N.D. Ind.		•					N.D. Ind.
S.D. Ind.		•				•	S.D. Ind.
N.D. Iowa		• ⁶				•	N.D. Iowa
S.D. Iowa		• ⁷				•	S.D. Iowa
D. Kan.		•				•	D. Kan.
E.D. Ky.							E.D. Ky.
W.D. Ky.		•				•	W.D. Ky.

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Table 1 (cont.)

District	Court ADR Programs					Summary Jury Trial	District
	Arbitration	Mediation	Early Neutral Evaluation	Settlement Week	Case Valuation		
E.D. La.						•	E.D. La.
M.D. La.		• ⁸				•	M.D. La.
W.D. La.						•	W.D. La.
D. Me.						•	D. Me.
D. Md.						•	D. Md.
D. Mass.						•	D. Mass.
E.D. Mich.					• ⁹		E.D. Mich.
W.D. Mich.	•	•	•		• ¹⁰	•	W.D. Mich.
D. Minn.		• ¹¹				•	D. Minn.
N.D. Miss.						•	N.D. Miss.
S.D. Miss.							S.D. Miss.
E.D. Mo.		•	•				E.D. Mo.
W.D. Mo. ¹²	•	•	•			•	W.D. Mo.
D. Mont.							D. Mont.
D. Neb.		• ¹³					D. Neb.
D. Nev.			• ¹⁴			•	D. Nev.
D. N.H.						•	D. N.H.
D. N.J.	•	•				•	D. N.J.
D. N.M.						•	D. N.M.
E.D.N.Y.	•	•	•				E.D.N.Y.
N.D.N.Y.	•					•	N.D.N.Y.
S.D.N.Y.		•					S.D.N.Y.
W.D.N.Y.	•			• ¹⁵			W.D.N.Y.
E.D. N.C.		•				•	E.D. N.C.
M.D. N.C.		•					M.D. N.C.
W.D. N.C.		•				•	W.D. N.C.
D. N.D.							D. N.D.
D. N. Mar. I.						•	D. N. Mar. I.
N.D. Ohio	•	•	•			•	N.D. Ohio
S.D. Ohio				•		•	S.D. Ohio
E.D. Okla.						•	E.D. Okla.
N.D. Okla.		• ¹⁶				•	N.D. Okla.
W.D. Okla.	•	•				•	W.D. Okla.
D. Or.		•				•	D. Or.
E.D. Pa.	•	•					E.D. Pa.
M.D. Pa.		•				•	M.D. Pa.

ADR in the Federal District Courts

Table 1 (cont.)

Court ADR Programs							District
District	Arbitration	Mediation	Early Neutral Evaluation	Settlement Week	Case Valuation	Summary Jury Trial	District
W.D. Pa.	●		● ¹⁷				W.D. Pa.
D. P.R.		● ¹⁸					D. P.R.
D. R.I.	●	●	●			●	D. R.I.
D. S.C.		●				●	D. S.C.
D. S.D.							D. S.D.
E.D. Tenn.		●					E.D. Tenn.
M.D. Tenn.		● ¹⁹					M.D. Tenn.
W.D. Tenn.						●	W.D. Tenn.
E.D. Tex.		●					E.D. Tex.
N.D. Tex.		● ²⁰				●	N.D. Tex.
S.D. Tex.		●	● ²¹			●	S.D. Tex.
W.D. Tex.	●	●					W.D. Tex.
D. Utah	●	●					D. Utah
D. Vt.			●				D. Vt.
D. V.I.		●					D. V.I.
E.D. Va.							E.D. Va.
W.D. Va.							W.D. Va.
E.D. Wash.	● ²²	●					E.D. Wash.
W.D. Wash.	●	●					W.D. Wash.
N.D. W. Va.				●		●	N.D. W. Va.
S.D. W. Va.		●					S.D. W. Va.
E.D. Wis.		●				●	E.D. Wis.
W.D. Wis.		● ²³	●			●	W.D. Wis.
D. Wyo.						●	D. Wyo.
Total	22	51 ²⁴	14 ²⁵	3	2	48	

1. In the Northern District of Alabama, arbitration occurs only as the second stage of a two-stage mediation/arbitration process.
2. Under the Northern District of California's Multi-Option ADR Program, parties in eligible cases are asked to select from among the court's ADR options—mediation, ENE, arbitration, and magistrate judge settlement conference—and private ADR. The summary jury trial is also offered but is seldom chosen. Four judges participate in the Multi-Option Program.
3. In the Southern District of California, parties in all eligible civil cases must meet with a magistrate judge to discuss the case and the court's ADR options. The meeting is referred to as early neutral evaluation.

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After this meeting, the parties may select an ADR option—arbitration, mediation, magistrate judge settlement conference—or the magistrate judge may order the parties to participate in one of these procedures.

4. In the District of Colorado, almost all civil cases are referred to the magistrate judges for mandatory settlement conferences. The magistrate judges are trained in mediation techniques and conduct the conferences as mediations.
5. The magistrate judges in the District of Delaware are trained in mediation and conduct mediation sessions in cases referred by the district judges.
6. Using classic mediation techniques, the magistrate judges in the Northern District of Iowa conduct settlement conferences in cases referred by the district judges.
7. In the Southern District of Iowa, the magistrate judges use classic mediation techniques in settlement conferences held in cases referred by the district judges.
8. Two mediation programs are available to litigants in the Middle District of Louisiana, a court-based program and a program sponsored by the Baton Rouge Bar Association.
9. In the Eastern District of Michigan, this process is also called Michigan Mediation and is administered by a nonprofit association established by the state courts.
10. This process is also called Michigan Mediation.
11. In the District of Minnesota, the settlement conferences conducted by the magistrate judges are modeled on the classic mediation process and techniques.
12. The Western District of Missouri has established the experimental Early Assessment Program (EAP) in which one-third of eligible civil cases are required to meet with the EAP administrator within thirty days after answer is filed to select one of the court's ADR options: mediation, ENE, arbitration, and magistrate judge settlement conferences. The vast majority of participating litigants select mediation with the court's program administrator.
13. In the District of Nebraska, cases are referred to mediation centers operated by the State of Nebraska Office of Dispute Resolution, where neutrals trained to mediate federal cases serve as mediators.
14. The District of Nevada is experimenting with an early case evaluation program for in forma pauperis pro se prisoner cases. District and magistrate judges conduct the evaluation hearings.
15. Some judges in the Western District of New York refer cases to a settlement week program sponsored by the Monroe County Bar Association. The court held its own settlement week in the fall of 1995.
16. The Northern District of Oklahoma calls its mediation process the Adjunct Settlement Judge Program.
17. The Western District of Pennsylvania calls its neutral evaluation process mediation/evaluation.
18. The District of Puerto Rico has trained all its judicial officers to serve as mediators, and any civil case may be referred for mediation to a judge other than the judge assigned the case. Magistrate judges conduct most of the mediations.
19. In the Middle District of Tennessee, cases may be referred to settlement conferences *sua sponte*, but most are referred with party consent. A judge who is not assigned to the case—usually a magistrate judge—conducts the settlement conference following either a facilitative or evaluative mediation model. On balance, the facilitative model is used more frequently than the evaluative model.
20. The court managed mediation program in the Northern District of Texas relies on private providers rather than on a court roster.
21. The Southern District of Texas offers a process whose goal is case evaluation and settlement. Although labeled “arbitration,” the procedure is more like ENE—no decision is given, for example, and no judgment entered.
22. In the Eastern District of Washington, arbitration is generally used only as the second stage in a case initially referred to mediation.

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23. The magistrate judges in the Western District of Wisconsin, who conduct most of the court's settlement conferences, use mediation techniques.
24. In eight of these mediation programs, the mediation sessions are conducted by magistrate judges. In the remainder of the programs, nonjudicial neutrals conduct the sessions.
25. In two of these ENE programs, the ENE sessions are conducted by judges. In the remainder of the programs, nonjudicial neutrals conduct the sessions.

Table 2: Other Case Resolution Practices and Procedures

District	Description
M.D. Ala.	Although the court has not established a court ADR program, it provides a settlement program in which most civil cases are eligible for voluntary settlement conferences with magistrate judges.
N.D. Ala.	In addition to mediation and mediation/arbitration, the court authorizes use of any private or court-sponsored ADR requested by the parties and approved by the court. All cases remain subject to a settlement conference with a district or magistrate judge.
S.D. Ala.	In addition to mediation, the court permits litigants to use private ADR or summary jury trial with court approval. Parties may also request a settlement conference with a judge.
D. Alaska	The court has determined that it will not at this time establish any court ADR programs. The judges may require litigants to participate in judge-conducted settlement conferences.
D. Ariz.	In addition to arbitration, the court authorizes referral to private ADR services with consent of all parties. Cases are also commonly referred to magistrate judges for settlement conferences.
E.D. Ark.	The court has determined that it will not establish any court ADR programs. Private ADR options are described in the court's general brochure for civil litigants.
W.D. Ark.	The court has determined that it will not establish any court ADR programs but will provide litigants a brochure describing private ADR options in the community. The court is experimenting with a mandatory settlement conference procedure, in which all trial-ready cases assigned to one of the court's district judges are referred to magistrate judges for settlement discussions.
C.D. Cal.	Late in the pretrial process, the court requires parties to participate in a mandatory settlement procedure hosted either by the assigned judge, another district judge, a magistrate judge, or an attorney. Parties may also request referral to a retired judge or private ADR provider. This program is described by the court as a "structured settlement conference" and may entail use of "summary adversarial hearings." Each judge is also authorized to develop procedural rules for other ADR methods suggested by the parties and approved by the judge.
E.D. Cal.	In addition to the early neutral evaluation program, all district and magistrate judges are available to conduct settlement conferences as early in the case as practicable.
N.D. Cal.	Under the court's Multi-Option ADR Program litigants may request an early settlement conference with a magistrate judge. Late-stage settlement conferences are also held in many civil cases, generally conducted by magistrate judges.

Table 2 (cont.)

District	Description
S.D. Cal.	In addition to its ADR programs, the court authorizes mandatory settlement conferences, which are held in almost every civil case and are conducted by the magistrate judges.
D. Colo.	In addition to its magistrate judge mediation program, the court encourages litigants to pursue private ADR options. The summary jury trial is used occasionally.
D. Conn.	The court has established a procedure in which retired attorneys, called parajudges, conduct settlement conferences. District and magistrate judges may also conduct settlement conferences, and consensual referrals to private ADR and summary jury trial are authorized as well.
D. Del.	The court has established a settlement program in which magistrate judges are authorized to conduct settlement conferences, mediations, early neutral evaluations, and arbitrations in cases referred by the district judges.
D. D.C.	In addition to the mediation program, individual judges refer cases to magistrate judges for settlement conferences.
M.D. Fla.	In addition to its mediation and arbitration programs, the court requires preliminary pretrial conferences at which settlement is discussed.
S.D. Fla.	In addition to its mediation program, the court also uses mandatory judge-hosted settlement conferences.
M.D. Ga.	In addition to the arbitration program, one judge frequently asks parties in complex civil cases to consider private mediation.
N.D. Ga.	The court authorized a mandatory, nonbinding arbitration program under its CJRA plan, but the court will not implement it until the district receives congressional funding and authorization for the program. Individual judges are experimenting with ADR on a case-by-case basis, and some encourage use of private mediation or arbitration.
S.D. Ga.	The court authorizes use of arbitration and mediation but has not established any court ADR programs to provide these services. The court regularly requires settlement conferences as part of status and pretrial conferences.
D. Guam	The court has not established any court ADR programs but authorizes voluntary use of judge-hosted settlement conferences in all cases.
D. Haw.	The court has not established any court ADR programs. The magistrate judges conduct many settlement conferences.
D. Idaho	In addition to its mediation program, the court refers all appropriate cases to the magistrate judges for mandatory settlement conferences after discovery is completed.

Table 2 (cont.)

District	Description
C.D. Ill.	The court has not established any court ADR programs but reports occasional use of the summary jury trial.
N.D. Ill.	The court has not established any ADR programs but relies instead on judge-hosted settlement conferences, the court's primary settlement process. Some judges also refer cases to private mediation and arbitration, and some conduct occasional summary jury trials.
S.D. Ill.	The court authorizes post-discovery referral to mandatory settlement conferences conducted by district and magistrate judges. One judge has made occasional use of the summary jury trial.
N.D. Ind.	The court requires that parties in cases not resolved by the court's mediation program participate in a settlement conference with a district or magistrate judge.
S.D. Ind.	In addition to providing a mediation process, the court refers nearly every civil case to a settlement conference with a magistrate judge. One judge uses the summary jury trial.
N.D. Iowa	In addition to referral of cases to the magistrate judge for settlement conferences, the judges occasionally hold a summary jury trial.
S.D. Iowa	In addition to use of the magistrate judges for settlement conferences in the court's lengthier cases, the court conducts an annual master trial calendar for shorter trial-ready cases. During the period 90–120 days before trial, the magistrate judges hold settlement conferences in these cases.
D. Kan.	In addition to mediation and summary jury trial, the court authorizes use of most other ADR methods but has not established court ADR programs to provide these services.
E.D. Ky.	The court has not established any court-wide ADR programs. In the Lexington division, litigants are advised of a private mediation service. In the Covington division, litigants are advised of a state court program for voluntary arbitration. Each judge has his or her own settlement procedures.
W.D. Ky.	The court is authorized by statute to provide voluntary arbitration but has not implemented a program. In addition to its mediation program, the court authorizes use of early neutral evaluation, but has not established an ENE program. The court occasionally refers a case to a summary jury or bench trial conducted by a magistrate judge. All judges conduct settlement conferences and also refer many cases to the magistrate judges for settlement.
E.D. La.	The assigned judge is authorized to employ any ADR processes endorsed by the court, including referral to private mediation with the parties' consent, but the court has not established a program to provide these ser-

Table 2 (cont.)

District	Description
	vices. Local rules require counsel to be authorized and prepared to discuss settlement at the final pretrial conference.
M.D. La.	In addition to the court's mediation program, all civil cases remain subject to judicial settlement conferences. The court also authorizes mandatory summary jury trials.
W.D. La.	The court authorizes and encourages use of arbitration and mediation but has determined that it will not establish court ADR programs. Two of the magistrate judges conduct summary jury trials, and the court maintains a list of attorneys and other experts who have volunteered to provide ADR services. The court also holds settlement conferences at the request of the parties.
D. Me.	The court uses summary jury trials and other ADR techniques but has not established court ADR programs. The court encourages settlement efforts throughout the litigation, and counsel must exchange settlement offers before the final pretrial conference.
D. Md.	The court has not established a court ADR program but advises clients in special cases of various ADR techniques, such as the summary jury trial. Settlement conferences with the magistrate judges are available.
D. Mass.	The court authorizes several forms of ADR and maintains a list of private ADR neutrals, but has not established a formal court ADR program. Some judges refer cases to a summary trial procedure managed by the Boston Bar Association. District or magistrate judges hold settlement conferences at party or judge request.
E.D. Mich.	In addition to the case valuation program, all judges are available to conduct settlement conferences. Individual judges may also authorize use of other forms of ADR on a case-by-case basis at party request.
W.D. Mich.	In addition to referral to the court's ADR programs, judges also refer selected cases to settlement conferences, usually conducted by a magistrate judge.
D. Minn.	The court authorizes use of nonbinding arbitration, summary jury trial, and other ADR procedures before a district judge, magistrate judge, or nonjudicial neutral but has not established a court ADR program. A proposed local rule to formalize existing practice would require nearly all trial-ready civil cases to participate in a settlement conference. Magistrate judges also hold settlement conferences at other stages of the litigation.
N.D. Miss.	Although the court has not established an ADR program, it authorizes use of most forms of ADR, including the summary jury trial, with consent of the parties. The clerk's office maintains a list of private ADR pro-

Table 2 (cont.)

District	Description
	viders. The magistrate judges routinely discuss settlement at the final pre-trial conference and at earlier stages if appropriate.
S.D. Miss.	Although the court has not established an ADR program, it encourages use of ADR and provides litigants with information about ADR resources in the community. The court authorizes mandatory settlement conferences.
E.D. Mo.	In addition to the mediation and early neutral evaluation programs, judges refer cases to settlement conferences on an ad hoc basis.
W.D. Mo.	Under the court's Early Assessment Program (EAP), parties may choose to have their case referred to a magistrate judge for settlement discussions. Cases not in the EAP may be referred for a magistrate judge settlement conference after discovery is complete.
D. Mont.	The court has not established any court ADR programs, but the judges routinely refer cases to post-discovery settlement conferences with the magistrate judges. Conferences may also be held earlier in the case if appropriate.
D. Nev.	The court authorizes the judges to use any appropriate form of ADR, including summary jury trial, but has not established procedures other than those for handling prisoner cases. On a case-by-case basis, cases may be referred to the magistrate judges for settlement conferences.
D. N.H.	The court has decided not to establish a court ADR program but promotes settlement at all stages of a case and encourages parties to consider voluntary use of private ADR. The summary jury trial has been used by some judges. All judges are available for settlement conferences, and settlement is routinely discussed at the final pretrial conference.
D. N.J.	In addition to its mediation and arbitration programs, mandatory settlement conferences with district and magistrate judges are an established procedure in the court.
D. N.M.	The court encourages the judges and litigants to consider use of ADR but has not established any ADR programs. The judges use summary jury trials, and mandatory settlement conferences with magistrate judges are held in all civil cases near the close of discovery.
E.D.N.Y.	In addition to its ADR procedures, the court's magistrate judges hold settlement conferences in nearly every civil case.
N.D.N.Y.	In addition to its arbitration program, the court refers most civil cases to the magistrate judges for settlement discussions. The summary jury trial is used by the court on occasion.

Table 2 (cont.)

District	Description
S.D.N.Y.	In addition to the mediation program, the judges hold settlement conferences in most civil cases.
W.D.N.Y.	In addition to its arbitration and settlement week procedures, the court authorizes mandatory settlement conferences in most civil cases early in the pretrial process.
E.D. N.C.	In addition to its mediation program, the court authorizes its magistrate judges to conduct settlement conferences at the request of judges or parties. On occasion, magistrate judges conduct a summary jury trial.
M.D. N.C.	In addition to its mediation program, the court holds settlement conferences in all cases set for the four annual civil trial calendars.
W.D. N.C.	Litigants who do not agree to participate in the court's mediation program must select another ADR process. Processes authorized by the court—though not established as court programs—include arbitration and early neutral evaluation. Summary jury trials are also authorized, as are mandatory settlement conferences.
D. N.D.	The court encourages voluntary use of ADR and other settlement devices, and the court's uniform scheduling/discovery form lists an array of options for litigants to consider, including early judicial settlement conferences; ENE with a judicial officer, technical expert, or attorney; and private mediation or arbitration. Parties most frequently request settlement conferences with a magistrate judge. Mandatory conferences are scheduled for cases that have not settled by the close of discovery.
D. N. Mar. I.	The court has determined that it will not establish court ADR procedures but authorizes use of the summary jury trial. Judicial settlement conferences may also be held, either at the order of a judge or request of a party.
N.D. Ohio	In addition to its ADR programs, the court held a settlement week in 1994.
S.D. Ohio	In addition to providing a settlement week process, the court authorizes party use of any appropriate ADR process available in the private sector. Summary jury trials are used on occasion in complex cases. District and magistrate judges conduct settlement conferences upon order of a judge or request of a party.
E.D. Okla.	Most civil cases are mandatorily referred to the magistrate judge—also called the settlement judge—for settlement conferences; referral generally occurs after completion of discovery. Summary jury trials are also used by the court.
N.D. Okla.	In addition to its mediation program, the court offers special procedures for business disputes, including the Executive Summary Jury Trial, which combines elements of the summary jury trial, the minitrial, and evaluative mediation in a one- to two-day settlement process. The court also

Table 2 (cont.)

District	Description
	authorizes use of mandatory judge-hosted settlement conferences at the earliest possible stage in the case. Some judges refer all eligible cases, others refer cases only with party consent.
W.D. Okla.	In addition to its ADR programs, the court refers most civil cases to a magistrate judge for mandatory settlement conferences after discovery is complete. Referral before discovery completion requires party consent.
D. Or.	In addition to its mediation program, the court authorizes settlement conferences at either a judge's order or a party's request. The summary jury trial is also used occasionally.
E.D. Pa.	In addition to its court programs, the court permits any party or judge to suggest use of any other ADR process. The court also authorizes mandatory settlement conferences.
M.D. Pa.	In addition to its mediation program, the court holds at least one pretrial/settlement conference in each civil case. The summary jury trial is used regularly by one judge on the court.
W.D. Pa.	In addition to its ADR programs, the court holds settlement conferences as needed.
D. P.R.	In addition to the magistrate judge mediation program, judges routinely hold settlement conferences in their cases before trial.
D.R.I.	All civil litigants must participate in a mandatory settlement conference with a magistrate judge or use one of the court's ADR options.
D. S.C.	In addition to the court's mediation program, some magistrate judges hold settlement conferences as part of their civil pretrial work. The court also held one settlement week in 1993 and has on occasion used the summary jury trial.
D. S.D.	The court has not established any court ADR programs but is experimenting with referral of selected complex cases to magistrate judges for settlement discussions.
M.D. Tenn.	The court approves and encourages the use of ADR but has not yet determined whether it will establish any court ADR programs other than the magistrate judges' mediation program. Most civil cases may be mandatorily referred to a judicial settlement conference at any time, but referrals are generally made only with party consent.
W.D. Tenn.	The court authorizes the assigned judge to use mediation, summary jury trial, or other forms of ADR as appropriate. The court is considering establishing a mediation program and has authorized but not implemented an ENE program. The court relies heavily on settlement conferences conducted by either the assigned judge, a magistrate judge, or another district judge.

Table 2 (cont.)

District	Description
E.D. Tex.	In addition to its mediation program, the court holds mandatory case management conferences at which settlement may be discussed.
N.D. Tex.	In addition to its mediation program, which authorizes referrals to private mediators, the court authorizes use of summary jury trial and referral to other private ADR methods. The court also authorizes mandatory judge-hosted settlement conferences and strongly favors early settlement discussions.
S.D. Tex.	In addition to the court's ADR procedures, summary jury trials are held on occasion. Some judges also hold settlement conferences.
W.D. Tex.	In addition to its arbitration and mediation programs, the court authorizes other ADR methods but has not established them as court programs. District and magistrate judges conduct settlement conferences upon request of the parties.
D. Utah	In addition to its ADR programs, the court authorizes judge-hosted settlement conferences, but they are not often used.
D. Vt.	In addition to providing early neutral evaluation, the court schedules mandatory judicial settlement conferences in almost all trial-ready cases.
D. V.I.	In addition to its mediation program, the court encourages settlement discussions at all conferences in civil cases. The judges hold settlement conferences at party request.
E.D. Va.	The court has not established any forms of court ADR. Settlement conferences are held when requested by the parties.
W.D. Va.	The court is one of ten authorized by statute to provide voluntary arbitration but is one of two that has not implemented a program. The court has not established any other ADR programs. Judge-hosted settlement conferences are used as needed.
E.D. Wash.	In addition to its ADR procedures, the court holds settlement conferences, upon party request, in cases in which discovery has been completed.
W.D. Wash.	In addition to its ADR procedures, the court authorizes settlement conferences at party or judge initiative. In mediated cases that do not settle, the judge frequently orders a settlement conference.
N.D. W. Va.	Settlement week is the court's main ADR device, but parties may opt out of settlement week by selecting another form of ADR authorized by the court, including arbitration, early neutral evaluation, and summary jury trial. The court has not established any court programs to provide these other ADR methods.
S.D. W. Va.	In addition to mediation, the court has authorized neutral evaluation with a judge. Judge-hosted settlement conferences are held in every trial-ready case.

Table 2 (cont.)

District	Description
E.D. Wis.	The court permits parties to use any form of ADR but provides only mediation through a court program. Summary jury trials are held occasionally, and the judges hold settlement conferences at their discretion.
W.D. Wis.	Although the court provides an early neutral evaluation program, the court's primary settlement device is a settlement conference with a magistrate judge, who may commence settlement on his or her own initiative or at a judge or party's request. Summary jury trials are held on occasion in cases headed for protracted trials.
D. Wyo.	The court authorizes use of arbitration, mediation, summary jury trial, and other dispute resolution methods, but has not established any court ADR programs. The magistrate judges provide most of the court's settlement assistance. Mandatory referral is authorized but seldom used.

Arbitration Program Specifics

Table 3: Arbitration Program Specifics—Date Established, Method of Case Referral, Type of Neutral, Fees, and Number of Cases Referred

District	Date Program Established	Mandatory Referral to		Mandatory Referral by		Voluntary Referral		Type of Neutral	Fees	Number of Cases Referred During Survey Period (1/94–9/94)*
		ADR Menu; Parties or Judge Select Process	Judge May Order on Case Basis	Judge May Order on Request of One Party	Based on Consent of All Parties					
N.D. Ala. ¹	1994						●	Nonjudicial	Parties pay the neutral at a rate set by the parties or court. Unless parties or the court determine otherwise, the parties share the fee equally. Neutrals are encouraged to provide five free hours annually to low-income litigants.	Very few.
D. Ariz.	1992						● ²	Attorneys	The court sets and pays the arbitrator a fee of \$250 per case or per hearing day.	155 (1/94–11/94)
N.D. Cal. ³	1978		●				●	Attorneys	The court sets and pays fees of \$250 a day to a single arbitrator or \$150 a day to each arbitrator on a three-member panel.	2524
S.D. Cal.	1992				●		●	Attorneys	No fee.	9

* Courts were asked to report the number of cases referred between January 1–September 30, 1994. Where the court reported for a different time period, the time period is noted. Some numbers in this column are approximate; see individual court descriptions.

Table 3 (cont.)

District	Date Program Established	Mandatory Referral by Case Type or Track	Mandatory Referral to ADR Menu: Parties or Judge Select Process	Judge May Order on Case-by-Case Basis	Judge May Order on Request of One Party	Voluntary Referral Based on Consent of All Parties	Type of Neutral	Fees	Number of Cases Referred During Survey Period (1/94-9/94)*
M.D. Fla.	1984	●				●	Attorneys	The court sets and pays fees of \$100 per hearing for each arbitrator.	500 ⁵ (1/94-11/94)
M.D. Ga.	1991					● ⁶	Attorneys	Funds permitting, the court pays a single arbitrator at a court-set rate of \$250 a day.	132
D. Idaho	1992					●	Attorneys or retired judges	In standard cases, the parties equally share the arbitrator's court-set fee of \$100 an hour. In large complex cases, where the parties may select three arbitrators, the parties and arbitrators negotiate the fee.	0
W.D. Mich.	Established in 1985 as a mandatory program; made voluntary in 1992					●	Attorneys	The court pays the single arbitrator at the court-set rate of \$250 per case.	9

* Courts were asked to report the number of cases referred between January 1-September 30, 1994. Where the court reported for a different time period, the time period is noted. Some numbers in this column are approximate; see individual court descriptions.

Arbitration Program Specifics

Table 3 (cont.)

District	Date Program Established	Mandatory Referral by Case Type or Track	Mandatory Referral to ADR Menu; Parties or Judge Select Process	Judge May Order on Case-by-Case Basis	Judge May Order on Request of One Party	Voluntary Referral Based on Consent of All Parties	Type of Neutral	Fees	Number of Cases Referred During Survey Period (1/94-9/94)*
W.D. Mo. ⁷	Established in 1985 as a mandatory program; made voluntary in 1992		●			●	Attorneys or retired judges	The parties equally share the single arbitrator's market-rate fee, which is listed in the arbitrator's application to the court.	1
D.N.J.	1985	●				●	Attorneys	For all mandatory referrals, the court pays the single arbitrator a court-set fee of \$250 per case. When parties use arbitration by consent, they pay the arbitrator's fee.	1,235 ⁸
E.D.N.Y.	1986	●		●		●	Attorneys	The court sets and pays fees of \$250 per case to a single arbitrator or \$100 a case to each member of a three-person panel.	527 ⁹
N.D.N.Y.	1991					●	Attorneys	The court sets and pays fees of \$250 per case to a single arbitrator or \$100 per case to each member of a three-person panel.	0

* Courts were asked to report the number of cases referred between January 1-September 30, 1994. Where the court reported for a different time period, the time period is noted. Some numbers in this column are approximate; see individual court descriptions.

Table 3 (cont.)

District	Date Program Established	Mandatory Referral by Case Type or Track	Mandatory Referral to ADR Menu; Parties or Judge Select Process	Judge May Order on Case Basis	Judge May Order on Request of One Party	Voluntary Referral Based on Consent of All Parties	Type of Neutral	Fees	Number of Cases Referred During Survey Period (1/94-9/94)*
W.D.N.Y.	1992					●	Attorneys	The court sets and pays fees of \$250 per case to a single arbitrator or \$100 per case to each member of a three-person panel if the arbitrators are selected from the court's panel. If outside arbitrators are used, the parties pay the fee if it exceeds the court-approved amount.	1
N.D. Ohio ¹⁰	1991			●	●	●	Attorneys and other qualified persons with special expertise or dispute resolution experience	The court sets and pays fees of \$250 per day or per case to a single arbitrator or \$100 per case or per day to each member of a three-person panel.	4
W.D. Okla.	1985	●				●	Attorneys	The court sets and pays fees of \$150 per case to a single arbitrator or \$100 per case to each member of a three-person panel.	86 ¹¹

* Courts were asked to report the number of cases referred between January 1-September 30, 1994. Where the court reported for a different time period, the time period is noted. Some numbers in this column are approximate; see individual court descriptions.

Arbitration Program Specifics

Table 3 (cont.)

District	Date Program Established	Mandatory Referral by Case Type or Track	Mandatory Referral to ADR Menu: Parties or Judge Select Process	Judge May Order on Case-by-Case Basis	Judge May Order on Request of One Party	Voluntary Referral Based on Consent of All Parties	Type of Neutral	Fees	Number of Cases Referred During Survey Period (1/94-9/94)*
E.D. Pa.	1978	●					Attorneys	The court pays each arbitrator on the three-person panel \$100 per case.	1,453 ¹²
W.D. Pa.	1991					● ¹³	Attorneys	The court sets and pays fees of \$250 a day to a single arbitrator or \$100 a day to each member of a three-person panel.	266
D. R.I. ¹⁴	1995		●				Attorneys and other qualified persons with special expertise or dispute resolution experience	There is no fee for the first hour of the hearing; thereafter the parties pay the arbitrator at a rate not to exceed \$150 an hour.	Information not yet available.
W.D. Tex.	1985	●				●	Attorneys	The court pays each member of the three-arbitrator panel \$75 a day.	2215

* Courts were asked to report the number of cases referred between January 1-September 30, 1994. Where the court reported for a different time period, the time period is noted. Some numbers in this column are approximate; see individual court descriptions.

Table 3 (cont.)

District	Date Program Established	Mandatory Referral by Case Type or Track	Mandatory Referral to ADR Menu; Parties or Judge Select Process	Judge May Order on Case Basis	Judge May Order on Request of One Party	Voluntary Referral Based on Consent of All Parties	Type of Neutral	Fees	Number of Cases Referred During Survey Period (1/94-9/94)*
D. Utah	1993			●		●	Attorneys	The court pays single arbitrators or each member of a panel of three arbitrators at a court-set rate of \$100 per day.	4
E.D. Wash. ¹⁶	1988					●	Attorneys	No fee.	Approximately 2% of the civil caseload was referred to arbitration from 1/94-12/94.
W.D. Wash.	1992					●	Attorneys	The court pays the single arbitrator at a court-set rate of \$150 per day.	2

* Courts were asked to report the number of cases referred between January 1-September 30, 1994. Where the court reported for a different time period, the time period is noted. Some numbers in this column are approximate; see individual court descriptions.

Arbitration Program Specifics

1. In the Northern District of Alabama, parties may use arbitration if they select the court's med-arb track, in which arbitration occurs only if mediation has not resolved the dispute.
2. In the District of Arizona, all eligible cases are automatically referred to arbitration after the answer is filed. Because this arbitration program is voluntary and all parties must consent to arbitrate, any party may withdraw from the arbitration referral for any reason by filing an opt-out notice.
3. Under the Northern District of California's Multi-Option Program, there is a presumption that cases assigned to the four program judges will select a form of ADR; arbitration is one of the choices. Cases assigned to other judges and that meet the criteria for arbitration set out in ADR Local Rule 4 are automatically and mandatorily referred to arbitration. In addition, any other party may choose arbitration at their own initiative.
4. Two hundred and forty-six cases were mandatorily referred by case type and damage amount under ADR Local Rule 4. Six cases selected arbitration under the court's Multi-Option Program.
5. The arbitration caseload in the Middle District of Florida consists predominantly of mandatory referrals.
6. All eligible cases are referred automatically to the voluntary arbitration program in the Middle District of Georgia. Because the arbitration program is voluntary and all parties must consent to arbitrate, any party may withdraw from the arbitration referral for any reason by filing an opt-out notice.
7. In the Western District of Missouri, one-third of eligible civil cases are automatically referred to the court's Early Assessment Program (EAP), which requires parties to select one of the court's ADR options, among which is arbitration. Another one-third of civil cases may voluntarily enter the EAP program; the full array of ADR options, including arbitration, is also available to these cases.
8. The arbitration caseload in the District of New Jersey consists predominantly of mandatory referrals.
9. The arbitration caseload in the Eastern District of New York consists predominantly of mandatory referrals.
10. In the Northern District of Ohio, a case may be referred to the court's voluntary arbitration program by judicial initiative, on the request of one party, or with the consent of all parties. Because the court's arbitration program is voluntary, any party may withdraw from an arbitration referral by filing a notice of nonconsent.
11. During the survey period in the Western District of Oklahoma, the court referred seventy-five cases to arbitration mandatorily by case type and eleven cases on consent of all parties.
12. The arbitration caseload in the Eastern District of Pennsylvania consists predominantly of mandatory referrals.
13. All eligible cases are referred to arbitration automatically in the Western District of Pennsylvania. Because this arbitration program is voluntary and all parties must consent to arbitrate, any party may withdraw from the arbitration referral for any reason by filing an opt-out notice.
14. Every civil litigant in the District of Rhode Island is required to select one of the court's settlement or ADR options, which include arbitration.
15. In the Eastern District of Washington, judges may order cases to the court's two stage mediation/arbitration process. Parties in cases not resolved by mediation may, upon their consent, proceed to arbitration.

Table 4: Mediation Program Specifics—Date Established, Method of Case Referral, Type of Neutral, Fees, and Number of Cases Referred

District	Date Program Established	Mandatory Referral by Case Type or Track	Mandatory Referral to ADR Menu: Parties or Judge Select Process	Judge May Order on Case-by-Case Basis	Judge May Order on Request of One Party	Voluntary Referral Based on Consent of All Parties	Type of Neutral	Fees	Number of Cases Referred During Survey Period (1/94–9/94)*
N.D. Ala. ¹	1994			●		●	Nonjudicial persons	In most cases, parties equally share the fee, which is either at a reasonable market rate or a court-set rate. Neutrals are encouraged to serve five hours a year without pay to accommodate low-income litigants.	100 (4/94–12/94)
S.D. Ala.	1994			●		●		The parties generally share the fee, at an agreed-on rate of \$150 an hour or less. Parties may ask the court to review the fee for reasonableness. To accommodate low-income litigants, each neutral must agree to serve without payment in one case a year.	Information not yet available.

* Courts were asked to report the number of cases referred between January 1–September 30, 1994. Where the court reported for a different time period, the time period is noted. Some numbers in this column are approximate; see individual court descriptions.

Mediation Program Specifics

Table 4 (cont.)

District	Date Program Established	Mandatory Referral by Case Type or Track	Mandatory Referral to ADR Menu; Parties or Judge Select Process	Judge May Order on Case-by-Case Basis	Judge May Order on Request of One Party	Voluntary Referral Based on Consent of All Parties	Type of Neutral	Fees	Number of Cases Referred During Survey Period (1/94-9/94)*
N.D. Cal. ²	1993		●			●	Attorneys	There is no fee for the initial four hours. Thereafter, the mediator may continue to volunteer his or her time, or if the parties wish to continue the mediation they may agree to jointly pay the mediator \$150 an hour.	83 ³
S.D. Cal.	1992			●		●	Attorneys	No fee.	7
D. Colo.	1992			●		●	Magistrate judges	Not applicable.	Unknown.
D. Del.	1991			●		●	Magistrate judges	Not applicable.	Unknown.
D.D.C.	1989					●	Attorneys	No fee.	140
M.D. Fla.	1989			● ⁴		●	Attorneys	The parties pay the mediator at the court-set rate of \$150 an hour.	300 (1/94-10/94)
N.D. Fla.	1995					●	State court approved roster of neutrals	The parties equally share the mediator's fee, which is at court-set rates.	Information not yet available.

* Courts were asked to report the number of cases referred between January 1-September 30, 1994. Where the court reported for a different time period, the time period is noted. Some numbers in this column are approximate; see individual court descriptions.

Table 4 (cont.)

District	Date Program Established	Mandatory Referral by Case Type or Track	Mandatory Referral to ADR Menu; Parties or Judge Select Process	Judge May Order on Case Basis	Judge May Order on Request of One Party	Voluntary Referral Based on Consent of All Parties	Type of Neutral	Fees	Number of Cases Referred During Survey Period (1/94-9/94)*
S.D. Fla.	1993			• ⁵		•	Attorneys	Parties equally share the mediator's court-set fee, which is \$150 an hour unless the parties and mediator agree otherwise in writing. To accommodate low-income litigants, mediators certified by the court are required to accept at least two cases per year for a lesser or no fee.	3,611 (1/94-11/94)
D. Idaho	1995	•					Attorney	Parties equally share mediators' market rate fees and expenses. Absent such rates, mediators are paid \$100 an hour.	Information not yet available.
N.D. Ind.	1991	•					Attorneys and non-attorneys	The parties pay the mediator at market-rate fees. Indigent parties may petition the court to modify the fee.	100 (1/94-12/94)
S.D. Ind.	1991					•	Attorneys	The parties pay the mediator at market rates.	150 (1/94-12/94)

* Courts were asked to report the number of cases referred between January 1-September 30, 1994. Where the court reported for a different time period, the time period is noted. Some numbers in this column are approximate; see individual court descriptions.

Mediation Program Specifics

Table 4 (cont.)

District	Date Program Established	Mandatory Referral by Case Type or Track	Mandatory Referral to ADR Menu; Parties or Judge Select Process	Judge May Order on Case-by-Case Basis	Judge May Order on Request of One Party	Voluntary Referral Based on Consent of All Parties	Type of Neutral	Fees	Number of Cases Referred During Survey Period (1/94-9/94)*
N.D. Iowa	Longstanding			●		●	Magistrate judges	Not applicable.	40
S.D. Iowa	Longstanding			●		●	Magistrate judges	Not applicable.	75
D. Kan.	1984 Wichita division only; 1991 authorized district-wide			●			Attorneys	The parties equally share the mediator's court-set fee of \$125 an hour.	270
W.D. Ky.	1993					●	Attorneys and non-attorneys	The parties generally share equally the mediator's market-rate fee. If they cannot agree on a fee, the court sets the fee and the payment allocations.	28 (11/93-11/94)
M.D. La. ⁶	1994					●	Attorneys and non-attorneys	In the court-based program, litigants pay a \$25 administrative fee. In the Baton Rouge Bar Assoc. Program, they pay a \$50 administrative fee and a \$250 mediator fee for the first five-hour mediation session. If it lasts longer, an additional fee is negotiated.	20 cases were referred to the court-based program (10/94-11/94).

* Courts were asked to report the number of cases referred between January 1-September 30, 1994. Where the court reported for a different time period, the time period is noted. Some numbers in this column are approximate; see individual court descriptions.

Table 4 (cont.)

District	Date Program Established	Mandatory Referral by Case Type or Track	Mandatory Referral to ADR Menu: Parties or Judge Select Process	Judge May Order on Case-by-Case Basis	Judge May Order on Request of One Party	Voluntary Referral Based on Consent of All Parties	Type of Neutral	Fees	Number of Cases Referred During Survey Period (1/94-9/94)*
W.D. Mich.	1995					●	Attorneys	The parties equally share the mediator's normal hourly rate.	Information not yet available.
D. Minn.	Longstanding			● ⁷			Magistrate Judges	Not applicable.	Unknown.
E.D. Mo.	1994			●	●	●	Attorneys	The parties pay the mediator at the rate stated in the mediator's fee schedule filed with the court. The court may review and modify the mediator's fees. For low-income litigants, the court may appoint a mediator who has agreed to serve without a fee.	3 (10/94-12/94)
W.D. Mo. ⁸	1992		●			●	Early Assessment Program administrator, magistrate judges, attorneys	If the court EAP administrator mediates, no fees are incurred. If a neutral from the panel is selected, the parties pay the neutral at market rates.	200+ ¹⁰

* Courts were asked to report the number of cases referred between January 1-September 30, 1994. Where the court reported for a different time period, the time period is noted. Some numbers in this column are approximate; see individual court descriptions.

Mediation Program Specifics

Table 4 (cont.)

District	Date Program Established	Mandatory Referral by Case Type or Track	Mandatory Referral to ADR Menu; Parties or Judge Select Process	Judge May Order on Case-by-Case Basis	Judge May Order on Request of One Party	Voluntary Referral Based on Consent of All Parties	Type of Neutral	Fees	Number of Cases Referred During Survey Period (1/94-9/94)*
D. Neb.	1995			●			Attorneys	The mediator is paid by the parties at a rate of \$100 an hour or less, set by the state mediation center. ^{1,2} The fees may be divided equally or otherwise as agreed by the parties. An indigent party's portion of the fees may be paid by the Fed. Practice Fund.	Information not yet available.
D. N.J.	1992			●		●	Attorneys	Mediation is free to litigants for the first six hours; thereafter the mediator is paid by the parties at the court-set rate of \$150 an hour.	17
E.D.N.Y.	1992					●	Attorneys	The parties generally equally share the mediator's market-rate fee.	7 (1/94-11/94)
S.D.N.Y.	1991			●			Attorneys	No fee.	582

* Courts were asked to report the number of cases referred between January 1-September 30, 1994. Where the court reported for a different time period, the time period is noted. Some numbers in this column are approximate; see individual court descriptions.

Table 4 (cont.)

District	Date Program Established	Mandatory Referral by Case Type or Track	Mandatory Referral to ADR Menu; Judge Select Process	Judge May Order on Case-by-Case Basis	Judge May Order on Request of One Party	Voluntary Referral Based on Consent of All Parties	Type of Neutral	Fees	Number of Cases Referred During Survey Period (1/94-9/94)*
E.D.N.C.	1994			●		●	Retired judges, mediators certified by the state, and attorneys	The parties generally share the fee equally, either at market rates or at a court-set rate. Parties must notify the court of the rate.	0
M.D.N.C.	1993	●					Attorneys certified to be mediators by the state	The parties equally share the mediator's court-set fee of \$125 an hour. There is no fee for low-income litigants.	292 (1/94-12/94)
W.D.N.C.	1995		● ¹¹				Attorneys	Parties generally pay the mediator's fees in equal shares. If the mediator is selected by the parties, the fee is negotiated by the parties and mediator. If the mediator is selected by the court, the fee is set by the court. Indigent parties pay no fee and the neutral's fee is reduced by that party's share.	Information not yet available.

* Courts were asked to report the number of cases referred between January 1-September 30, 1994. Where the court reported for a different time period, the time period is noted. Some numbers in this column are approximate; see individual court descriptions.

Mediation Program Specifics

Table 4 (cont.)

District	Date Program Established	Mandatory Referral by Case Type or Track	Mandatory Referral to ADR Menu; Parties or Judge Select Process	Judge May Order on Case-Basis	Judge May Order on Request of One Party	Voluntary Referral Based on Consent of All Parties	Type of Neutral	Fees	Number of Cases Referred During Survey Period (1/94-9/94)*
N.D. Ohio	1991			●	●	●	Attorneys and other qualified persons with special expertise or dispute resolution experience	The mediation is free to litigants for the first four and a half hours; thereafter the parties pay the mediator at the court-set rate of \$150 an hour.	182
N.D. Okla.	1989			●	●	●	Attorneys	There is no fee, except in complex cases where the mediator is appointed by the court as a "special project judge" and is paid by the parties at market rates.	415 (1/94-11/94)
W.D. Okla.	1992			●		● ¹³	Professional mediators or attorneys	The mediator is paid by the parties according to the mediator's fee schedule filed with the court. The usual range is \$250 to \$900 per mediation session, split by the parties.	97

* Courts were asked to report the number of cases referred between January 1-September 30, 1994. Where the court reported for a different time period, the time period is noted. Some numbers in this column are approximate; see individual court descriptions.

Table 4 (cont.)

District	Date Program Established	Mandatory Referral by Case Type or Track	Mandatory Referral to ADR Menu; Parties or Judge Select Process	Judge May Order on Case Basis	Judge May Order on Request of One Party	Voluntary Referral Based on Consent of All Parties	Type of Neutral	Fees	Number of Cases Referred During Survey Period (1/94-9/94)*
D. Or.	1987			●	●		Neutral	No fee.	No information available.
E.D. Pa.	1991	●					Attorneys	No fee.	101
M.D. Pa.	1994			●	●		Attorneys	No fee.	19 (4/94-9/94)
D. P.R.	1995			●		●	District and magistrate judges	Not applicable.	Unknown.
D. R.I. ¹⁴	1995		●				Attorneys and other qualified persons with special expertise or dispute resolution experience	The mediation is free to litigants for the first hour. Thereafter the parties pay the mediator at a rate of \$150 an hour or less, as agreed to and shared by the parties.	Information not yet available.

* Courts were asked to report the number of cases referred between January 1-September 30, 1994. Where the court reported for a different time period, the time period is noted. Some numbers in this column are approximate; see individual court descriptions.

Mediation Program Specifics

Table 4 (cont.)

District	Date Program Established	Mandatory Referral by Case Type or Track	Mandatory Referral to ADR Menu: Parties or Judge Select Process	Judge May Order on Case-by-Case Basis	Judge May Order on Request of One Party	Voluntary Referral Based on Consent of All Parties	Type of Neutral	Fees	Number of Cases Referred During Survey Period (1/94-9/94)*
D.S.C.	1995					●	Attorneys	When the parties select the mediator, they and the mediator must agree on a fee. When the court appoints the mediator, the mediator is compensated at a rate agreed to by the parties or set by the court.	Information not yet available.
E.D. Tenn.	1994					●	Attorneys	Parties pay the mediator's market-rate fees, subject to court oversight for reasonableness. Parties also pay a \$100 administrative fee for each case referred to mediation. Low-income litigants can seek relief from the administrative fee and mediator costs.	5 (12/94)
M.D. Tenn.	Longstanding. Formally authorized in 1994.			●15		●	District and magistrate judges	Not applicable.	Unknown.
E.D. Tex.	1992			●		●	Retired judges and attorneys	Parties split the court-set mediator's fee, which ranges from \$125 to \$250 an hour.	47

* Courts were asked to report the number of cases referred between January 1-September 30, 1994. Where the court reported for a different time period, the time period is noted. Some numbers in this column are approximate; see individual court descriptions.

Table 4 (cont.)

District	Date Program Established	Mandatory Referral by Case Type or Track	Mandatory Referral to ADR Menu: Parties or Judge Select Process	Judge May Order on Case-by-Case Basis	Judge May Order on Request of One Party	Voluntary Referral Based on Consent of All Parties	Type of Neutral	Fees	Number of Cases Referred During Survey Period (1/94-9/94)*
N.D. Tex.	1993			●	●	●	Mediators certified by the state	The parties pay the mediator at market rates.	580 (7/93-6/94)
S.D. Tex.	1992			●	●		Attorneys	The mediator is paid by the parties at market rates. The court may review the fee for reasonableness.	263
W.D. Tex.	1993			●		●	Attorneys	The mediator is paid by the parties at market rates. The court may review the fee for reasonableness and may appoint a neutral to serve without a fee where appropriate.	No information available.
D. Utah	1993			●		●	Attorneys	No fee. ¹⁶	34

* Courts were asked to report the number of cases referred between January 1-September 30, 1994. Where the court reported for a different time period, the time period is noted. Some numbers in this column are approximate; see individual court descriptions.

Mediation Program Specifics

Table 4 (cont.)

District	Date Program Established	Mandatory Referral by Case Type or Track	Mandatory Referral to ADR Menu; Judge Select Process	Judge May Order on Case-by-Case Basis	Judge May Order on Request of One Party	Voluntary Referral Based on Consent of All Parties	Type of Neutral	Fees	Number of Cases Referred During Survey Period (1/94-9/94)*
D. V.I.	1991			●		●	Retired judges, attorneys, mediators certified by court-approved national organizations, and members of other professions	The parties pay the mediator at market rates or court-set fees. Parties each pay one half, unless the court determines that one party has not mediated in good faith.	86 ¹⁷ (1/94-12/94)
E.D. Wash.	1988			●	●	●	Attorneys	No fee.	Approximately 10% of the civil caseload (1/94-12/94)
W.D. Wash.	1979			●			Attorneys	There is no fee, but the parties may agree to compensate the neutral.	Almost all civil cases are eligible for and are referred to mediation.
S.D. W. Va.	1994			●	●	●	Attorneys	No fee.	0 (9/94 -12/4)

* Courts were asked to report the number of cases referred between January 1-September 30, 1994. Where the court reported for a different time period, the time period is noted. Some numbers in this column are approximate; see individual court descriptions.

Table 4 (cont.)

District	Date Program Established	Mandatory Referral by Case Type or Track	Mandatory Referral to ADR Menu; Parties or Judge Select Process	Judge May Order on Case-by-Case Basis	Judge May Order on Request of One Party	Voluntary Referral Based on Consent of All Parties	Type of Neutral	Fees	Number of Cases Referred During Survey Period (1/94-9/94)*
E.D. Wis.	1992			●			Any person considered by the referring judge	Parties pay fees as directed by court.	15
W.D. Wis.	Longstanding				●	●	Magistrate judges	Not applicable.	Unknown.

* Courts were asked to report the number of cases referred between January 1-September 30, 1994. Where the court reported for a different time period, the time period is noted. Some numbers in this column are approximate; see individual court descriptions.

1. In the Northern District of Alabama, litigants are offered three primary ADR options or tracks: mediation, med-arb, or use of any private or court ADR process agreed to by the parties and approved by the court. Under the court's Three-Track ADR Program, mediation is the most popular option.
2. In the Northern District of California, cases assigned to the four judges participating in the Multi-Option ADR Program must select one of the court's ADR options, which include mediation, or must persuade the judge that ADR is inappropriate for the case. Mediation is available to cases assigned to other judges only if resources permit.

Mediation Program Specifics

3. Sixty-seven cases were referred to mediation under the Multi-Option ADR Program, and sixteen cases were referred to mediation by stipulation of parties not participating in this program.
4. In the Middle District of Florida, most cases are referred to mediation by court mandate.
5. In the Southern District of Florida, almost all civil cases filed are set for mandatory mediation.
6. Two mediation programs are available to litigants in the Middle District of Louisiana, a court-based program and a program sponsored by the Baton Rouge Bar Association.
7. Under a proposed local rule, all cases in the District of Minnesota would automatically be scheduled for a mediation conference within thirty days of trial.
8. In the Western District of Missouri, a randomly selected one-third of eligible civil cases are mandatorily referred to the Early Assessment Program (EAP), which requires that parties select one of the court's ADR options, among which is mediation. Another randomly selected one-third of eligible cases may enter the EAP at their choosing; among the ADR options from which they may choose is mediation.
9. Almost all mediations are conducted by the court's EAP administrator.
10. One hundred and forty-seven cases were automatically referred to the EAP and sixty-six cases opted into the EAP. All but a very few chose mediation.
11. In the Western District of North Carolina, parties in nearly all civil cases must select a form of ADR. If they do not, the case is referred to mediation.
12. In the District of Nebraska, cases are referred to mediation centers operated by the State of Nebraska Office of Dispute Resolution.
13. In the Western District of Oklahoma, referral by party consent is the customary practice.
14. In the District of Rhode Island, every civil litigant is required to select one of the court's ADR or settlement options, which include mediation.
15. Although sua sponte referral is authorized in the Middle District of Tennessee, cases are seldom referred without party consent.
16. The District of Utah is seeking authorization from Congress to pay mediators from court appropriations at \$100 an hour.
17. During 1994 in the District of the Virgin Islands, seventy-two cases were sent to mediation by sua sponte order of a judge, and fourteen cases entered mediation by stipulation of the parties.

Table 5: Early Neutral Evaluation Program Specifics—Date Established, Method of Case Referral, Type of Neutral, Fees, and Number of Cases Referred

District	Date Program Established	Mandatory Referral by Case Type or Track	Mandatory Referral to ADR Menu: Parties or Judge Select Process	Judge May Order on Case-by-Case Basis	Judge May Order on Request of One Party	Voluntary Referral Based on Consent of All Parties	Type of Neutral	Fees	Number of Cases Referred During Survey Period (1/94–9/94)*
E.D. Cal.	1994					●	Attorneys	No fee.	50
N.D. Cal. ¹	1985	●	●	●	●	●	Attorneys	There is no fee for the evaluator's preparation time or for the first four hours of the ENE session. After that, the evaluator may continue to volunteer his or her time, the parties may end the session, or they may continue at a fee of \$150 per hour shared by the parties.	212 ²
S.D. Cal. ³	1992	●					Magistrate Judges	No fee.	1,410
W.D. Mich.	1983			●	●	●	Attorneys	Unknown.	13

* Courts were asked to report the number of cases referred between January 1–September 30, 1994. Where the court reported for a different time period, the time period is noted. Some numbers in this column are approximate; see individual court descriptions.

Early Neutral Evaluation Program Specifics

Table 5 (cont.)

District	Date Program Established	Mandatory Referral by Case Type or Track	Mandatory Referral to ADR Menu; Parties or Judge Select Process	Judge May Order by-Case Basis	Judge May Order on Request of One Party	Voluntary Referral Based on Consent of All Parties	Type of Neutral	Fees	Number of Cases Referred During Survey Period (1/94-9/94)*
E.D. Mo.	1994			●	●		Attorneys	The parties equally share the evaluator's market-rate fee, which the court may review for reason-ability. Litigants with financial difficulties may request an evaluator who has agreed to serve without a fee.	0 (10/94-12/94)
W.D. Mo. ⁴	1992		●			● ⁵	Attorneys	The parties equally share the evaluator's market-rate fee.	4
D. Nev. ⁶	1994			●			Judges	No fee.	75
E.D.N.Y.	1992			●		●	Attorneys	No fee.	93 (1/94-11/94)

* Courts were asked to report the number of cases referred between January 1-September 30, 1994. Where the court reported for a different time period, the time period is noted. Some numbers in this column are approximate; see individual court descriptions.

Table 5 (cont.)

District	Date Program Established	Mandatory Referral by Case Type or Track	Mandatory Referral to ADR Menu: Parties or Judge Select Process	Judge May Order on Case Basis	Judge May Order on Request of One Party	Voluntary Referral Based on Consent of All Parties	Type of Neutral	Fees	Number of Cases Referred During Survey Period (1/94-9/94)*
N.D. Ohio	1991			●	●	●	Attorneys and other qualified persons with special expertise or dispute resolution experience	There is no fee for the first four and a half hours of service; thereafter, the parties split the evaluator's court-set fee of \$150 an hour.	89
W.D. Pa.	1995			●	●		Attorneys	There is no fee, except in unusual cases and by party request.	Information not yet available.
D. R.I. ⁷	1995		●				Attorneys and other qualified persons with special expertise or dispute resolution experience	There is no fee for the first hour of service; thereafter, the parties split the evaluator's fee at a rate agreed to by the parties, not to exceed \$150 an hour.	Information not yet available.

* Courts were asked to report the number of cases referred between January 1-September 30, 1994. Where the court reported for a different time period, the time period is noted. Some numbers in this column are approximate; see individual court descriptions.

Early Neutral Evaluation Program Specifics

Table 5 (cont.)

District	Date Program Established	Mandatory Referral by Case Type or Track	Mandatory Referral to ADR Menu; Parties or Judge Select Process	Judge May Order on Case-by-Case Basis	Judge May Order on Request of One Party	Voluntary Referral Based on Consent of All Parties	Type of Neutral	Fees	Number of Cases Referred During Survey Period (1/94-9/94)*
S.D. Tex.	1992			●	●	●	Attorneys	The parties pay the neutral at market rates, unless the court orders the neutral to serve without payment.	1
D. Vt.	1994	●				●	Attorneys and non-attorneys	The evaluator is compensated by the parties at a rate of \$500 per case split equally by the parties. This court-set fee assumes a half-day ENE session. If significantly more time is required, the parties and the evaluator agree on additional compensation.	60 (11/94-12/94)
W.D. Wis.	1993					●	Attorneys	No fee.	9

* Courts were asked to report the number of cases referred between January 1-September 30, 1994. Where the court reported for a different time period, the time period is noted. Some numbers in this column are approximate; see individual court descriptions.

1. In the Northern District of California, cases assigned to the four judges participating in the Multi-Option ADR Program must select one of the court's ADR options, which include early neutral evaluation (ENE), or must persuade the judge that ADR is inappropriate for the case. For other judges, even-numbered cases meeting specified criteria are automatically and mandatorily referred to ENE.
2. One hundred and thirty-eight cases were referred to ENE automatically and mandatorily by case type during the survey period. Seventy-four cases selected ENE under the Multi-Option ADR Program.
3. In the Southern District of California, parties in all eligible civil cases must meet with a magistrate judge to discuss the case and the court's ADR options. The meeting is referred to as early neutral evaluation. After this meeting, the parties may select an ADR option—arbitration, mediation, magistrate judge settlement conference—or, the magistrate judge may order the parties to participate in one of these procedures.
4. In the Western District of Missouri, one-third of eligible civil cases are automatically referred to the court's Early Assessment Program (EAP), which requires parties to select one of the court's ADR options, among which is early neutral evaluation.
5. One-third of eligible civil cases are randomly assigned to a group that may volunteer to participate in the EAP process.
6. The experimental case evaluation program in the District of Nevada is for in forma pauperis pro se prisoner cases.
7. In the District of Rhode Island, litigants in every civil case are required to select one of the court's settlement or ADR options, which include ENE.

Settlement Week Program Specifics

Table 6: Settlement Week Program Specifics—Date Established, Method of Case Referral, Type of Neutral, Fees, and Number of Cases Referred

District ¹	Date Program Established	Mandatory Referral by Case Type or Track	Mandatory Referral to ADR Menu; Judge Select Process	Judge May Order on Case-by-Case Basis	Judge May Order on Request of One Party	Voluntary Referral Based on Consent of All Parties	Type of Neutral	Fees	Number of Cases Referred During Survey Period (1/94 –9/94) *
W.D.N.Y.	1995 ²			●			Attorneys	No fee.	131 ³
S.D. Ohio	1985 ⁴			●		●	Attorneys	No fee.	141
N.D. W. Va.	1987			●			Attorneys	No fee.	152

* Courts were asked to report the number of cases referred between January 1–September 30, 1994. Where the court reported for a different time period, the time period is noted. Some numbers in this column are approximate; see individual court descriptions.

1. Two additional districts—the Northern District of Ohio and the District of South Carolina—have held a settlement week in the past. See Table 2.
2. The court held a settlement week in the fall of 1995 but has not yet determined whether it will establish an ongoing program.
3. This is the number of cases referred for the settlement week held in the fall of 1995.
4. The age of the procedure varies from division to division. The longest running program is nearly ten years old.

Table 7: Case Valuation Program Specifics—Date Established, Method of Case Referral, Type of Neutral, Fees, and Number of Cases Referred

District	Date Program Established	Mandatory Referral by Case Type or Track	Mandatory Referral to ADR Menu; Parties or Judge Select Process	Judge May Order on Case-by-Case Basis	Judge May Order on Request of One Party	Voluntary Referral Based on Consent of All Parties	Type of Neutral	Fees	Number of Cases Referred During Survey Period (1/94–9/94)*
E.D. Mich.	1984			●	●	●	Attorneys	Each party pays \$75 to the nonprofit agency that administers the program, which in turn pays the three neutrals. Parties who request a panel with special expertise pay the neutrals at market rate.	145 ¹ (1/94–10/94)
W.D. Mich.	1983	● ²		●	●	●	Attorneys	Each party pays each of the three neutrals \$50.	127

* Courts were asked to report the number of cases referred between January 1–September 30, 1994. Where the court reported for a different time period, the time period is noted. Some numbers in this column are approximate; see individual court descriptions.

1. This is the number of hearings held. The number of cases referred is not known.
2. Referral is mandatory and automatic for some, but not all, eligible case types.

Part II
District-by-District
Descriptions

What Is in Part II?

In Part II, we provide a district-by-district description of current ADR and settlement procedures in each of the ninety-four district courts.¹⁹ Although our main focus in these descriptions is court-wide practices, we also note procedures used by only one or a few judges and those planned but not yet established. Likewise, we cover both court-managed programs and private programs that receive case referrals from the court, as well as programs that are formally authorized and those that are not. We also indicate where common practice regarding ADR or settlement may deviate from the court's written procedure or rule.

For each court, we first give an in-brief description that provides an overview of the ADR and settlement practices in that court. Where a court offers a judge-based, nonprogrammatic ADR procedure, we describe it as fully as possible based on the materials provided by the court. The summary also notes whether a court has adopted extra ADR obligations for attorneys, has evaluated its ADR programs, has published an ADR brochure, or anticipates further ADR developments.

Where a court has developed court-wide, formal rules and procedures for the use of ADR and conducts the day-to-day operation of the program—that is, for courts with what we call court-based ADR programs—the in-brief description is followed by an in-depth description summarizing the key elements of these programs.²⁰ Each in-depth description first provides a short summary description of the ADR procedure, including its authorization, the date of adoption, and the number of cases referred during our survey period. It then summarizes such key elements as the kinds of cases eligible for ADR, the method for referring cases to ADR, the timing of the ADR session, whether the outcome is

19. ADR programs, particularly mediation, have also been instituted in a growing number of U.S. bankruptcy courts, including all four bankruptcy courts in California, the Middle and Southern Districts of Florida, the Southern District of New York, the Eastern District of Pennsylvania, and the District of Utah. In addition, almost all of the federal courts of appeals have settlement programs involving mediation. The Federal Judicial Center is preparing a sourcebook on the appellate programs. For information about both the appellate and bankruptcy programs, contact the Research Division at the Federal Judicial Center (202-273-4070).

20. In addition to having court-wide, formal rules and procedures, most programs we classify as court-based also rely on nonjudicial neutrals, such as attorneys, for the ADR service. When courts rely instead on district or magistrate judges for the ADR service—as they do in summary jury trials, two early neutral evaluation programs, and in several mediation programs—they generally have not developed detailed, court-wide rules for these procedures but leave the execution of the process to the individual judge. Even though we used detailed rules and procedural guidelines as the primary criterion for identifying court-based ADR programs, the reader should not infer that courts with such rules and guidelines necessarily have a fully operational program in place. Some courts with extensive rules and guidelines may not yet have implemented their programs or may have done so on only a limited, experimental basis. This information is noted in the in-depth descriptions.

reported to the assigned judge, whether fees are required, the selection and training of neutrals for the court's roster, and assignment of neutrals to cases.

The information in our descriptions is based in part on a questionnaire we sent to each federal district court in 1994, asking the court to describe its ADR and settlement practices, policies, and plans as comprehensively as possible.²¹ We also reviewed copies of all pertinent court rules, orders, and other documents. Where necessary, we made follow-up telephone calls. Each court had an opportunity to review and update our draft descriptions; we accepted revisions through the summer of 1995.

Because change has been a constant in ADR during the past several years, the reader should keep in mind that the picture in some courts may already be slightly different from the one sketched here. Practitioners who use this sourcebook should not substitute it for a careful reading of local rules, CJRA plans, and other court ADR documents. These cautions notwithstanding, this sourcebook provides a comprehensive guide to ADR and settlement procedures in the federal district courts.

Definitions and Key Features of ADR and Settlement Processes in the Federal District Courts

One of the challenges in studying ADR and settlement practices nationwide is the field's unsettled and evolving vocabulary. Different courts, judges, and litigants ascribe different meanings to commonly used words like mediation, arbitration, and settlement conference. The uncertainty may reflect lack of familiarity with dispute resolution concepts, simple misuse of standard dispute resolution terminology and concepts, historical developments, or regional differences.²²

Misnomers are found even in newly established programs. For example, a new settlement program in a district may be called arbitration in the court's

21. Because some court rules, documents, and survey responses were much more detailed than others, our descriptions vary accordingly. Where a procedure depends on the individual judge's directions in the particular case—e.g., settlement conferences in many courts and summary jury trials generally—the spokesperson for the court may not have been in a position to provide more than a general answer.

22. A classic example of historical and regional developments is “mediation” in the two district courts in Michigan. These programs, which are based on a long-standing state program called “mediation,” more closely resemble nonbinding arbitration or case valuation. While the well-known Michigan process causes little confusion among the judges and litigants in that state because of its long use, those outside the state would be misled by the term. To minimize confusion, the federal courts now refer to the process as “Michigan mediation.” In the sourcebook we classify it as case valuation.

literature, even though the court's local rule describes a facilitated negotiation process that sounds like mediation. In this sourcebook, where the process or program name used by a court deviates substantially from general usage, we use the generally accepted name but also note the name used by the court.

Other ambiguities come from the procedural flexibility inherent in many ADR processes, especially facilitative procedures like mediation or settlement conferences. The way in which a skillful attorney-mediator or settlement judge, for example, practices the "art of settlement" often varies from case to case and from neutral to neutral. Most courts do not specify which techniques the mediator or settlement judge should use to conduct the mediation session or settlement conference, generally leaving the choice of settlement strategies to the neutral. As a consequence, a mediation session or settlement conference in one district or with one neutral may look very different from the same settlement event in another district or with another neutral.

The unsettled terminology raises basic questions of whether the ADR processes used in the federal courts share core defining attributes. For example, are judicial settlement conferences across the districts more alike or different? Is mediation with attorney-mediators the same as mediation with judicial officers? Is mediation by the trial judge different from mediation by another judge, especially one whose primary responsibility is settlement? What is early neutral evaluation, and how does it differ from mediation or from early case management conferences? Without a far more extensive examination of ADR and settlement practices, we cannot answer these questions definitively, but we can provide the generally accepted definitions of the principal forms of ADR and settlement offered by the courts and surveyed in this guide.²³

Arbitration

Court-annexed arbitration is an adjudicatory process in which one or more attorney arbitrators issue a nonbinding judgment on the merits after an expedited, adversarial hearing in which attorneys for each party present their cases. Witnesses are not called but exhibits may be submitted. The arbitrator's decision addresses only the disputed legal issues and applies legal standards. Either party may reject the nonbinding ruling and proceed to a trial *de novo*.

Most of the federal court arbitration programs were established under federal statute, 28 U.S.C. §§ 651–658, which authorizes ten federal district courts to establish mandatory arbitration programs in which litigant participation is presumptively mandatory and another ten districts to implement voluntary programs in which parties participate by choice. Two districts with statutory mandatory arbitration programs (Western District of Michigan and Western Dis-

²³ For a discussion of benefits and concerns relative to many of these ADR methods, see Elizabeth Plapinger et al., *Judge's Deskbook on Court ADR* (CPR Institute for Dispute Resolution 1993).

trict of Missouri) have made arbitration one of several ADR options offered by the courts; one (Middle District of North Carolina) has discontinued its program. Of the ten courts authorized to establish voluntary arbitration programs, two (Western District of Kentucky and Western District of Virginia) have chosen not to implement the program. Under the CJRA, a few courts have established arbitration programs independently of the statutory umbrella or hope to institute arbitration programs with appropriate statutory authorization. The future of the statutory arbitration programs is the subject of ongoing congressional debate (*see supra* note 18).

The statutory arbitration programs are the most uniform of all ADR programs in the federal district courts. The key attributes of the procedure generally are the following.

Referral. In mandatory arbitration programs, eligible cases are generally referred automatically to arbitration at filing by court order. Eligible cases typically include contract and tort cases of \$100,000 or less (a few courts have a higher cap of \$150,000). In most mandatory programs, litigants in other case categories are permitted to volunteer for arbitration by agreement of all parties and with the consent of the assigned judge, and in all programs litigants automatically referred to arbitration are permitted to request removal from the process. In voluntary programs, litigants in eligible cases either request referral to arbitration by opting in or are permitted to freely opt out of an automatic referral.

Arbitrator. The arbitrators are lawyers who meet qualification standards set by the court. In most courts, the parties may decide whether a single arbitrator or a panel of three arbitrators will preside. In the statutory arbitration programs, arbitrators are generally paid nominal fees by the court. In nonstatutory programs, the arbitrator may serve without compensation or may be compensated by the parties.

Hearing. The arbitration hearing is generally held after completion of discovery and rulings on dispositive motions. At the hearing, which typically lasts about four hours, each side presents its case under relaxed rules of evidence. Most courts require party attendance at the hearing and authorize use of sanctions for failure to comply.

Decision. After the hearing, the arbitrator issues a decision on the merits and, where appropriate, determines an award. The decision is nonbinding and kept under seal until the period for requesting a trial *de novo* has passed.

Trial de novo. Parties dissatisfied with the decision may request a trial *de novo* with the assigned judge. The trial proceeds as though the arbitration had not occurred. In some courts, trial requests must be accompanied by a sum equal to the arbitrator's fees, and if the party requesting the trial does not improve on the arbitrator's award, the deposited sum is forfeited.

Judgment. If a trial de novo is not demanded, the arbitration award becomes the nonappealable judgment of the court.

Case Valuation (“Michigan Mediation”)

This hybrid ADR process provides litigants in trial-ready cases with a written, nonbinding assessment of the case’s judgment value, delivered by a panel of three attorneys after a short hearing. If the panel’s valuation is accepted by all parties, the case is settled for that amount. If any party rejects the panel’s assessment, the case proceeds to trial. Used in the federal and state courts in Michigan, this arbitration-like process is also known as “Michigan Mediation.”

In the Eastern District of Michigan, almost all civil cases seeking primarily money damages are eligible for referral. The most common referrals involve contract, personal injury, and civil rights cases. In the Western District of Michigan, all civil cases are eligible for referral; in certain diversity, medical malpractice, and tort cases, referral is mandatory.

Court Minitrial

The minitrial is a flexible, nonbinding ADR process. Although used primarily out of court, in the past decade a few federal district judges have developed their own version of the minitrial. Like the summary jury trial (see below), the court minitrial is a relatively elaborate ADR method, generally reserved for large disputes and used sparingly in the federal courts.

In a typical court minitrial, each side presents a shortened form of its best case to settlement-authorized representatives of the parties to the dispute. Since this procedure is used primarily for business litigation, the representatives are usually the companies’ senior executives. The hearing is informal, with relaxed rules of evidence and procedure and no witnesses. In court settings, a judge, magistrate judge, or nonjudicial neutral may preside over the one- or two-day hearing. Following the hearing, the client representatives meet, with or without the neutral, to negotiate a settlement. At the parties’ request, the neutral advisor may assist the settlement discussions by facilitating discussion or by issuing an advisory opinion. If the parties reach an impasse, the case proceeds to trial.

Early Neutral Evaluation

Early neutral evaluation (ENE) is a nonbinding ADR process designed to improve case planning and settlement prospects by providing litigants with an early advisory evaluation of the likely court outcome. Case planning and settlement assistance may also be offered during the session, which is generally held before much discovery has been taken. In ENE, a neutral evaluator (usually a private attorney with expertise in the subject matter of the dispute) holds a confidential session with parties and counsel early in the litigation to hear both

sides of the case. The evaluator helps the parties clarify arguments and evidence, identifies strengths and weaknesses of the parties' positions, and gives the parties a nonbinding assessment of the case's merits. Depending on the goals of the program, the evaluator may also mediate settlement discussions or offer case planning assistance.

Like mediation, ENE is thought to be widely applicable to many types of civil cases, including complex disputes. The process was originally designed to improve attorneys' pretrial practices, and in some courts, most prominently the Northern District of California where the process originated, ENE retains its original purpose of improving case development. In other courts, such as the District of Vermont, ENE is used primarily as a settlement device and resembles evaluative mediation.

Typically, the ENE process moves through the following steps.

Referral. Some ENE programs compel specific categories of civil cases to participate in ENE and refer these cases to ENE automatically at filing. In other courts, ENE referrals are made on a case-by-case basis by the assigned judge, with or without the approval of the litigants.

Evaluator. Early neutral evaluators are generally experienced litigators who are expert in the subject matter of the case. Trained and certified by the court, evaluators in most districts serve without compensation, at least for an initial session. In other districts, the parties pay the evaluators their market rate or a court-set fee. Depending on the program, the evaluator is selected by the parties or assigned to the case by a court administrator. In two districts, the Southern District of California and the District of Nevada, judges conduct the ENE sessions.

Preparing for ENE. Before the conference, parties are usually required to submit to the evaluator and other parties court documents and memoranda describing the dispute.

ENE conference. The ENE session usually begins with the evaluator explaining the process and outlining the procedures. Each side then makes a short opening statement summarizing the facts, legal contentions, and evidence. Following the opening statements, the evaluator may ask open-ended questions of both sides, attempt to clarify arguments, explore evidentiary gaps, and probe strengths and weaknesses. The evaluator helps the parties analyze their positions and identify key areas of agreement and disagreement. The evaluator then prepares a written evaluation of the case and presents it to the parties. (In some courts the parties may choose not to hear the neutral's evaluation.) The evaluator may also facilitate settlement discussions before or after the case assessment is issued. If settlement discussions are not successful, the evaluator may help the parties plan the next stages of the case. Where settlement is the chief purpose of the conferences, the evaluator may meet separately with each side, although in some programs separate meetings are not permitted. Clients usually participate

in the confidential ENE sessions, which typically last around three to four hours. Follow-up sessions may also be held.

Concluding the ENE. Unless the case settles at the confidential ENE session, the case continues through the court's regular procedures.

Judge-Hosted Settlement Conferences

The most common form of settlement assistance used in federal courts is the settlement conference presided over by a district or magistrate judge. Almost all ninety-four of the federal district courts use judicial settlement conferences; close to a third of the courts assign this role primarily to magistrate judges.

The classic role of the settlement judge is to give an assessment of the merits of the case and to facilitate the trading of settlement offers. Some settlement judges also use mediation techniques in the settlement conference to improve communication among the parties, probe barriers to settlement, and help formulate resolutions. In some courts, a specific district or magistrate judge is designated as the *settlement judge*. In others, the assigned district judge—or, as is sometimes the case in bench trials, another judge who will not hear the case—hosts settlement conferences at various points during the litigation, often just before trial. The appropriate role of judges in settling cases on their own dockets is a matter of some debate among judges and attorneys.

Mediation

Mediation is a flexible, nonbinding dispute resolution procedure in which a neutral third party—the mediator—facilitates negotiations between the parties to help them settle. A hallmark of mediation is its capacity to help parties expand traditional settlement discussions and broaden resolution options, often by going beyond the legal issues in controversy. Mediation sessions are confidential and structured to help parties communicate—to clarify their understanding of underlying interests and concerns, probe the strengths and weaknesses of legal positions, explore the consequences of not settling, and generate settlement options. The mediator, who may meet jointly or separately with the parties, serves as a facilitator and does not issue a decision or make findings of fact. In the federal district courts, the mediator is usually an attorney approved by the court, though in some districts magistrate judges, and occasionally district judges, have been trained in mediation techniques and serve as mediators.

As mediation develops, distinct mediation strategies are emerging. In classic mediation, the mediator's mission is *facilitative*—to help the parties find solutions to the underlying problems giving rise to the litigation. In this kind of mediation, the mediator is primarily a process expert, rather than an expert in the subject matter of the litigation. In *evaluative* mediation, the mediator uses case evaluation—i.e., an assessment of potential legal outcomes—as a primary settlement tool. Evaluative mediation is similar to early neutral evaluation and

requires mediators who are experts in federal litigation and in the subject matter of the case.

Although most courts do not specify which mediation approach they practice, some do. The mediation program in the Northern District of Oklahoma, for example, uses both facilitative and evaluative tools. The mediator first facilitates party negotiations and then, if necessary or desired, offers an evaluation of the case. Where the mediation approach is clear from a court's materials, we report it, recognizing that the actual practices of individual mediators may vary.

Regardless of which mediation model a court or mediator follows, most mediations progress through the following stages.

Referral. In most courts, cases are screened by the assigned judge for referral to mediation, usually in conjunction with the parties at early case management conferences. Although the parties are generally involved in the decision whether to mediate—and may, in many courts, play a critical role—most mediation programs authorize judges to refer cases to mediation without party consent. In a few courts, most civil cases are routinely referred to mediation, but in most others mediation is used on a case-by-case basis or targeted at specific kinds of disputes. Almost all courts exclude certain categories of cases from mediation, such as administrative appeals, prisoner civil rights cases, and writs. The timing of the referral varies and generally is left to the judge.

Mediator. The mediator is usually a lawyer (or an expert from another discipline) who meets the qualifications and training standards set by the court. In some mediation programs, litigants select a mediator from the court's roster or, with the court's approval, from another source. In other programs, a court administrator or judge selects the mediator. In the majority of federal court programs the parties pay the mediator his or her market rate or a court-set fee, although in some the attorney-mediator serves without compensation.

Preparation for mediation. To educate the mediator about the litigation, parties are usually required or encouraged to submit to the mediator copies of relevant court documents, along with a short memorandum of legal, factual, and settlement positions. Courts vary as to whether the premediation submissions are exchanged among all parties. Typically, the submissions are not included in the court files and are returned to the parties at the close of the mediation.

Mediation sessions. Depending on the goals of the program and needs of the case, mediation can involve a single session of several hours or multiple sessions over time. In addition to counsel, most courts require parties or insurers to attend the mediation session and authorize sanctions for failure to comply with mediation procedures. At the initial session, the mediator explains the mediation process, hears short presentations about the case from each party, and asks questions to clarify positions and interests. In most programs, the mediator then meets privately with each side (generally party and counsel, but

sometimes party or counsel separately), to explore each party's underlying interests, to probe the strengths and weaknesses of legal positions, and to help them determine which interests or goals are most important. These private meetings are usually called caucuses. In later separate and joint sessions, the mediator helps the parties generate ideas and evaluate alternative proposals. In courts with evaluative mediation, practice differs as to whether predictions of court outcome or case evaluations are offered in joint or separate sessions.

Completion of the mediation. Some court rules specifically authorize the mediator to end the mediation session or declare an impasse, but most are silent on the question. If the parties reach settlement, the mediator may prepare an outline of the agreement for later completion by counsel. If complete settlement is not possible, the mediator may help the parties seek partial agreements or consider their next steps. If no agreement is reached, the case returns to the trial track.

Multi-Door Courthouse or Multi-Option ADR

These terms describe courts that offer an array of dispute resolution options. Some multi-door courthouses refer all cases of certain types to particular ADR programs, while others offer litigants a menu of options. Multi-door courthouses have been established in state courts in New Jersey, Texas, Massachusetts, and the District of Columbia. In the federal court system, several courts, including the Northern District of Ohio, the Northern District of California, and the District of Rhode Island, now have multi-option ADR programs.

Settlement Week

In a typical settlement week, a court suspends normal trial activity and, aided by bar groups and volunteer lawyers, sends numerous trial-ready cases to mediation conferences held at the courthouse and conducted by attorney-mediators. Mediation sessions may last several hours, with additional sessions held as needed. In the federal district courts, settlement weeks are used regularly only in the Southern District of Ohio and the Northern District of West Virginia, with a third program just starting in the Western District of New York. Settlement weeks are used more widely in the state courts, and a few federal districts refer cases to state-court-sponsored settlement weeks. Cases unresolved during settlement week return to the court's regular docket for trial.

Summary Jury Trial

The summary jury trial (SJT) is a nonbinding ADR process presided over by a district or magistrate judge and designed to promote settlement in trial-ready cases. The process provides litigants and their counsel with an advisory verdict after an abbreviated hearing in which evidence is presented to a jury by counsel

in summary form. Witnesses are generally not called. The jury's nonbinding verdict is used as a basis for subsequent settlement negotiations. If no settlement is reached, the case returns to the trial track.

Developed in the mid-1970s by former Chief Judge Thomas D. Lambros (N.D. Ohio), the summary jury trial is authorized in many federal districts but used only occasionally. Some judges use this resource-intensive process only for protracted cases, others for routine civil litigation where litigants differ significantly about the likely jury outcome. A district judge or magistrate judge usually presides over the summary jury trial. A variant of the SJT is the summary bench trial, in which the presiding district judge or magistrate judge issues an advisory opinion. Part or all of a dispute may be submitted to a summary jury trial or a summary bench trial.

Like other ADR processes, the summary jury trial is a flexible process intended to be adapted to the needs of an individual case. Summary jury trials are typically used after discovery is complete and often include the following steps:

Preparing for the SJT. Before the hearing, the court may require counsel to submit trial memoranda, proposed voir dire questions, proposed jury instructions, and motions in limine. If extensive presentations are expected, the court may also require the parties to submit lists of exhibits and witnesses whose testimony will be summarized during the proceeding.

Voir dire. On the day of the summary jury trial, prospective jurors are called from the regular jury pools. Limited voir dire is conducted and a six-person jury is seated. Jurors are told of their advisory role either at the start of the process or after they render a verdict.

Hearing. The summary jury trial is generally presided over by a judge and conducted like an expedited adversarial hearing. Clients generally attend. Depending on the complexity of the case, a summary jury trial hearing may be completed in a day or may take one or two weeks. Opening and closing statements are presented, and narrative presentations of admissible evidence are made by counsel. Live witnesses are generally not permitted, although videotaped testimony may be allowed. Evidentiary objections are usually addressed before the hearing, although disagreements about the accuracy of the lawyers' representations are resolved by the presiding judge at the hearing. After closing arguments and jury instructions, the jury retires to deliberate.

Verdict. Usually jurors are instructed to reach a unanimous decision, but if a consensus verdict cannot be reached, individual verdicts may be returned. In some courts, the judge and counsel are permitted to question the jurors after the verdict is announced.

Settlement negotiations. Settlement discussions can occur throughout the planning, hearing, and deliberation phases of the summary jury trial. After the advi-

Definitions and Key Features

sory verdict is issued, negotiations can begin immediately or start several days or weeks later if the parties need a cooling-off period or time to assess new information. Some judges play an active role in settlement negotiations; others leave the negotiation phase to counsel.

District-by-district summaries

72	Middle District of Alabama	178	District of Montana
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Middle District of Alabama

IN BRIEF

Process summary

Magistrate judge settlement conferences. In the Middle District of Alabama, almost all civil cases are eligible for voluntary settlement assistance with one of the district's three magistrate judges. Under the court's settlement program, the assigned district judge discusses the voluntary settlement option with counsel late in the pretrial period or earlier if appropriate. If all counsel consent, the case is referred to one of three magistrate judges. Before the session, counsel submit position papers and records supporting damage claims. Parties with settlement authority are required to attend.

At the session, the magistrate judge frequently offers an evaluation of the case or gives a decision. The sessions are confidential, and contact between the magistrate judge and the assigned district judge is prohibited. Sessions generally last between three and eight hours; multiple sessions may be held.

The court's program, which is called mediation by the court, is authorized by the general order implementing the district's CJRA plan, which was effective December 1, 1993. Between January and September 1994, 105 cases were referred to magistrate judge settlement conferences.

Of note

Obligations of counsel. Under the court's pretrial order, counsel are required to discuss settlement and to inform the court of their progress within six weeks of the pretrial order.

Information from court. A statement describing the court's settlement program is attached to the pretrial order.

Plans. The court is considering emphasizing use of ADR earlier in the pretrial period. Use of the summary jury trial is also under consideration.

For more information

John L. Carroll, U.S. Magistrate Judge, 205-223-7540

Northern District of Alabama

IN BRIEF

Process summary

Three-track ADR program. The Northern District of Alabama has established an ADR program under the district's CJRA plan, effective December 1, 1993. See below.

Judicial settlement conferences. All civil cases remain subject to settlement conferences with either a district judge or a magistrate judge.

Of note

Obligations of counsel. Counsel or unrepresented parties must attend a conference

with the court early in the litigation process to determine whether the case is appropriate for adr. Local Rule 16.1(c) also makes ADR a topic for discussion at all Rule 16 conferences. In addition, at the initial meeting of the parties pursuant to Fed. R. Civ. P. 26(f) and Local Rule 26(d), counsel are required to discuss the suitability of the case for ADR and to report the results of those discussions to the court.

Evaluation. The court plans to conduct a formal evaluation of the ADR program. Currently, the program is being monitored closely and feedback is being sought informally from all participants.

For more information

Edwin L. Nelson, U. S. District Judge, 205-731-1720

Ethel Self, Supervisor, Courtroom Operations, 205-731-1217

IN DEPTH

Three-Track ADR Program in Alabama Northern

Overview

Description and authorization. The Northern District of Alabama established an ADR program under the district's CJRA plan, effective December 1, 1993. The program, which became fully operational in April 1994, offers litigants three primary ADR options or tracks—mediation, med-arb, and use of any private or court-sponsored dispute resolution method agreed to by the parties and approved by the assigned judge. Under the program, called the Three-Track ADR Program, counsel or unrepresented litigants must attend a conference with the court early in the litigation process to determine whether the case is appropriate for any kind of ADR. Unless specifically excluded by the court or by the assigned judge, all categories of cases may be considered for referral. Ordinarily, the court will not refer a case to ADR if any party objects. A court panel of trained, nonjudicial neutrals provides the mediation and med-arb services for fees paid by the litigants. Pro bono service is also provided for low-income litigants. If litigants choose private ADR, they select a private ADR provider.

On the Mediation Track, the most popular ADR process in the district to date, litigants meet with a mediator selected by the litigants or appointed by the court. The neutral may be, but is not required to be, an expert in the subject area of the dispute. The mediator facilitates in-depth settlement discussions among litigants to identify underlying issues and develop a settlement package.

The Mediation-Arbitration Track (Med/Arb) combines mediation and some features of arbitration. On this track, a dispute is first submitted to mediation. If the parties are unable to reach a mediated agreement, the neutral proceeds to the arbitration phase. During the arbitration phase, parties may present witnesses, documents, and other exhibits, and they may make oral presentations summarizing the facts and law. Based on these presentations, the neutral issues a nonbinding decision on the merits. The primary purpose of the med/arb track is to provide parties with an appraisal of the case's likely outcome at trial or in binding arbitration.

Under the flexible Open Track, parties may use any other form of ADR, either court-sponsored or private, with the approval of the assigned judge. The court hopes that the Open Track option will encourage litigants to explore any private or court ADR process

suitable to the case. A single ADR process or combination of ADR processes may be requested or crafted. The court will approve use of the summary jury trial in appropriate cases and if the parties request it.

Number of cases. Between April and December 1994, approximately 100 cases were referred to ADR. With few exceptions, referrals were to the mediation track.

Case selection

Eligibility of cases. All civil cases are eligible for ADR, except categories of cases expressly excluded by the court as a whole or by an individual judge for cases assigned to that judge. To date, no category of cases has been excluded by the court from the ADR process, but individual judges have excluded some cases or categories of cases assigned to them.

Referral method. After consulting with the parties during the Rule 16 scheduling conference or at a special ADR evaluation conference called for that purpose, the assigned judge decides whether ADR should be used in the case. Ordinarily, the court will not refer a case to ADR over the objection of any party.

Opt-out or removal. In any case, a party may move for reconsideration within ten days of an order referring a case to the ADR program.

Scheduling

Referral. An ADR evaluation conference is held early in the case to determine whether ADR is appropriate.

Written submissions. At least ten days before the ADR session, the parties must submit to the neutral copies of relevant pleadings and motions; a short memorandum stating the legal and factual positions of each party; and any other materials the parties believe would be beneficial to the neutral. Upon reviewing these items, the neutral may schedule a preliminary meeting with counsel.

ADR session. The ADR session is held when sufficient discovery has been conducted so the parties understand the strengths and weaknesses of the case or at any earlier time by agreement of the parties and with approval of the court. The ADR plan does not set a time limit for the ADR process, but the judge referring a case to ADR will usually direct that the process be completed within a stated period. The neutral, after consultation with counsel, sets the date for each ADR session. Sessions are held at any location agreeable to the neutral and parties or as otherwise directed by the court.

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

Program features

Discovery and motions. After referral, other case proceedings are stayed for a period set by the court. If any party makes a motion, the court may for good cause shown extend the stay.

Party roles and sanctions. The attorney primarily responsible for a party's case must attend the ADR session and be prepared and authorized to discuss all relevant issues, including settlement. The parties also must be present. When a party is not an individual or when a party's interests are being represented by an insurance company, a representative of the party or insurance company with full settlement authority must attend. Willful failure of a party to attend is reported by the neutral to the court, which may impose sanctions.

Outcome. When a case is referred to the mediation track, the mediator must report the results of the mediation to the court. If settlement is reached, the mediator, or one of the parties at the mediator's request, must prepare a written statement of the settlement agreement for signing by the parties and filing for court approval. If settlement is not reached, the mediator must report in writing the following: "Mediation was held, but no agreements were reached."

When the referral is to the med/arb track and agreement is reached during the mediation phase, the neutral, or one of the parties at the neutral's request, must prepare a written statement of the settlement agreement for signing by the parties and filing for court approval. If settlement is not reached during mediation and the parties proceed to arbitration, the neutral delivers a written copy of the decision to each party and files a copy with the clerk of court.

De novo request. When a case is referred to the med/arb track and the parties proceed to arbitration and do not agree to binding arbitration, they have thirty days to reject the arbitrator's decision. If it is not accepted and the case proceeds to trial, the rejecting party must obtain a better result at trial or pay to the other party all costs and attorney's fees incurred from the date the arbitrator received the notice rejecting the award.

Confidentiality. All ADR processes offered by the court are confidential. By entering into any of them the parties agree not to disclose anything except the terms of settlement to the court or to third persons unless all parties agree otherwise. Parties, counsel, and neutrals may respond to confidential inquiries or surveys by persons authorized by the court to evaluate the ADR program. Information provided in such inquiries is confidential and is not identified with particular cases.

The ADR processes are considered compromise negotiations for purposes of federal and state rules of evidence. The neutral is disqualified as a witness, consultant, attorney, or expert in any pending or future action relating to the dispute, including actions between persons not parties to the ADR process.

No record is made during mediation or the mediation phase of med/arb. If the parties choose to present witnesses during the arbitration phase, the neutral may, with party consent, make a stenographic, audio, video, or other recording necessary to reach a fair decision.

Neutrals

Qualifications and training. The court has established a panel of neutrals for the mediation and med/arb tracks. The panel is made up of people who have applied to the court and who, based on their training or experience, are considered by the judges to be qualified to serve as mediators and arbitrators. Any person placed on the panel may be removed for cause at the discretion of the chief judge.

Members of the panel of neutrals are expected to engage in training sufficient to qualify them to act as neutrals and to maintain their skills on a continuing basis. The court, which periodically notifies panel members of educational opportunities, has not established any formal court-sanctioned training program.

Selection for case. When a case is referred to ADR, the parties are first given an opportunity to select a neutral. Within ten days of the court's notice of referral, they must give the court the name of their choice.

If the parties fail to agree on a neutral or fail to notify the court within the ten-day time period, the court sends the parties a list of the names of three proposed neutrals taken from the court's panel of neutrals. Each party then ranks the neutrals in order of preference and, within seven days of the date of the written notice, returns the list to the court. The court then selects one party's list at random, strikes the last name on that list, strikes the last name on the other party's list, and selects the remaining name as the neutral. If there are multiple parties not united in interest, the court adds the name of one proposed neutral for each additional party and then handles the returned lists as described above.

Disqualification. If at any time during the ADR process the neutral becomes aware of, or a party raises, an issue concerning the neutral's impartiality, the neutral must disclose the relevant facts to all parties. If a party believes the neutral is not or cannot remain impartial, the party may request the neutral's withdrawal and the neutral must then withdraw and notify the court. The court will appoint another neutral.

Immunity. The court has not addressed the issue of immunity for ADR neutrals. In the absence of other authority, the court will address the issue on a case-by-case basis.

Fees. The neutral is compensated at a reasonable rate agreed to by the parties or set by the court. The fee is borne equally by the parties unless otherwise agreed by the parties or directed by the court. In an effort to provide ADR services for low-income litigants, the court encourages, but does not require, neutrals to serve without remuneration at least five hours a year.

Program administration

The court's ADR program is administered by a district judge with assistance from the clerk's office.

Southern District of Alabama

IN BRIEF

Process summary

Mediation. In February 1995, the Southern District of Alabama adopted an alternative dispute resolution plan whose principal component is mediation. See below.

Other ADR. In addition to mediation, the court's ADR plan grants litigants broad discretion to use any form of private ADR with court approval. The ADR plan provides that if the parties agree in writing to use arbitration, mediation/arbitration, or minitrial, the court will make its resources available to facilitate these forms of ADR. With the consent of the parties, the court will also approve use of the summary jury trial in appropriate cases.

Judicial settlement conferences. In addition to the ADR plan, parties may request a settlement conference with a judge.

Of note

Evaluation. Under the ADR plan, the clerk of court is directed to create a system for monitoring the impact of the mediation program, including tracking the time from

filing to settlement or trial, assessing the mediator, and studying other features relevant to the merits of the program.

For more information

Deborah S. Hunt, Clerk of Court, 205-690-2371

IN DEPTH

Mediation in Alabama Southern

Overview

Description and authorization. In February 1995, the Southern District of Alabama adopted, by general order, an alternative dispute resolution plan, which authorizes use of any form of ADR agreed to by the parties. The plan also authorizes mediation, which may be used if the parties agree or the judge orders, and sets out detailed rules for this process. Cases are referred to mediation on a case-by-case basis after the assigned judge discusses the case's suitability for mediation with the parties at the initial Rule 16 scheduling conference.

The court's mediation process is designed to help the parties devise better settlements and to improve relationships among litigants. The mediator, who may hold private caucuses with any party or counsel, facilitates discussions among the parties to help them identify underlying issues and develop a settlement. Generally, testimony is not taken during mediation sessions; however, with the consent of the mediator, the parties may produce witnesses to provide additional information. When necessary, the mediator may obtain expert advice concerning technical aspects of the dispute if the parties agree and pay the expert's fee. The parties pay a reasonable fee to the mediator, not to exceed \$150 per hour unless the parties agree otherwise. The mediation process is confidential.

Number of cases. This information is not yet available.

Case selection

Eligibility of cases. All civil cases are potentially eligible for mediation. Each judge decides which cases or types of cases should be referred to or excluded from mediation.

Referral method. The ADR plan encourages each judge to evaluate whether a case will benefit from ADR and to decide, after consulting with the parties, whether ADR should be used. If the parties agree to an ADR process, the judge issues an order of referral. If the parties do not request or agree on a form of ADR and the judge believes the case would benefit from ADR, the judge may order the case to mediation.

Opt-out or removal. When the judge refers a case to mediation on his or her own motion, a party may object by filing a request for reconsideration within ten days of the judge's order. Mediation will be stayed pending decision on this request.

Scheduling

Referral. The plan encourages the judge to determine the appropriateness of ADR at the initial Rule 16 scheduling conference and to schedule the ADR session as soon as possible. If a case is considered appropriate for ADR at a later stage in the litigation, the ADR session must occur within thirty days of the close of discovery so as not to delay trial.

Written submissions. At least five days before the mediation conference, the parties must submit the following to the mediator: (1) copies of relevant pleadings and motions; (2) a short, confidential memo stating the legal and factual positions of each party; and (3) any other materials the party believes would assist the mediator. After receiving these items, the mediator may, at his or her discretion or at a party's request, schedule a preliminary meeting with counsel.

Mediation session. The mediator sets the date and time of each mediation session. Sessions may be held at any location agreeable to the parties and mediator.

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

Program features

Discovery and motions. Proceedings in the case are not automatically stayed by mediation. If a party makes a motion, the court may for good cause stay certain proceedings for a specified time.

Party roles and sanctions. The attorney who is primarily responsible for the case and who is expected to try the case must personally attend the mediation session and must be prepared to discuss all relevant issues, including settlement. The parties must also be present. When the party is not an individual or is being represented by an insurance company, an authorized representative of the party or insurance company must attend, with full authority to settle. The mediator must report to the court failure of a party or representative to attend, and the court may impose sanctions. Persons other than parties and their representatives may attend only with consent of all parties and the mediator.

Outcome. The mediator must report the results of the mediation process to the court as follows: (1) If a settlement is reached, a party prepares a written summary of the agreement; the parties and their representatives sign the summary; and the mediator reports to the court whether a consent order, a stipulation of dismissal, or other document will be filed and by what date. (2) If a settlement is not reached, the mediator reports that a mediation conference was held but that no settlement was reached. The mediator may not comment on the mediation to the court.

Confidentiality. Mediation sessions are private and confidential. The mediator may not disclose to any party any information disclosed by the other party and identified as confidential. The parties are responsible for identifying any documents or communications that should not be revealed to other parties, including documents or other items submitted before the mediation conference.

The parties and mediator may not disclose the settlement terms to the court or any third persons without party agreement. The mediation process is treated as a compromise negotiation under federal and state rules of evidence. Information revealed in mediation and not otherwise known by the opposing party is inadmissible without a specific court ruling, and the mediator is disqualified as a witness, consultant, attorney, or expert in any pending or future action relating to the dispute, including actions between persons not parties to the mediation process.

Neutrals

Qualifications and training. Persons selected for the court's panel of neutrals must have the following minimum qualifications: (1) membership in good standing in the Alabama bar and the bar of the district court and at least seven years of law practice, with at

least 50% of that experience in litigation; (2) extensive documented experience as a mediator; (3) experience as a former judge of an Alabama trial court; or (4) experience as a former district, magistrate, or bankruptcy judge in any federal court in Alabama. A law degree is not required but is highly recommended. In addition, candidates must complete a mediation training course by a recognized group specializing in ADR. The training must include instruction in ethical issues relating to ADR. Panelists and others mediating a case under the ADR plan must also agree to be bound by the ADR plan. The court appoints candidates to the panel and may remove any panelist.

Selection for case. Within ten days of the notice of referral the parties must select a mediator and file written notice of their selection. If they cannot agree within this time period, the judge selects the mediator and notifies the parties and the mediator. Parties may select the mediator from the court's panel of neutrals, or they may use a neutral who is not on the panel if the mediator signs an agreement to be bound by the rules of the court's ADR plan.

Disqualification. If at any time during the mediation process, the mediator becomes aware of, or a party raises an issue concerning, the mediator's neutrality, the mediator must disclose to all parties the facts relevant to the issue. If a party believes that the mediator will not be impartial, the party may request that the mediator withdraw. When such a request is made, the mediator must immediately notify the court, who may then appoint another mediator. If the court selects the mediator, the court first determines if the mediator has any conflict of interest regarding any parties in the case and then notifies the parties of the selection.

Immunity. The ADR plan does not address this issue.

Fees. Unless otherwise agreed by the parties or ordered by the court, the parties must bear equally the expenses of the mediator or any witnesses or experts called by the mediator. The mediator is compensated at a rate agreed to by the parties or set by the court. The rate should not exceed \$150 per hour unless parties agree otherwise. The fee must be paid within thirty days of receipt of a bill from the mediator and should be paid before disbursement of settlement funds. Parties may petition the court to review a mediator's fee as unreasonable or as deviating from the agreed-on fee, but must do so within ten days of receipt of the bill. To provide mediation to those who cannot afford the cost of ADR, each person serving on the panel must, if requested, serve as a neutral without compensation in at least one case annually.

Program administration

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

District of Alaska

IN BRIEF

Process summary

ADR generally. Based on the CJRA advisory group's conclusion that the district is too small and its resources are too limited to offer an ADR program, the District of Alaska has determined that it will not establish any court-based ADR programs at this time. Settlement assistance is provided through judge-hosted settlement conferences.

Judicial settlement conferences. The judges may require litigants to participate in judge-conducted settlement conferences. Before the settlement conference, the settlement judge usually requires the parties to submit confidential memoranda to the judge stating their opening settlement positions. Counsel are expected to evaluate the case fairly and reasonably and to discuss the case's strengths and weaknesses with the client. If, after a review of the settlement positions, the settlement judge believes there is no reasonable possibility of settlement, the settlement conference is canceled. For example, when counsel differ greatly on the dollar value of a case, the court informs the parties in general terms of this circumstance and states that the settlement conference will be rescheduled when and if the parties are prepared to reevaluate their opening settlement positions.

Of note

Plans. The court will consider ADR again after the Alaska state courts adopt a planned ADR rule.

For more information

H. Russel Holland, U.S. District Judge, 907-271-5621

District of Arizona

IN BRIEF

Process summary

ADR generally. In its CJRA plan, effective December 1, 1993, the District of Arizona states that it "wholeheartedly supports alternative dispute resolution mechanisms" in civil cases and encourages judges and counsel to consider referring appropriate cases to ADR. In addition to the ADR and judicial settlement options noted below, the court authorizes referral of cases to private ADR providers if all parties consent. The court is also experimenting with settlement conferences in criminal cases.

Arbitration. The District of Arizona is one of the ten pilot districts authorized by 28 U.S.C. §§ 651-658 to provide voluntary, nonbinding court-annexed arbitration. See below.

Judicial settlement conferences. District judges commonly refer cases to magistrate judges for settlement conferences. Settlement conferences may also be conducted by

District of Arizona

visiting judges or district judges other than the assigned judge. Cases are referred to mandatory settlement conferences by court order.

Of note

Obligations of counsel. The district's standard case management order requires counsel to confer before the initial scheduling conference regarding the case's suitability for referral to arbitration or any other alternative dispute resolution mechanism.

Information from court. At filing counsel are given a handout describing the district's voluntary arbitration program. An ADR brochure is planned.

Plans. The court plans to implement mediation and ENE programs.

Evaluation. A Federal Judicial Center study of the first year of the court's voluntary arbitration program is reported in David Rauma & Carol Krafka, *Voluntary Arbitration in Eight Federal District Courts: An Evaluation* (Federal Judicial Center 1994). As one of the ten comparison districts established by the CJRA, the court is also 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

Alycia Wood, CJRA Analyst, 602-514-7067

June Honanie, Arbitration Clerk, 602-514-7102

IN DEPTH

Arbitration in Arizona

Overview

Description and authorization. The District of Arizona is one of the ten pilot districts designated by 28 U.S.C. §§ 651-658 to provide voluntary, nonbinding court-annexed arbitration in cases involving monetary claims of \$100,000 or less. It is one of four districts (see also W.D. Pa., M.D. Ga., N.D. Ohio) using an opt-out system. Under the program, which was established in 1992, cases are automatically referred to arbitration after answer is filed, but any party may take the case out of arbitration by filing a Notice of Withdrawal within 21 days of the referral. Arbitration hearings are held within 180 days of filing. A single arbitrator presides and is compensated by the court. The arbitration procedure is described in Local Rule 2.11, which also permits parties to consent to binding arbitration.

Number of cases. Between January and November 1994, 155 cases were referred to arbitration; 29 went into the arbitration process, and the others settled or opted out.

Case selection

Eligibility of cases. Eligible civil cases are those involving money damages only of \$100,000 or less, exclusive of interest and costs. The court assumes damages are within this range unless the parties certify otherwise. Cases ineligible for arbitration include civil rights, tax refunds, ADEA, ERISA, Social Security, Title VII, class actions, cases pending on the multidistrict calendar, constitutional claims, prisoner pro se actions, actions seeking injunctive or equitable relief, actions against six or more defendants, and cases assigned to the expedited track under the district's local rule on differentiated case management.

Referral method. Eligible cases are automatically referred to arbitration when all defendants have filed answers or the time for filing answers has expired. If a dispositive motion is filed before the arbitration referral, arbitration proceedings are automatically stayed.

Opt-out or removal. Cases may be exempted from voluntary arbitration in several ways. Any party may opt out of the arbitration program by submitting a notice of withdrawal to the arbitration clerk within twenty-one days of the referral date. Parties may seek to withdraw at a later time for good cause by motion to the arbitrator. Additionally, the assigned judge may exempt a case from arbitration at any time if the matter involves a complex or novel legal issue, if legal issues predominate over factual issues, or for other good cause.

Scheduling

Referral. Cases are referred to arbitration when the answer is filed or the filing time has elapsed, and parties are notified by court order. If a dispositive motion is filed before the arbitration referral, arbitration proceedings are automatically stayed.

Discovery and motions. Discovery is permitted and must be completed within 120 days of the arbitration referral. The arbitrator handles all discovery motions and other case management matters arising after the arbitration referral.

Written submissions. At least ten days before the arbitration hearing, parties must submit to opposing counsel and the arbitrator prehearing statements, listing issues to be determined and all potential witnesses and exhibits. Prehearing briefs may also be filed.

Arbitration hearing. The arbitrator sets the location, time, and date of the hearing. The arbitration clerk advises the parties of the hearing, which must be held within 180 days of filing the answer. Arbitration hearings are usually conducted at the arbitrator's office.

Length of hearing. Hearings generally last no more than one day.

Program features

Party roles. In addition to counsel, parties or party representatives with settlement authority are required to attend the arbitration hearing. Sanctions are authorized under local rule for a party's failure to attend the hearing or to participate in the hearing in a meaningful manner.

Filing of award. The arbitration award and decision are filed with the arbitration clerk under seal. If a trial de novo is not requested, the award is entered as the final judgment. If a de novo request is filed, the award remains sealed, and the docket notes only the date the arbitration award was filed.

De novo request. Parties not satisfied with the arbitration award must file a request for trial de novo within thirty days of the filing of the award. When requesting a trial de novo, the moving party is required to deposit with the arbitration clerk a sum equal to the total fees paid or payable to the arbitrator. The sum is returned if the party obtains a final judgment more favorable than the arbitration award.

Confidentiality. Withdrawals from arbitration are confidential, and the identity of the party opting out does not appear on the docket. Awards are sealed unless accepted by the parties. The sealed arbitrator's award may not be considered by the court or jury before, during, or after the trial de novo.

Neutrals

Qualifications and training. To serve as an arbitrator, attorneys must have practiced law for at least five years, be admitted to the District of Arizona bar, and possess substantial experience in either litigation, neutral practice, or consensual problem solving in complex negotiations. Candidates must also specify their areas of expertise.

Selection for case. A single arbitrator is selected by either the parties or the court. The parties may select an arbitrator from the court's roster of attorneys and former judges, or they may identify an arbitrator from another source. If the parties fail to agree on an arbitrator, the arbitration clerk will select an arbitrator with the desired subject matter expertise from the court roster. Each side may reject one court-selected arbitrator, whereupon the arbitration clerk will select another arbitrator.

No specialized training of the arbitrators is required. The court notes: "This District is fortunate to be situated in a state where arbitration has been in place, with attorneys having considerable experience serving as neutrals in that court system. Several arbitrators are retired judges, now residing in Arizona."

Disqualification. The arbitrator is subject to the disqualification rules set forth in 28 U.S.C. § 455 and may decline to serve for any reason.

Immunity. The court has not addressed this issue.

Fees. The court sets and pays arbitrators a fee of \$250 for each case or each day of hearing, whichever is greater. Outside arbitrators selected by the parties are subject to the court's compensation structure.

Program administration

The arbitration program is administered by the clerk's office. Substantive or procedural problems are handled by an advisory committee chaired by a district judge and composed of three counsel, two district judges, and the court clerk.

Eastern District of Arkansas

IN BRIEF

Process summary

ADR generally. The Eastern District of Arkansas has determined that it will not establish court-based ADR programs.

Of note

Obligations of counsel. Attorneys are required to discuss ADR with their clients and opposing counsel and to demonstrate that they have done so. They must also be prepared to discuss with the assigned judge the case's suitability for ADR services provided by the private sector.

Information from court. ADR options available to litigants in the private sector are discussed in the court's general brochure for civil litigants, *Your Day in Court—The Federal Court Experience*.

For more information

James W. McCormack, Clerk of Court, 501-324-5351

Western District of Arkansas

IN BRIEF

Process summary

ADR generally. The Western District of Arkansas has determined that it will not establish any court-based ADR programs but will provide settlement assistance through magistrate judge settlement conferences.

Magistrate judge settlement conferences. The Western District of Arkansas is experimenting with a mandatory settlement conference program in which one of the court's three district judges refers almost all civil cases to magistrate judges for settlement conferences. Cases involving prisoners, student loans, and social security appeals are excluded from referral; cases involving the U.S. government as plaintiff may be excluded by the assigned judge at his or her discretion. Eligible cases are referred to the program automatically through the assigned judge's scheduling order.

The purpose of the settlement conference program is to improve communication between the parties and to provide an evaluation of the case where appropriate. The confidentiality of the sessions are protected by Fed. R. Evid. 408, and the hosting magistrate judge does not discuss any aspect of the settlement proceeding with the referring judge.

Before the settlement conference, which is generally held thirty to sixty days before trial, each party provides the magistrate judge with a concise description of claims, defenses, and trial evidence. The magistrate judge determines the timing of the conference, whether the parties must attend, and whether the conference will be conducted by telephone or in person. Conferences generally take one to two hours, and there may be several follow-up telephone conferences. At the conclusion of the process, the magistrate judge files a report indicating only whether settlement occurred.

No local rules have been enacted for this experimental program. Authorization is provided in each referral order. Approximately ninety cases were referred to magistrate judge settlement conferences between January and September 1994.

Of note

Information from court. The court is preparing a brochure that will identify private ADR resources available to litigants.

For more information

Beverly R. Stites, U.S. Magistrate Judge, 501-783-7045

Bobby E. Shepherd, U.S. Magistrate Judge, 501-863-3173

Central District of California

IN BRIEF

Process summary

Mandatory settlement procedures. The Central District of California has authorized, through Local Rule 23, mandatory referral to settlement procedures for most civil cases. See below.

Other ADR. In the Central District of California, referral to different forms of ADR, such as arbitration, mediation, minitrial, or summary jury trial, is at the discretion of the individual district or magistrate judge. No court-based ADR programs or rules have been established. When a judge refers parties to one of these forms of ADR, the judge sets the procedures for the process. The judges have also appointed special masters to settle cases and have referred some cases to a minitrial procedure. On a few occasions, one judge has held a summary jury trial.

Of note

Obligations of counsel. Attorneys must discuss ADR options with opposing counsel and indicate in their case management statements that they have done so.

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

Plans. The court is creating a panel of settlement judges and a panel of attorney settlement officers to serve as neutrals in the court's mandatory settlement procedures.

For more information

William J. Rea, U.S. District Judge, 213-894-0466

Harry L. Hupp, U.S. District Judge, 213-894-6730

IN DEPTH

Mandatory Settlement Procedures in California Central

Overview

Description and authorization. Under Local Rule 23, the Central District of California has established a variety of procedures to assist settlement. The court's procedures were first adopted in 1993 and were modified by an amendment to Local Rule 23 in November 1994. Known as the Mandatory Settlement Procedures Program, it is not yet fully implemented.

When the program is fully operational, it will require litigants in all civil cases to meet with the trial judge, another district judge, a magistrate judge, an attorney settlement officer, or a private mediator to pursue settlement at least forty-five days before the final pretrial conference. Parties will be required to select one of the court's settlement options. If they cannot agree on a process, the assigned district or magistrate judge is authorized to conduct an appropriate settlement process. The court's three options include (1) participation in a settlement process hosted by a settlement attorney on the court's roster; (2) referral to a retired judge or other private ADR neutral; or (3) referral

to another district judge or a magistrate judge for settlement. The selected settlement officer has broad discretion to structure the settlement process. Under the rule, the settlement officer may (1) require an opening statement from each counsel; (2) hold, with agreement of the parties, a summary jury trial or minitrial; may require presentation of testimony or summary of testimony of expert witnesses; (3) order closing argument by each counsel; or (4) require any combination of these. Any case may be excluded from the program by the assigned judge.

Number of cases. No information is yet available on the number of cases referred.

Case selection

Eligibility of cases. All civil cases are eligible. A case may be excluded from the program by the assigned district or magistrate judge.

Referral method. No later than forty-five days before the final pretrial conference, the parties must select and participate in one of the court's approved settlement procedures. If parties do not select a settlement option, the court may order the parties to participate in any of the settlement procedures set forth in Local Rule 23.

Opt-out or removal. The assigned judge may, if a party applies or sua sponte, excuse the case from participation in a settlement procedure.

Scheduling

Process selection. Parties who have not chosen the assigned judge to preside over their settlement proceedings must file a Notice of Selection of Settlement Procedure, signed by counsel for each side, no later than fourteen days before the date of the selected settlement procedure. The notice must state the settlement procedure selected, the name of the settlement officer, and the date, time, and place of the settlement procedure.

Written submissions. At least five days before the settlement procedure, each party must submit to the settlement officer, in camera, a letter of five pages or less setting forth its statement of the case; its settlement position (including the last offer or demand made), and the offer or demand it will make at the settlement conference. The letter is returned to the party at the end of the settlement conference.

Settlement session. The settlement conference must take place no later than forty-five days before the final pretrial conference.

Number and length of sessions. No data are currently available about the length of settlement sessions or the number of sessions generally held.

Program features

Rule 23 settlement procedures. Four settlement procedures are offered under Local Rule 23:

Settlement procedure no. 1. Unless another settlement procedure is selected by the parties with the consent of the trial judge, the parties must appear before the assigned district or magistrate judge for any settlement procedures the judge may conduct.

Settlement procedure no. 2. The parties may engage in settlement discussions with an attorney selected from the Attorney Settlement Officer Panel (when established and functioning) or with an attorney appointed by the trial judge.

Settlement procedure no. 3. The parties may appear before a retired judge or other private or nonprofit dispute resolution body for "mediation-type settlement proceedings."

Settlement procedure no. 4. With the consent of the trial judge, the parties may ap-

pear for settlement proceedings before another district or magistrate judge selected at random from the Civil Settlement Panel.

Discovery and motions. Local Rule 23 does not address this subject.

Party roles and sanctions. In addition to the attorney who will try the case, each party must attend the settlement proceeding in person or be represented by a person with full authority to settle. Parties residing outside the district may have an authorized representative available by telephone during the proceeding. Each party must analyze the case before the proceeding and must be prepared to discuss all economic and non-economic factors relevant to settlement. Local Rule 23 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 parties must report it immediately to the assigned judge's courtroom deputy and submit a written settlement agreement as soon as possible.

Confidentiality. All proceedings are confidential. No statements made during the settlement procedures are admissible in any subsequent proceeding in the case unless the parties agree. No part of the proceeding may be reported or recorded without consent of the parties, except for the written settlement agreement.

Neutrals

Qualifications and training. Local Rule 23 does not address this subject.

Selection for case. When parties choose to proceed before an attorney, they may select the attorney from the Attorney Settlement Officer Panel (when established and functioning) or before an attorney appointed by the trial judge for settlement proceedings. If the neutral is a district or magistrate judge other than the assigned judges, the settlement judge is selected at random from the Civil Settlement Panel.

Disqualification. Local Rule 23 does not address this subject.

Immunity. Local Rule 23 does not address this subject.

Fees. Local Rule 23 does not address this subject.

Program administration

No administrative structure has been established to date.

Eastern District of California

IN BRIEF

Overview

Early neutral evaluation (ENE). Based on a pilot program in early neutral evaluation, the Eastern District of California formally amended its local rules, effective December 19, 1994, to establish court-based procedures for voluntary referral of civil cases to a nonbinding neutral-evaluator. See below.

Early settlement conferences. All district and magistrate judges are available to conduct settlement conferences as early as practicable in the case.

Of note

Information from court. The court notifies plaintiffs of the early neutral evaluation program at filing. Plaintiffs must provide copies of the notice to all other parties involved in the action.

For more information

R. Lynette Groff, Sacramento Division, 916-498-5468
Marianne Matherly, Fresno Division, 209-487-5757

IN DEPTH

Early Neutral Evaluation in California Eastern

Overview

Description and authorization. After several years of experimentation with ENE, the Eastern District of California amended Local Rule 252 on December 19, 1994, to establish a voluntary, nonbinding ENE program. Most civil case types are eligible, but participation requires party consent. An ENE evaluator is appointed to bring the parties in a civil action together in an informal setting and to offer impartial guidance by (1) allowing each party to state its position, (2) identifying areas of agreement and thereby narrowing the focus to issues of nonagreement, (3) assisting the parties in identifying the strengths and weaknesses of their positions, (4) planning discovery, (5) providing a realistic assessment of legal costs, and (6) effecting resolution of as many issues as possible before proceeding to trial. The neutral-evaluators serve without compensation.

Number of cases. In early 1995, fifty-five cases were referred to the ENE process.

Case selection

Eligibility of cases. Most civil cases are eligible for referral to ENE, except for the following: prisoner petitions; cases in which one of the parties is appearing pro se; voting rights cases; Social Security cases; deportation cases; Freedom of Information Act cases; and cases involving the constitutionality of federal, state, or local statutes or ordinances.

Referral method. Parties voluntarily elect early neutral evaluation by filing a stipulation with the court indicating that all parties agree to proceed under Local Rule 252. When the stipulation is received, the court issues an order referring the case to ENE.

Opt-out or removal. No procedure is necessary, as participation in ENE is strictly voluntary.

Scheduling

Referral. At the initial status conference, the court informs all parties of the availability of ENE. Parties may then file a stipulation for early neutral evaluation.

Written submissions. At least seven days before the evaluation session, each party must submit to the evaluator and all other parties a written evaluation statement of ten pages or less. The statement must (1) briefly list the facts and pertinent principles of law; (2) identify significant disputed issues; (3) identify issues whose early resolution may reduce the scope of the dispute or contribute significantly to the productivity of settlement discussions; and (4) identify the people, in addition to counsel, who will

attend the session with decision-making authority. Documents or other physical evidence may also be identified or attached.

ENE session. Unless the court directs otherwise, the first ENE session must be held as soon as possible after the evaluator is appointed and no more than ninety days after the appointment. The evaluator selects the location, date, and time for the initial session.

Number and length of sessions. Most ENE actions are resolved at the initial session. The evaluator determines if follow-up sessions or procedures are needed.

Program features

Discovery and motions. Typically, the ENE process is invoked before the start of discovery and motion practice.

Party roles and sanctions. The attorney who will be primarily responsible for the trial must attend the ENE session. Parties or party representatives with settlement authority must also attend. If there is insurance coverage, an adjuster with reasonable settlement authority may attend. Governmental entities must be represented by an attorney with authority to settle or recommend settlement. Local Rule 252 does not specify whether or what type of sanctions may be imposed for failure to comply with the attendance and other requirements.

Outcome. Within thirty days of the ENE session, the evaluator must report in writing to the ENE program administrator the outcome of the session and whether any follow-up sessions or procedures are still to be completed.

Confidentiality. All written and oral communications made during any ENE session are confidential and are governed by Fed. R. Evid. 408.

Neutrals

Qualifications and training. The clerk is responsible for maintaining a panel of qualified evaluators who are experienced civil litigators familiar with practice in federal court. The panel initially consisted of evaluators who were selected to participate in the ENE pilot project. The chief judge may select additional members who want to serve. Evaluators may ask to be dropped from the panel for a specified period of time or permanently.

Selection for case. Once a stipulation for early neutral evaluation is filed, the court appoints an evaluator from a panel maintained by the clerk's office. All parties are notified of the appointment.

Disqualification. No person may serve as an evaluator in any action where a conflict of interest exists or is believed to exist. If a party believes that an assigned evaluator has a conflict of interest and does not bring the concern to the attention of the clerk within ten days of learning of the conflict, the party waives any objection based on that conflict.

Immunity. The court has not addressed this issue.

Fees. Evaluators receive no compensation for their service.

Program administration

The clerk is responsible for administering the court's ENE program.

Northern District of California

IN BRIEF

Process summary

ADR multi-option program. On July 1, 1993, the Northern District of California established the ADR Multi-Option Program in partial fulfillment of its responsibilities as a demonstration district under the Civil Justice Reform Act. Under the Multi-Option Program, which is authorized by ADR Local Rule 3, litigants in certain civil case types assigned to four pilot program judges are presumptively required to participate in one of the court's nonbinding ADR processes (listed below). In lieu of a court-connected process, litigants may substitute a similar process offered by a private provider. Through this experiment the court hopes to assess the potential of various ADR processes for different types of cases. See below.

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

Mediation. The Northern District of California has established an experimental mediation program as part of the Multi-Option Program. See below.

Early neutral evaluation (ENE). The Northern District of California authorizes automatic referral, at filing, of specified case types to early neutral evaluation. See below.

Other ADR. The assigned judge may appoint a special master. Additional forms of ADR, such as the summary jury trial, are offered as part of the Multi-Option Program but are seldom chosen. In lieu of a court-connected process, litigants subject to the Multi-Option Program may select an ADR process offered by a private provider. Between January and September 1994, parties in seventeen cases selected a private ADR provider.

Early magistrate judge settlement conference. Under the Multi-Option Program, participating litigants may choose an early magistrate judge settlement conference to fulfill the court's ADR requirements. Between January and September 1994, seventy-six cases were referred to an early magistrate judge settlement conference.

Judicial settlement conferences. A significant number of cases are referred by the district judges for settlement conferences at later stages of the litigation. The referrals are generally to the magistrate judges.

Of note

Obligations of counsel. In cases subject to the Multi-Option Program, counsel are required to discuss the ADR options for the case and, if possible, stipulate to an ADR process. In all cases, the filing party is required to serve on all other parties the court's brochure, *Dispute Resolution Procedures in the Northern District of California*. Each party in all civil cases except those exempted by Local Rule 16 must file, but need not serve on other parties, a certification of discussion and consideration of ADR options. The certification, signed by both client and counsel, indicates that they have read the court's brochure, discussed the available court-connected and private ADR options, and considered whether their case might benefit from any of them.

Information from court. The court provides the brochure *Dispute Resolution Procedures in the Northern District of California*.

Evaluation. An evaluation of the court's arbitration program is reported in Barbara Meierhoefer, *Court-Annexed Arbitration in Ten District Courts* (Federal Judicial Center 1990). An evaluation of the ENE program is reported in J. Rosenberg & H. J. Folberg, *Alternative Dispute Resolution: An Empirical Analysis*, 46 *Stanford L. Rev.* 1487 (July 1994). As a demonstration district under the CJRA, the court's ADR Multi-Option Program is included in the Federal Judicial Center's study of the five CJRA demonstration districts, which will be reported to Congress by the Judicial Conference in 1996.

For more information

Carroll DeAndreis, Administrative Assistant, ADR Programs, 415-556-3167

IN DEPTH

ADR Multi-Option Program in California Northern

Overview

Description and authorization. On July 1, 1993, the Northern District of California established the ADR Multi-Option Program in partial fulfillment of its responsibilities as a demonstration district under the Civil Justice Reform Act. Initially, five judges participated in the experimental program; since one has left the bench, four now participate. They are Chief Judge Thelton E. Henderson and Judges Marilyn Hall Patel, Fern M. Smith, and Vaughn R. Walker.

Under the ADR Multi-Option Program, which is authorized by ADR Local Rule 3, litigants in certain civil case types are presumptively required to participate in one non-binding process offered by the court, including mediation, arbitration, early neutral evaluation, or early magistrate judge settlement conference. In lieu of a court-connected process, litigants may substitute a similar process offered by a private provider. Selection of an ADR process is made during a conference call between counsel and the court's ADR director or deputy director, unless parties previously stipulate to a procedure or cannot agree and postpone further discussion of ADR options until the initial case management conference with the assigned judge.

Number of cases. For a summary of the number of cases that have selected arbitration, early neutral evaluation, and mediation, see the following descriptions. Between January and September 1994, seventy-six cases were referred to an early settlement conference with a magistrate judge and seventeen cases were referred to a private ADR provider.

Case selection

Eligibility of cases. Eligible cases include most civil cases that are assigned to the four participating judges and are subject to the court's case management procedures (see Local Rule 16). Cases presumptively excluded from the Multi-Option Program are those set out in Local Rule 16 and include bankruptcy appeals, actions for review of federal agency decisions, prisoner civil rights cases, habeas corpus petitions, pro se cases, reinstated or reopened cases, forfeiture actions, and tax suits.

Referral method. All cases eligible for the Multi-Option Program are presumptively required to participate in one nonbinding ADR process. Cases are designated at filing by

an order issued by the clerk to the filing party and served by the filing party on the defendant. Counsel in the designated cases must stipulate to a specific ADR procedure or participate in a joint telephone conference call with the ADR director or deputy director to discuss the suitability of the ADR options for their case. The designation order specifies the date and time of the conference call, which is held between 95 and 105 days after the complaint is filed. Counsel primarily responsible for the case must participate, and clients and their insurance carriers are strongly encouraged to participate.

If parties agree on an ADR process before the conference call, the call is not held, and the parties file a stipulation and order selecting an ADR process. Parties who agree to an ADR process after the conference call may file the form stipulation or include their ADR stipulation in their case management statement.

If the parties do not agree on an ADR process before the case management conference required by Local Rule 16, the judge discusses the ADR options at that conference. If by the end of the conference the parties cannot agree on a process, the judge selects one, unless persuaded that no ADR process will be beneficial or cost-effective. If an ADR process is selected, the judge issues a referral order.

To assist parties in selecting an ADR process, the court provides to the filing party the brochure, *Dispute Resolution Procedures in the Northern District of California*.

Opt-out or removal. To seek exemption from the telephone conference call, counsel may file a motion with the assigned judge. Although there is a presumption of ADR use in cases assigned to the Multi-Option Program, counsel may seek by motion or at the case management conference to persuade the judge that it would be inappropriate.

Scheduling

Selection of an ADR process. Parties may agree on an ADR process at any time before the case management conference. If they do not agree before the case management conference, the decision is made at the conference. The judge may also defer the ADR decision to a later point in the case.

Written submissions. See the following descriptions for arbitration, mediation, and early neutral evaluation.

ADR session. See the following descriptions for arbitration, mediation, and early neutral evaluation.

Number and length of sessions. See the following descriptions for arbitration, mediation, and early neutral evaluation.

Program features

Discovery and motions. Cases referred to ADR under the Multi-Option Program remain subject to the court's local rules and general orders, including the court's case management requirements (Local Rule 16), as well as each judge's standing orders.

Party roles and sanctions. See the following descriptions for arbitration, mediation, and early neutral evaluation.

Outcome. See the following descriptions for arbitration, mediation, and early neutral evaluation.

Confidentiality. See the following descriptions for arbitration, mediation, and early neutral evaluation.

Neutrals

See the following descriptions for arbitration, mediation, and early neutral evaluation.

Program administration

Administrative matters related to the Multi-Option Program are managed by the director, deputy director, and administrative assistant of the court's Office of ADR Programs. Administration includes scheduling and conducting the telephone conference calls with counsel, sending memoranda reports on these calls to the assigned judges, assigning neutrals to cases referred to an ADR process, and selecting and training neutrals for the court's roster. A magistrate judge serves as liaison judge for the court's ADR programs.

Arbitration in California Northern

Overview

Description and authorization. The Northern District of California is one of ten courts authorized by 28 U.S.C. §§ 651–658 to establish a mandatory, nonbinding court-annexed arbitration program. The court's procedures are spelled out in ADR Local Rule 4, which was first adopted in 1978 as Local Rule 500. Before the court adopted its Multi-Option Program on July 1, 1993, all cases meeting the eligibility criteria were automatically referred to arbitration. Under the Multi-Option Program, the civil cases of four judges are now subject to procedures established by the program and are exempt from Rule 4's automatic referral at filing. Of cases not in the Multi-Option Program, specified case types seeking only money damages of \$150,000 or less are automatically assigned to arbitration at filing. Parties in cases with higher damages or nonmonetary damages may jointly request referral to arbitration. The parties determine whether the arbitration hearing will be conducted by one or three arbitrators, chosen from a list of ten arbitrators randomly selected by the court from its roster of attorneys trained by the court. The court pays the arbitrators \$250 per day if serving singly and \$150 per day if serving on a panel of three.

Number of cases. Between January and September 1994, 246 cases were referred to arbitration under Rule 4. An additional 6 cases were referred to arbitration under the Multi-Option Program.

Case selection

Eligibility of cases. All civil cases not assigned to the Multi-Option judges that fall within the following categories are automatically assigned to arbitration: (1) actions in which the United States is not a party that seek relief limited to money damages not exceeding \$150,000 (exclusive of any punitive or exemplary award and interest and costs), and that are founded on diversity of citizenship or admiralty or maritime jurisdiction and arise under a contract or out of personal injury or property damage; (2) actions in which the United States is a party that seek relief limited to money damages not exceeding \$150,000, and that arise under the Federal Tort Claims Act or the Longshoremen's and Harbor Workers Act or under the Suits in Admiralty Act and involve no general average; or (3) actions that arise under the Miller Act, in which the United States has no monetary interest, and that seek relief limited to money damages not exceeding \$150,000 (exclusive of any punitive or exemplary award and interest and costs). Parties in other cases,

regardless of the amount in controversy, may jointly request submission to arbitration. If approved by the assigned judge, the case proceeds under the procedures outlined in ADR Rule 4. Parties who believe the amount in controversy exceeds \$150,000 must file certification to this effect within thirty days of the initial docketing of the case. Failure to do so waives the right to object to submission of the case to arbitration on the grounds that the case exceeds the monetary ceiling. Case types not falling in the categories above are exempt from arbitration, unless the parties agree to submit the case to arbitration.

Referral method. Every action subject to ADR Rule 4 is referred to arbitration by the clerk once the complaint or notice of removal is filed. The court's Order Re Court Procedures notifies the filing party of the referral; this party then serves the order on other parties. A case not referred at filing but that otherwise meets the referral criteria may be referred by order of the assigned judge following stipulation by all parties, motion by a party, or on the judge's initiative. Cases not meeting the referral criteria may be referred only if all parties consent.

Opt-out or removal. Within twenty days of the filing of the last responsive pleading, any party may move for removal from arbitration by demonstrating that the case involves novel or complex legal issues or significant and complex factual issues, that legal issues predominate over factual issues, or other grounds for finding good cause.

Scheduling

Referral. Eligible cases are referred to arbitration when the complaint or notice of removal is filed.

Discovery and motions. Every action subject to ADR Rule 4 is assigned to a judge upon filing, and the judge has authority to conduct status and settlement conferences, hear motions, and in all other respects supervise the case in accordance with the court's rules notwithstanding the referral to arbitration. Parties may serve discovery requests within thirty days of serving the complaint, notwithstanding Local Rule 16's temporary stay of discovery. Discovery must be completed twenty days before the arbitration hearing.

Written submissions. No later than ten calendar days before the arbitration session, parties must give the arbitrator and other parties a written arbitration statement that summarizes the claims and defenses, identifies contested issues and proposed witnesses, and identifies the person with decision-making authority who will attend.

Optional telephone conference. The arbitrator may conduct a brief joint telephone conference with counsel before the hearing to discuss matters such as hearing procedures, supplemental written materials, witnesses, and presentation of testimony.

Arbitration hearing. Case systems administrators in the clerk's office set the hearing date. The hearing must take place within 20 to 120 days after the arbitrators are selected. No arbitration hearing may begin until 30 days after disposition by the court of any motion to dismiss the complaint, motion for judgment on the pleadings, motion to join necessary parties, or motion for summary judgment, provided such motion was filed and served within 30 days of the filing of the last responsive pleading. Arbitration hearings may be held anywhere within the district designated by the arbitrator, including the courthouse.

Length of hearing. Although the length of arbitration hearings depends on the case, they generally take no more than one day.

Program features

Party roles and sanctions. Each party and its lead trial counsel must attend the hearing. A corporate or government party may be represented by someone knowledgeable about the facts of the case. A party may be excused from personal attendance by showing extraordinary hardship in a letter submitted at least fifteen days before the hearing to the ADR magistrate judge, but the excused party must participate by telephone. Violation of the attendance requirement or any other requirement of ADR Rule 4 must be reported to the ADR magistrate judge, who will determine whether sanctions should be imposed.

Nature of the hearing. All testimony is given under oath, and each party may cross-examine witnesses. The arbitrator is guided by the Federal Rules of Evidence but is not precluded from receiving privileged evidence or evidence he or she considers relevant.

Filing of award. The arbitrator must file the award with the clerk's office within ten days of the hearing. The award is filed under seal and is forwarded to the assigned judge. The clerk serves copies on the parties. Unless a party files a request for trial de novo, the clerk enters judgment on the arbitration award.

De novo request. A request for trial de novo must be filed within thirty days of filing the arbitration award. No fees are assessed against parties who request trial de novo but do not improve their position by trial.

Confidentiality. The arbitration award may not be made known to any judge who might preside at trial or rule on dispositive motions until the court has entered final judgment or the action has otherwise been terminated. The award may also be made known to those who prepare the report required by § 903(b) of the Judicial Improvements and Access to Justice Act. No transcript, record, or award is admissible as evidence in a trial de novo or any subsequent proceeding unless the evidence is otherwise admissible or the parties stipulate, and the parties may not reveal at trial any evidence of or concerning the arbitration. There may be no ex parte communication between an arbitrator and any counsel or party on any matter touching on the action except for purposes of scheduling the hearing.

Neutrals

Qualifications and training. The clerk maintains a roster of arbitrators who hear actions referred under ADR Rule 4. To be eligible for selection for the roster an attorney (1) must have been admitted to practice for at least ten years, (2) must be a member of the bar of the court, and (3) must, for at least five years, have committed 50% of his or her professional time to litigation or have had substantial experience as a neutral in dispute resolution proceedings. Each person selected for the roster must successfully complete the training conducted by the court, which gives the history and purpose of the arbitration program and requires participation in role-play scenarios that focus mainly on difficult procedural and ethical issues that may arise in arbitration.

Selection for case. Promptly after the last responsive pleading is filed, the clerk's office provides the parties a list of ten arbitrators randomly drawn from the court's roster. The parties then confer to determine whether to select a single arbitrator or to request, in writing, that they be permitted to select three. Through a process of strikes (described in ADR Rule 4), the parties select the arbitrator(s) and then submit the name(s) to the clerk within ten days of receipt of the original list. If they do not, the clerk randomly selects the arbitrator(s) from the list.

Disqualification. No person 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. A party who believes the neutral has a conflict of interest must object in writing within ten days of learning of the possible conflict or objection is waived.

Immunity. ADR Rule 2 specifies that arbitrators perform quasi-judicial functions and are entitled to the immunities and protections accorded to such persons by law.

Fees. The court pays arbitrators \$250 per day or portion of a day for serving as a single arbitrator or \$150 per day or portion of a day for serving on a panel of three.

Program administration

Administrative matters related to arbitration are managed by the director, deputy director, and administrative assistant of the court's Office of ADR Programs. Their duties include recruiting and training arbitrators, assisting arbitrators with ethical or procedural issues, and debriefing arbitrators after their sessions. Day-to-day management, including sending notices to parties, generating the lists of arbitrators from which parties may choose, coordinating dates, docketing all arbitration events, and tracking the progress of the arbitration cases, is handled by the case systems administrators in the clerk's office.

Mediation in California Northern

Overview

Description and authorization. Under ADR Rule 6, the Northern District of California provides a mediation program as one component of the court's Multi-Option Program. The mediation program became effective July 1, 1993. The four judges participating in the Multi-Option Program offer mediation as one of several ADR options. Except for certain case types specified in Local Rule 16, all civil cases assigned to these judges and subject to the court's case management procedures are eligible for mediation. If appropriate resources are available, mediation is provided to litigants in other cases who agree to the procedure.

In the mediation process, a neutral attorney-mediator, trained in communication and negotiation techniques and knowledgeable about federal litigation, helps counsel and their clients improve communication, clarify their understanding of their own and opponent's case, probe weaknesses in each party's legal position, identify areas of agreement, and explore settlement alternatives. The mediator may hold private caucuses with the parties but generally does not give an evaluation of the case. The first four hours of mediation are free. Parties and the mediator must then decide whether the mediator will continue to volunteer his or her time or whether the parties will jointly pay an hourly fee of \$150 to continue the procedure. The parties and mediator may agree on appropriate follow-up to the mediation session, such as exchange of information or additional sessions.

Number of cases. The mediation program is experimental and limited to four judges. Between January and September 1994, sixty-seven cases were referred to mediation under the Multi-Option Program, and another sixteen cases agreed to the procedure.

Case selection

Eligibility of cases. Most civil cases assigned to the four Multi-Option Program judges

and subject to Local Rule 16 are eligible for referral to mediation. If appropriate resources are available, mediation is available to litigants in other cases. Cases presumptively excluded from the mediation process include transferred cases, cases filed by pro se plaintiffs, cases remanded from appellate court, reinstated and reopened cases, and cases in the following categories: prisoner petitions, forfeiture/penalty, bankruptcy, Social Security, and other statutes enumerated in Local Rule 16. The four Multi-Option Program judges as well as other judges may select for referral cases other than those formally designated as eligible.

Referral method. All cases assigned to the Multi-Option Program are presumptively required to participate in one nonbinding ADR process. Cases are designated at filing by an order issued by the clerk to the filing party and served by the filing party on the defendant. Counsel in the designated cases must stipulate to a specific ADR procedure or participate in a joint telephone conference call with the ADR director or deputy director to discuss the suitability of the ADR options for their case. The designation order specifies the date and time of the conference call, which is held between 95 and 105 days after the complaint is filed. Counsel primarily responsible for the case must participate, and clients and their insurance carriers are strongly encouraged to do so.

If parties stipulate to an ADR process before the conference call, the call is not held, and the parties file a stipulation and order selecting an ADR process. Parties who stipulate after the conference call may do so in their case management statement.

If the litigants do not agree to an ADR process before the case management conference required by Local Rule 16, the judge discusses the ADR options at that conference. If by the end of the conference the parties cannot agree on a process, the judge selects one, unless persuaded that no ADR process will be beneficial or cost-effective. If an ADR process is selected, the judge issues an order referring the case.

Cases not assigned to the Multi-Option Program may be referred to mediation by order of the assigned judge following stipulation by all parties, motion by a party, or on the judge's initiative.

To assist parties in selecting an ADR process, the court provides a brochure, *Dispute Resolution Procedures in the Northern District of California*, which the clerk gives to the filing party along with the notice designating the case as a Multi-Option case.

Opt-out or removal. To seek exemption from the conference call or from a referral to ADR, counsel may file a motion with the assigned judge.

Scheduling

Referral. Parties may stipulate to mediation at any time before the case management conference. If they do not stipulate before the conference, the decision is made at the conference.

Written submissions. At least ten days before the first mediation session, each party must submit to the mediator and serve on all parties a written mediation statement of ten pages or less. The statement, which is not filed or transmitted to the assigned judge, must (1) identify those with decision-making authority who will attend the sessions, (2) describe the suit, setting forth the party's views on the key liability issues and damages, (3) identify others whose presence might substantially improve the prospects for settlement, (4) indicate the status of settlement negotiations and other information that might be helpful to the mediator, (5) identify discovery or motions that would contribute to

meaningful settlement negotiations, and (6) include copies of documents that might advance the settlement process.

Mediation session. Promptly after appointment to a case, the mediator sets the date and place of the mediation session, within time frames set by the ADR order. The mediator also schedules a telephone conference with counsel to discuss such matters as scheduling, procedures to be followed, and client attendance. Unless otherwise ordered, mediation sessions must be conducted within ninety days of the first case management conference or issuance of the case management order, whichever comes first. Requests to extend the deadline must be submitted by motion to the assigned judge at least fifteen days before the session is to be held.

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

Program features

Discovery and motions. Cases referred to mediation remain subject to the court's local rules and general orders, including the requirements of Local Rule 16 and each judge's standing orders.

Party roles and sanctions. Parties and their counsel must attend all mediation conferences. A party other than a natural person (e.g., a corporation or insurance company) satisfies this requirement if represented by a person other than outside counsel who has full settlement authority and knowledge about the facts of the case. Governmental entities must send a representative knowledgeable about the facts of the case and the government's position. At least fifteen days before the mediation session, a party may ask by letter to the ADR magistrate judge to be excused from attendance because of extraordinary hardship. An excused party must be available by telephone. Mediators must report any violation of the mediation order to the ADR magistrate judge, including failure to comply with the attendance requirements. The magistrate judge will determine whether sanctions should be imposed.

Outcome. Within ten days of the mediation session, on a form provided by the court, the mediator must report to the ADR director whether the mediation resulted in full or partial settlement, whether any follow-up is scheduled, and any stipulations the parties agreed to disclose.

Confidentiality. The court, the mediator, all counsel, and all parties must treat as confidential all written and oral communications made in connection with or during any mediation session. All communications are protected by Fed. R. Evid. 408 and Fed. R. Civ. P. 68. Absent stipulation by the parties and mediator, no written or oral communication made by any party, attorney, or other participant may be disclosed to anyone not involved in the litigation or used for any purpose in pending or future proceedings in this court. None of the substance of the mediation may be communicated by anyone to the assigned judge. The mediator may ask the parties and all those attending the session to sign a confidentiality agreement.

Neutrals

Qualifications and training. Mediators must be admitted to the practice of law for at least seven years and be a member of the California bar or of the faculty of an accredited law school. Additionally, mediators on the court roster must have strong mediation process skills and training to listen well and facilitate communication.

Selection for case. After entry of an order referring the case to mediation, the ADR

office appoints a mediator from the court's roster and notifies the parties of the appointment.

The court conducts a two-day mediation training program for applicants to its roster. The training includes participation in role-play scenarios, observation of segments of a mediation session, and discussion of ethical and administrative requirements. Training must be successfully completed before appointment to the roster.

Disqualification. No mediator may serve in violation of the standards set forth in 28 U.S.C. § 455. If a circumstance covered by § 455 might exist, the mediator must promptly notify the parties. A party who believes that the assigned mediator has a conflict of interest must bring it to the attention of the ADR director, in writing, within ten calendar days of learning the source of the potential conflict or is deemed to have waived objection.

Immunity. ADR Rule 2 specifies that mediators perform quasi-judicial functions and are entitled to the immunities and protections accorded to such persons by law.

Fees. Mediators volunteer their preparation time and the first four hours of the mediation session. If the mediation session exceeds four hours, the mediator may either continue to volunteer his or her time or give the parties the option of concluding the procedure or paying the mediator for additional time at an hourly rate of \$150. The mediation session continues only if all parties and the mediator agree.

Program administration

Administrative matters related to mediation are managed by the director, deputy director, and administrative assistant of the court's Office of ADR Programs. Their duties include recruiting and training mediators, assigning mediators to cases, assisting mediators with ethical or procedural issues, debriefing mediators after their sessions, and reviewing requests to excuse clients from requirements to attend in person. The court's case systems administrators docket all ADR events and assist with tracking cases and following up with neutrals.

Early Neutral Evaluation in California Northern

Overview

Description and authorization. In 1985, the Northern District of California created the concept and practice of early neutral evaluation through a small experimental project authorized by general order. The program was expanded in 1988 to include a larger portion of the caseload. Eligible cases include tort and contract cases, employment civil rights cases, property rights cases (e.g., patent and trademark), antitrust and RICO cases, cases involving securities or commodities, and other cases designated by the assigned judge or not eligible for the court's arbitration program or assigned to the Multi-Option Program. Before the court's adoption on July 1, 1993, of its Multi-Option Program, all even-numbered eligible cases were automatically referred to early neutral evaluation. Under the Multi-Option Program, however, civil cases of the four participating judges are now exempt from automatic referral to ENE but may select it as their preferred ADR option. Eligible cases on other judges' dockets remain subject to automatic referral to ENE.

In the ENE program in this district, which is now authorized by ADR Rule 5, an attorney with experience in the subject matter of the case meets with counsel and parties for

both sides at an early stage in the litigation. After each side presents its position, the evaluator assists the parties in clarifying issues and assessing the strengths and weaknesses of the case. The evaluator may provide a nonbinding case assessment and, if asked by the parties, will help develop a discovery plan or will assist with settlement negotiations. The evaluator may also schedule follow-up sessions. The rules of evidence do not apply, and there is no formal examination of witnesses. Evaluators are not paid for their preparation time and the first four hours of ENE session time. If additional time is needed, the evaluator may continue to volunteer his or her time or give the parties the option of concluding the session or paying the evaluator for additional time at the hourly rate of \$150.

Number of cases. Between January and September 1994, 138 cases were referred to ENE under ADR Rule 5. An additional 74 cases were referred to ENE under the Multi-Option Program.

Case selection

Eligibility of cases. Cases that may be automatically ordered to ENE include contract and tort cases, employment civil rights cases, property rights cases (e.g., patent and trademark), antitrust and RICO cases, and cases involving securities or commodities. Judges may designate cases in other subject matter categories if qualified evaluators are available. Cases eligible for the arbitration program are not automatically referred to ENE but may be referred on stipulation of the parties.

In addition to the cases assigned to the Multi-Option Program judges and to arbitration, cases not automatically referred to ENE include class actions, cases in which the principal relief sought is injunctive, and cases in which one or more parties is pro se. Cases in which a declaratory judgment only is sought may not be automatically referred when the only parties to the action are insurance carriers, sureties, or bonding companies.

Referral method. Upon filing or notice of removal, and subject to the availability of qualified evaluators, the court designates for ENE every even-numbered case that meets the eligibility criteria of ADR Rule 5 and is not subject to the Multi-Option Program. On motion of a party or sua sponte, a judge may refer other cases to ENE as well. When a case is designated for ENE at filing, the clerk's office sends an Order Re Court Procedures to the plaintiff's counsel, who provides the defendant with a copy of the notice within ten days of receiving it or when the defendant is served.

Opt-out or removal. A party who believes an extraordinary circumstance makes participation in ENE unfair may petition the assigned judge for relief within ten days of receiving notice that the case has been designated for ENE.

Scheduling

Referral. For cases meeting the eligibility criteria for ENE, automatic referral occurs at filing. For other cases, referral may occur later if the court so orders, if all parties agree, or if one party requests ENE.

Written submissions. No later than ten days before the evaluation session, each party must submit directly to the evaluator and serve on all other parties a written evaluation statement. The statement must (1) identify the people with decision-making authority, including counsel, who will attend the session, (2) describe the substance of the suit, (3) address whether there are legal or factual issues whose early disposition might reduce

the scope of the dispute or contribute to settlement, (4) identify the discovery that promises to contribute most to meaningful settlement negotiations, and (5) describe the history and status of settlement negotiations. Parties must attach to these statements copies of documents out of which the suit arose (e.g., contracts and medical reports). ADR Rule 5 sets out additional requirements for statements submitted in patent, copyright, and trademark cases. Parties' statements are not filed, and the assigned judge does not have access to them.

ENE session. In cases automatically referred to ENE when filed, the ENE session is held within 150 days of the filing of the complaint or notice of removal, or within 45 days of the clerk's issuance of a notice appointing an evaluator. In cases referred through the Multi-Option Program, the ENE session is held within 90 days of the initial case management conference or issuance of the case management order, whichever comes first. In cases not in the Multi-Option Program that are referred to ENE sometime after filing, the court fixes the time frame for the ENE session. Requests to extend deadlines must be by motion to the assigned judge at least 15 days before the session is held. Within the time frames set by the court, the evaluator sets the date and place for the evaluation session. Sessions are held in a neutral location, such as the evaluator's office or the courthouse. The evaluator also holds a telephone conference with counsel to discuss scheduling, procedures to be followed, and attendance of parties.

Number and length of sessions. The number and length of sessions varies by case. A study of the ENE program showed that 30% of the sessions last no more than two hours. Another 40% last from two to four hours, 20% from four to six hours, and 10% more than six hours. In 20% of the cases, more than one session was held. (See Evaluation.)

Program features

Discovery and motions. The court and evaluators may not schedule ENE events to interfere with the management of the case by the assigned judge. Agreements made in the ENE session may not impose duties or fix schedules inconsistent with orders issued by the judge. A party may not seek to avoid or postpone any obligation imposed by the judge on any ground related to the ENE program. To seek relief from any deadlines, a party must file a motion with the assigned judge.

Party roles and sanctions. The parties and the attorney primarily responsible for the case must attend the ENE session. If the party is a corporation or insurance company, it must be represented by a person other than outside counsel who has authority to settle and is knowledgeable about the facts of the case. A party that is a unit of government must send someone knowledgeable about the case and the government's position and who has, to the greatest extent possible, authority to settle. Attendance is excused only by writing to the ADR magistrate judge at least fifteen days before the ENE session and only on a showing of an extraordinary or unjust hardship. Parties excused from attending must participate by telephone. Evaluators must promptly report any violations of ADR Rule 5 to the ADR magistrate judge, who may impose sanctions as necessary.

Outcome. Within ten days of the close of each ENE session, the evaluator must report to the ADR office whether any follow-up is scheduled, whether the case settled in whole or in part, and any stipulations the parties agree may be disclosed.

Confidentiality. The parties' written evaluation reports are not filed with the court, and the assigned judge does not have access to them. All written or oral communications made in the ENE process are confidential and are protected by Fed. R. Evid. 408

and Fed. R. Civ. P. 68. Communications made in the ENE process may not be disclosed to anyone not involved in the litigation and may not be used, including for impeachment purposes, in any pending or future litigation in this court. There may be no communication about the case or the ENE process between the evaluators and the judges on the court. The evaluator may ask the parties and all those attending the ENE session to sign a confidentiality agreement.

Neutrals

Qualifications and training. To be selected for the court's ENE roster, an applicant must be a member of a state bar for at least fifteen years and a member of the bar of the court or a faculty member at an accredited law school. Applicants must also have subject matter expertise in one or more categories of cases eligible for the ENE program and have the temperament to listen well, facilitate communication, and, if called on, assist in settlement negotiations.

All evaluators are required to successfully complete the court's ENE training session. The program describes the history and components of the ENE model. Panels of experienced evaluators then discuss their roles in the ENE session, including preparation and opening statements; the parties' case presentations and the evaluator's assessment of the case; settlement discussions; and case planning and follow-up.

Selection for case. The ADR office selects the evaluator from the court's roster of trained ENE neutrals. After determining that no conflict of interest exists, the director notifies the evaluator and counsel of the assignment. Evaluators are assigned on the basis of subject matter expertise so they can effectively assess the positions of the parties and give a meaningful evaluation of the case.

Disqualification. No evaluator may serve in any matter in violation of the standards set forth in 28 U.S.C. § 455. If the evaluator believes that a circumstance covered by section 455(a) exists, the evaluator must disclose this circumstance to all counsel in writing. If a party who believes there is a conflict of interest does not notify the ADR office in writing within ten days of learning the source of the potential conflict, he or she waives the objection.

Immunity. ADR Rule 2 specifies that ENE neutrals perform quasi-judicial functions and are entitled to the immunities and protections accorded such by law.

Fees. Evaluators are not paid for their preparation time or for the first four hours of ENE session time. If the ADR session exceeds four hours, the evaluator may either continue to volunteer his or her time or give the parties the option of concluding the procedure or paying the evaluator for additional time at an hourly rate of \$150. The ENE session continues only if all parties and the evaluator agree.

Program administration

Administrative matters related to ENE are managed by the director, deputy director, and administrative assistant of the court's Office of ADR Programs. Their duties include recruiting and training evaluators, assigning evaluators to cases, assisting evaluators with ethical or procedural issues, debriefing evaluators after their sessions, and reviewing requests to excuse parties from attending in person. The case systems administrators in the clerk's office assist by tracking the ENE cases, following up with neutrals, and docketing all ENE events.

Southern District of California

IN BRIEF

Process summary

ADR generally. The Southern District of California authorizes various ADR processes for civil cases, including early neutral evaluation, mediation, nonbinding arbitration, summary jury trial, minitrial, and settlement conferences with judges. As an initial step, litigants in almost all civil cases are required to meet with the assigned magistrate judge shortly after responsive pleadings are filed to discuss their claims and defenses and to try to reach settlement. This initial session is called early neutral evaluation (ENE) in this district. At the conclusion of the ENE conference or at any other time, the assigned district or magistrate judge may refer the case with or without party consent to one of the court's other ADR processes. The court's ADR programs are authorized under the district's CJRA plan, effective January 1, 1992, Local Rules 16.1(c) and 37.1, General Order 394-B, and the court's Arbitration and Mediation Rules. The court is also experimenting with settlement procedures in criminal cases.

Early neutral evaluation (ENE). Litigants in almost all civil cases are required to meet with the assigned magistrate judge shortly after responsive pleadings are filed to discuss the case and to try to reach settlement. See below.

Mediation. If a case is not resolved through the ENE conference, it may be referred to mediation with or without party consent. See below.

Arbitration. If a case is not resolved through the ENE conference, it may be referred to arbitration with or without party consent. See below.

Summary jury trials (SJT). The summary jury trial is authorized by Local Rule 37.1.f. Referrals may be made with or without party consent after a hearing. Eligible cases include trial ready cases in which the potential judgment does not exceed \$250,000 and the referring judge believes the case is suited to settlement by this process. This procedure is not used extensively.

Minitrial. The minitrial, which in this district is a nonbinding summary trial held before a magistrate judge who acts as the fact finder, is authorized by Local Rule 37.1.f. Referrals may be made with or without party consent after a hearing. This procedure is not used extensively.

Judicial settlement conferences. Under Local Rule 37.1, mandatory settlement conferences conducted by magistrate judges are held in almost all cases. Party attendance may be required. The judge conducting the settlement conference is disqualified from trying the case unless all parties agree to waive this restriction. In addition, the trial judge may order the parties, before judgment is entered, to participate in a post-verdict settlement conference with a judge other than the trial judge.

Of note

Obligations of counsel. Counsel must be prepared to discuss ADR and settlement with the assigned judge at every case conference.

Evaluation. As one of the ten pilot courts established under the CJRA, the Southern District of California 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

Barry Ted Moskowitz, U.S. District Judge, 619-557-5583

IN DEPTH

Early Neutral Evaluation in California Southern

Overview

Description and authorization. The Southern District of California requires litigants in almost every civil case to meet with the assigned magistrate judge supervising discovery for a settlement-oriented conference, or an ENE session, within forty-five days of filing the answer. At the session, attended by counsel and parties, the magistrate judge and parties discuss the claims and defenses and attempt to settle the case. The conference is informal, off the record, privileged, and confidential. If a case does not settle at the conference, the magistrate judge is authorized to refer the case to mediation or arbitration with or without party consent. The ENE program, which is experimental, is authorized under the district's CJRA plan, effective January 1, 1992, General Order 394-B, and Local Rule 16.1.c.

Number of cases. Between January and December 1994, approximately 1,410 cases were referred to ENE.

Case selection

Eligibility of cases. Almost all civil cases are required to participate in an early neutral evaluation session. Social Security appeals and habeas corpus cases are excluded from ENE.

Referral method. All eligible cases are automatically designated for ENE. Parties and counsel receive an order from the magistrate judge hosting the conference notifying them of the time and date of the mandatory ENE conference.

Opt-out or removal. There is no procedure for removing cases from ENE.

Scheduling

Referral. Cases are designated for mandatory ENE when the answer is filed.

Written submissions. No written submissions are required.

ENE session. The ENE conference is generally held within forty-five days of filing the answer. The conference is arranged by court staff and is held at the courthouse.

Number and length of sessions. The ENE conference lasts from thirty minutes to three hours. A second conference may be scheduled if needed.

Program features

Discovery and motions. All other case activities, including discovery, proceed unless stayed by the magistrate judge for cause.

Party roles and sanctions. All counsel and parties with settlement authority must attend the conference. Sanctions may be imposed for unexcused failure to attend.

Outcome. At the conclusion of the conference, an order is entered indicating that the conference was held, noting whether the case settled, and stating whether the case has been referred to mediation or arbitration.

Confidentiality. The ENE conference is privileged and confidential.

Neutrals

Selection for case. The magistrate judge supervising discovery conducts the conference.

Immunity. Magistrate judges are protected by judicial immunity.

Disqualification. The requirements for disqualification are stated in 28 U.S.C. §§ 144 and 455.

Program administration

The process is individually administered by each magistrate judge for cases assigned to that judge.

Mediation in California Southern

Overview

Description and authorization. The Southern District of California offers mediation as one of the ADR options established by its CJRA plan. If a case does not settle at the mandatory ENE conference, the magistrate judge is authorized to refer the case to non-binding mediation. Referral to mediation may be made without party consent, although consensual referrals are preferred. The initial mediation session is generally held within forty-five days of the referral. If no settlement is reached, the case returns to the trial calendar. The mediation program, which is experimental, is authorized by the district's CJRA plan, effective January 1, 1992, General Order 394-B, Local Rule 16.1, and the court's Arbitration and Mediation Rules.

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

Case selection

Eligibility of cases. Although all civil cases are eligible, mediation generally is not used in habeas corpus, Social Security, and prisoner cases.

Referral method. The judge may refer a case to mediation with or without party consent. Referral is made on a case-by-case basis after discussion with the parties and at the discretion of the judge hosting the ENE session. Mandatory referral is authorized if the judge believes mediation might result in cost-effective resolution of the lawsuit. Parties may also use the process voluntarily. Once a case is referred, a written order is entered.

Opt-out or removal. The rules do not specify a removal procedure.

Scheduling

Referral. Referral to mediation normally occurs at the conclusion of the mandatory ENE session. Referral may also be made at any other appropriate time in the litigation.

Written submissions. Ten days before the mediation session, each party must submit a statement regarding liability and damages to the mediator and other parties. These statements are not filed with the court.

Mediation session. The mediation hearing is generally held within forty-five days of the referral date. Arrangements for the mediation session are made by the mediator, and the session is held at the mediator's office.

Number and length of sessions. Mediation sessions may last up to a maximum of six hours, and more than one session may be held.

Program features

Discovery and motions. All other case activities, including discovery or motion practice, must go forward during the mediation process.

Party roles and sanctions. Unless excused by the mediator, the parties themselves are required to attend the mediation session with counsel. If the defense of an action is provided by a liability insurance company, a settlement-empowered insurer representative must also attend. Sanctions may be imposed for failure to participate or proceed in good faith.

Outcome. If no settlement results, the mediator must file a statement with the court indicating whether there has been compliance with the settlement and mediation requirements of the rule and that settlement was not reached.

Confidentiality. All proceedings of the mediation conference, including any statement made by any party, attorney, or other participant, are protected 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, in which event the settlement agreement must be in writing and is binding on all parties.

Memoranda prepared by the parties or the mediator are not filed with the court or otherwise made available to the court or jury. No comments of the mediator are made available to the trial judge or jury, but the mediator may discuss the action with the judge who has oversight responsibility for the court's ADR and settlement programs.

Neutrals

Qualifications and training. Lawyers admitted in the district with at least five years of practice are eligible to be appointed to the court's roster of mediators and arbitrators. The court does not require or provide training for the neutrals.

Selection for case. The parties select one mediator from the court's roster of mediators and arbitrators. If the parties cannot agree, the assigned district judge or magistrate judge makes the selection. When the court makes the appointment, a mediator with subject matter expertise is selected.

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 under 28 U.S.C. § 455 to disqualify themselves if they were a justice, judge, or magistrate judge.

Immunity. The court states that mediators have immunity to the extent provided by law.

Fees. Mediators serve without compensation.

Program administration

The process is individually administered by each assigned judge for cases assigned to that judge.

Arbitration in California Southern

Overview

Description and authorization. The Southern District of California offers arbitration

as one of the ADR options established by its CJRA plan. If a case does not settle at the mandatory ENE session, the assigned magistrate judge is authorized to refer the case to nonbinding arbitration. Mandatory referral is authorized when the judge believes arbitration might result in a cost-effective resolution of the lawsuit. Consensual referrals are also permitted. A single arbitrator serves without compensation. If either party rejects the arbitrator's nonbinding award, the case returns to the litigation track without penalty. The district's experimental arbitration program is authorized by the court's CJRA plan, effective January 1, 1992, General Order 394-B, and the court's Arbitration and Mediation Rules. The program is not within the ambit of 28 U.S.C. §§ 651–658.

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

Case selection

Eligibility of cases. All civil cases are eligible for referral to arbitration at the discretion of the assigned judge. No cases are excluded, but as a practical matter, prisoner cases and Social Security cases are not referred to arbitration.

Referral method. Cases may be referred to arbitration with or without the consent of the parties. The standard for referral is whether the judge believes arbitration might result in cost-effective resolution of the lawsuit. Referral is discussed at the mandatory ENE conference held in each case, and an order of referral is entered.

Opt-out or removal. No removal procedure is specified in the rules.

Scheduling

Referral. Cases are generally referred to arbitration at the conclusion of the court's mandatory ENE session.

Discovery and motions. During the period of arbitration referral and hearing, discovery goes forward as usual. Dispositive motions are not ruled on by the court until the arbitration process concludes.

Written submissions. At least ten days before the arbitration hearing, each party must submit to opposing counsel and the arbitrator a prehearing statement listing the issues to be determined and all witnesses and exhibits to be presented at the arbitration hearing. An arbitration brief may also be filed.

Arbitration hearing. The arbitration hearing must be held within forty-five days of the ENE conference, absent a written order of extension from the court. The court's policy is to discourage continuances and extensions. The arbitrator sets the location, time, and date of the arbitration hearing.

Length of hearing. A hearing can last up to six hours.

Program features

Party roles and sanctions. The arbitrator may order the parties or client representatives with settlement authority to attend the arbitration hearing. Sanctions may be imposed for failure to participate in good faith in accordance with the local rules.

Filing of award. The arbitrator issues the award either orally at the end of the hearing or in writing within five days of the hearing. The arbitrator's award is communicated only to the parties and is not included in the court file.

De novo request. Unless the case settles, the action returns to the court's normal trial calendar. Litigants incur no fees or sanctions for rejecting the arbitrator's nonbinding award.

District of Colorado

Confidentiality. At the trial of the action, no evidence of the arbitration proceeding or result is admissible. All proceedings, including any statements made by any party, are protected 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 in the arbitration proceeding unless a settlement is reached.

The magistrate judge assigned to the case may obtain the results of the arbitration hearing from the parties or the arbitrator for use in settlement discussions. The arbitrator may also discuss the case with the referring magistrate judge to facilitate settlement.

Neutrals

Qualifications and training. Lawyers admitted to the district with at least five years of practice are eligible for appointment to the court's roster, which is a combined list of both arbitrators and mediators and includes brief professional histories for each. No training is provided for the court's roster of neutrals.

Selection for case. A single arbitrator may be selected by the parties from the court's roster. If the parties fail to agree on a neutral, the selection will be made by the assigned district or magistrate judge. When the court makes the appointment, an arbitrator with subject matter expertise is selected.

Disqualification. An arbitrator is subject to the disqualification rules of 28 U.S.C. § 144 and 28 U.S.C. § 455.

Immunity. The court states that arbitrators have immunity to the extent provided by law.

Fees. The arbitrators provide their services pro bono.

Program administration

All of the ADR processes are administered by the judges on a case-by-case basis. There is no central administration. All issues concerning the rules are referred to the assigned district judges for resolution.

District of Colorado

IN BRIEF

Process summary

ADR generally. In the District of Colorado, Local Rule 53.2 authorizes judges to refer litigants, pursuant to a motion by the judge or stipulation or motion by the parties, to a settlement conference (see below) or other form of ADR. On occasion judges have appointed special masters for settlement purposes, conducted summary jury trials, or referred cases to arbitration proceedings outside the court. In the main, however, the court believes fair settlements are best promoted by active judicial case management rather than through court-based ADR. Alternatives to the judicial process, the court believes, should be pursued by litigants through entities other than the court. The court rejected the recommendation of its CJRA advisory group to establish a court-based ADR program.

Magistrate judge settlement conferences. Under Local Rule 53.2, almost all civil cases are referred to magistrate judges for mandatory settlement conferences. On occasion the judge assigned the case may refer it to another district judge, rather than a magistrate judge, for settlement. A case may be removed from the settlement process if a party shows good cause or the judge orders removal. Cases excluded from referral to settlement conferences include bankruptcy and administrative appeals; habeas corpus proceedings; pro se prisoner cases; forfeiture proceedings; government collection actions; IRS, SEC, EPA, HHS, and other government agency administrative proceedings; actions to enforce or register judgments; and proceedings to enforce or contest summons, subpoenas, and deposition proceedings in civil actions pending in other districts.

The district judge assigned the case makes the settlement conference referral and may do so at any time during the litigation. Some district judges include the settlement conference referral in a general order of reference to a magistrate judge shortly after the case is filed. During the referral, the district judge may stay the action in whole or in part to facilitate settlement.

Before the settlement conference, counsel for each party may be required to submit to the settlement judge a confidential statement, including an estimate of the attorney's fees and other expenses the client is likely to incur if the case goes to trial. Counsel must also provide the statement to their clients.

Generally, the settlement judges use neutral evaluation and mediation techniques, depending on the case and counsel. Very often more than one session is held in a case. The settlement judge does not discuss the case with the referring district judge. All the court's magistrate judges receive mediation training.

Of note

Obligations of counsel. Attorneys are required to discuss ADR options with their clients and with each other and must demonstrate in their case management statement that they have done so. Some judges also require that counsel discuss in their case management statement the suitability of ADR for their case.

For more information

James R. Manspeaker, Clerk of Court, 303-844-3433

District of Connecticut

IN BRIEF

Process summary

Parajudge settlement conferences. In the District of Connecticut, six of the seven active judges and two senior judges use attorneys called parajudges to conduct settlement conferences. A parajudge is an attorney, usually with considerable trial experience, who is either fully or nearly fully retired. A parajudge is usually assigned to one judge and comes to the court regularly—for example, one to three days per week. Two or three

matters are scheduled before a parajudge on a given day. As with judicial settlement conferences, the parties must submit a confidential settlement statement outlining their factual and legal assessments of the case, the history of any settlement negotiations, and their positions regarding settlement. The parajudge reviews these statements and the pleadings if necessary. Parajudges are also on call for conferences that may arise when a bench trial or hearing is being conducted and counsel want a settlement conference but the judge hearing the matter cannot conduct it. The parajudge retains the case for additional conferences if settlement is not achieved at the first conference but is considered possible. When settlement prospects are exhausted, the parajudge notifies the assigned judge, who then places the case in line for a trial assignment.

Summary jury trials (SJT). At the request of the parties, the assigned judge or a magistrate judge has the discretion to conduct a summary jury trial or a minitrial. Counsel present a summary of the case, including evidence, to a jury that has been advised of their function and argue for a resolution in their client's favor. No testimony is permitted, but exhibits may be submitted. After return of the jury's advisory verdict, the parties are encouraged to discuss settlement. The presiding judge facilitates the negotiation.

Private ADR. To seek referral to a private ADR provider, parties must file a Stipulation for Reference to ADR, which must specify (1) the ADR process; (2) its scope (e.g., resolution of the case or only certain specified issues); (3) the ADR provider; (4) the procedures to be completed before the ADR process convenes (e.g., medical examinations); (5) the judicial proceedings to be stayed, if any; (6) whether the ADR outcome will be binding or nonbinding; and (7) the date or dates for filing progress reports and/or completing the ADR process. Attendance at ADR sessions takes precedence over all non-judicially assigned matters, such as depositions. Parties pay the private ADR provider. The clerk of court maintains a file of information submitted by the private ADR organizations approved by the court, which is made available to counsel and parties for selection of an ADR provider. If the case is not resolved through private ADR, the court process is resumed.

Judicial settlement conferences. At the request of a party or sua sponte, the assigned district judge or a magistrate judge may conduct a settlement conference—which, according to the court, is essentially a mediation process. The assigned judge decides when settlement discussions are likely to be most productive. A party's request, either formal or confidential, prompts an immediate conference. Each party must submit a confidential settlement statement outlining its factual and legal assessments of the case, the history of any settlement negotiations, and its settlement position. The parties or representatives with full authority to settle must attend the conference. Attendance is excused in some instances if the individual is immediately available to counsel by telephone.

Special master settlement conferences. Local Rule 28 authorizes settlement conferences before special masters at the request of a party or on court assignment. These conferences are conducted by two attorneys selected by the judge from a panel of volunteers established by the court and composed of attorneys with settlement experience. As in judicially hosted settlement conferences, parties participating in a special master settlement conference must submit a confidential settlement statement outlining their factual and legal assessments of the case, the history of any settlement negotiations, and their position regarding settlement.

Of note

Obligations of counsel. A form attached to the court's ADR brochure must be signed by the attorney and party and filed with the court to certify that they are aware of the court's ADR options.

Information from court. Each party or the party's attorney is given a copy of the court's brochure *Your Day in Court*, which describes the available ADR options, including mediation, early neutral evaluation, summary jury trial, minitrial, and arbitration.

For more information

Kevin F. Rowe, Clerk of Court, 203-773-2140

District of Delaware

IN BRIEF

Process summary

Magistrate judge settlement program. Under the district's CJRA plan, effective December 23, 1991, the court established a settlement program in which the district's magistrate judges conduct settlement conferences, mediations, early neutral evaluations, and arbitrations. The assigned district judge may refer cases on stipulation of the parties or sua sponte without party consent. All civil cases, except prisoner and habeas corpus petitions, are eligible for referral. To date, the program has been used for cases involving contracts, employment discrimination and other civil rights matters, trademark, copyright, patent claims, securities, and environmental matters.

At the initial Rule 16 conference, the assigned district judge discusses settlement options with the parties. If appropriate, the case is referred by the judge's scheduling order to the magistrate judge settlement program. Typically, all other case activities go forward simultaneously, unless a stay of litigation is stipulated to by the parties or ordered by the court.

To select an appropriate process and to discuss timing of the settlement event, the assigned magistrate judge holds a telephone conference with counsel shortly after the order of referral is issued. At least ten days before the settlement event, each party is generally required to submit to the magistrate judge a confidential memorandum or letter limited to fifteen pages describing the party's positions, the case's strengths and weaknesses, and prior settlement efforts, and suggesting how the court can best assist the parties in resolving the case. Critical documents may also be attached. The precise subjects to be addressed in the settlement statement are set forth in the settlement order.

In addition to trial counsel, the parties or client representatives with settlement authority must attend the settlement session. Failure to comply with the attendance requirement may result in an order to show cause. If the settlement session is a mediation or settlement conference, the session is generally scheduled to last all day or approximately eight hours. If the initial session does not result in settlement, the advisability of

District of Columbia

follow-up sessions or the use of other forms of ADR are discussed with the litigants and scheduled as appropriate. All settlement proceedings are confidential and may not be recorded without prior consent of all parties and the magistrate judge. Settlement information may not be introduced in other proceedings.

Of note

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

Plans. Mediation and arbitration are being reviewed by the local rules committee.

Evaluation. As one of the ten pilot districts established by the CJRA, the District of Delaware 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 Pat Trostle, U.S. Magistrate Judge, 302-573-6173

District of Columbia

IN BRIEF

Process summary

Mediation. In 1989, the District of Columbia created a voluntary mediation program, which is governed by the court's *Program Procedures for Mediation*. See below.

Early neutral evaluation (ENE). In 1989 the court established an early neutral evaluation program but eliminated it in 1995 because the court's mediation program has proven to be appropriate for most cases referred to ADR. Neutrals with subject-matter expertise continue to be available for ADR assignments in cases in which the judge and/or the parties think the evaluation of an independent expert would help.

Judicial settlement conferences. Individual judges refer cases to magistrate judges for settlement conferences.

Of note

ADR obligations of counsel. Under the district's CJRA plan, counsel face new mandatory obligations to discuss ADR with opposing counsel and to consider whether their case would benefit from ADR. Counsel must also address this issue in their proposed case management statement.

Information from court. The court distributes a brochure to all counsel describing the district's mediation program.

Evaluation. An evaluation of the district's mediation programs has been completed by an outside consultant. The April 1995 unpublished report is entitled *Assessment of the Mediation Program of the U.S. District Court for the District of Columbia*.

For more information

Nancy E. Stanley, Director of Dispute Resolution, 202-273-0657

Michael A. Terry, Deputy Director of Dispute Resolution, 202-273-0657

IN DEPTH

Mediation in the District of Columbia

Overview

Description and authorization. The District Court for the District of Columbia created its voluntary mediation program in 1989. The process is governed by the court's *Program Procedures for Mediation*. All civil cases are eligible, but the majority of those referred are contract, personal injury, or employment discrimination cases, as well as a significant number of cases involving government litigants. Cases are designated for mediation in one of two ways: the judge may recommend that a case enter the program and encourage the parties to consent to the process, or parties themselves may ask the judge to refer the case to mediation. Referrals may be made at any time in the litigation. After a case enters the program, the court appoints a trained mediator who arranges an initial joint session, usually within three weeks of appointment. The mediation may involve one or two sessions or may require a series of meetings over a period of time. The process is nonbinding and is provided pro bono.

Number of cases. Between January and September 1994, approximately 140 cases were referred to mediation.

Case selection

Eligibility of cases. All civil cases are eligible for referral to mediation, although the majority of referrals involve contract, personal injury, or employment discrimination actions. A significant number of cases involving government litigants are also handled by the program. No civil case type is presumed ineligible, but pro se litigants are discouraged from using the process.

Referral method. Referral to mediation requires the consent of all parties and the approval of the assigned judge. The judge may recommend that a case enter the program and encourage the parties to consent to the process, or the parties themselves may ask the judge to refer their case to mediation. The court's ADR staff also assist parties and judges in assessing individual cases for mediation. If the parties consent to referral, the judge enters a referral order.

Opt-out or removal. Since the referral is made only with party consent, no removal or opt-out procedures are necessary.

Scheduling

Referral. Referral to mediation may be made at any time during the litigation.

Written submissions. At least seven days before the first mediation session, each litigant must submit a position paper of ten pages or less to the mediator and each party, outlining key facts and legal issues and describing pending motions. These position papers are not filed with the court.

Mediation session. In the referral order, the referring judge generally establishes a time limit for the duration of the mediation process. The court's ADR staff and media-

District of Columbia

tor monitor the process. The mediator schedules the mediation sessions, which are usually held at the courthouse or mediator's office within three weeks of the mediator's appointment.

Number and length of sessions. The initial session usually lasts several hours. In a complex case, there may be as many as five or six sessions, with additional follow-up telephone calls.

Program features

Discovery and motions. The general policy of the court is to require other activities to go forward during ADR, but judges occasionally suspend litigation activities sua sponte or at the request of the parties.

Party roles and sanctions. All parties and their counsel are required to attend the joint mediation sessions. When an institution is a party, the court requires a representative of the institution with settlement authority either to attend or to be readily accessible by telephone. When the party is a government entity, senior government attorneys may attend the session, but efforts must be made to ensure telephone access to an official with settlement authority. Party noncompliance with program procedures may be reported to the ADR staff, who, if necessary, consult the court's compliance judge, a specially designated judge with authority to impose sanctions on uncooperative parties.

Outcome. A copy of the referral order with the notation "settled" or "not settled" is sent to the referring judge after the mediation is concluded.

Confidentiality. The *Program Procedures for Mediation* protect the confidentiality of the mediation process, bind the mediator to guarantee the confidentiality of all information, and shield the assigned judge from all information about the mediation. Contact between the mediator and the assigned judge is prohibited.

Neutrals

Qualifications and training. Each member of the court's roster of mediators is individually invited by the court to be on the roster. In issuing these invitations, the court seeks attorneys who have been in practice for at least ten years, are members of the district's bar, are well respected among the bar, and possess creative problem-solving skills. The mediators must complete a sixteen hour training program offered by the court and are encouraged to attend periodic in-service training sessions.

Selection for case. The court's ADR staff appoints a mediator from the court's roster of trained attorney-mediators. The selection process considers the needs of the case and the litigants. Where subject matter expertise is important, a mediator with the requisite knowledge is appointed.

Disqualification. The court has no written disqualification rules, but its unwritten policy requires the mediators to recuse themselves from cases in which they believe they would have a conflict of interest. The ADR administrators ask the mediators to check for conflicts when the case is assigned and encourage the mediators to recuse themselves when they or their law firm have a current or prior professional affiliation with any party, when they have a close relationship with one or more of the attorneys, or for any other reason that might make their service as a mediator in the particular case inappropriate. A new mediator may be substituted if any party objects to the mediator initially appointed by the program administrators.

Immunity. The U.S. Court of Appeals for the D.C. Circuit recently decided *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), which grants case evaluators in the D.C. Superior Court absolute quasi-judicial immunity. *Wagshal's* application to the U.S. district court mediation program has not been tested.

Fees. The mediators serve without compensation.

Program administration

The mediation program is administered by the court's dispute resolution staff, located in the D.C. Circuit's Office of the Circuit Executive. Program administrators select and help train mediators, assign mediators to cases referred to mediation, monitor the mediators' work, and serve as a resource for mediators and the public when questions arise about the mediation program or about particular cases.

Middle District of Florida

IN BRIEF

Process summary

Arbitration. The Middle District of Florida is one of ten districts authorized by 28 U.S.C. §§ 651–658 to provide mandatory, nonbinding court-annexed arbitration in cases involving monetary claims only of \$150,000 or less. See below.

Mediation. Under the district's mediation program, established in 1989, most civil cases are eligible for mandatory referral at the discretion of the assigned judge. See below.

The court's general policy is that cases will not be referred to more than one form of ADR. On occasion, however, referral to both arbitration and mediation is ordered by the assigned judge *sua sponte* or at the request of the parties.

Judicial settlement conferences. Local Rule 3.05 mandates preliminary pretrial conferences in trial-track cases and permits scheduling of preliminary pretrial conferences in other cases. Settlement possibilities are discussed at these conferences.

Of note

Obligations of counsel. Before the preliminary pretrial conference, counsel are required to discuss ADR and settlement among themselves and in the case management report they submit to the judge.

Information from court. Written descriptions of the court's arbitration and mediation programs are provided to all counsel at the time of referral to ADR.

Evaluation. The court conducted an evaluation of its arbitration program in 1986 and continues to monitor its arbitration and mediation programs. A Federal Judicial Center study of the arbitration program is reported in Barbara Meierhoefer, *Court-Annexed Arbitration in Ten District Courts* (Federal Judicial Center 1990).

For more information

Susan H. Walsh, Operations Chief, 813-228-2739

IN DEPTH

Arbitration in Florida Middle

Overview

Description and authorization. The Middle District of Florida is one of ten districts authorized by 28 U.S.C. §§ 651–658 to provide mandatory, nonbinding court-annexed arbitration in cases involving money claims only of \$150,000 or less. Under the program, which was established in 1984, eligible cases are automatically referred to arbitration shortly after the case is at issue. The arbitration hearing is generally held within 110 days of referral, and three arbitrators usually preside. Parties may also consent to arbitration in any civil case. The program is governed by Chapter 8 of the court’s local rules.

Number of cases. Between January and November 1994, approximately 500 cases were referred to arbitration.

Case selection

Eligibility of cases. Eligible cases are those involving monetary claims only of \$150,000 or less, exclusive of interest and costs, and with no substantial nonmonetary claims. In addition, if the United States is a party, arbitration is ordered in Miller Act or Federal Tort Claims Act cases within the monetary limit. If the United States is not a party, cases involving money damages of \$150,000 or less, exclusive of punitive damages, interest, costs, and attorney fees, are eligible if they arise under the following statutes and rules: 28 U.S.C. § 1331 and the Jones Act; 46 U.S.C. § 688, or FELA; 45 U.S.C. § 51; 28 U.S.C. §§ 1331 or 1332 arising out of a negotiable instrument or a contract; or 28 U.S.C. §§ 1332 or 1333 and Fed. R. Civ. P. 9(h) to recover for personal injuries or property damage. Cases that exceed the automatic referral monetary limit may also be mandatorily referred to arbitration on a case-by-case basis if the assigned judge determines that arbitration may promote prompt and just disposition of the case. Parties may also consent to arbitration for any civil case.

Excluded from arbitration are constitutional claims, any case where jurisdiction is based on 28 U.S.C. § 1343, and all other cases not enumerated above.

Referral method. Referral is mandatory and automatic for all eligible cases. The parties are notified of the referral by the clerk within twenty days of issuance. Consensual use of arbitration is also permitted.

Opt-out or removal. A party may request that the case not be designated to arbitration by certifying at filing that damages exceed \$150,000. In addition, any civil action may be exempt or withdrawn from arbitration if the presiding judge determines that the case is not suitable for arbitration. Mediation may be substituted for arbitration if the judge determines that the case is better suited to mediation.

Scheduling

Referral. Cases are referred to arbitration within twenty days after the case is at issue.

Discovery and motions. Parties may file pretrial motions and conduct discovery within the time limits specified in the assigned judge’s case management order.

Written submissions. At least ten days before the arbitration hearing, each party is required to give every other party a list of witnesses and copies of all exhibits to be used at the hearing. Parties must also file and serve answers to standard interrogatories before a specified date.

Arbitration hearing. The arbitration hearing is held within 110 days of the referral date. Continuance of an arbitration hearing more than 90 days after the designation of the arbitrators is allowed only by order of the court, but it is discouraged. Arbitration hearings are held at the courthouse and are arranged by clerk's office staff.

Length of hearing. On average, arbitration hearings last two to four hours.

Program features

Party roles and sanctions. In addition to counsel, individual parties or authorized representatives of corporate parties must attend the arbitration hearing unless excused in advance by the arbitrators for good cause. The arbitration hearing may proceed without a party, who, after notice, fails to attend, but an award of damages may not be based solely on the absence of a party. The local rules do not address sanctions for noncompliance.

Filing of award. The award is filed with the clerk under seal within ten days of the hearing. No factual findings or conclusions of law are required. The clerk's office docket the award (leaving out the details of the award), mails a copy to the arbitrators and counsel, seals it, and places it in the case file. If a written demand for trial de novo is filed, the award remains sealed and will be opened only if the court orders. If a timely request for trial de novo is not made, the arbitrator's award is entered as the judgment.

De novo request. A request 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 must deposit a sum equal to the arbitrators' fees. The de novo fees are forfeited if the demanding party fails to obtain a judgment in the district court that is more favorable than the arbitration award, exclusive of interest and costs.

Confidentiality. The contents of an arbitration award may not be made known to the judge assigned to the case (1) except as necessary for the court to determine whether to assess costs or attorney's fees under 28 U.S.C. § 655; (2) until the district court has entered final judgment in the action or the action has been otherwise terminated; or (3) except for purposes of preparing the report required by Section 903(b) of the Judicial Improvements and Access to Justice Act.

At the trial de novo the court will not admit any evidence about the arbitration process or the award. Testimony given at an arbitration hearing may be used for any purpose otherwise permitted by the Federal Rules of Evidence or the Federal Rules of Civil Procedure.

Neutrals

Qualifications and training. An attorney may be certified to serve as an arbitrator if he or she has been a member of the Florida bar for at least five years, is admitted to practice in the district, and has been determined competent to serve as an arbitrator by the chief judge.

Selection for case. Within twenty days of the notice of referral to arbitration, the parties may select three arbitrators from the court's roster of attorney-arbitrators. If the parties do make a selection, the clerk randomly selects a panel of three arbitrators from the roster. Parties may also agree to use fewer than three arbitrators.

Disqualification. Any person selected as an arbitrator may be disqualified for bias or prejudice as provided in 28 U.S.C. § 144 and must disqualify himself or herself in any action in which the neutral would be required to do so if he or she were a justice, judge, or magistrate judge governed by 28 U.S.C. § 455.

Immunity. The court has not addressed this issue.

Fees. The court sets and pays the fees of \$100 per arbitrator per hearing.

Program administration

The clerk's office administers the program. The judge assigned the case addresses case specific issues, and the court as a whole deals with general program issues.

Mediation in Middle Florida

Overview

Description and authorization. The Middle District of Florida established a mandatory mediation program by local rule in 1989. Under Local Rule Chapter 9, referrals are made on a case-by-case basis by the assigned judge, generally late in the litigation after discovery is complete. Almost all civil cases not subject to mandatory arbitration are eligible for compulsory mediation. Consensual referrals are also permitted. A single attorney-mediator, certified and trained in mediation and selected by the parties or the court, presides over the mediation. Parties are required to attend and participate in the mediation session until a settlement is reached or an impasse is declared by the mediator. At the conclusion, the mediator reports the outcome of the process to the presiding judge: that the case settled, adjourned for further mediation at the parties' request, or is at an impasse. Most mediations last from three to five hours. The parties jointly bear the cost of the mediator, whose fees are set by the court at \$150 an hour.

Number of cases. Between January and November 1994, approximately 300 cases were referred to mediation.

Case selection

Eligibility of cases. Almost all civil cases are eligible for mediation except cases referred to mandatory arbitration; appeals from rulings of administrative agencies; habeas corpus and/or extraordinary writs; forfeitures of seized property; and bankruptcy appeals.

Referral method. The assigned judge may refer a case to mediation without party consent. Parties may also stipulate to referral to mediation. An order of referral is entered after the judge or parties select mediation.

Opt-out or removal. Any civil action or claim referred to mediation may be exempt or withdrawn from mediation by the presiding judge at any time, before or after reference, if it is determined that the case is not suitable for mediation.

Scheduling

Referral. A referral to mediation may be made at any appropriate time in the litigation.

Written submissions. Each party must submit to the mediator and opposing counsel a brief written summary of the facts and issues in the case. The mediation summary is treated as confidential and is not filed with the court.

Mediation session. The mediation hearing generally occurs late in the litigation after the close of discovery and shortly before trial. The preferred window for mediation is no sooner than forty-five days and not later than ten days before the scheduled trial date. In the mediation referral order, the assigned judge assigns one of the attorneys responsibility for coordinating and scheduling the mediation sessions. The mediation session may be held at the courthouse.

Number and length of sessions. On average, a single mediation session lasts three to five hours.

Program features

Discovery and motions. All other case activities go forward during the mediation referral.

Party roles and sanctions. In addition to counsel, all parties, corporate representatives, and any other claims professionals with full authority to settle are required to attend the mediation conference. Failure to comply with the attendance or settlement authority requirements may subject a party to sanctions by the court.

Outcome. Within five days of the close of the first mediation session, the mediator files a mediation report with the court indicating whether the case settled, whether additional sessions were requested by the parties, or whether the mediator has declared an impasse. If the case settles, lead counsel must notify the court, and judgment is entered.

Confidentiality. All proceedings of the mediation conference, including statements made by any party, attorney, or other participant, are privileged in all respects. The proceedings may not be reported, recorded, placed into evidence, made known to the trial court or jury, or construed for any purpose as an admission. A party is not bound by anything said or done at the conference, unless a settlement is reached.

Neutrals

Qualifications and training. An individual may be certified to serve as a mediator if: (1) he or she is a former state court judge who presided in a court of general jurisdiction and was also a member of the bar in that state; or (2) he or she is a retired federal judge; or (3) he or she has been a member of a state bar or the bar of the District of Columbia for at least ten years and is currently admitted to the bar of the district court. In addition, an applicant for certification must have completed a minimum of forty hours in the Florida Circuit Court Mediation Training Course certified by the Florida Supreme Court and must be found competent by the chief judge to perform mediation duties.

The chief judge certifies qualified mediators and is authorized to withdraw the certification of any mediator at any time. Local lists of certified mediators are maintained by each division of the court and made available to counsel and the public on request.

Selection for case. The parties may select a mediator from the court's roster of certified mediators. If the parties cannot agree on a mediator, the assigned judge will make the appointment from the court's roster.

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.

Immunity. Local rules do not address this issue.

Fees. The mediator is compensated at a rate set by the court, which is currently \$150 an hour. The mediator's fees are borne equally by the parties.

Program administration

Case-specific issues are addressed by the judge assigned the case. The court as a whole deals with general program issues.

Northern District of Florida

IN BRIEF

Process summary

Mediation. In April 1995, the Northern District of Florida formally authorized its already existing mediation process. See below.

Of note

Obligations of counsel. Counsel are encouraged to discuss ADR with their clients, but no direct obligation is imposed on them by court rule or otherwise.

Evaluation. As one of the ten comparison courts established by the CJRA, the Northern District of Florida 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

Maurice M. Paul, Chief U.S. District Judge, 904-942-8848

IN DEPTH

Mediation in Florida Northern

Overview

Description and authorization. Under Local Rule 16.3, adopted April 1, 1995, the Northern District of Florida formally authorized a voluntary mediation program, codifying the court's existing practice of referring cases to mediation. The court's program provides for a neutral mediator, whose role is to assist parties in identifying interests, to suggest alternatives, to analyze issues, to question perceptions, to conduct private caucuses, and to stimulate negotiations between opposing sides. The mediator does not review or rule on questions of fact or law or render a final decision in the case. Mediators are compensated at a rate set by the court.

Number of cases. The court does not routinely maintain information on the number of cases referred to mediation.

Case selection

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

Referral method. Any pending civil case may be referred to mediation by the presiding judge with consent of the parties at any time the judge believes it appropriate. Additionally, the parties may at any time ask the court to submit any pending civil case to mediation.

Opt-out or removal. There is no removal procedure in the rules. It is unlikely that a party would request removal since the court refers only cases in which all parties request mediation or consent to it.

Scheduling

Referral. There is no set time for referring cases to mediation. Some cases are not referred until the final pretrial conference.

Written submissions. The parties are not required to submit any particular material for the mediation conference. The mediators determine what material will be furnished to them and when.

Mediation session. The local rules do not establish a specific time frame for completing mediation; however, it is common practice for the order of referral to set a time limit.

Number and length of sessions. The number and length of the mediation sessions are determined by the mediator on a case-by-case basis.

Program features

Discovery and motions. The court's rule does not specify whether discovery and other case activities are tolled during mediation, but generally discovery is tolled.

Party roles and sanctions. There is no written procedure or rule governing the conduct or responsibilities of the parties to the mediation, nor are there provisions for sanctioning noncompliance with the mediation process.

Outcome. Absent a settlement or consent of the parties, the mediator reports to the presiding judge only whether the case settled, was adjourned for additional sessions, or was terminated because the mediator declared an impasse.

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

Neutrals

Qualifications and training. Any person who is certified and in good standing as a circuit court mediator under the rules adopted by the Supreme Court of Florida is qualified to serve as a mediator.

Selection for case. The mediator is generally selected by agreement of the parties from the list of mediators certified by the Florida Supreme Court. If the parties agree and the court approves, any other person may be a mediator in a specific case.

Disqualification. After reasonable notice and hearing, the presiding judge has the discretion and authority to disqualify any mediator from serving in a particular case. Cause for disqualification may include violation of the standards of professional conduct for mediators established by the Supreme Court of Florida. Additionally, any person selected as a mediator may be disqualified for bias or prejudice as provided in 28 U.S.C. § 144, and a person 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 member of the bar who is certified or selected as a mediator pursuant to the court's rules is not, for that reason alone, disqualified from appearing as counsel in other cases pending in the district.

Immunity. The court reports that this subject is not addressed in the local rules and has not been addressed by the court or the Eleventh Circuit.

Fees. Absent other agreement, mediators are paid equally by the parties at a rate set by the court. Mediators may not accept any other compensation without prior written approval of the court.

Program administration

Each judge administers the mediation process on a case-by-case basis.

Southern District of Florida

IN BRIEF

Process summary

Mediation. In 1993, under Local Rule 16.2 and the district's CJRA plan, the Southern District of Florida established a mandatory mediation program. See below.

Other ADR. Summary jury trials are occasionally used.

Judicial settlement conferences. Mandatory settlement conferences with judges are also authorized and used by the court.

Of note

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

For more information

T. G. Cheleotis, Special Assistant to the Court Administrator, 305-536-4053

Carol Cope, Chair, Mediation Committee, 305-235-0248

IN DEPTH

Mediation in Florida Southern

Overview

Description and authorization. Under Local Rule 16.2 and the district's CJRA plan, effective November 21, 1991, the Southern District of Florida established a mandatory mediation program in 1993 for almost all civil cases. Eligible cases are automatically referred by the assigned judge to mediation by pretrial order following the initial, mandatory scheduling conference. A single mediator, selected by the parties from the court's roster of certified mediators or from an outside source, meets with the parties to facilitate settlement by suggesting alternatives, analyzing issues, and conducting private caucuses. The process does not allow for testimony of witnesses, and the mediator does not review or rule on questions of fact or law. Absent other agreement, mediators are paid \$150 per hour, shared equally by the parties.

Number of cases. Between January and November 1994, 3,611 civil cases were filed in the district. Those that proceeded to an initial scheduling conference were automatically referred to mediation.

Case selection

Eligibility of cases. All civil cases are eligible for mediation except the following case types, which are exempted by Local Rule 16.2.C: habeas corpus cases; motions to vacate sentences under 28 U.S.C. § 2255; Social Security cases; foreclosure matters; civil forfeiture matters; IRS summons enforcement matters; bankruptcy proceedings; land condemnation cases; default proceedings; student loan cases; VA loan overpayment cases; naturalization proceedings filed as civil actions; cases seeking review of administrative

agency action; statutory impleader actions; Truth-in-Lending Act cases not brought as class actions; Interstate Commerce Act cases; Labor Management Relations Act and ERISA actions seeking recovery for unpaid employee welfare benefits and pension funds; and civil penalty cases. In addition, any case may be exempted by order of the assigned judge.

Referral method. Cases are referred to mandatory mediation after the initial scheduling conference by order of the assigned judge. In addition, any action or claim may be referred to mediation on stipulation of the parties.

Opt-out or removal. Cases may be exempted or withdrawn from mediation by the presiding judge at any time before or after reference if a party applies for removal or if the judge determines for any reason that the case is not suitable for mediation.

Scheduling

Referral. Cases are referred to mediation by court order entered after the initial scheduling conference.

Written submissions. At least ten days before the mediation, all parties must exchange and submit to the mediator brief written summaries of the case, identifying the issues to be resolved.

Mediation session. The mediation hearing must be conducted no later than sixty days before the scheduled trial date. Plaintiff's counsel is responsible for coordinating the mediation date and location. Mediation hearings are generally conducted either at the courthouse or at the neutral's office.

Number and length of sessions. The mediation process usually entails one to three sessions, which last three to ten hours altogether.

Program features

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

Party roles and sanctions. In addition to counsel, each party or party representative with full settlement authority is required to attend the mediation session. If insurance is involved, an adjuster must attend with authority to settle up to the policy limits or up to the most recent demand, whichever is lower. Sanctions may be imposed by the court for failure to comply with the attendance requirements or other aspects of the referral order.

Outcome. Within five days of the mediation session, the mediator must file a mediation report stating whether attendance requirements were met and whether the case settled, will continue in mediation with the consent of the parties, or should be removed from mediation because the mediator has declared an impasse. If the parties settle, counsel must inform the court by notice of settlement signed by counsel of record within ten days of the mediation. If the mediation ends in impasse, the case is tried as scheduled.

Confidentiality. All proceedings of the mediation conference, including statements made by any party, attorney, or other participant, are privileged. The proceedings may not be reported, recorded, placed into evidence, made known to the trial court or jury, or construed for any purpose as an admission. A party is not bound by anything said or done at the conference, unless a written settlement is reached, in which case only the terms of the settlement are binding. Absent a settlement, the mediator reports to the

Middle District of Georgia

assigned judge only whether the case settled, was adjourned for further mediation by agreement of the parties, or was declared at an impasse by the mediator.

Neutrals

Qualifications and training. Individuals may be certified by the chief judge as court mediators if they have completed at least forty hours of mediation training in the Florida Circuit Court Mediation Course and are either: (1) a former state judge in a court of general jurisdiction and a member of the bar in the state in which he or she presided; (2) a retired federal judge; or (3) an attorney admitted to a state bar or the bar of the District of Columbia for at least ten years and currently admitted to the bar of this court. In exceptional cases, other candidates may be certified as court mediators.

Selection for case. Within fifteen days of the order of referral, the parties must agree on a mediator. If they cannot, the court assigns one. The parties are encouraged to use the court's list of certified mediators, but they may select any individual as mediator. If the court appoints the mediator, the clerk selects one from the court's roster through a blind draw.

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.

Immunity. Florida Statute § 44.10 grants quasi-judicial immunity to mediators receiving referrals from the state courts. The court has indicated that it believes a similar immunity would be found to apply to mediators receiving referrals from the federal district court program.

Fees. Mediators are compensated at the rate of \$150 an hour set, by standing order of the court, unless the parties and the mediator agree in writing to a different rate. Absent other agreement by the parties, the mediator's fees are shared equally by the parties. Mediators certified by the court are also required to accept at least two mediation assignments a year for a lesser fee or no fee.

Program administration

There is no overall court administration of the mediation program. The clerk's office maintains a list of certified mediators. The parties are responsible for all other aspects of the mediation referral.

Middle District of Georgia

IN BRIEF

Process summary

Arbitration. The Middle District of Georgia is one of ten courts authorized by 28 U.S.C. §§ 651–658 to provide voluntary, nonbinding court-annexed arbitration. See below.

Mediation. One district judge frequently asks parties in complicated civil cases to consider private mediation and provides them with information on private mediation

Middle District of Georgia

firms that handle referrals from the court. If the parties agree to mediate, they make all arrangements and pay all fees. A referral to private mediation may be made at any time in the case.

Of note

Information from court. All counsel in cases referred to arbitration are mailed a copy of the *Arbitration Handout*.

Plans. The court is considering an amendment to the local rules proposed by the court's Rules Committee to expand arbitration to all civil cases.

Evaluation. A Federal Judicial Center study of the first year of the court's voluntary arbitration program is reported in David Rauma & Carol Krafka, *Voluntary Arbitration in Eight Federal District Courts: An Evaluation* (Federal Judicial Center 1994).

For more information

Gregory J. Leonard, Clerk of Court, 912-752-3497

Mary Rowe, Arbitration Clerk, 912-752-3497

IN DEPTH

Arbitration in Georgia Middle

Overview

Description and authorization. The Middle District of Georgia is one of ten courts authorized by 28 U.S.C. §§ 651–658 to establish a voluntary, nonbinding court-annexed arbitration program. The program, which was implemented in 1991 under Local Rule 11 and is experimental, applies to contract, tort, and other specified civil cases seeking damages of \$150,000 or less. This court is one of four districts (see also D. Ariz., W.D. Pa., and N.D. Ohio) in which all eligible cases are automatically referred to arbitration, but any party is permitted to opt out of the referral for any reason within a designated time period. If the parties agree to arbitrate, an attorney-arbitrator from the court's roster presides over a three-to-four-hour hearing held in a courtroom and renders a decision on the merits of the case. Judgment is entered on the arbitrator's award if a demand for trial de novo is not filed within thirty days. The arbitrator is paid by the court.

Number of cases. Between January and September 1994, 132 cases were referred to arbitration.

Case selection

Eligibility of cases. Local Rule 11.3 enumerates categories of eligible cases, generally including contract and tort cases seeking money damages of \$150,000 or less, exclusive of punitive damages, interest, costs, and attorney's fees. If the United States is a party, claims within the monetary limit and brought under the Miller Act or the Federal Tort Claims Act are eligible for referral. Other kinds of cases involving the United States may also be referred to arbitration if permitted by regulation. Other civil cases within the monetary limit are eligible for referral to arbitration if brought pursuant to (1) 28 U.S.C. § 1331 and the Jones Act, 46 U.S.C. § 688 or the FELA Act, or 45 U.S.C. § 51; (2) 28 U.S.C. §§ 1332 or 1333 arising out of a negotiable instrument or contract; or (3) 28 U.S.C. §§ 1332 or 1333

Middle District of Georgia

and Rule 9(h) of the Federal Rules of Civil Procedure to recover for personal injuries or property damage. Additionally, parties may consent to arbitration in any other kind of matter. Excluded from the arbitration program are claims of constitutional violations or claims where jurisdiction is based on 28 U.S.C. § 1343.

Referral method. All eligible cases are automatically referred to arbitration within twenty days of being notified of the answer by the clerk of court. If a motion to dismiss is filed in lieu of an answer, the arbitration referral is deferred pending decision of the motion.

Opt-out or removal. Within twenty days of receiving the referral notice, either party may opt out of the arbitration program for any reason by filing a written notice with the clerk of court.

Scheduling

Referral. Within twenty days of the filing of the answer, the clerk of court notifies parties in eligible cases that their case has been referred to arbitration. If a motion to dismiss has been filed in lieu of an answer, the case is referred to arbitration after the motion to dismiss has been decided.

Discovery and motions. An arbitration referral does not interfere with the normal progression of discovery or other case management events.

Written submissions. At least ten days before the arbitration hearing, parties exchange lists of witnesses, along with copies or photographs of all exhibits to be offered at the hearing. The arbitrator may refuse to consider witnesses and exhibits not so disclosed.

Arbitration hearing. The parties and the arbitrator determine a mutually convenient date for the arbitration hearing, which must be completed within ninety days of selecting the arbitrator (which is usually within forty days of filing the answer). The arbitration hearing is held at the courthouse.

Length of hearing. The hearing usually lasts three to four hours.

Program features

Party roles and sanctions. In addition to counsel, individual parties or authorized representatives of corporate parties must attend the arbitration hearing. Local Rule 11 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. Within ten days of the arbitration hearing, the arbitrator files the award with the clerk, who then mails the decision to all the parties. The award remains sealed until the period for requesting a trial de novo expires. The award becomes the final judgment if such a request is not made.

De novo request. A request for trial de novo must be made within thirty days of the arbitrator's decision. No bond is required and no fees or sanctions are incurred if the requesting party does not improve on the arbitration award at trial.

Confidentiality. The contents of the arbitration award are shielded from the assigned judge (1) except as necessary for the court to determine whether to assess costs or attorneys' fees under 28 U.S.C. § 655; (2) until the district court has entered a final judgment in the action or the action is otherwise terminated; and (3) except for purposes of preparing the report required by section 903(b) of the Judicial Improvements and Access to Justice Act. At trial de novo, the court will not admit any evidence about the arbitration process or award.

Neutrals

Qualifications and training. An attorney appointed to the court's roster must be a member of the state bar for at least ten years; admitted to practice in this court or any other U.S. district court; and determined by the chief judge to be competent to perform the duties of an arbitrator. No training in arbitration is required by the court.

Selection for case. The court selects three potential arbitrators from its roster of approved attorney-arbitrators and mails the names to the parties. Each party may strike one name, and the remaining name becomes the arbitrator in the case.

Disqualification. Any person selected as an arbitrator may be disqualified for bias or prejudice as provided by 28 U.S.C. § 144 and must disqualify himself or herself in any action in which he or she would do so if serving as a justice, judge, or magistrate judge governed by 28 U.S.C. § 455.

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

Fees. Depending on availability of funds, arbitrators are compensated by the court at a rate set by the chief judge by standing order. The current rate is \$250 per day. If parties agree to arbitrate cases outside the program's eligibility guidelines, the parties pay the costs of the arbitrators themselves.

Program administration

The arbitration program is administered by the clerk's office. Problems that cannot be resolved by the clerk are referred to the chief judge.

Northern District of Georgia

IN BRIEF

Process summary

Arbitration. The Northern District of Georgia authorized a mandatory, nonbinding court-annexed arbitration program in its CJRA plan, effective December 31, 1991. Current law authorizing mandatory arbitration programs in federal district courts (28 U.S.C. §§ 651–658) does not include this district, and therefore the Northern District of Georgia will not implement an arbitration program until it receives funding and statutory authority.

Special masters program. Also authorized under the court's CJRA plan is a voluntary program that would permit parties in complex cases to refer cases to a special master for discovery management and trial. The rulings and findings of the special master would be binding on the parties and reversible by the court only if clearly erroneous. The court is seeking government funding to pay the special masters and will not implement the program until funds are available.

Other court ADR. Several judges use ADR processes on a case-by-case basis. One judge is experimenting with early neutral evaluation. Another has referred a case to a minitrial conducted by a magistrate judge, who rendered an advisory opinion after an abbreviated hearing. Special masters, paid by the parties, have also been used in complex cases.

Private ADR. A number of the court's judges recommend the use of private mediation

Southern District of Georgia

or arbitration in appropriate cases. A variety of civil cases, including ERISA cases, have been referred with party consent to private arbitration programs in the community. Mediation is recommended generally in complex civil cases, and referral is based on party consent. If the parties consent to private ADR, the parties select a neutral, make all arrangements, and pay the neutral's fee.

Of note

Obligations of counsel. Under Local Rule 235-2, counsel are required to discuss settlement twice, first before the start of discovery and again within ten days of the close of discovery. Parties with settlement authority are required to attend the later conference with counsel. If settlement does not result, counsel must report the status of settlement negotiations to the court in their pretrial statement.

Plans. See above for discussion of planned arbitration and special master programs.

Evaluation. As one of the ten pilot courts established under the CJRA, the Northern District of Georgia 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

Jeanne J. Bowden, Special Assistant, 404-331-0956

Luther D. Thomas, Clerk of Court, 404-331-6485

Southern District of Georgia

IN BRIEF

Process summary

ADR generally. In the Southern District of Georgia, Local Rule 3.3, which became effective September 1, 1994, requires counsel at the beginning of each case to advise their clients of the availability of mediation, binding arbitration, nonbinding arbitration, and assignment of the case to a magistrate judge. To ensure that counsel have done so and that the parties give full consent to participation in ADR, the court requires counsel for each party to file with the clerk and to send to opposing counsel a form entitled *Notice of Case Management Procedures (Litigant's Bill of Rights)*. On the form, counsel must certify that the ADR options have been explained to the client and must state whether the client is interested in using an alternative procedure. Counsel for plaintiffs must file the form within fifteen days of filing the complaint; counsel for defendants must file the form with their answer. The court sua sponte, or on motion by counsel, can provide assistance in setting up ADR procedures appropriate for the case. Cases exempted by Local Rule 16.1 scheduling requirements are also exempted from ADR requirements (Social Security cases, habeas corpus cases, bankruptcy proceedings, condemnation cases not involving real property, mortgage and foreclosure cases, government collection actions, actions to enforce or register judgments, civil forfeiture actions, cases that will clearly be transferred to multidistrict litigation, and claims for relief under maritime or admiralty jurisdiction).

District of Guam

Judicial settlement conferences. District and magistrate judges regularly require settlement conferences as part of status and pretrial conferences conducted pursuant to Local Rules 16.2 and 16.5. Local Rule 16.5 specifically provides that at the pretrial conference the court may require a party or its representative with settlement authority to be present or available by telephone to consider settlement options.

Of note

Obligations of counsel. See ADR generally above.

For more information

B. Avant Edenfield, Chief U.S. District Judge, 912-652-4080

District of Guam

IN BRIEF

Process summary

Judicial settlement conferences. Under its CJRA plan adopted November 29, 1993, and local rules adopted in September 1994, the District of Guam has authorized the use of optional or voluntary settlement conferences in all civil cases. In this one-judge court, parties may request a settlement conference with a visiting judge or the assigned trial judge. If the conference is held before the trial judge, a written stipulation must be filed by all counsel consenting to the trial judge's settlement role. When a visiting judge presides, the assigned judge and the visiting judge are prohibited from discussing the case. The visiting judge is authorized to report only that the settlement conference has taken place. Participating counsel must be authorized by their clients to participate in settlement negotiations. By court order, the party or party representative also may be required to attend the settlement conference. Between January and September 1994, three cases participated in settlement conferences.

Of note

Obligations of counsel. Counsel must discuss with each other whether the case will be submitted to a settlement conference and advise the court of their decision.

For more information

Mary L. Moran, Clerk of Court, 671-472-7411

Bridget Ann Keith, Career Law Clerk, 671-472-7292

District of Hawaii

IN BRIEF

Process summary

ADR generally. The District of Hawaii has no formal ADR procedures.

Magistrate judge settlement conferences. The magistrate judges have an extensive settlement conference practice.

Of note

Plans. The CJRA advisory group is reviewing prospective ADR programs for the district.

For more information

Alan C. Kay, Chief U.S. District Judge, 808-541-1904

District of Idaho

IN BRIEF

Process summary

Arbitration. In its CJRA plan, effective March 1, 1992, the District of Idaho authorized an arbitration program. See below.

Magistrate judge settlement conferences. The court systematically identifies cases in which discovery is complete and a settlement conference would be appropriate. Suitable cases are referred to a magistrate judge for a settlement conference. If counsel object to the referral, they must state their reasons in writing.

Of note

Obligations of counsel. The court requires counsel to read the court's ADR information and to discuss ADR options with their clients.

Information from court. In cases selected by the court, counsel are sent information explaining the availability of arbitration and the court's *Arbitration Rules and Procedures*, which describe the procedure in detail.

Plans/evaluation. The CJRA advisory group evaluated the effects of the voluntary arbitration program and found a number of problems, including timing, evidence, confidentiality, and relinquishment of decision-making power. They concluded that the bar is much more familiar with mediation and would be more likely to use mediation than arbitration. The court has subsequently established a mediation program (see General Order 121, adopted November 6, 1995). The court also hopes to reformulate the arbitration program and offer a form of neutral case valuation.

For more information

Tom Murawski, Administrative Supervisor/ADR Coordinator, 208-334-9205

IN DEPTH

Arbitration in Idaho

Overview

Description and authorization. Under its CJRA plan, effective March 1, 1992, the District of Idaho established a voluntary arbitration program. Any civil case not involving prisoners is eligible for arbitration at the parties' discretion. Arbitration may occur at any stage in the case, although the court considers it more beneficial if substantial discovery has taken place. If the parties choose arbitration, they and the court select one or three arbitrators from the court's list of trained attorney-neutrals. There is no penalty for not accepting an arbitration award, and parties who consent to arbitration do not lose their position on the judge's trial calendar. Parties who choose arbitration are encouraged to agree that the decision will be binding. The court's program, which is not within the ambit of 28 U.S.C. §§ 651–658, is described in the court's *Arbitration Rules and Procedures*.

Number of cases. Between January and November 1994, no cases were referred to arbitration.

Case selection

Eligibility of cases. Almost all civil cases are eligible for arbitration, except prisoner cases.

Referral method. The court notifies parties in appropriate cases of the availability of arbitration and systematically targets some cases at certain stages of the litigation to remind them of the availability of the procedure. The arbitration process, however, is initiated only if a party requests it. If one party requests arbitration, the court attempts to secure the participation of the other parties.

Opt-out or removal. There is no procedure for removal because referral occurs only at the consent of all parties.

Scheduling

Referral. Parties may request arbitration at any stage in the case, but the court considers it more beneficial if substantial discovery has taken place.

Discovery and motions. Other events in the case are not stayed during the arbitration process. Cases that participate in arbitration keep their position on the assigned judge's calendar, and the judge retains responsibility for overall management of the case. The arbitrator has authority, however, to decide all matters relating to the arbitration, including arbitration discovery issues.

Written submissions. At least ten days before the arbitration hearing, each party must provide to the arbitrator and all parties a summary of the facts and legal positions, relevant documentation supporting the claims, and a list of witnesses.

Arbitration hearing. Unless the parties agree otherwise or show good cause, the arbitrator conducts the hearing between twenty and ninety days after notification of selection of the arbitrator. The hearing must be held at least sixty days before the scheduled trial. The arbitrator designates the location for the hearing and, unless otherwise agreed to by the parties, schedules the hearing during business hours.

The arbitrator is authorized to administer oaths, and all testimony is under oath. The scope and length of the hearing are determined by the arbitrator. In receiving evidence,

the arbitrator is guided by the Federal Rules of Evidence but is not precluded from requesting other relevant evidence that is not privileged.

Length of hearing. This information is not yet available.

Program features

Party roles and sanctions. All counsel and parties, including individual litigants, representatives of corporate parties, and insurance carriers, are required to attend the hearing unless excused by the arbitrator. 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.

Filing of award. Within thirty days of the hearing, the arbitrator must provide the parties a written award. When the arbitrator serves the award, the court is notified of this action but not of the decision itself, which is sealed. If the parties accept the arbitration award, it is filed and entered as the judgment. If the parties do not accept the award, they must notify the court within thirty days of receipt of the award.

De novo request. Any party not satisfied with the award must file a written demand for trial de novo within thirty days of receipt of the award.

Confidentiality. No recording may be made without consent of all the parties. No ex parte communication between the arbitrator and any counsel or party is permitted. All memoranda and other materials are confidential and are returned to the parties after the arbitration process. Any communication made during the process by any participant is confidential, is not subject to discovery, and may not be submitted in subsequent proceedings in the case. The arbitration award itself is sealed.

Neutrals

Qualifications and training. To be eligible for the court's roster, applicants must (1) have been admitted to practice for five years or have special expertise in arbitration, (2) be a member of the bar or a retired judge or attorney, (3) have experience in complex cases, and (4) have attended a comprehensive arbitration training session. Arbitrators must also complete a one-day training session conducted for the court by expert trainers.

Selection for case. If the parties agree to arbitrate the case, the court provides a list of arbitrators. The parties may indicate their preferences, but the court makes the final selection. In large, complex cases, the parties may select three arbitrators. If the parties agree, they may select an arbitrator not on the court's roster.

Disqualification. No person may serve as an arbitrator in an action in which any of the circumstances set forth in 28 U.S.C. § 455 exist. All arbitrators are also governed by the American Arbitration Association's Code of Ethics for Arbitrators in Commercial Disputes.

Immunity. The court's rules do not address immunity.

Fees. Each arbitrator receives \$100 per hour, paid by the parties and usually shared jointly. In large, complex cases, the arbitrators and parties may negotiate the fee.

Program administration

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

Central District of Illinois

IN BRIEF

Process summary

ADR generally. The Central District of Illinois has not established court-based ADR programs. Two judges on the court occasionally use a minitrial or summary jury trial to assist the parties in settlement. The court's CJRA advisory committee has recommended further exploration of ADR.

For more information

Michael M. Mihm, Chief U.S. District Judge, 309-671-7113

Northern District of Illinois

IN BRIEF

Process summary

ADR generally. On a case-by-case basis, some judges refer cases to ADR procedures, including mediation, arbitration, minitrials, summary jury and bench trials, and special settlement masters. Except for summary trials, which are conducted by judges, most ADR services are provided by private providers. Judges on the court differ considerably in the extent of their ADR use.

Judicial settlement conferences. The judicially hosted settlement conference is the most widely used settlement process in the Northern District of Illinois. Settlement conferences may be ordered by the assigned judge or at the request of one or all parties and may be hosted by the assigned judge, another district judge, or a magistrate judge. Where parties have consented to trial before a magistrate judge, a district judge may host the settlement conference. Under the court's standard order on pretrial procedure, litigants are required to assess settlement prospects before filing a final pretrial order.

Of note

Information from court. The court is preparing a pamphlet for litigants on private ADR resources available in the community. In addition, if the proposed trademark mediation program is adopted (see below), litigants in eligible cases will receive written information from the court on that program.

Plans. The court is considering a proposed amendment to the local rules authorizing a court-wide mediation program for trademark cases arising under the Lanham Act (15 U.S.C. §§ 1051-e). The court would provide parties with a list of mediators with expertise in Lanham Act disputes. Participation in the program would be based on party consent.

Evaluation. As one of the ten comparison districts under the CJRA, the Northern District of Illinois 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

Perry J. Moses, Chief Deputy Clerk, 312-435-5677

Southern District of Illinois

IN BRIEF

Process summary

Judicial settlement conferences. The primary settlement program in the Southern District of Illinois is a mandatory settlement conference program, authorized by Local Rule 11(c) and the CJRA plan, which became effective December 27, 1991. All civil cases are eligible. The assigned judge or a magistrate judge selects the cases referred to settlement conferences. Parties can seek to withdraw from the mandatory referral by motion. A judge other than the assigned trial judge conducts the conference, which in most cases is held within forty-five days of the discovery cutoff, although it may be held earlier at the request of a party. Before the conference, each party files a brief, confidential settlement statement with the settlement judge. In addition to lead counsel, parties or insurers with full settlement authority are required to attend the conference, which is confidential.

Summary jury trial (SJT). One judge has made occasional use of the summary jury trial.

Of note

Obligations of counsel. Counsel are encouraged to discuss ADR with their clients. The court generally discusses the possibility of voluntary ADR use with counsel at the initial pretrial scheduling conference.

Information from court. A brochure prepared by the court to introduce ADR is distributed to all counsel at filing. Also available from the clerk of court is a partial listing of national and local ADR organizations that offer assistance to litigants.

For more information

Any U.S. magistrate judge in the Southern District of Illinois

Northern District of Indiana

IN BRIEF

Process summary

Mediation. Under Local Rule 53.2, the Northern District of Indiana has established a mediation program. See below.

Judicial settlement conferences. The Northern District of Indiana requires parties in almost all civil cases to participate in a settlement conference with a district or magistrate judge. Settlement is first discussed at the initial pretrial conference. When media-

tion has not resolved the case, a settlement conference is scheduled between the final pretrial conference and the trial date. Five days before the settlement conference, counsel must submit a settlement statement setting out (1) the legal and factual contentions of the parties as to both liability and damages; (2) the factors considered in arriving at the current settlement posture; and (3) the status of settlement negotiations to date.

Of note

Obligations of counsel. Counsel must discuss mediation with their clients and must be prepared to discuss mediation and the selection of a mediator with the assigned judge.

Evaluation. As one of the ten comparison districts under the CJRA, the Northern District of Indiana 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

William C. Lee, U.S. District Judge, 219-422-2841

Kathryn Brooks, Deputy Clerk in Charge, Fort Wayne Division, 219-424-7360

IN DEPTH

Mediation in Indiana Northern

Overview

Description and authorization. Under Local Rule 53.2, most civil cases in the Northern District of Indiana must participate in a single, mandatory mediation session conducted by an attorney or non-attorney-mediator selected from the court's roster. The program has been in effect since 1991. The mediation session, which is confidential, may occur at any time appropriate for the case but no later than ten days before the final pretrial conference. The court believes the session is most beneficial if some discovery has taken place. Parties must submit a confidential statement to the mediator before the mediation session and must attend in person. The role of the mediator is to help the parties resolve the case by mutual agreement. If asked by the parties, the mediator may also provide a confidential evaluation of the merits and value of the case. The parties and the mediator agree on a fee, which is split evenly by the parties. The specific procedures are stated in mediation orders issued by the individual judges.

Number of cases. During 1994, approximately 100 cases were referred to mediation.

Case selection

Eligibility of cases. Most civil case types are eligible for referral to mediation. Excluded are all cases exempted from the Rule 16 scheduling order and cases that involve pro se parties.

Referral method. All eligible cases are automatically referred to mediation. Parties receive notice of referral in the Notice of Preliminary Pretrial Conference and discuss the referral with the judge at the preliminary pretrial conference. Only one mediation session is mandatory. Others may be held at the parties' discretion.

Opt-out or removal. To be removed from mediation, parties must seek written leave of the court.

Scheduling

Referral. Cases are referred to mediation at the initial pretrial scheduling conference.

Written submissions. Five days before the mediation session, each party must submit to the mediator a confidential settlement statement of ten pages or less, which is not filed in the record or served on other parties. The statement must set out (1) the legal and factual contentions of the parties as to both liability and damages; (2) the factors considered in arriving at the current settlement posture; and (3) the status of settlement negotiations.

Mediation session. The mediation session may occur at any time but not later than ten days before the final pretrial conference. The parties schedule the time and place for the session.

Number and length of sessions. Only one mediation session is mandatory, but others may be scheduled if all agree that it would be worthwhile. No specific length of time is suggested.

Program features

Discovery and motions. All other case events go forward during the mediation process. In a few instances discovery has been stayed because the parties thought the prospects for settlement were good. Leave of the court is needed to stay discovery or any other scheduled event.

Party roles and sanctions. Attendance by all parties is mandatory. If an insurance company is involved, the court requires a person with full settlement authority to be present if possible or continuously available by telephone. Parties must obtain leave of court to participate by telephone or to be excused from participation. The court may impose sanctions on any party or counsel who fails to comply in good faith with the order to mediate.

Outcome. At the close of the mediation process the mediator files a short report noting the status of settlement negotiations and providing any comments that would be helpful in achieving settlement. The report, which is kept in a file in the clerk's office, is not part of the official record and is not made available to the public. Parties may request that the information in the report be kept confidential or that the terms of settlement, if there is one, be kept confidential. In such instances, no further report is made.

Confidentiality. Parties may request that the mediation discussions and outcome be kept confidential.

Neutrals

Qualifications and training. The court's roster is composed of attorneys and non-attorneys who have responded affirmatively to a court questionnaire asking whether they wish to be listed on the roster of mediators. The roster notes the individual's areas of expertise and whether he or she is certified by the state of Indiana as a trained mediator or has received formal training in mediation.

Selection for case. Parties must come to the preliminary pretrial conference with an agreed-on name of a mediator selected from the court's roster. If the parties cannot agree on a mediator, the court appoints one from its roster.

Disqualification. The court has not established rules for disqualification.

Immunity. The court does not specify protections for the mediators but is aware of a recent D.C. Circuit decision, *Wagshal v. Foster*, 28 F.3d 1249 (D.C. Cir. 1994) (court-ap-

pointed mediator or neutral case evaluator has quasi-judicial immunity when performing official duties).

Fees. The parties and mediator must agree on a fee, to be divided equally by the parties and to be paid within thirty days of the mediation session. Indigent parties may petition the court to modify the mediation fee.

Program administration

The magistrate judge who is responsible for all pretrial matters in the case supervises the mediation process.

Southern District of Indiana

IN BRIEF

Process summary

Mediation. By Local Rule 53.2 and the CJRA plan, effective December 31, 1991, the Southern District of Indiana has authorized use of mediation in cases where all parties agree to participate in the procedure. See below.

Summary jury trial (SJT). One judge uses the summary jury trial.

Magistrate judge settlement conference. Settlement is explored at every pretrial conference, and nearly every case is referred to a settlement conference with a magistrate judge. Parties generally do not attend, although the magistrate judge is authorized to require their attendance. Magistrate judges may engage in shuttle diplomacy and, if the parties do not reach agreement but appear to be moving, will often propose a settlement for each side to consider. The magistrate judge reports settlement progress to the assigned judge.

Of note

Obligations of counsel. Attorneys are required to discuss ADR with their clients and with each other and to address in their case management statement the suitability of ADR for their case. They must also be prepared to discuss ADR options for the case with the assigned judge.

Information from court. A proposal for an ADR brochure is currently under consideration.

Plans/evaluation. Before the court considers future ADR developments, it will evaluate the conclusion of an ongoing study of current procedures, which is being conducted by the CJRA advisory group.

For more information

John Paul Godich, U.S. Magistrate Judge, 317-226-7572

IN DEPTH

Mediation in Indiana Southern

Overview

Description and authorization. Under Local Rule 53.2 and the CJRA plan, effective December 31, 1991, judges in the Southern District of Indiana may, with the consent of the parties, set any appropriate case for mediation. Parties in cases referred to mediation select a mediator from a certified list maintained by the state Supreme Court for the state system and pay the attorney's standard hourly fee. Referral to mediation may occur at any appropriate time, and other case activities may or may not be suspended during the mediation process. Cases referred to mediation remain subject to a settlement conference with a district or magistrate judge.

Number of cases. From January to December 1994, approximately 150 cases used mediation, but since attorneys do not always report their use of the procedure to the court, the exact number is not known.

Case selection

Eligibility of cases. All types of cases may be mediated, but personal injury cases are the most common referral. No type of case is presumed to be ineligible.

Referral method. Referral to mediation requires consent of all the parties. Usually the process originates with the parties, although district and magistrate judges or court staff also may suggest mediation at a pretrial conference.

Opt-out or removal. No opt-out or removal procedure is necessary, as referrals are always by party choice.

Scheduling

Referral. A referral to mediation may occur at the initial scheduling conference, after discovery has been completed, or at any other appropriate time.

Written submissions. Discretion lies with the attorney-mediator whether and when to request written submissions. Usually each side gives the mediator a confidential settlement statement.

Mediation session. Mediation sessions are arranged by the mediator and are held at the mediator's office.

Number and length of sessions. Mediation sessions last two to four hours. Typically one or two sessions will suffice, but many mediators schedule multiple conferences until the case is settled or an impasse is reached.

Program features

Discovery and motions. Discovery and other case activities are usually suspended during the mediation process, but they may go forward. Parties may request suspension of discovery, which is subject to court approval.

Party roles and sanctions. The mediators usually order parties to attend. There are no sanctions for noncompliance with mediation. Since the process is consensual, the need rarely arises.

Outcome. The court does not require any filings at the conclusion of mediation, but parties usually file a stipulation of dismissal if mediation has settled the case.

Confidentiality. Confidentiality is not addressed by Local Rule 53.2. By local custom and practice, the parties expect mediators to maintain confidentiality.

Neutrals

Qualifications and training. To be placed on the certified list of mediators, applicants must have been admitted to the bar and must have completed a forty-hour certification training program required by the state Supreme Court. They must also have had five hours of training in the two years before they apply to be on the list.

Selection for case. The parties select a mediator from a list of certified mediators maintained by the state Supreme Court.

Disqualification. This subject is not addressed in Local Rule 53.2. The state Supreme Court Rule 2.5 states that a mediator may not have an interest in the outcome of the litigation or be employed by or related to the parties.

Immunity. The court states that the issue of immunity is unresolved.

Fees. The parties pay the mediators their usual hourly attorney's fee.

Program administration

The program is administered on a case-by-case basis by the assigned judge, the magistrate judge, and their courtroom deputies.

Northern District of Iowa

IN BRIEF

Process summary

Magistrate judge settlement conferences. In the Northern District of Iowa, most civil cases, excluding prisoner, Social Security, habeas, and routine collection cases, are eligible for referral to a settlement conference. The assigned judge may refer a case to a magistrate judge for settlement without party consent. Generally the referral occurs in cases that have not settled by the time of the final pretrial conference, although the judges may refer cases at other times if appropriate or if requested by the parties. The parties are notified of the referral by order of the court and must attend the conference. Sanctions may be imposed for noncompliance.

In the settlement conference, the magistrate judge meets with the parties to try to reach settlement. Shuttle diplomacy may be used, but the magistrate judge does not offer an evaluation of the case or give a decision. Settlement conferences take about five hours. The court has an informal policy that the settlement judge will not discuss the particulars of the settlement conference with the presiding judge if the case does not settle.

The court's program, which is called mediation, has not been encoded in written rules or orders, although it is an established procedure in the court. Approximately forty cases were referred to magistrate judge settlement conferences between January and September 1994.

Summary jury trial (SJT). On occasion a judge has held a summary jury trial.

Of note

Obligations of counsel. Counsel must discuss ADR options in the Rule 16 scheduling report.

Plans. The court is in the process of adopting a court-based mediation program using attorney-neutrals who will serve without compensation.

For more information

John A. Jarvey, Chief U.S. Magistrate Judge, 319-364-4509

Southern District of Iowa

IN BRIEF

Process summary

Judicial settlement conferences. Judicial settlement conferences, also called mediation conferences by the court, are an established but not specifically authorized ADR method in the Southern District of Iowa. Almost any civil case is eligible for referral, but referral is most common in lengthy cases. Prisoner, foreclosure, Social Security, and seizure cases are not eligible. Referral to settlement may occur at any time appropriate for the case, including before, during, or after trial. The parties may request a settlement conference, and the district and magistrate judges may refer cases sua sponte. Two district judges routinely refer cases 120 days before trial. After the referral order, a magistrate judge holds a telephone conference with counsel to explore settlement prospects. If settlement appears unlikely, a conference is not scheduled or is scheduled for later in the case.

Before a settlement conference, each party must submit a brief summary of factual and legal issues to the settlement officer, and at least three days before the conference, parties must submit to the settlement officer a concise statement of the evidence to be produced at trial. These documents are not given to other parties in the case or filed with the court. The settlement officer—a judge not assigned to try the case—meets with counsel and the parties to discuss settlement options. The settlement officer caucuses separately with each side and may make suggestions about case value if appropriate. The settlement proceedings are protected by the confidentiality provisions of the Federal Rules of Evidence.

Parties must attend the settlement conference, although the court will permit attendance by telephone under some circumstances (e.g., distance, poverty, or representation by an insurance company). Failure to attend, as well as failure to comply with any aspect of the settlement process, may result in sanctions. The first settlement conference typically lasts two to four hours. If a settlement is not reached, additional sessions may be held at the discretion of the settlement officer and are often conducted by telephone.

At the conclusion of the settlement conference, the settlement judge files an order stating whether the case settled. If it did, a date for submission of closing documents is specified in the judge's order. Between January and September 1994, approximately seventy-five cases were referred to judicial settlement conferences.

Settlement week calendar. In addition to their regular settlement work, once each year the magistrate judges receive additional cases for settlement conferences. During

District of Kansas

the 90- to 120-day period before the court's April master trial calendar (held for short trials), the magistrate judges hold settlement conferences in the cases set on the calendar. In 1994, 51 cases were set.

Appointment of special master for settlement. By special order of the court, a special master, working with a magistrate judge, was appointed to settle a large number of asbestos cases. He is now serving as settlement master in a major products liability case.

Summary jury trial (SJT). By court order and with consent of the parties, the court may refer lengthier, complex civil cases for a summary jury trial.

Of note

Obligations of counsel. Attorneys must be prepared to discuss ADR options with the assigned judge and must discuss in the case management statement the suitability of ADR for the case.

Plans. The court is considering early neutral evaluation conducted by the magistrate judges. The court may also establish a triggering mechanism for referral to settlement in all cases at the time of the order setting trial and may use nonjudicial adjuncts with appropriate training to conduct the settlement conferences.

For more information

Celeste F. Bremer, Chief U. S. Magistrate Judge, 515-284-6200

District of Kansas

IN BRIEF

Process summary

Mediation. In the District of Kansas, each district judge is authorized to refer almost any civil case on his or her docket to a mandatory mediation conference conducted by an attorney-mediator. See below.

Other ADR. In addition to mediation, Local Rule 214 and the court's CJRA plan approve most forms of ADR, including minitrials and summary jury trials.

Of note

Obligations of counsel. Attorneys must discuss ADR options with their clients and with opposing counsel and demonstrate in their case management plan that they have done so. They must also be prepared to discuss ADR with the judge.

For more information

Richard C. Hite, Coordinating Attorney, 316-265-7761

John Thomas Reid, U.S. Magistrate Judge, 316-269-6411

IN DEPTH

Mediation in Kansas

Overview

Description and authorization. In the District of Kansas, each district judge is authorized to refer almost any civil case to a mandatory mediation conference conducted by an attorney-mediator, a magistrate judge, or a trial judge other than the assigned judge. The district-wide mediation program is authorized by the court's CJRA plan, effective December 31, 1991, and by amended Local Rule 214. The program is based on the mandatory mediation process instituted in the Wichita division in 1984. Under the current program, most civil cases are referred to mediation, and each judge uses his or her own mediation protocols and orders. The session is confidential, attendance by a party representative with settlement authority is required, and the mediator is authorized to provide an evaluation of the merits of the case at the request of the parties. Joint and private sessions are used.

Litigants are encouraged to select a mediator from the court's roster of trained mediators. When a mediator is selected, the litigants pay a court-set fee of \$125 per hour, shared equally by the parties. Cases in which a litigant is unable to pay a mediator's fee are referred to a magistrate judge for mediation.

Number of cases. Approximately 270 cases were referred to mediation between January and September 1994.

Case selection

Eligibility of cases. Almost all civil cases are eligible for mediation. Social Security appeals, bankruptcy appeals, and certain cases involving the United States are generally not referred to mediation.

Referral method. Each judge has the discretion to refer any case to a mandatory mediation conference, and each judge follows his or her own protocol for referral. Generally, however, shortly after a case is at issue the assigned judge enters a scheduling order that urges the parties to explore settlement and mandates a mediation conference.

Opt-out or removal. The assigned judge may remove a case from mediation if the court finds the process would be futile. Requests for removal are rare.

Scheduling

Referral. Notice of the mandatory referral to mediation is sent to the parties in a scheduling order shortly after the case is at issue.

Written submissions. Counsel are encouraged to submit short premediation statements to the mediator describing the factual and legal issues and the relief sought. The statements, which are not filed with the court, may or may not be shared with opposing counsel, depending on the details of the court's order.

Mediation session. After discussion with counsel at a status conference held about thirty days after the initial scheduling order, the assigned judge sets the date and time frame for the mediation session. Early in the mediation program, most cases were set for mediation shortly before trial. As the program has developed, litigants are requesting earlier mediation conferences, often before substantial discovery has occurred. The mediation session is generally held at the office of the mediator, but it may also be held at the courthouse. Exhibits, expert witness reports, and other aids may be used at the mediation session.

Number and length of sessions. A typical mediation session in a standard case lasts about four hours. In such cases, mediation generally involves only one session.

Program features

Discovery and motions. Typically, some discovery takes place before the mediation session. Some judges may suspend discovery and motions activity around the time of the mediation session.

Party roles and sanctions. In addition to trial counsel, a party representative with settlement authority must attend the mediation session. When the United States is a party, the requirement is met by attendance of the U.S. attorney for the District of Kansas. If the person with settlement authority cannot attend, the conference is rescheduled or appropriate accommodations are made on a case-by-case basis. The court's mediation rule does not specify whether or what type of sanctions might be imposed for failure to comply with the attendance and other requirements.

Outcome. The mediator is asked to report to the judge only whether the case settled. Some judges require this in writing, others do not.

Confidentiality. Mediation conference statements, memoranda submitted to the court, and any other communications that take place during the mediation process may not be used by the parties in the trial of the case. The mediator is barred from discussing the mediation conference with the trial judge.

Neutrals

Qualifications and training. The court developed a district-wide list of attorney-mediators after consultation with all interested bar associations, review by a committee of the court, and approval by the full court. The criteria for selection include ten years in civil trial litigation and a good reputation. The court provides training for new mediators.

Selection for case. District and magistrate judges, as well as attorneys, may serve as mediators. If an attorney is desired, the parties generally select the mediator from the court's roster of approved neutrals. Litigants are also free to select a mediator outside the court's list.

Disqualification. The court has no formal guidelines for disqualification and reports that conflicts are generally addressed by the parties and the mediator. If a conflict becomes evident, the mediator informs the court.

Immunity. The court does not have a rule regarding immunity but is discussing the issue. The court's view is that the mediator's role is quasi-judicial and entitled to quasi-judicial immunity.

Fees. When an attorney-mediator is selected, the parties equally share the mediator's court-set fee of \$125 per hour. No charges are incurred if a judge hosts the mediation.

Program administration

The mediation program is administered by each district judge for cases referred by that judge. Courtroom deputies handle ministerial issues and the assigned judge deals with substantive matters.

Eastern District of Kentucky

IN BRIEF

Process summary

ADR generally. The Eastern District of Kentucky has not established a district-wide ADR program, but the court's CJRA advisory group has proposed that the court adopt ADR procedures. In the Lexington division, litigants are advised of the availability of a private for-fee mediation service. Use of this service is wholly voluntary. In the Covington division, litigants are advised of the availability of a voluntary nonbinding arbitration program administered by the state courts.

Judicial settlement conferences. Each judge has his or her own procedures for settlement conferences.

Of note

Evaluation. As one of the ten comparison districts established by the CJRA, the Eastern District of Kentucky 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

William O. Bertelsman, Chief U.S. District Judge, 606-655-3800

Western District of Kentucky

IN BRIEF

Process summary

Mediation. The Western District of Kentucky is conducting an experimental mediation program in which any civil case is eligible for referral to mediation with the consent of the parties. See below.

Arbitration. The Western District of Kentucky is one of ten courts authorized by 28 U.S.C. §§ 651–658 to establish a voluntary, nonbinding court-annexed arbitration program. The court has chosen not to implement such a program.

Other ADR. The court has approved but not implemented an early neutral evaluation program. Occasionally, cases are referred to summary jury or bench trials conducted by a magistrate judge.

Judicial settlement conferences. All judges conduct settlement conferences, and many cases are referred to the magistrate judges for settlement conferences.

Of note

Obligations of counsel. Attorneys must be prepared to discuss ADR with the judge and must discuss in their case management statement whether ADR would be suitable for their case.

Plans. Mediation and early neutral evaluation are not yet implemented via local rule. The goal of the judges is district-wide implementation.

Western District of Kentucky

Evaluation. As one of the ten comparison districts under the CJRA, the Western District of Kentucky 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

John G. Heyburn II, U.S. District Judge, 502-582-6648

IN DEPTH

Mediation in Kentucky Western

Overview

Description and authorization. In the Western District of Kentucky the judges have over the years made occasional referrals to mediation. More frequent use began in 1993, and the court is now conducting a pilot mediation program in which all civil cases are eligible for mediation with the consent of the parties. Although all the judges refer cases to mediation, the court has not established formal rules for the program, and the judges vary in their frequency of referral to mediation. Each judge fashions the procedure as needed for the specific case and maintains his or her own list of mediators consisting of both attorneys and other qualified persons. Counsel may also recommend another mediator for the court's consideration. The parties pay the mediator's fee.

Number of cases. Between November 1, 1993, and November 1, 1994, twenty-eight cases were referred to mediation.

Case selection

Eligibility of cases. All cases are eligible for mediation. No case types are excluded from consideration for mediation.

Referral method. Cases are referred with the consent of the parties on a case-by-case basis.

Opt-out or removal. There is no opt-out procedure because referral occurs only with party consent.

Scheduling

Referral. Referral may be made at the initial scheduling conference or at any other time appropriate for the case.

Written submissions. The mediator determines whether any materials should be submitted before the mediation session.

Mediation session. The district judge sets the time limits for the mediation process after consultation with the parties. The neutral and the parties make arrangements for the mediation session, which can be held at the courthouse, the neutral's office, or elsewhere, depending on the needs of the parties.

Number and length of sessions. The length and number of sessions are determined by the mediator and parties. The district judge, after consultation with the parties, sets the total period of time to be given to the mediation process and monitors compliance.

Program features

Discovery and motions. Other case activities are suspended during the mediation process, unless something is needed to facilitate the mediation.

Party roles and sanctions. Party attendance is determined by the mediator and counsel. The court has not established authorization to sanction for noncompliance.

Outcome. The mediator determines how to notify the court of the outcome. The notice may state only whether a resolution was reached.

Confidentiality. Contact is allowed between the neutral and the judge for purposes of status updates only.

Neutrals

Qualifications and training. Each judge maintains a small roster of attorneys and other qualified persons who have the skills and training needed to mediate. The court has not established training requirements.

Selection for case. The mediator is selected from the court's roster by mutual agreement of the parties and the court. Selection depends on the needs of the case and may require (1) a person with specific training in mediation; (2) a person with specific expertise in the subject matter giving rise to the dispute; or (3) a person with particular sensitivity or hands-on experience with the issues. The parties may also propose a mediator not on the court's roster.

Disqualification. The mediator must disclose any potential conflicts.

Immunity. The court indicates that mediator immunity is established by legal precedent.

Fees. The parties pay the mediator's fee, which varies from case to case. Generally, the parties agree on the total amount to be spent and share the costs equally. If they do not, the judge specifically states who is responsible for payment and sets a maximum amount the mediator may charge.

Program administration

Each judge administers his or her cases.

Eastern District of Louisiana

IN BRIEF

Process summary

ADR generally. Under its CJRA plan, effective December 1, 1993, the Eastern District of Louisiana authorizes the assigned judge to refer appropriate cases to private mediation with party consent and to mandate use of the minitrial or summary jury trial with or without party consent. The CJRA plan also authorizes the assigned judge to use any other ADR processes endorsed by the district. The court has not established procedures for ADR use and expects case-by-case use, initiated and administered by the parties or the assigned judge.

Judicial settlement conferences. Pursuant to the court's CJRA plan and uniform scheduling order, judicial settlement conferences may be held at any time at the request of a party. The assigned judge may preside or arrange for another district judge or a magistrate judge to conduct the settlement conference. Counsel of record with authority to

bind must attend. The presiding judge may require that the party or its representative who has settlement authority attend the conference.

The district's CJRA plan also requires the assigned judge or the courtroom deputy to discuss with counsel at the preliminary scheduling conference the possibility of future settlement conferences or of an early neutral evaluation session. Local Rule 8.01e requires counsel to conduct timely settlement negotiations to avoid costly eve-of-trial settlements. In addition, the court's uniform pretrial notice requires counsel to be fully authorized and prepared to discuss settlement with the court during the final pretrial conference. Prior settlement negotiations are also urged in the uniform pretrial notice.

Of note

Information from court. The New Orleans Chapter of the Federal Bar Association is preparing a litigation handbook for the Eastern District of Louisiana that will include information about ADR.

Plans. In January 1994, an ADR study group was appointed by the chief judge to consider whether and how court-based ADR should be developed in the district.

For more information

Warren A. Kuntz, Jr., Administrative Assistant to the Chief Judge, 504-589-7406

Middle District of Louisiana

IN BRIEF

Process summary

Mediation. The Middle District of Louisiana's CJRA plan, effective December 1, 1993, authorizes use of alternative dispute resolution programs designated for use in the district and authorizes referral of cases to private mediation with the parties' consent. See below.

Other ADR. The court's CJRA plan authorizes the judges to order nonbinding minitrials or summary jury trials with or without the parties' consent. Summary jury trials are used more often than minitrials, usually in relatively simple factual disputes or where dollar amounts are contested.

Judicial settlement conferences. All civil cases remain subject to a settlement conference with a judge. Approximately twenty-five cases were assigned to a settlement conference with a judge between January and September 1994.

Of note

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

Plans. The court will evaluate the court-based mediation program in 1995 to determine whether the program should be continued or expanded.

Evaluation. Questionnaires are sent to attorneys and mediators participating in the court's mediation program.

For more information

Christine Noland, U.S. Magistrate Judge, 504-389-0286

IN DEPTH

Mediation in Louisiana Middle

Overview

Description and authorization. Under its CJRA plan, effective December 1, 1993, the Middle District of Louisiana authorized a mediation program. The program, whose purpose is to help parties overcome obstacles to effective negotiation, became effective in September 1994. All civil cases are eligible for referral to mediation on consent of the parties. In practice, the court does not refer student loan cases, bankruptcy appeals, habeas corpus applications, Social Security claims, and most prisoner § 1983 cases. All others are considered on a case-by-case basis. The court offers two mediation options. Under the court's pilot court-based program, fifteen mediators have been sworn in and conduct sessions at no charge to the parties. The court may also refer cases to the Baton Rouge Bar Association, where mediators are selected from the association's roster and charge \$250 for up to five hours, with additional fees negotiated for longer sessions. Both the court-based and association mediators may use shuttle diplomacy to facilitate the process, but they do not offer an evaluation of the case or give a decision to the parties. The mediation process in both programs is confidential.

Number of cases. Between September 1994, when the court's mediation program was implemented, and November 1994, approximately twenty cases were referred to mediation under the court-based program. Figures are not available for the number of cases referred to the bar association program.

Case selection

Eligibility of cases. All cases are eligible for referral to mediation. It is used most often in personal injury and contract disputes, as well as environmental, Title VII, mass torts, and other more complex cases.

Although mediation is authorized for any civil case, student loan cases, bankruptcy appeals, habeas corpus applications, Social Security claims, and most prisoner § 1983 cases are not referred.

Referral method. Any district or magistrate judge may refer a case to mediation on consent of the parties. When a referral is made to the court-based program, the magistrate judge who directs the mediation program selects a mediator and a mediation order is sent to the mediator and parties. Under the bar association's mediation process, an order is entered showing that the case is proceeding to mediation.

Opt-out or removal. The court may vacate any order of referral to a court-based mediator. In cases referred to the bar association's program, if mediation seems to be lagging, the court can set a date for trial and thus prompt the parties to decide whether to move forward with mediation.

Scheduling

Referral. Most cases are referred to mediation after discovery has been completed; however, more parties are asking for mediation earlier, before hiring and deposing certain types of experts.

Written submissions. The mediator may receive and consider affidavits, depositions, and other forms of written evidence agreed to by the parties or deemed by the mediator to be relevant and reliable. Position papers may be received in confidence. Timing for submission of these papers is at the discretion of the mediator.

Mediation session. Currently, two to three months are allotted for completion of the mediation process. In some cases, the magistrate judge who assigns the neutral sets the date and time and finds an available mediator. In those instances, the time period can be a few days or one or two months. In the court-based program, the mediation sessions are scheduled in the courthouse, at the date and time selected by the magistrate judge, if set by the magistrate judge, or by the mediator and parties. Under the bar association's program, the mediation sessions are conducted at a place and time mutually agreed to by the parties and mediator. If they cannot agree, the mediator selects the location and sets the time.

Number and length of sessions. Usually only one day is allotted for the mediation session. Normally, a session lasts three or four hours. More complex cases may require two or three days.

Program features

Discovery and motions. In cases in which the parties consent to mediation to save discovery costs, all discovery is stayed during the mediation process. In other cases, where parties need additional discovery before mediation begins, the parties are permitted to continue discovery. In every case, whether referred to the court's program or the bar association's program, the court retains full control of the case.

Party roles and sanctions. Parties with settlement authority and their counsel are required to attend all sessions. If an insurance company is a party and the representative is out of state, the representative may be allowed to be available by telephone during the mediation session. If only a board of directors can approve a final settlement, an attorney may be permitted to have present a representative who can make a recommendation to the board for later approval. There is currently no policy on sanctions for those who fail to attend.

Outcome. In the court-based program, the mediator files a certificate of completion at the end of the mediation session. The certificate merely states that the session is complete, whether a settlement was reached, and, if so, which party will be filing the motion to dismiss.

In the bar association's program, counsel for all parties must jointly do one of the following within ten days of completion of the mediation conference: (1) If the mediation results in the settlement of all claims, the parties must file a joint motion for dismissal with the court. (2) If the mediation results in the settlement of a portion of the claims, the parties must file a written report with the court describing the claims that have been settled and the claims that remain so that the court can take appropriate action. (3) If the mediation does not result in settlement of any claims, counsel for the parties must file a written report with the court so the court can take appropriate action. Within three days of completion of the conference, the mediator must file a writ-

ten report with the Baton Rouge Bar Association and must mail a copy to each party or its attorney of record and to the judge referring the case.

Confidentiality. Under the court-based program, the magistrate judge signs a confidentiality order at the same time the mediation order is issued. The confidentiality order is sent to the mediator, who signs it and has all persons attending the session sign it before beginning the session. After the session is complete, the order is filed in the record. It provides that all mediation proceedings, including private caucuses between the mediator and a party, may not be reported, recorded, placed in evidence, made known to the court or jury, or construed as an admission. The mediator may not discuss the merits of the case with the trial judge during or after mediation and may converse with another mediator only after there has been a check for conflicts of interest.

Under the bar association's program, there may be no ex parte communications between a mediator and any counsel or party on any matter related to the action except for the process of scheduling or continuing the conference.

Neutrals

Qualifications and training. To qualify as a mediator in the bar association's program, the mediators must be members in good standing of the Baton Rouge Bar Association and licensed to practice law in Louisiana by the Louisiana Supreme Court for at least five years or have been engaged in legal scholarship or teaching for at least five years. No mediation certification is required in the bar association's program.

The mediators in the court-based program must meet the bar association's qualifications or be certified by the court. Attorney-mediators must have had no disciplinary actions against them in their areas of expertise. Three nonlawyer mediators have volunteered for the program: two social workers and an engineer. All nonlawyer mediators must be certified as mediators. Two attorneys with experience in mediation have been allowed to participate without a certificate, but if the program continues, the court expects to require all mediators to be trained and certified. The court will provide training as funds allow.

Selection for case. The magistrate judge administering the court-based program selects the mediator for the case. Under the bar association's program, the association provides each party with a list of five mediators selected from its master list. Within ten days of receipt of the list, each party must strike two names from the list, then rank the remaining three names in order of preference. The mediator with the lowest combined score is appointed. If there is a tie and the parties cannot agree, the mediator is selected by drawing lots. Parties also have the option of proceeding through an independent ADR organization. Parties generally select mediators who have expertise in the subject matter of the case.

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 of a justice, judge, or magistrate judge governed by 28 U.S.C. § 455. If a party who believes an assigned mediator has a conflict of interest does not bring it to the attention of the assigning judge within ten days of learning of the source of the conflict, the party will be deemed to have waived objection. The mediator has the same period of time to check for conflicts and decline the assignment.

Immunity. In the court-based program, a "hold harmless" clause is part of the confidentiality agreement signed by all participants. Under the bar association's pro-

gram, the parties agree to hold harmless the mediator, the Baton Rouge Bar Association, and the members of the Alternative Dispute Resolution Committee from any liability in connection with the mediation proceedings.

Fees. In the court-based program, parties pay a \$25 administrative fee directly to the mediator to cover the mediator's travel, telephone, and photocopying costs. Under the bar association's program, the parties equally share a \$300 fee paid with the filing of the application for mediation, of which \$50 is a nonrefundable administrative fee. The remaining \$250 is the fee for all or any part of the first five hours of mediation. If the session is longer, an additional fee is negotiated. If the case settles before the mediation session, the \$250 is refunded.

Program administration

The court-based program is administered by a magistrate judge. Other judges may refer cases to the magistrate judge for referral to a mediator.

Western District of Louisiana

IN BRIEF

Process summary

Mediation and arbitration. In its CJRA plan, effective December 1, 1993, the Western District of Louisiana encourages use of alternative dispute resolution but notes that the court "will not establish formal procedures for mediation or arbitration." The court maintains a registry of mediators and arbitrators who volunteer to be on the list and provide their services at fees they set. The registry is composed primarily of attorneys but includes other professionals as well. If the parties to a case want to use ADR, they can request the court's list. The plan also authorizes judges to order nonbinding mediation or arbitration in appropriate cases. No cases have voluntarily selected or been ordered to mediation or arbitration.

Other ADR. Two of the court's magistrate judges conduct summary jury trials, and minitrials have been used in some cases. The court has also appointed special masters for settlement purposes in appropriate cases.

Judicial settlement conferences. The court holds settlement conferences on request by the parties.

Of note

Obligations of counsel. Attorneys must demonstrate in their case management statement that they have discussed ADR with opposing counsel, and they must also be prepared to discuss ADR options with the assigned judge. In addition, under the uniform scheduling order instituted under the court's CJRA plan, counsel must file an affidavit with the clerk of court certifying that they have met to discuss settlement and stating the date of the settlement discussions. Defense counsel must also attest that any settlement offer made by the plaintiff was conveyed to the defendant.

Plans. The court's CJRA committee is preparing a report for the court on how best to communicate available ADR methods to litigants.

For more information

Robert Shemwell, U.S. Magistrate Judge and Clerk of Court, 318-676-4225
Pam Mitchell, CJRA Staff Attorney, 318-670-4232

District of Maine

IN BRIEF

Process summary

ADR generally. Although the District of Maine has not established an ADR program, it encourages participation in settlement efforts throughout the course of litigation. The court has used minitrials and summary jury trials and will use other ADR techniques as appropriate. At the Rule 16 conference, the judge explores ADR's suitability with counsel.

Judicial settlement conferences. Settlement is actively discussed at the final pretrial conference, at which counsel are required to certify to the court that they have exchanged written settlement proposals and responses in accordance with the court's uniform scheduling order. Failure to comply with this requirement may result in sanctions. For cases in which the trial would be a bench trial, a judge other than the trial judge conducts the settlement conference. In appropriate cases, the judge may schedule an additional settlement conference and require party representatives with settlement authority to attend.

Of note

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

Plans. A subcommittee of the court's CJRA advisory group is studying current ADR use among federal practitioners. The results will inform the court's consideration of whether to establish formal court-based ADR programs.

For more information

William S. Brownell, Clerk of Court, 207-780-3356

District of Maryland

IN BRIEF

Process summary

ADR generally. The District of Maryland has not established ADR programs. In special cases the court advises counsel of various ADR alternatives, such as summary jury trials conducted by a judge.

Magistrate judge settlement conferences. Settlement conferences with the magistrate judges are available to litigants in civil cases.

Of note

Evaluation. As one of the ten comparison districts under the CJRA, the District of Maryland 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

Clarence Goetz, Chief U. S. Magistrate Judge, 410-962-4560

J. Frederick Motz, Chief U.S. District Judge, 410-962-0782

District of Massachusetts

IN BRIEF

Process summary

ADR generally. On April 29, 1994, the District of Massachusetts authorized referral to a range of ADR processes, including early neutral evaluation, mediation, minitrial, and summary jury trial. Litigants are encouraged to explore ADR early in the case and to consider whether any of the authorized options are suited to the case. If the parties choose one, the ADR sessions are conducted by neutrals selected from bar association panels or by the judges. On request, the court provides parties with a list of private providers of ADR services. Use of special masters in appropriate cases is also encouraged. Except for special masters and private providers of ADR services, all court-sponsored ADR is available at no charge to litigants. All processes are nonbinding, and most entail no more than a three-to-four-hour session. Use of all ADR procedures is voluntary and requires the consent of all parties. From adoption of the court's ADR programs on April 29, 1994, through October 1994, approximately thirty cases were referred to mediation.

Bar association summary trial procedure. Some of the court's judges refer selected cases to a summary trial procedure managed by the Boston Bar Association. Cases referred to summary trial are tried at the courthouse before a panel of three neutrals appointed by the bar association and selected from its roster. The purpose of the procedure is to provide parties a realistic assessment of the value of their case. The proceedings include opening and closing statements by counsel and an overview of trial proofs. Evidentiary and procedural rules are few and flexible, and the panel's verdict is nonbinding. Summary trials typically last a half day and rarely more than one day. Summary trial proceedings are confidential and are not reported to the court.

Judicial settlement conferences. A settlement conference with a district or magistrate judge, other than the one assigned to the case, may be conducted at any stage of the litigation. The conference is usually requested by one or more of the parties or by the judge to whom the action is assigned. The judge assumes a variety of roles at the conference, including meeting with the parties, promoting communications, offering an objective assessment of the case, and suggesting settlement options. In appropriate cases, the judge may order that representatives of the parties with settlement authority be present.

Of note

Obligations of counsel. The court requires that counsel discuss ADR with opposing counsel and address it in their case management statement. Counsel must also be prepared to discuss the case's ADR suitability with the assigned judge.

Information from court. The court has published a brochure, *Alternative Dispute Resolution Procedures for the District of Massachusetts*, that describes the ADR programs available to litigants through the court. The court encourages counsel to read the brochure and discuss ADR options with their clients before appearing in court.

For more information

Helen Costello, Operations Manager, 617-223-9166

Eastern District of Michigan

IN BRIEF

Process summary

Case valuation (Michigan Mediation). In cases involving money damages only, judges in the Eastern District of Michigan may order parties to participate in a case valuation program administered by the nonprofit Wayne County Mediation Tribunal. See below.

Other ADR. No other ADR programs have been formally authorized by the Eastern District of Michigan, although individual judges may authorize other types of ADR at the request of the parties, and a general blessing of ADR is included in the court's CJRA plan, effective December 1, 1993.

Judicial settlement conferences. All judges are available to conduct settlement conferences in the cases assigned to them and, on request of a colleague, in cases assigned to others. Settlement conferences are held at the request of the parties at any time.

Of note

Obligations of counsel. Attorneys must be prepared to discuss the ADR options for their case with the assigned judge.

Evaluation. The court conducted an evaluation in 1987. The report, *Mediation in the Federal Court System*, was prepared by and is available from the court's administrative manager.

For more information

Judith K. Christie, Administrative Manager, 313-226-7802

IN DEPTH

Case Valuation (Michigan Mediation) in Michigan Eastern

Overview

Description and authorization. Under Local Rule 53.1, the Eastern District of Michigan provides a mandatory case valuation program known as Michigan Mediation. This pro-

gram was first established twenty years ago by the state courts and is run by the Wayne County Mediation Tribunal, a nonprofit corporation. The court has referred cases to the program for more than ten years. According to the court, the name mediation is a misnomer because the process is in essence an abbreviated hearing, which results in a nonbinding case valuation. The assigned district or magistrate judge may refer to the program any civil case in which the United States is not a party and the primary relief sought is monetary. After discovery has been completed, parties meet with a panel of three attorney-neutrals, who hear fifteen-minute presentations by each party and then return a nonbinding evaluation of the case. Each party pays a \$75 fee.

Number of cases. From January through September 1994, valuation hearings were held in approximately 145 cases. During a comparable time period in 1993, 14% accepted the valuation and settled.

Case selection

Eligibility of cases. The court may refer to the program any civil case in which the United States is not a party and the relief sought is primarily money damages. The most commonly referred cases are contract, personal injury, and civil rights cases. No case types are presumed ineligible.

Referral method. District or magistrate judges may order cases to case valuation at their own motion or at the request of one party. Parties may also stipulate to referral, with the approval of the court. When a case is referred, an order of reference is sent to the parties.

Opt-out or removal. Party objections to a referral order must be made within fourteen days of the order and must be served on all parties. Referral is stayed pending the decision on the objection.

Scheduling

Referral. Cases are referred to mediation after completion of discovery.

Written submissions. At least fourteen days before the hearing, each party must file with the mediation clerk three copies of documents pertaining to the issues to be heard and three copies of a concise summary setting forth that party's factual and legal position on the issues. One copy of the documents and summary must also be served on each attorney of record. Failure to file the required materials or to serve copies on other parties subjects the offending party to a \$60 penalty, which the attorney may not charge to the client without the client's written consent.

Case valuation session. The brief hearings, called mediation sessions, are arranged by the Wayne County Mediation Tribunal and are held at the tribunal's office. Notification must be sent to the parties at least forty-two days before the date set for the mediation hearing. The local rule does not specify a time period within which the mediation session must be held.

Length of sessions. Presentations are generally limited to fifteen minutes per side. In multiparty cases, some alterations in the time allotments may be made.

Program features

Discovery and motions. Cases are referred to the program after completion of discovery. Any remaining events in the case must proceed according to schedule during the valuation process.

Party roles and sanctions. Parties are not required to attend and generally do not. If they choose to attend, no testimony may be taken or permitted by any party.

Filing of award. Within fourteen days of the hearing, the panel must make a written valuation of the case and provide it to each party. If the panel's valuation is accepted by all parties, judgment is entered by the court. If the panel's valuation is rejected, the case proceeds to trial.

De novo request. Parties have twenty-eight days from receipt of the written valuation to file a written acceptance or rejection with the tribunal clerk. Failure to file a response constitutes a rejection. If the party rejecting the valuation does not obtain a verdict at trial that is more than 10% better than the valuation, that party must pay the other party's actual costs, which include "those costs and fees taxable in any civil action" and may, "where permitted by law or upon consent of the parties," include attorneys' fees.

Confidentiality. Parties are not accorded any special confidentiality protections beyond those specified by Fed. R. Evid. 408.

Neutrals

Qualifications and training. Neutrals must have at least five years of litigation experience, membership in the Michigan State Bar for five years, and substantial trial and personal injury experience representing both plaintiffs and defendants. No special training is required of neutrals. A brief orientation is offered to new members of the roster.

Selection for case. Unless the parties agree otherwise, a hearing panel is selected by the Wayne County Mediation Tribunal from a roster of attorneys maintained by the tribunal. Each panel is made up of an attorney from the plaintiff's bar, the defense bar, and an attorney not identified as either. In cases in which special expertise or particular neutrals are desired, the parties may jointly request a "blue ribbon" panel and may select the panel members themselves from the tribunal's roster or from other sources.

Disqualification. The rules for disqualification of a neutral are the same as the Michigan state rule for disqualification of a judge.

Immunity. There is no explicitly authorized immunity protection for the neutrals.

Fees. Each party pays a \$75 fee to the Mediation Tribunal. The tribunal pays the mediators. If the parties suggest a "blue-ribbon panel" of particular neutrals, they pay the selected neutrals at the market rate.

Program administration

The program is administered by the staff of the Wayne County Mediation Tribunal. Referrals are sent directly to the tribunal by the judges. Case valuations are returned to the administrative manager in the Eastern District's clerk's office, who logs the results and forwards the information to the referring judge.

Western District of Michigan

IN BRIEF

Process summary

ADR generally. Local Rule 41, adopted in 1983, states that “[t]he judges of this District favor initiation of alternative formulas for resolving disputes, saving costs and time, and permitting the parties to utilize creativity in fashioning non-coercive settlements.” The rule also established a Committee on Procedures and Standards in Alternative Methods of Dispute Resolution, made up of attorneys, with the chief judge or a designee serving *ex officio*. As one of the demonstration districts designated by the CJRA to experiment with differentiated case management, the court’s ADR programs are part of a comprehensive case management system.

Case valuation (Michigan Mediation). Since 1983, Local Rule 42 has authorized an ADR process that resembles an arbitration hearing and provides a valuation of the case. See below.

Arbitration. The Western District of Michigan is one of ten courts authorized by 28 U.S.C. §§ 651–681 to mandatorily refer certain classes of cases to nonbinding court-annexed arbitration. See below.

Voluntary facilitative mediation. The Western District of Michigan has adopted a facilitative mediation program, effective January 1, 1996. See below.

Judicial settlement conferences. Since 1983, pursuant to Local Rule 45, the court may hold a settlement conference in any civil case. Settlement options are discussed at the initial case management conference and, where the judge believes a judicial settlement conference would be helpful, a referral is entered onto the scheduling order. The district judge may conduct the conference or, as is the usual practice, may refer the case to a magistrate judge. The judges vary in the submissions they require before the conference, but customarily they order plaintiffs and defendants to be present. Between January and September 1994, 147 cases were referred to judicial settlement conferences.

Summary jury and bench trials, mini-hearings, and early neutral evaluation. Local Rule 44, adopted in 1983, authorizes use of summary jury trials, mini-hearings, and early neutral evaluation. Cases may be referred to these procedures, as well as to summary bench trials, by stipulation of the parties with approval of the court, on motion by a party with notice to opposing parties, or on the court’s own motion. The judges and parties fashion these procedures in the way they believe is appropriate for the case. Each of these procedures is used in only a small number of cases each year. From January through September 1994, no cases were referred to summary jury or bench trials or to a mini-hearing. Thirteen cases were referred to early neutral evaluation.

Appointment of special master. The court’s CJRA plan and Fed. R. Civ. P. 53 authorize the use of a single neutral who meets with the parties to facilitate settlement. Complex civil cases requiring specialized knowledge—for example, environmental or patent cases—are the types of cases generally referred.

Of note

Obligations of counsel. Attorneys must be prepared to discuss ADR options with the judge and must discuss in the case management statement whether ADR is suitable for the case.

Information from court. The court's brochure, *Your Day in Court: The Federal Court Experience*, includes a brief description of the ADR procedures used by the court.

Evaluation. The court's mandatory arbitration program was included in the Federal Judicial Center's evaluation of the ten mandatory arbitration programs, Barbara Meierhoefer, *Court-Annexed Arbitration in Ten District Courts* (Federal Judicial Center 1990). The court's current programs are included in the Center's ongoing study of the five CJRA demonstration districts, which will be reported to Congress by the Judicial Conference in 1996.

For more information

Richard A. Enslin, Chief U.S. District Judge, Chair, Judges' ADR Committee, 616-343-7542

Hugh W. Brenneman, Jr., U.S. Magistrate Judge, Court ADR Coordinator, 616-456-2568

IN DEPTH

Case Valuation (Michigan Mediation) in Michigan Western

Overview

Description and authorization. In 1983, the Western District of Michigan, through Local Rule 42, established a procedure that is similar to arbitration but is referred to by the court as mediation. To distinguish the procedure from true mediation, it is often referred to as Michigan Mediation or case valuation. The program, which was first established twenty years ago in the state courts and then adopted by the federal district courts in Michigan, is currently the most popular form of ADR in the Western District of Michigan. In cases referred to the program, counsel present their case to a panel of three neutrals (called mediators), who render an evaluation based on counsels' arguments and evidence. All civil cases are eligible and may be referred by stipulation of the parties with court approval, by motion of one party with notice to the other, and by the court's own motion. Referral is mandatory in cases whose sole basis of jurisdiction is diversity and for which the rule of decision is supplied by Michigan tort or medical malpractice law. Each party pays a fee of \$150 to the mediators.

Number of cases. Between January and September 1994, 127 cases were referred to case valuation.

Case selection

Eligibility of cases. Any civil action or part thereof is eligible for referral to case valuation. Referral is mandatory in (1) all actions alleging medical malpractice under the Michigan Medical Malpractice Mediation Act (Michigan Comp. Laws §§ 600.4901-4923) and (2) all cases based on Michigan tort law under the Michigan Tort Mediation Act (Michigan Comp. Laws §§ 600.4951-4969). The following matters are generally not referred to the program: prisoner civil rights actions brought pursuant to 42 U.S.C. § 1983; petitions for writs of habeas corpus; § 2255 cases; bankruptcy appeals; and Social Security and student loan cases.

Referral method. A case may be selected for referral by stipulation of the parties with approval of the court, on motion of a party with notice to the opposing party, or on the court's own motion without notice to any party. The court's ADR options are discussed at the initial Rule 16 conference, and a referral to the case valuation process is entered

into the case management order if it is deemed appropriate. At the same time, an order is entered setting out (1) the deadline for notifying the court's ADR clerk of the selection of the neutrals, (2) the date, time, and place of the hearing, and (3) the deadline by which the session must be held.

Opt-out or removal. Parties' objections to referral must be made within ten days of the date of the court's order. A copy of the motion for reconsideration must be served on opposing counsel and the court. The ADR process is stayed pending decision on the motion unless otherwise ordered by the court.

Scheduling

Referral. The referral most frequently occurs at the initial scheduling conference, in cases mandatorily referred under Michigan law as well as in cases selected by other procedures.

Discovery and motions. Selection of a case for the ADR process has no effect on the normal progress of the case toward trial.

Written submissions. At least ten business days before the session, parties must provide to each neutral and opposing counsel all documents on questions of liability and damages, including all medical reports, bills, records, photographs, and any other documents supporting the party's claim, including a summary or brief of factual and legal positions. A fee of \$60 is assessed (\$20 for each neutral) if a party fails to submit documents by the time designated.

Valuation hearing. The time frame for completion of the ADR process is established in the case management and referral orders and is monitored by the ADR clerk. The ADR clerk sets the date, time, and place for the hearing if the parties fail to make their own arrangements. At least thirty days before the hearing date, the ADR clerk sends notice of the hearing to all counsel and the mediators, indicating deadlines for submission of fees and proof of service of the written submissions, as well as the date, time, and place of the hearing.

Length of hearing. Presentations to the panel are limited to thirty minutes per side unless there are multiple parties or unusual circumstances. Generally only one session is held.

Program features

Party roles and sanctions. Pursuant to Local Rule 42, parties are required to attend the hearing unless excused by the panel chair. When scars, disfigurement, or other unusual conditions exist, they may be demonstrated to the panel in person; however, no testimony may be taken from any party. In practice, the parties are almost always excused from appearing at the hearing.

Filing of award. Within ten days of the hearing, the panel must notify each counsel in writing of its valuation of the case, including all fees, costs, and interest. The award may be rendered by any two of the three mediators. Within twenty-eight days of the date of the valuation, each party must submit to the ADR clerk a written acceptance or rejection of the valuation. If all parties accept the valuation, the award is entered on the docket unsealed, and the plaintiff's counsel is directed to prepare for submission to the court a judgment consistent with the valuation and approved by opposing counsel. If any party rejects the valuation, the docket notes that the outcome is sealed.

De novo request. If a party rejects the valuation award, it must do so in writing within twenty-eight days of the mailing of the award. If the award is unanimous and the defendant accepts it but the plaintiff rejects it, the plaintiff must, to avoid payment of actual costs to the defendant, obtain a trial verdict that is more than 10% greater than the valuation. If the award is unanimous and the plaintiff accepts it but the defendant rejects it, the defendant must, to avoid payment of actual costs to the plaintiff, obtain a trial verdict that is more than 10% less than the valuation. If the panel decision is not unanimous and both parties reject the valuation and the trial verdict is not more than 10% above or below the valuation, the defendant must pay actual costs if the trial verdict is more than 10% above the valuation, and the plaintiff must pay actual costs if the trial verdict is more than 10% below the valuation. A party against whom actual costs are awardable under Local Rule 42 forfeits the right to tax costs otherwise collectable by that party. (See Local Rule 42 for discussion of Sixth Circuit and other laws regarding taxing of costs and fees as sanctions in this procedure.)

Confidentiality. Statements by counsel and the brief or summary of factual and legal positions prepared by the parties are not admissible in any court or evidentiary proceeding. If the valuation of the panel is rejected, the ADR clerk places all documents in a sealed envelope before forwarding them to the clerk of court for filing. Neither the parties nor their lawyers may reveal the award to the judge in a nonjury case.

Neutrals

Qualifications and training. An individual must be certified by the chief judge for inclusion on the court's roster. To be certified, an individual (1) must have been a member of the state bar for at least five years, (2) must be admitted to practice in the court, and (3) must be determined by the judges to be qualified to perform the duties of an ADR neutral.

Selection for case. The hearing is conducted by three lawyers. A list of neutrals (called mediators by the court) is maintained in the clerk's office. When a case is referred to case valuation, counsel for the plaintiff(s) and defendant(s) each select one neutral from the list. The third neutral is chosen by agreement of counsel. If they cannot agree, the other two neutrals select the third. If the neutrals decline to select the third, or if any party fails to choose an ADR neutral, the ADR clerk makes the selection and provides written notice to the parties. Notwithstanding these provisions, the judge assigned the case may select the third neutral, who may be someone not on the court's list and may be a magistrate judge of the district.

Disqualification. No person may serve as a neutral in an action in which any of the circumstances specified in 28 U.S.C. § 455 exist or may in good faith be believed to exist.

Immunity. The court is unaware of any claims against a neutral in this district. Notwithstanding, the court would rely on present case law, such as *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 parties pay the neutrals' fees, which are \$50 per neutral per party, payable within ten days of the mailing of the notice of the hearing. An additional fee of \$20 per neutral is assessed against a party who fails to pay the fee within the time designated. If notice of settlement is given to the ADR clerk at least ten days before the hearing date, the fees are returned to the parties.

Program administration

This ADR process is administered by the clerk's office. Problems that may arise are initially handled by the ADR deputy clerk, with assistance provided as needed by the court's ADR coordinator.

Arbitration in Michigan Western

Overview

Description and authorization. The arbitration program in the Western District of Michigan, which was implemented in 1985, is one of ten mandatory arbitration programs authorized under 28 U.S.C. §§ 651–658. Arbitration was at one time used extensively, but after the court implemented its CJRA plan on September 1, 1992, the number of cases referred to the arbitration program fell dramatically because the time needed to arbitrate a case does not fit well into the timeline of most of the differentiated case management tracks now in use by the court. Consequently, arbitration is now a voluntary procedure and is one among several ADR options offered by the court. Local Rule 43 describes the court's arbitration procedures. Eligible cases include most civil cases, except certain case types specified by the rule. Referrals are made at the initial scheduling conference. The procedure involves a formal hearing before a single arbitrator at which testimony is taken and arguments presented. The court pays the arbitrator's fee.

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

Case selection

Eligibility of cases. Almost all civil cases are eligible for participation in arbitration. The following matters may not be referred: cases seeking money damages greater than \$100,000, exclusive of punitive damages, interest, costs, and attorneys' fees (except by stipulation of the parties that the award may exceed \$100,000); Social Security cases; pro se civil rights cases; any case based on an alleged violation of a right secured by the U.S. Constitution; or any case for which jurisdiction is based in whole or in part on 28 U.S.C. § 1343.

Referral method. Under the original mandatory program, eligible case types were automatically referred to arbitration by the clerk within sixty days of the last responsive pleading. Under the new voluntary program, the court's ADR options are discussed at the initial Rule 16 conference, and, if appropriate, a referral to arbitration is included in the case management order and a separate order is issued referring the case to the arbitration track. Thirty days after entry of the orders, the ADR clerk sends a notice of referral to all counsel.

Opt-out or removal. Once referred to arbitration, a party may seek to remove a case from the arbitration track by motion at any time during the arbitration process.

Scheduling

Referral. Referrals are made at the initial scheduling conference.

Discovery and motions. Discovery is limited to 120 days from the filing of the last responsive pleading. The time taken to dispose of certain motions (to dismiss, for judgment on the pleadings, to join parties, and for summary judgment) is not charged against the 120 days allowed for discovery.

Written submissions. At least ten business days before the hearing, a summary of factual and legal positions, together with copies of all documents on questions of liability and damages, must be submitted to the arbitrator and opposing counsel. Documents must include all medical records, bills, photographs, and any other document supporting the party's claim. Failure to provide documents within the time designated results in an assessment of \$60, payable to the arbitrator or to the court.

Arbitration hearing. The arbitration hearing must take place within 180 days of filing of the last responsive pleading, unless the arbitration period has been stayed by the filing of motions. Hearings may be held at any location within the district designated by the arbitrator, including any courtroom or other room in the federal, state, or county courthouses. The court's ADR clerk arranges the date, time, and location of the hearing and sends notices of the hearing after the arbitrator has been selected and before the end of discovery.

Length of hearing. Each party is given two and a half hours to present its case.

Program features

Party roles and sanctions. Each individual party must attend the hearing in person. Each party that is a corporation, governmental body, or other entity must be represented by an officer or person with complete settlement authority. The court's rules do 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 should announce the award to the parties at the close of the hearing, but in any event must file an award with the ADR clerk within ten days after the hearing. The clerk serves copies on the parties. If a demand for trial de novo is not made within thirty days of the filing of the award, the award becomes the judgment in the case. The award is sealed unless it becomes the judgment.

De novo request. Within thirty days of filing the arbitration award, any party may demand a trial de novo. The requesting party must post a bond equal to the amount the court paid the arbitrator. Once the matter is resolved, if the party requesting trial de novo has failed to better its position by 10% or more, the bond is forfeited to the court, unless the court finds the party had just cause to request the trial de novo. In cases where the parties have consented to the arbitration process, the court may also assess against the requesting party the opposing party's costs under 28 U.S.C. § 1920 and reasonable attorney's fees if (1) the requesting party fails to obtain judgment, exclusive of interest and costs, that is substantially more favorable than the arbitration award and (2) the court determines that the party's request for trial de novo was made in bad faith.

Confidentiality. There may be no ex parte communication between the arbitrator or any counsel or parties except to schedule or continue a hearing. The contents of the award must not be made known to the judge assigned to the case except as allowed by 28 U.S.C. § 654(b). No evidence of or concerning the arbitration hearing may be admitted at the trial de novo except by stipulation or as provided by 28 U.S.C. § 655(c).

Neutrals

Qualifications and training. An individual must be certified by the chief judge for inclusion on the court's roster of arbitrators. To be certified, an individual must have been a member of the state bar for at least five years, must be admitted to practice in this court, and must be determined by the judges to be qualified to perform the duties of an arbitrator. The arbitrators were trained when the program was implemented in 1986.

Selection for case. When a case is referred to arbitration and before the arbitration discovery period is over, the ADR clerk gives each party a list of arbitrators whose names have been drawn at random from the court's roster of arbitrators. The list includes one more name than there are parties to the case. Each party must strike one name. Barring any conflict of interest, the remaining name is appointed the arbitrator.

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

Immunity. The court is unaware of any claims against a neutral in the district. Notwithstanding, the court would rely on existing case law, such as *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 court pays the arbitrator a fee of \$250, plus expenses and mileage, per case.

Program administration

The arbitration program is administered by the clerk's office. Problems that may arise in cases are initially handled by the ADR deputy clerk, with assistance provided as needed by the court's ADR coordinator.

Voluntary Facilitative Mediation in Michigan Western

Overview

Description and authorization. The Western District of Michigan adopted a facilitative mediation program on July 7, 1995. The program, effective January 1, 1996, is a flexible, nonbinding dispute resolution process in which an impartial third party facilitates negotiations among the parties to help them reach settlement. The mediator, who may meet jointly or separately with the parties, serves as a facilitator only and does not decide issues or make findings of fact. Most civil cases are eligible for facilitative mediation, but referral is made only with consent of all parties, who equally share the mediator's normal hourly fee. The court's program has not yet been incorporated into local rules but is described in a handout, *Voluntary Facilitative Mediation Program Description*. This program is distinguished from the court's hybrid process known as Michigan Mediation, which is an evaluative form of ADR.

Number of cases. Information is not yet available.

Case Selection

Eligibility of cases. All civil cases are eligible for voluntary facilitative mediation except prisoner civil rights complaints, habeas corpus, Social Security cases, and § 2255 motions.

Referral method. In preparation for the initial Rule 16 scheduling conference, parties are encouraged to discuss the use of alternative dispute resolution and to indicate their preference in the joint status report. If the district or magistrate judge is satisfied that the selection of facilitative mediation is purely voluntary and has the full approval of all parties, the judge incorporates their selection into the case management order. After the parties have selected a mediator, the judge issues an order of referral.

Opt-out or removal. Opt-out and removal procedures are not necessary, as referral is made only with the consent of all parties.

Scheduling

Referral. Referral is made at the time of the initial Rule 16 scheduling conference.

Written submissions. Not less than seven calendar days before the initial mediation session, each party must provide the mediator with a concise memorandum of no more than ten double-spaced pages, setting forth the party's position on the issues to be resolved in mediation, including damages and liability. The mediator may distribute the party's memorandum to other parties.

Mediation session. Within fourteen days of issuance of the referral order, the mediator consults with the parties, sets a time and place for the mediation session, and sends a notice of hearing to all parties and the ADR clerk. Sessions may be conducted at the courthouse, mediator's office, or any other location agreed to by the parties. The mediator determines the length and timing of the sessions and the order in which issues are presented. The initial mediation session is held within sixty days of the referral order, but the mediation process may continue as long as the parties consider it useful.

Number and length of sessions. The mediation process may involve one or several sessions, depending on the needs of the case.

Program features

Discovery and motions. Any case referred to mediation continues to be subject to management by the assigned judge. Unless otherwise ordered, parties are not precluded from filing pretrial motions or pursuing discovery.

Mediation assessment. The court assesses parties a fee of \$50 per referral, of which \$25 is paid by the plaintiff(s) and \$25 by the defendant(s). The fees are deposited into the Voluntary Facilitative Mediation Training Fund. In the instance of a pro bono mediation, the assessment is waived.

Party roles and sanctions. Parties or individuals with settlement authority are required to attend the mediation session. The court's program description does not address the question of sanctions for noncompliance with this or other mediation requirements.

Outcome. If settlement is reached the mediator helps the parties draft a settlement agreement, as well as a stipulation and proposed order to dismiss, which is filed with the court. If settlement is not reached, the parties have seven calendar days to inform the mediator whether they want to continue with the mediation process. Within ten calendar days of completing mediation, the mediator must file a brief report with the ADR clerk and send copies to all the parties. The report indicates who participated in the mediation session and whether settlement was reached.

Confidentiality. Information disclosed during any mediation session may not be disclosed to any other party without consent of the party disclosing the information. All mediation proceedings are considered to be compromise negotiations within the meaning of Fed. R. Evid. 408.

Neutrals

Qualifications and training. To be considered for certification for the court's roster, an attorney must have a minimum of five years of practice, be an active member of the court's bar, have general peer recognition for his or her expertise, demonstrate an interest in the program, and display attributes that make it likely he or she will be successful, such as (1) the ability to listen actively; (2) the ability to analyze problems, identify and

separate the issues involved, and frame these issues for resolution or decision making; (3) the ability to use clear, neutral language; (4) sensitivity to strongly felt values of the disputants; (5) ability to deal with complex factual materials; (6) an overt commitment to honesty, dignified behavior, respect for the parties, and an ability to create and maintain control of a diverse group of disputants; (7) the ability to identify and to separate the neutral's personal values from issues under consideration; and (8) the ability to understand power imbalances. A committee of attorneys has been appointed by the court to help select and certify mediators.

The court sponsors periodic training sessions for new mediators and refresher training for currently certified mediators. Certified mediators must complete at least sixteen hours of training either sponsored or approved by the court and serve as a co-mediator in at least one case. The court may also ask mediators to attend periodic refresher seminars sponsored by the court.

Each mediator is assessed an initial fee of \$100 for certification and thereafter an annual fee of \$25 for recertification. The funds are held by the court in a separate account for training mediators, court personnel, and judicial staff and for education of the public and bar.

Selection for case. Within ten calendar days of issuance of the case management order, the parties must jointly choose one mediator from the list of court-certified mediators. The list discloses each mediator's hourly fee. When the parties agree on a mediator, the plaintiff is responsible for notifying the ADR clerk of the selection. If the parties cannot agree, they must notify the ADR clerk, who then makes the selection. The ADR clerk notifies the mediator and requests a check for potential conflicts of interest. If the mediator notifies the ADR clerk of a conflict, the clerk either selects an alternate mediator or asks the parties to make a new selection. Once a mediator has been selected, the ADR clerk notifies the judge assigned to the case, who issues an order of referral for facilitative mediation. A mediator may decline to serve after completing five or more mediations in a given calendar year. The court expects a mediator to serve in a pro bono capacity once each calendar year, but any further requests for pro bono appointment may be declined.

Disqualification. No person may serve as a mediator in any action in which any of the circumstances specified in 28 U.S.C. § 455 exist or in good faith are believed to exist.

Immunity. The court considers certified mediators to be officers of the court and therefore entitled to quasi-judicial immunity.

Fees. Mediators are paid their normal hourly rate, divided equally by the parties, and are responsible for billing the parties directly. In the event of noncompliance, the mediator may petition the district or magistrate judge for an order directing payment of his or her fees.

Program administration

The mediation program is administered by the clerk's office. Any problems that arise in the course of a mediation session are brought initially to the ADR clerk. The ADR clerk also collects data about the efficacy of the program and reports to the court on a regular basis.

District of Minnesota

IN BRIEF

Process summary

Magistrate judge settlement conferences. In the District of Minnesota, which is currently revising its local rules, proposed Local Rule 16.5 states that within the thirty-day period before trial, a settlement conference must be held in all civil cases except Social Security appeals and habeas corpus petitions. Trial counsel for each party as well as a party representative with full settlement authority are required to attend each settlement conference. The court may require additional settlement conferences at any other appropriate time during the pretrial period.

Although this rule has not yet been adopted, some magistrate judges have for many years routinely conducted settlement conferences. These conferences are scheduled at any time a district or magistrate judge decides it might be useful and do not stay any other proceedings in the case. Parties are generally notified by a letter or a formal notice issued by the magistrate judge. Some magistrate judges require the parties to meet before the settlement conference and to report in writing where they stood before the meeting and where they stand after it. Plaintiffs must also submit a written settlement demand and defendants must respond in writing. Participation in a settlement conference is mandatory, and all parties, as well as insurance representatives, must attend the conference. A mediation model is followed in the sessions, with both joint sessions and private caucuses held. Confidentiality is governed by Fed. R. Evid. 408. After the conference, only a minute order is filed indicating whether settlement occurred. Since January 1, 1994, the magistrate judges have conducted settlement conferences in hundreds of cases.

Other ADR. Parties may be ordered by the assigned judge to participate in other non-binding dispute resolution programs before a district or magistrate judge, such as summary jury trials and nonbinding arbitration. The court may also order parties to use nonbinding ADR procedures conducted by a nonjudge neutral. In such instances, the parties may be ordered to bear the reasonable costs incurred by the ADR process as allocated by the court.

Of note

Obligations of counsel. Attorneys must discuss ADR with each other and must address in their joint case management plan whether and how ADR should be used in their case.

Information from court. The court is preparing a booklet for federal court litigants that outlines ADR options and defines ADR terms. The parties and counsel will be required to sign an acknowledgment stating that they have read and understand the booklet.

Plans. The court will consider and experiment with any ADR proposals that appear to have merit.

For more information

Francis E. Dosal, Clerk of Court, 612-290-3944

Franklin L. Noel, U.S. Magistrate Judge, 612-290-3181

Northern District of Mississippi

IN BRIEF

Process summary

ADR generally. The CJRA plan in the Northern District of Mississippi, effective January 1, 1994, encourages use of ADR in appropriate cases. The judges are authorized to inquire about ADR at the initial case management conference, and counsel must be prepared to advise the court of their positions on ADR. Magistrate judges generally conduct the initial case management conference and usually make a finding on the record of whether ADR is appropriate. The clerk of court maintains a list of private ADR providers for cases referred to mediation and arbitration. If an ENE or settlement conference is considered appropriate, the court conducts the conference in the ordinary course of the case management conference or pretrial conference. Summary jury and bench trials, minitrials, and settlement weeks are also authorized by the plan.

Judicial settlement conferences. The magistrate judges routinely discuss settlement at the final pretrial conference and may initiate settlement discussions at earlier stages in the case if appropriate.

For more information

Norman L. Gillespie, U.S. Magistrate Judge and Clerk of Court, 601-234-1971

Southern District of Mississippi

IN BRIEF

Process summary

ADR generally. In its CJRA plan, effective January 1, 1994, the Southern District of Mississippi encourages ADR use in appropriate cases. The court has not established a formal ADR program but provides interested parties with information about ADR resources in the community.

Judicial settlement conferences. The court has authorized mandatory settlement conferences. The initial settlement conference is held at the case management conference. Counsel may request at any time thereafter that the magistrate judge assigned to the case schedule a settlement conference.

Of note

Obligations of counsel. Attorneys must discuss ADR with opposing counsel and must be prepared to discuss ADR with the judge. Counsel are also required to discuss in their case management plan whether ADR would be suitable for their case and to demonstrate that they have discussed ADR with opposing counsel.

Information from court. The clerk's office maintains a list of ADR resources available in the community.

For more information

Alfred G. Nicols, Jr., U.S. Magistrate Judge, 601-965-4525

John Roper, U.S. Magistrate Judge, 601-432-8612

James C. Sumner, U.S. Magistrate Judge, 601-965-4292

Eastern District of Missouri

IN BRIEF

Process summary

Mediation. In the Eastern District of Missouri, the CJRA plan, effective January 1, 1994, and the court's General Order Pertaining to Alternative Dispute Resolution Procedures authorize mediation for most civil actions. See below.

Early neutral evaluation (ENE). Under the court's CJRA plan and its General Order Pertaining to Alternative Dispute Resolution Procedures, a judge may refer any civil case to early neutral evaluation. See below.

Other ADR. The court has used special masters for settlement in appropriate cases.

Judicial settlement conferences. On an ad hoc basis, the judges refer cases to settlement conferences.

Of note

Obligations of counsel. Attorneys must familiarize themselves with the court's ADR programs and be prepared to discuss ADR options with the judge. They must also discuss in the case management statement whether ADR is suitable for their case.

Information from court. The court encourages attorneys to familiarize themselves with its General Order Pertaining to Alternative Dispute Resolution Procedures. The court also provides an ADR procedures manual.

For more information

Sherry Compton, DCM/ADR Coordinator, 314-539-7589

Jim Woodward, Chief Deputy Clerk, 314-539-7363

IN DEPTH

Mediation in Missouri Eastern

Overview

Authorization and description. The Eastern District of Missouri's CJRA plan, effective January 1, 1994, and its General Order Pertaining to Alternative Dispute Resolution Procedures authorize the court's mediation program, an informal nonbinding dispute resolution process in which an attorney-neutral facilitates negotiations among the parties to help them reach a settlement. The program became operational on October 17, 1994. Most civil case types are eligible for referral to mediation, which may be ordered sua sponte by the judge, at the request of one party, or on stipulation of all parties. Any civil action may be referred to mediation, but the court generally will not select cases that are typically resolved without a hearing.

Number of cases. Between mid-October 1994, when the program became operational, and mid-December 1994, three cases were referred to mediation.

Case selection

Eligibility of cases. Most civil cases are eligible for referral to mediation. Particularly suitable are personal injury, products liability, and routine diversity cases; disputes involving long-term relationships; and environmental and regulatory disputes.

The court does not refer to mediation cases that would ordinarily be resolved without a hearing: appeals from rulings of administrative agencies, habeas corpus and extraordinary writs, bankruptcy appeals, Social Security cases, and prisoner civil rights cases. Cases that may also be considered unsuitable include those involving substantial issues of public policy, multiple parties, or esoteric or unsettled legal issues.

Referral method. Cases may be referred to mediation by the court on its own motion, on the motion of any party, or by stipulation of the parties. The court enters an order of referral, which includes a maximum number of days in which the parties must conclude the ADR process.

Opt-out or removal. The mediator may terminate the mediation session if the case seems inappropriate for mediation.

Scheduling

Referral. Referral may be made at any time appropriate to the case but normally occurs at the Rule 16 conference.

Written submissions. Seven days before the first meeting or conference, each party must provide the mediator and serve on all parties a summary of disputed facts and a discussion of its position on liability and damages. These documents are not court documents and are not filed in the record of the case.

Mediation session. The order of referral includes a maximum number of days in which the parties must complete the mediation process. The designated lead counsel is responsible for coordinating the date, time, and location of the initial conference, in consultation with the mediator and parties. Parties are entitled to at least fourteen days' notice of the first conference. Subsequent sessions are scheduled by the mediator in consultation with the parties. If the parties request that the conference be held in the courthouse, the clerk will make space available.

Number and length of sessions. The number and duration of the mediation sessions are determined by the mediator in consultation with the parties.

Program features

Discovery and motions. Unless otherwise ordered by the court, referral to mediation does not suspend other action in the case, and no scheduled dates for submissions or other pretrial events may be delayed or deferred, including the date of trial.

Party roles and sanctions. Unless excused by the judge, the attorney primarily responsible for the case must attend the mediation conference. Parties and corporate representatives and insurers who have authority to settle must also attend. Willful or negligent failure to attend must be reported to the court by the mediator in a compliance report, and sanctions may be imposed by the assigned judge. The judge may also impose sanctions for the failure of a party, its representatives, or counsel to proceed or participate in good faith in any other aspect of the mediation process.

Mediator's assessment report. A mediator is not required to provide the parties with written recommendations but may, at his or her discretion, offer an assessment report and a recommended settlement. This report may not be filed with the clerk or provided to the judge, but counsel must transmit it promptly to their clients.

Outcome. If the session concludes without settlement of any part of the case, the mediator must promptly file a written certification with the clerk, indicating whether there has been compliance with the judge's referral order. If the parties reach an agreement, a written settlement or a stipulation signed by all parties and counsel is filed with the court, and a copy is sent to the mediator within fourteen days of the last session.

Confidentiality. The mediation session is private. All written and oral communications made or disclosed to the mediator are confidential and may not be disclosed by the mediator, any party, or any other participant unless agreed on in writing. The mediator may not be called as a witness in any proceeding by any party or the court.

Neutrals

Qualifications and training. A candidate may be certified by the court as a neutral if he or she (1) has been admitted to the bar of the highest court of any state or the District of Columbia for at least five years and is a member in good standing, and (2) has completed a training course sponsored by the district court or a training program of at least sixteen hours provided by any sponsor accredited under Missouri Supreme Court Rule 15.04. In exceptional circumstances, an individual who does not meet these criteria may be approved for appointment to a particular case with the consent of the parties and the court.

Selection for case. Within ten days of the entry of order of referral to mediation, the parties must select a mediator from the court's list of certified neutrals and notify the clerk in writing of their choice. If they cannot agree, the clerk selects the mediator. In consultation with the parties, the judge may also appoint a person from the list who has special subject matter expertise or designate a mediator who is not on the list. The clerk sends notice of appointment to the mediator.

Disqualification. 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.

Immunity. Immunity is not provided in the rules, but neutrals on the court's panel have been advised of the holding in *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 cost of the mediator's service is borne equally by the parties at the rate or fee stated in the mediator's fee schedule. The court reserves the right to review the reasonableness of the fee and to enter an order modifying it. A party may obtain appointment of a mediator who has agreed to serve pro bono if the party demonstrates to the judge a financial inability to pay a fee. The list of certified neutrals maintained by the clerk indicates which neutrals have agreed to serve pro bono.

Program administration

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

Early Neutral Evaluation in Missouri Eastern

Overview

Description and authorization. The Eastern District of Missouri's CJRA plan, effective January 1, 1994, and its General Order Pertaining to Alternative Dispute Resolution Procedures authorize the court to refer civil cases to ENE in the early pretrial period for a nonbinding assessment by an experienced neutral-evaluator. The court may refer any civil case in which the judge believes the parties are likely to benefit from such a referral. The judge may order a referral to ENE sua sponte or at the request of one party.

The objective of ENE in this district is to promote early and meaningful communication, enable parties to plan their case effectively, and inform parties of the relative strengths and weaknesses of their positions. While this confidential environment provides an opportunity to negotiate a resolution, immediate settlement is not a primary purpose of this process.

Number of cases. The early neutral evaluation procedure became operational on October 17, 1994. No referrals had been made as of December 12, 1994.

Case selection

Eligibility of cases. The court may refer to ENE any civil case in which the judge believes the parties would be assisted by such a procedure. No cases are categorically excluded.

Referral method. At the initial scheduling conference, the court may order referral of a civil case to ENE on its own motion or on the motion of any party, if the case is one in which the judge believes all parties are likely to benefit from such referral.

Opt-out or removal. The neutral may terminate the session if the case appears inappropriate for ENE.

Scheduling

Referral. Referral occurs at the initial Rule 16 scheduling conference.

Written submissions. Seven days before the first meeting or conference each party must provide the neutral and serve on all parties a memorandum presenting a summary of disputed facts and a narrative discussion of its position relative to both liability and damages. These documents are not court documents and are not filed in the record of the case.

ENE session. The order of referral includes a maximum number of days in which the parties must conclude the ENE process. The designated lead counsel is responsible for consulting with the neutral and the parties and coordinating the date, time, and location of the initial conference. Parties must be given at least fourteen days' notice of the first conference. Subsequent sessions are scheduled by the neutral in consultation with the parties. If a party requests that the conference be held in the courthouse, the clerk will make space available.

Number and length of sessions. The number and duration of ENE sessions are determined by the neutral in consultation with the parties.

Program features

Discovery and motions. Unless otherwise ordered by the court, referral to ENE does not suspend other action in the case, and no scheduled dates for submissions or other pretrial events may be delayed or deferred, including the date of trial.

Party roles and sanctions. Unless excused by the judge, the attorney primarily responsible for the case, the parties, and corporate representatives and insurers must attend the ENE session. Willful or negligent failure to attend must be reported in a compliance report filed with the court by the neutral-evaluator. The judge may impose sanctions. The judge may also impose sanctions for any other failure of a party, its representatives, or counsel to proceed or participate in the ENE process in good faith.

Evaluator's assessment report. The evaluator is not obligated to provide the parties with written recommendations but may at his or her discretion offer an assessment report and a recommended settlement. This report may not be filed with the clerk or provided to the judge, but counsel are required to transmit it promptly to their clients.

Outcome. If the session concludes without settlement of any part of the case, the neutral files a written certification with the clerk indicating whether the parties complied with the judge's referral order. If the parties reach an agreement, a written settlement or a stipulation signed by all parties and counsel is filed with the court and a copy is sent to the neutral within fourteen days of the last conference. If referral to ENE results in decisions or agreements by the parties regarding case planning, the parties must file their plan with the court for approval and provide a copy to the neutral.

Confidentiality. The ENE session is private. All written and verbal communications made or disclosed to the neutral are confidential and may not be disclosed by the neutral, any party, or any other participant unless agreed on in writing. The neutral may not be called as a witness in any proceeding by any party or the court.

Neutrals

Qualifications and training. A candidate may be certified by the court as a neutral if he or she (1) has been admitted to the bar of the highest court of any state or the District of Columbia for at least five years and is a member in good standing, and (2) has completed a training course sponsored by the district court or a training course of at least sixteen hours provided by any sponsor accredited under Missouri Supreme Court Rule 15.04. In exceptional circumstances, an individual who does not meet these criteria may be approved for appointment to a particular case if the parties consent and if ordered by the court.

Selection for case. Within ten days of the entry of order of referral to ENE, the parties must agree on and notify the clerk in writing of their choice of a neutral from the court's roster. If the parties cannot agree, the clerk selects the neutral. The judge may also, in consultation with the parties, appoint a person from the roster who has special subject matter expertise or designate a neutral who is not on the list. The clerk sends a notice of appointment to the neutral.

Disqualification. A neutral 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.

Immunity. Immunity is not an element of the program, but neutrals have been advised of the holding in *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 cost of the neutral's service is borne equally by the parties at the rate or fee stated in the neutral's fee schedule. The court reserves the right to review the reasonableness of the fee and to enter an order modifying it. A party may obtain appointment

of a neutral who has agreed to serve pro bono if the party demonstrates to the judge a financial inability to pay a fee. The list of certified neutrals maintained by the clerk indicates which neutrals have agreed to serve pro bono.

Program administration

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

Western District of Missouri

IN BRIEF

Process summary

Early assessment program (EAP). The Western District of Missouri is one of five demonstration districts designated by the Civil Justice Reform Act. The Act directs the district to experiment with various methods for reducing litigation costs and delay, including ADR. In response, in the spring of 1992, the court established the Early Assessment Program, an experimental program for early case evaluation and settlement. The purpose of the program is to assist parties in selecting one of the court's nonbinding ADR processes, which include mediation with an attorney-neutral, ENE, nonbinding arbitration, settlement conference with a magistrate judge, and summary jury trial. Alternatively, parties may choose to mediate their case with the EAP program administrator.

Listed below are the different forms of ADR offered as part of the Early Assessment Program, along with the number of cases referred to each type. Altogether, between January and September 1994, 147 cases were automatically referred to the EAP program; litigants in an additional 66 cases requested referral to the program. See below.

Mediation. Mediation may occur as part of the first early assessment session, in which case it is conducted by the EAP administrator, or as a follow-up to the initial session. If conducted as a follow-up, the parties may choose the EAP administrator as mediator, or they may select an attorney from the court's roster of certified neutrals. If the parties select the EAP administrator as mediator, no fees are incurred. If a neutral from the court's roster is selected, the parties pay the neutral at his or her established professional rate. Between January and September 1994, 142 of the 147 cases that were automatically referred to the EAP program selected mediation.

Early neutral evaluation (ENE). When parties select ENE as their ADR process, they may select a neutral-evaluator from the court's roster of certified neutrals or, with consent of the EAP administrator, from the private sector. In this court, ENE serves primarily as a settlement vehicle rather than as a method for case planning. Between January and September 1994, four of the cases automatically referred to the EAP program selected early neutral evaluation.

Arbitration. Under the court's arbitration procedures, a single arbitrator who is selected by the parties from the court's roster or another source presides at the hearing. The arbitrator's decision becomes a nonappealable, final judgment of the court unless a timely appeal is filed by a party. No fees are required to request a trial de novo. The

court's arbitration program was first established in 1985 and is authorized by 28 U.S.C. §§ 651–658, which designates the district as one of the ten pilot courts for mandatory nonbinding arbitration. The mandatory program is no longer in effect, having been replaced by the Early Assessment Program. Between January and September 1994, one of the cases automatically referred to the EAP program selected arbitration.

Summary jury trial and other ADR processes. The general order authorizing the EAP also broadly authorizes the use of other forms of ADR, including summary jury trial, minitrial, binding arbitration, or other “hybrid form[s] of alternative dispute resolution.” These ADR processes are seldom used. If the EAP administrator approves, litigants may select a private provider of ADR services not included on the court's roster of neutrals.

Magistrate judge settlement conference. Another option under the EAP is a settlement conference with a magistrate judge. The conference is confidential and informal and may include, with party agreement, private discussions or caucuses between the magistrate judge and each side. The purpose of the conference is “to permit an informal discussion between the lawyers, parties, and the magistrate of every aspect of the lawsuit, thus permitting the magistrate privately to express his or her views concerning the actual dollar settlement value or other reasonable disposition of the case” (EAP General Order, Section VII.B.4). Cases not referred to the EAP may also be referred to the magistrate judges for settlement conferences. In these cases, referral usually occurs after discovery is complete.

Of note

Obligations of counsel. Counsel in cases assigned to the Early Assessment Program must discuss the court's ADR options with their clients, opposing counsel, and the judge assigned the case.

Evaluation. The court's mandatory arbitration program was included in the Federal Judicial Center's evaluation of the ten mandatory arbitration programs, Barbara Meierhoefer, *Court-Annexed Arbitration in Ten District Courts* (Federal Judicial Center 1990). The Early Assessment Program is monitored on an ongoing basis by the court's EAP administrative and systems staff. As a demonstration district under the CJRA, the Western District of Missouri is also 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

Kent Snapp, Administrator, Early Assessment Program, 816-426-3060

IN DEPTH

Early Assessment Program in Missouri Western

Overview

Description and authorization. As a demonstration district under the Civil Justice Reform Act, the Western District of Missouri has established an experimental ADR program to encourage early case evaluation and settlement. The program was implemented in the spring of 1992 in the Kansas City Division and is called the Early Assessment Program (EAP). One-third of all eligible civil cases are randomly assigned to mandatory

participation in the Early Assessment Program. Another one-third of eligible civil cases are invited to participate, and the remaining one-third are excluded from participation as a research control group. The court adopted the random assignment system to provide the comparison groups needed to evaluate the effects of the EAP program. Program details are set out in the court's General Order Regarding the Early Assessment Program.

In cases referred to the EAP, counsel and parties are required to meet with the EAP administrator within thirty days of filing responsive pleadings to pursue early assessment and settlement of their case. The goals of the program are to improve party-to-party communication, assess the case and its management needs early, attempt early solution of the case through facilitated negotiation, and help litigants select a nonbinding ADR process from the district's ADR menu. As originally conceived, the initial early assessment session was to be followed by a mandatory referral to an ADR process of the parties' choice—mediation, ENE, nonbinding arbitration, settlement conference with a magistrate judge, and summary jury trial. In practice, almost all cases have remained with the EAP administrator for further settlement assistance, with the mediation session often occurring at the initial assessment session. There is no fee for the administrator's services, whereas if parties use a neutral from the court's roster, they must pay the neutral's fees.

Trial counsel and parties with full settlement authority must attend the early assessment session. The facts and law of the case are discussed by the parties in joint session, and then the EAP administrator meets separately with each side in confidential sessions. Any discovery or other problems inhibiting early case evaluation are identified, possible solutions are discussed, and facilitated negotiations are started. If limited discovery is needed for assessment or settlement, or if additional time is advisable for other reasons, a second meeting is scheduled. An average of 1.6 meetings are held per case. Parties are required to attend all scheduled EAP meetings unless the EAP administrator determines otherwise.

Number of cases. Between January and September 1994, 147 cases were automatically referred to the EAP. Litigants in an additional 66 cases requested entry into the program. Almost all cases were mediated by the program administrator, with a few cases choosing ENE, mediation, or arbitration conducted by a neutral selected from the court's roster.

Case selection

Eligibility of cases. Almost all newly filed civil cases are randomly placed in one of three categories. One-third of the cases are assigned to the EAP and are required to attend an early assessment meeting with the program administrator. One-third are invited to participate in the EAP if all parties consent. The remaining one-third of the cases are a control group and are not allowed to participate in the program.

The following case types are not eligible for assignment to the EAP: multidistrict cases, Social Security appeals, bankruptcy appeals, habeas corpus actions, class actions, student loan cases, prisoner pro se cases, and other pro se cases in which a motion for appointment of counsel is pending.

Referral method. At filing, cases randomly designated for automatic inclusion in the Early Assessment Program are sent a notice of inclusion. On filing of responsive pleadings, cases eligible to volunteer for the program are sent an invitation to participate. At

the initial EAP session, parties in the automatic referral group must choose some form of ADR, which may be conducted by the EAP administrator (if it is mediation) or a court-certified neutral (for any form of ADR). Parties voluntarily participating in the EAP may choose, after the first session, to discontinue their efforts or to stay in the program. If they stay in the program, they may select any form of ADR, including mediation with the EAP administrator or any process conducted by an attorney-neutral.

Opt-out or removal. Parties may request removal from automatic inclusion in the EAP by letter to the EAP administrator within ten days of receiving the notice of inclusion. An appeal of the EAP administrator's decision to the assigned district judge is permitted. Withdrawal is granted when the EAP administrator or the judge believes that ADR cannot help the case.

Scheduling

Referral. The parties must make their ADR selection at the first early assessment meeting, which is scheduled within thirty days of filing responsive pleadings.

Written submissions. Parties are not required to submit any written statements before the EAP session. However, if parties select either arbitration or early neutral evaluation, the following requirements apply:

Arbitration: At least seven days before the hearing, each party must serve on all parties a list of all witnesses and depositions to be presented at the hearing, as well as copies of written exhibits. In addition, each party must submit a statement to the arbitrator summarizing claims, critical factual issues, and contested legal issues.

ENE: At least seven days before the evaluation session, each party must submit to the evaluator and all parties a statement of ten pages or less describing the facts and law, identifying disputed legal and factual issues, and indicating whether any early rulings or additional discovery would assist settlement. Counsel and parties attending the ENE session are also identified. Significant documents and other evidence may be attached.

EAP sessions. Early assessment meetings are held at the courthouse, and the first meeting is scheduled within thirty days of the filing of responsive pleadings. Generally, cases subject to the EAP must complete any follow-up sessions and limited discovery within 90 days of the first session. The goal is to dispose of the case, if possible, within 120 days of the filing of responsive pleadings.

For cases that select an ADR procedure other than mediation with the EAP administrator, the administrator helps the parties and the neutral set the date and location for the initial ADR session. For cases that select arbitration, the time frame for the arbitration hearing is set by the program administrator. Within ten days of selecting an arbitrator, counsel are required to file a report with the EAP administrator stating the agreed-on hearing date.

Number and length of sessions. The initial EAP session generally lasts from two and a half to three hours. The average number of sessions per case is 1.6 sessions.

Program features

Discovery and motions. All other case activities, including discovery and motion practice, must go forward during the early assessment process and any subsequent ADR processes.

Party roles and sanctions. In addition to counsel, parties with full settlement authority are required to attend the initial early assessment meeting. Party representatives with

full settlement authority must also attend any subsequent EAP sessions and ADR sessions (arbitration, mediation, or early neutral evaluation). If a party fails to make a good faith effort to participate in the initial assessment meeting or any subsequent meetings, or fails to comply with any other program requirements in accordance with the provisions and spirit of the court's general order authorizing the EAP, the assigned judge or the court may impose appropriate sanctions. To date, none have been requested.

Outcome of ADR sessions. Within ten days of the conclusion of any ADR session, the neutral must file a report with the EAP administrator stating whether all required parties were present and whether or not the case settled. In all cases subject to the EAP, the program administrator notifies the assigned district judge when the case has completed the EAP process.

In cases that select arbitration, the arbitrator files a written award with the program administrator promptly after the hearing ends. The award becomes a final judgment unless a party files a statement of nonacceptance with the administrator within thirty days of the filing of the award. In cases involving multiple claims or parties, any part of the arbitration award not specifically rejected by a party becomes part of the final judgment of the court.

Confidentiality. In accordance with Fed. R. Evid. 408, any written or oral communication not under oath made in connection with this program may not be disclosed by the parties, their counsel, the neutrals, or any other participant in the program to anybody unrelated to the program. Further, communications made in connection with the program may not be used for any purpose, including impeachment of any witness or party in any pending or future proceeding in this court.

Communication between the program administrator or any other neutral and the assigned judge is authorized in limited circumstances. The administrator advises the assigned judge when a settlement has been reached and when he believes that the EAP process will not help the case. The administrator and neutrals may also bring to the attention of the assigned judge or the court en banc any noncompliance by parties or lawyers with this court's general order authorizing the EAP.

Neutrals

Qualifications and training. To be included on the court's roster of neutrals, a candidate must be either (1) a former federal judge or Missouri state judge with arbitration or mediation experience, or (2) a lawyer admitted to practice in the district, a current member of the Missouri bar, and a member of a state bar for at least eight years. In addition, all applicants for the court's roster must satisfy the court's training requirements. Those who want to be mediators or evaluators must complete sixteen hours of training in mediation and case evaluation certified under Missouri Supreme Court Rule 17 or by the district court, or a reasonable equivalent thereof. Arbitrator candidates must complete four hours of training certified under Missouri Supreme Court Rule 17, certified by the district court, or a reasonable equivalent thereof.

Selection for case. The program administrator, a court staff member with an extensive litigation background, hosts the initial EAP session and serves as mediator if the parties request.

For parties that choose to pursue ADR with a neutral other than the program administrator, the court has established a roster of court-certified mediators, arbitrators, and

evaluators. The parties may select any ADR neutral on the court's roster or, with the program administrator's approval, a neutral not on the court's list. If the parties cannot agree on a neutral, the administrator will give them a random listing of neutrals for striking. When the EAP administrator prepares a list of neutral candidates, he or she does not usually select the potential neutrals for their subject matter expertise.

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 by 28 U.S.C. § 455 if serving as a judge. Any party who believes that a neutral has a conflict of interest or should be disqualified must notify the EAP administrator immediately.

Immunity. The EAP administrator is presumed to have quasi-judicial immunity.

Fees. There is no fee when the EAP administrator serves as the mediator. The parties pay other neutrals at the rate set by the neutral and listed in his or her application with the court. The neutral's fees are borne equally by the parties.

Program administration

The EAP is directed by the program administrator, who reports to the district judges. The program administrator is assisted by a management analyst and a program secretary, both of whom are clerk's office employees operating under the supervision of the EAP administrator.

District of Montana

IN BRIEF

Process summary

Magistrate judge settlement conferences. Local Rule 235-5 provides that the district judge presiding in a case may, if a party requests in writing or on the judge's own initiative, order the parties to participate in a settlement conference convened by the court. This is the court's only formal settlement procedure.

The assigned judge has discretion to order a settlement conference, but the judge usually makes this determination in consultation with the parties. All civil cases, except Social Security cases, pro se prisoner petitions, and bankruptcy appeals, are eligible to participate. Settlement conferences are routinely scheduled in the case management plan authorized by the court's CJRA plan, effective April 1, 1992, and generally are held after discovery has been completed but far enough before trial to avoid the costs of trial preparation. A settlement conference may be held, however, at any time if the presiding judge, in consultation with counsel, determines that settlement is a realistic possibility.

The settlement conference is convened by a magistrate judge on direction of the district judge. The procedures used for the specific case are determined by the assigned magistrate judge. In general, the magistrate judge requires each party to submit a written overview of the case before the conference so the magistrate judge may become familiar with the case and the parties' settlement positions. These submissions, as well as any oral communications, are held in confidence by the magistrate judge. Every party

District of Nebraska

or a representative with full settlement authority must attend the settlement conference.

Of note

Obligations of counsel. Parties or their counsel, or both, are required to discuss settlement with the magistrate or district judge who presides at the initial scheduling conference.

Plans. The CJRA advisory group recommended against a court-wide ADR program, noting the efficiency of the magistrate judge settlement conferences and its support by the bench, bar, and litigants. The court will continue to assess the need for a court-wide ADR program.

For more information

Robert M. Holter, U.S. Magistrate Judge, 406-727-0028

Richard W. Anderson, U.S. Magistrate Judge, 406-657-6804

Leif B. Erickson, U.S. Magistrate Judge, 406-329-3386

District of Nebraska

IN BRIEF

Process summary

Mediation. Under its Mediation Plan, adopted January 9, 1995, the District of Nebraska has authorized mediation for civil cases. See below.

Of note

Evaluation. The clerk is charged with evaluating the effectiveness of mediation in each case and assessing party satisfaction, cost savings, and time savings. The clerk must report to the court annually on the effects of the mediation program.

For more information

Lyle E. Strom, Senior Judge, 402-221-3421

IN DEPTH

Mediation in Nebraska

Overview

Description and authorization. The District of Nebraska authorized use of mediation in civil cases pursuant to a general order and its *Mediation Plan*, which was adopted January 9, 1995. Under the program, which went into effect in June 1995, any district or magistrate judge may refer a case to mediation when the nature of the case and the amount in controversy make resolution by mediation a possibility. Party consent is not required. Cases are referred after the answer is filed and after consultation with the parties. All other proceedings in the case are stayed on referral to mediation. Cases are

referred to one of several mediation centers operated by the State of Nebraska Office of Dispute Resolution. At the mediation session, the parties may be required to present information to help the mediator understand the issues and the parties' interests. The mediator helps the parties by identifying issues, generating options, and proposing solutions, but he or she does not offer an evaluation of the legal merits of the case. Mediation proceedings are confidential. The fee, which is paid by the parties, is set by the mediation center handling the case, but is not more than \$100 an hour.

Number of cases. No information is available on the number of cases referred to the mediation process.

Case selection

Eligibility of cases. A case may be referred to mediation when the judge determines that the nature of the case and the amount in controversy, together with the information available regarding the possibility of settlement, make resolution of the case by mediation a possibility. Such cases may include, but are not limited to: employment cases in which the parties have not previously engaged in conciliation proceedings; cases involving policy or practice questions that lend themselves to negotiation regarding actions or procedures to be taken in the future; cases in which the litigation costs are high in relation to the amount in controversy; cases in which the amount in controversy is determined to be less than \$100,000; and cases in which the United States is a party and the parties to the litigation have not previously engaged in negotiations, work-out arrangements, or similar efforts. No case types are excluded from consideration for mediation.

Referral method. The assigned judge is authorized to refer any civil case to mediation after conferring with the parties and/or counsel. Party consent is not required. An order referring the case to the appropriate mediation center is issued by the judge.

Opt-out or removal. Any party may file an objection to the mediation referral within seven days of the court's order. If the party objects to a specific substantive matter or procedure, it must propose an alternative after discussing the matter with opposing counsel. Unless all parties agree to the proposal, the assigned judge will confer with counsel and/or parties to attempt to resolve the objection.

Scheduling

Referral. Cases are referred as soon as practicable after all defendants have answered the complaint.

Written submissions. There is no rule requiring written submissions. However, before the mediation session the mediator may ask counsel and/or the parties to provide information about the case, including material documents, exhibits and statements concerning the dispute, and information about any previous attempts to resolve it.

Mediation session. Within twenty days of the referral order, counsel must confer with the staff of the mediation center to schedule the mediation session. The mediation center sets the date, time, and location of the session, which must be held within sixty days of the order of referral or within ninety days if all parties agree to a continuance. Except as specifically provided by the court's *Mediation Plan*, mediation sessions must be conducted in accordance with the Nebraska Dispute Resolution Act (Neb. Rev. Stat. §§ 25-2901 to 25-2920).

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

Program features

Discovery and motions. The assigned judge stays all proceedings in the case pending the outcome of mediation.

Party roles and sanctions. All parties and counsel must attend the mediation session. Failure to attend may result in sanctions against the offending party and/or counsel.

Outcome. Within five days of the mediation session, the mediation center must report to the clerk whether the case settled and whether the fees for the mediation have been paid. If the case does not settle, the clerk notifies the assigned district or magistrate judge, who restores the case to the docket.

Confidentiality. All written or oral statements made only during the course of the mediation proceeding are confidential and are not admissible in evidence for any reason at trial should the case not settle.

Neutrals

Qualifications and training. An individual may be certified by the court to serve as a mediator if he or she has qualified under the requirements of the Nebraska Dispute Resolution Act; is an attorney in good standing in the state of Nebraska and the district court; has been admitted to practice law in any state for at least five years; and has completed at least fifteen hours of specialized training in mediating cases in federal court. Certification is effective for a period of five years, and a certified mediator is eligible for recertification for succeeding periods of five years. The court is offering training in mediation in cooperation with the Nebraska Office of Dispute Resolution.

Selection for case. The court maintains a list of certified mediators, which is made available to counsel and the public on request. The court also provides the list to the Nebraska Office of Dispute Resolution for use by its mediation centers. When a case is referred to a mediation center, the center selects a mediator from those certified by the federal court. In exceptional circumstances, an individual not certified by the court may be appointed to serve as mediator if the parties consent and the judge approves.

Disqualification. Mediators must meet the ethical standards established by the Nebraska Office of Dispute Resolution. In addition, a mediator: (1) must not have represented any of the parties in any previous matter; (2) must not be or have been affiliated with any firm or professional corporation or association that has represented any of the parties; (3) must not have any financial or other interest in any organization or entity that is a party or is related to a party; (4) must not hold any position, interest, or relationship to any party that might reasonably cause the mediator's impartiality to be questioned; (5) must not hold any personal interest, bias, or prejudice for or against any party; and (6) must not represent any of the parties for a period of at least six months following the mediation and after that may represent one of the parties only in a matter that is clearly distinct from the mediated issues. A mediator must withdraw if any of these requirements are not met or if any party so requests and makes a showing that the mediator does not meet these requirements or the court's standards for certification. Once the mediator withdraws, he or she may not act on behalf of any of the parties in the matter that was the subject of the mediation.

Immunity. The court has not addressed this issue.

Fees. The mediator is paid by the parties at a rate established in conjunction with the mediation center but not greater than \$100 an hour. The fee may be divided equally or

split in another way if the parties agree. If one or more of the parties is proceeding in forma pauperis, the mediation fees of that party may be paid from the Federal Practice Fund.

Program administration

The clerk's office administers the program.

District of Nevada

IN BRIEF

Process summary

Early case evaluation in prisoner cases (triage hearings). Under Local Rule 185, the court began an experimental ADR program in 1994 for in forma pauperis pro se prisoner cases. Under the program, called early case evaluation or triage hearings, summary hearings are held in selected cases before service of process, discovery, and motion practice occur. Cases are selected for the program by the assigned district or magistrate judge after a screening for frivolousness. The judge issues a minute order notifying parties of the mandatory referral and setting the time and place of the hearing. The evaluation hearings usually last about fifteen minutes. The prisoner is required to attend, usually by telephone, along with a representative of the state office of the Attorney General. The hearing is on the record.

The court reports that judges, pro se law clerks, attorneys in the Nevada office of the Attorney General, Nevada Department of Prison officials, and inmates have expressed satisfaction with the hearings. Between January and September 1994, approximately 75 cases were referred to the program.

Other ADR. Under 1992 revisions to Local Rule 185, judges in the district are authorized to set any appropriate civil case for summary jury trial or other form of ADR.

Magistrate judge settlement conferences. Local Rule 185 also authorizes use of magistrate judge settlement conferences, which are usually ordered by the assigned judge on a case-by-case basis.

Of note

Plans. The court and the district's CJRA advisory group are monitoring ADR developments in the courts nationally to determine whether additional ADR initiatives would be beneficial to litigants in the district.

Evaluation. The Federal Judicial Center is currently conducting a study of the early case evaluation program in pro se prisoner cases.

For more information

Howard D. McKibben, U.S. District Judge, 702-784-5111

District of New Hampshire

IN BRIEF

Process summary

ADR generally. Although the District of New Hampshire declined, in its December 1, 1993, CJRA plan, to establish a formal ADR program because of existing workload and resources, the court promotes settlement efforts at every stage of a case and encourages parties to consider voluntary use of private ADR services. ADR use in the district requires consent of all parties. The summary jury trial has been used by some judges.

Judicial settlement conferences. Settlement is discussed at the final pretrial conference, which is held in all trial-ready cases. All judges are available to hold settlement conferences, either at their discretion or on request of counsel. In appropriate cases, the assigned judge will ask another judge to host the settlement conference.

Of note

Obligations of counsel. Counsel must be prepared to discuss the case's suitability for ADR with the assigned judge.

Information from court. The court's publication, *Provisional Handbook for Summary Jury Trial Proceedings*, describes the court's summary jury trial process.

Plans. The court will reconsider its approach to ADR annually and may consider offering litigants a menu of ADR options, including neutral evaluation, mediation, non-binding arbitration, binding arbitration, summary jury trial, and minitrial.

For more information

James R. Starr, Clerk of Court, 603-225-1423

District of New Jersey

IN BRIEF

Process summary

Arbitration. New Jersey is one of the ten districts authorized by 28 U.S.C. §§ 651–658 to provide mandatory, nonbinding court-annexed arbitration in cases involving monetary claims only of \$100,000 or less. Under General Rule 49, eligible cases are automatically referred to arbitration. See below.

Mediation. Under its CJRA plan, effective December 31, 1991, and General Rule 49, the District of New Jersey has established a mandatory mediation program targeted at complex civil cases. See below.

Other ADR. Consensual use of arbitration, mediation, minitrial, summary jury trial, and summary bench trial are also authorized by General Rules 47 and 49. Between January and September 1994, several cases were referred to mediation and arbitration at the request of the parties.

Judicial settlement conferences. Mandatory settlement conferences with judges are an established settlement method of the court.

Of note

Obligations of counsel. Attorneys are required to discuss ADR options with their clients and each other, address the case's ADR suitability in their case management statement, and be prepared to discuss ADR's use in the case with the assigned judge.

Information from court. The court has prepared two publications—*Guidelines for Arbitration* and *Guidelines for Mediation*—to explain the court's programs to counsel and clients. The judges also frequently participate in bench-bar programs to discuss the court's ADR programs.

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). The court's Lawyers Advisory Committee also conducted a survey of arbitrators in 1993; the results are available from the court. The court has not conducted any formal evaluation of its mediation program, but it routinely sends questionnaires to attorneys and parties who participate in the process.

For more information

Ronald J. Hedges, U.S. Magistrate Judge, 201-645-2247 or 3827

IN DEPTH

Arbitration in New Jersey

Overview

Description and authorization. New Jersey 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. Parties may also elect to use arbitration by consent. Cases are automatically referred to arbitration at the time the complaint is filed, and the arbitration hearing is held after discovery is completed. A single arbitrator presides and is compensated by the court at court-set fees. The program, which is governed by the district's General Rule 47, was implemented in March 1985 and is described for litigants and counsel in the court's pamphlet, *Guidelines for Arbitration*.

Number of cases. Between January and September 1994, approximately 1,235 cases were referred to arbitration.

Case selection

Eligibility of cases. Eligible cases are those involving money damages only of \$100,000 or less, exclusive of interest, costs, and claims for punitive damages. Parties may also consent to arbitration in any civil action regardless of the amount in controversy. Excluded from arbitration are constitutional claims, tax refund actions, and Social Security actions.

Referral method. All eligible cases are automatically referred to mandatory arbitration when complaints are filed. Parties are notified of the referral by written notice from the clerk's office, and the arbitration referral is discussed at the initial case management conference. Parties in cases not eligible for automatic referral may elect to use arbitration by consent.

Opt-out or removal. A party may request, at filing or subsequently by motion, that an otherwise eligible case be excluded from arbitration. The assigned district or magistrate

judge may also exempt a case from arbitration sua sponte or on the recommendation of the arbitrator if the matter involves complex or novel legal issues, if legal issues predominate over factual issues, or for other good cause.

Scheduling

Referral. Eligible cases are automatically referred to mandatory arbitration at the time the complaint is filed.

Discovery and motions. Discovery is permitted for the period specified in the scheduling order entered by the assigned district or magistrate judge in every case. If timely filed dispositive motions are pending at the time of the arbitration hearing, a party or parties may request that the arbitration hearing be postponed until the motion is decided.

Written submissions. Before the arbitration hearing, the clerk sends the arbitrator all the pleadings, and each counsel provides the arbitrator and adverse counsel with copies of all exhibits.

Arbitration hearing. Arbitration hearings are held at the courthouse, and logistical arrangements are made by court staff. Hearings are conducted after discovery and dispositive motion practice is completed.

Length of hearing. Hearings generally last about three hours.

Program features

Party roles and sanctions. In addition to counsel, all parties, corporate representatives, and any other necessary claims professionals with full settlement authority are required to attend the hearing. Local rules authorize sanctions for noncompliance with arbitration procedures, but noncompliance is exceedingly rare.

Filing of award. A written award is filed by the arbitrator within thirty days of the hearing. The award is not docketed or entered as a judgment until the time period for demanding a trial de novo has expired.

De novo request. A party requesting a trial de novo must do so within thirty days of the filing of the arbitration award. When requesting a trial de novo, the moving party must deposit \$150 with the clerk. The sum is returned if the party obtains a final judgment more favorable than the arbitration award or if the court determines, pursuant to a timely motion, that the demand for trial de novo was made for good cause.

Confidentiality. Neither the clerk nor any party or attorney may disclose the contents of the arbitration award to any judge to whom the action is or may be assigned. Contact between the arbitrator and the assigned judge is not permitted, except in instances of noncompliance with arbitration procedures.

Neutrals

Qualifications and training. To serve as an arbitrator, attorneys must have practiced law at least five years, be admitted to the bar in the district, be recommended by the court's committee on arbitration, and be determined by the chief judge to be competent to perform the duties of an arbitrator. In practice, the panel of approximately 150 certified arbitrators has an average of fifteen to twenty years of federal litigation experience. No training is required to serve on the court's panel of arbitrators.

Selection for case. The court assigns one attorney, selected randomly from the court's roster, to serve as arbitrator.

Disqualification. After receiving notice of appointment, the arbitrator is required

under General Rule 47 to inform all parties in writing whether the arbitrator, or any firm or member of any firm with which he or she is affiliated, has (either as a party or 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 a party.

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 under 28 U.S.C § 455 to disqualify themselves if they were a justice, judge, or magistrate judge.

Immunity. Immunity is not addressed in the court rules.

Fees. The court sets and pays the arbitrator's fee, which is currently \$250 per case. If parties use arbitration by consent, they must pay the arbitrator's fee.

Program administration

The arbitration program is administered by the clerk's office. Problems arising in specific cases are handled by the assigned district or magistrate judge.

Mediation in New Jersey

Overview

Description and authorization. The District of New Jersey established a mandatory mediation program for complex cases under the district's CJRA plan, effective December 31, 1991. The plan authorizes the assigned judge to refer civil cases to mediation at any time during the litigation. Judges may refer cases sua sponte or with party consent. There is no limit on the number of cases judges may refer with party consent, but they are permitted to refer only two complex cases to the program at any one time sua sponte. Attorney-mediators, trained and selected by the court, serve without compensation for the first six hours of service. Thereafter, the parties share the mediator's court-set fee of \$150 an hour.

The mediation program is governed by General Rule 49 and is described for litigants and counsel in the court's pamphlet, *Guidelines for Mediation*. Mediation began as an experimental program in the spring of 1992, but it became a permanent court-wide program in November 1993.

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

Case selection

Eligibility of cases. The mandatory mediation program was established for complex cases, designated as Track II cases by the court, such as complex patent and environmental cases. All civil case types, however, are eligible for referral to mediation. No civil case types are excluded by rule from participation.

Referral method. The assigned judge may refer any case to mediation on his or her own initiative. Only two complex cases may be referred to mediation by a judge without party consent at any time. There are no per-judge limits on referrals made with party consent. When a case is referred to mediation, an order of referral is entered.

Opt-out or removal. Court rules do not provide a mechanism for removing a case from referral to mediation.

Scheduling

Referral. A case may be referred to mediation at any time in the litigation.

Written submissions. Parties submit a position paper of ten pages or less to the mediator. Other essential papers may be appended, but pleadings are not submitted unless requested by the mediator.

Mediation session. Logistical arrangements for the mediation session are made jointly by the mediator and the parties. The mediation session can be held at any convenient location. The mediation process must generally be concluded within sixty days of the referral date.

Number and length of sessions. The number and length of mediation sessions vary depending on the case.

Program features

Discovery and motions. When a case is referred to mediation, all proceedings, including pretrial motions and pursuit of discovery, are stayed for a sixty-day period. To extend the stay, the parties and the mediator must apply jointly. The district's *Guidelines for Mediation* states that the purpose of the stay is to give parties a reasonable period of time to reach settlement. If it appears unlikely that settlement will be reached before the stay expires, the mediator may ask that the case be restored to the active calendar.

Party roles and sanctions. The mediator may order the parties to attend the mediation session. 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. Nothing is filed with the court at the conclusion of the mediation process.

Confidentiality. All information presented to the mediator is, if a party requests, held confidential and may not be disclosed by anyone, including the mediator, without consent except as necessary to advise the court of an apparent failure to participate. The mediator may not be subpoenaed by any party. Statements made and documents prepared for mediation may not be disclosed in any subsequent proceeding or construed as admissions. No communication between the neutral and the assigned judge is permitted.

Neutrals

Qualifications and training. To qualify as a mediator, a lawyer must be a member of the New Jersey state bar for at least five years, be admitted to practice in the district, be deemed competent to serve as a mediator by the chief judge, and have satisfactorily completed the training program offered by the court. The court's mediation training consists of two days (sixteen hours) of lectures, simulations, and role play exercises.

Selection for case. In a mandatory referral to mediation, the compliance judge selects the mediator from the court's roster. In appropriate cases, two co-mediators may be appointed. When parties consent to mediation, they may select a neutral from the court's roster or from any other source.

Disqualification. General Rule 49B addresses mediator conflicts of interest and provides:

1. A mediator must disclose to the parties and to the compliance judge any current, past, or future representation or consulting relationship with or pecuniary interest in any party or attorney involved in the mediation.
2. A mediator must disclose to the parties any close personal relationship or other circumstance that might reasonably raise a question as to the mediator's impartiality.

3. The burden of disclosure rests on the mediator. All such disclosures must be made as soon as practical after the mediator becomes aware of the interest or the relationship. After appropriate disclosure, the mediator may serve if all parties so desire. If the mediator believes or perceives that there is a clear conflict of interest, the mediator must withdraw irrespective of the expressed desires of the parties.

4. In no circumstance may a mediator represent any party in any matter during the mediation.

5. A mediator may not use the mediation process to solicit, encourage, or otherwise incur future professional services with any party.

Immunity. The question of mediator immunity is not directly addressed by the mediation procedures, but General Rule 49A.3 provides that “[e]ach mediator shall, for the purpose of performing his or her duties, be deemed a quasi-judge of the Court.”

Fees. Mediators serve without compensation for the first six hours of service; thereafter parties equally share the mediator’s court-set fee of \$150 an hour. The mediator has the discretion to extend the mediation beyond the initial six hours.

Program administration

The mediation program is administered by the compliance judge designated by the court.

District of New Mexico

IN BRIEF

Process summary

Magistrate judge settlement conferences. Mandatory settlement conferences with the magistrate judge assigned to the case are held in all civil cases, except prisoner petitions, contract recovery cases, and Social Security appeals. The settlement conferences are generally held near the close of discovery and are confidential. At the request of the assigned judge, a magistrate judge other than the one assigned to the case or another district judge will conduct the settlement conference. Between January and December 1994, approximately 300 cases participated in mandatory settlement conferences with the assigned magistrate judge.

Other ADR. Judges in the District of New Mexico have used summary jury trials, minitrials, and special masters as facilitators of settlement. In its CJRA plan, effective January 1, 1993, the court asks the district and magistrate judges to consider additional procedures that may lead to settlement, such as consensual arbitration, mediation, conciliation, and settlement conferences. The CJRA plan indicates that the court will establish a roster of attorney-neutrals to serve as mediators and arbitrators and recommends that the district and magistrate judges discuss ADR options with parties at the initial pretrial conference.

For more information

Contact the courtroom deputy for each judge.

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

Robert C. Heinemann, Clerk of Court, 718-330-2105

Gerald P. Lepp, ADR Administrator, 718-330-2944

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

Terry John Mitchell, Arbitration Clerk, 607-773-2756
Thomas Smith, CJRA Attorney, 315-448-0595

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

George O'Malley, CJRA Staff Counsel, 212-637-0136, ext. 5407

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

Rachel Brody Bandyck, CJRA Attorney, 716-263-6719

Susan M. Oogjen, Arbitration Clerk, 716-263-6719

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-

tribunal 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

Western District of Pennsylvania

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 Krafska, *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.

District of Puerto Rico

IN BRIEF

Process summary

Magistrate judge settlement program (Mediation). Under the district's CJRA plan, as amended April 1995, the District of Puerto Rico has established an evaluative mediation program using magistrate judges as mediators. Under the program, any civil case on the court's standard or complex tracks may be referred to mediation by the assigned judge without party consent at any stage in the litigation. The assigned judge selects the judicial mediator, who may be a district, senior, or magistrate judge; a visiting judge; or a bankruptcy judge. The court expects that most mediation assignments will be handled by magistrate judges. Participating judges are trained in mediation. The program went into effect in the summer of 1995.

The initial mediation session must be held within ninety days of the referral. Shortly before the session, counsel are asked to submit to the judicial mediator short written statements about the case and key documents. At the initial session, the mediator explains the process, hears short presentations from each party, and asks open-ended questions to clarify positions and interests. The goal of the process is to develop a mutually acceptable resolution to the dispute. If complete agreement is not possible, the judicial mediator seeks partial agreements. The entire process is confidential; written materials are not filed with the court and are returned to the parties at the close of the mediation process. All other case activities, including motions and discovery, go forward during the mediation process.

Judicial settlement conferences. Settlement conferences are held by the assigned judges in most cases shortly before trial. As appropriate, the court may ask the parties to attend the conference in person or by telephone.

For more information

Francis Ríos de Morán, Clerk of Court, 809-766-6047

Lizabel Negrón, CJRA Staff Attorney, 809-766-5695

District of Rhode Island

IN BRIEF

Process summary

ADR program. Under its CJRA plan, effective December 1, 1993, the District of Rhode Island has adopted an ADR program designed to reduce the number of civil trials in the district. The plan, which was implemented on February 8, 1995, requires all civil litigants to participate in some form of settlement program offered by the court. Parties are automatically referred to and must participate in a magistrate judge settlement conference, unless they elect to use one of the court's alternative processes—early neutral

District of Rhode Island

evaluation, mediation, arbitration, summary jury trials, or summary bench trials. The court's ADR administrator helps litigants select an ADR procedure suited to their case. Program procedures are described in the court's Alternative Dispute Resolution Plan.

At filing, counsel receive a brochure describing the court's ADR and settlement program. Counsel in each civil case are required to discuss settlement and select one of the court's ADR or settlement options. Within thirty days of the filing of an answer, counsel must certify to the court that they have conferred with one another regarding the case and the court's ADR options. If counsel elect to participate in one of the ADR options, they must also make this selection within thirty days of the answer's filing. If they do not select an ADR process within this time frame, they are required to participate in a mandatory magistrate judge settlement conference within 120 days of the answer's filing.

The court's ADR program includes the following processes:

Magistrate judge settlement conferences. Under the court's ADR and settlement program, all civil cases must participate in a settlement conference with a magistrate judge unless the parties elect to use one of the court's other ADR options. The use of magistrate judges as settlement judges is a long-standing practice in the court. Approximately eighty cases were referred to magistrate judge settlement conferences between January and September 1994.

Magistrate judges are randomly assigned to cases but may be reassigned if potential conflicts of interest preclude service in a particular case. Settlement conferences take place within 120 days of the answer's filing. Within 10 days of the session, counsel must submit to the magistrate judge position statements of ten pages or less, relevant pleadings and motions, and other pertinent material. Parties or insurers with full settlement authority are required to attend the session with counsel. At the settlement conference, the magistrate judge works with the parties and their counsel to identify issues, facilitate settlement discussions, and if possible, resolve the dispute. The settlement conference process is confidential.

Arbitration. Under the district's ADR program, parties in any civil case may agree to select nonbinding arbitration as an alternative to a mandatory settlement conference with a magistrate judge. See below.

Mediation. Under the district's ADR program, parties in any civil case may agree to select mediation as an alternative to a mandatory settlement conference with a magistrate judge. See below.

Early neutral evaluation (ENE). Under the district's ADR program, parties in any civil case may agree to select ENE as an alternative to a mandatory settlement conference with a magistrate judge. See below.

Summary jury trial (SJT). The summary jury trial is recommended by the court for use in trial-ready cases for which other settlement efforts have failed. Earlier use in some cases is suggested where appropriate. The court's ADR plan contains general procedures for the SJT, which may be amended by the assigned judge as needed. The process is sometimes referred to as a minitrial.

Summary bench trial. Under the court's summary bench trial process, a district judge or magistrate judge presides over a summary hearing by parties and issues an advisory decision. Where appropriate, the procedures specified for the summary jury trial may apply. A judge other than the assigned trial judge presides. The process is sometimes referred to as a minitrial.

Of note

Obligations of counsel. In every civil case, counsel must meet to discuss the case and the possibility of settlement. Within thirty days of the filing of the answer, counsel must certify to the court that they have conferred in accordance with this requirement. Counsel must also be prepared to discuss the court's ADR requirements with the assigned judge at the initial Rule 16 conference.

Information from court. An ADR brochure describing the court's ADR and settlement program is distributed to all counsel and pro se parties at filing. Before the initial Rule 16 conference, parties also receive a notice and order regarding the Rule 16 conference and the court's ADR requirements.

Evaluation. The court plans to evaluate the ADR and settlement program quarterly.

For more information

Berry B. Mitchell, ADR Administrator, 401-528-5252

IN DEPTH

Arbitration in Rhode Island

Overview

Description and authorization. Under the court's CJRA plan, effective December 1, 1993, the District of Rhode Island has authorized arbitration as one of the court's ADR options. The court's ADR and settlement program, which was implemented February 8, 1995, requires all civil cases to participate in a settlement conference with a magistrate judge unless the parties select one of the court's ADR options. Parties in any civil case may, if they agree, select nonbinding, court-based arbitration. Parties may also agree to use binding arbitration but must request a referral to a private ADR provider. In the court-based program, the hearing is before a single arbitrator who is not compensated for the first hour of service. Parties must equally share the subsequent fee of \$150 per hour or less. Procedures for arbitration and the court's other ADR options are contained in the district's Alternative Dispute Resolution Plan.

Number of cases. Caseload information is not yet available.

Case selection

Eligibility of cases. All civil cases are eligible for arbitration. On a case-by-case basis, a case may be excluded from the district's ADR program by the assigned judge.

Referral method. Every civil litigant is required to select one of the court's ADR options or, alternatively, appear before a magistrate judge for a settlement conference within 120 days of filing the answer or a motion to dismiss. To elect arbitration, parties execute a form order referring the case to ADR and indicating their proposed ADR method. Within ten days of the referral order, parties must arrange a joint meeting with the ADR administrator to discuss the court's ADR plan, the facts and issues of the case, the proposed ADR method, and potential neutrals.

Opt-out or removal. A party may move to remove the case from arbitration. Once a case is removed, the parties may select another of the court's ADR options or notify the ADR administrator that settlement efforts have reached an impasse and request that the case be returned to the trial track.

Scheduling

Referral. Parties receive information about the court's ADR requirements before the initial Rule 16 conference and may, by execution of a form order, select arbitration before, during, or after the conference.

Discovery and motions. Deadlines for completing discovery and motions are established by the assigned judge. If a trial de novo is filed, no additional pretrial discovery may be taken without leave of court.

Written submissions. At least five days before the arbitration hearing, each party must submit to the arbitrator a set of relevant pleadings and a memo of ten pages or less stating the legal and factual positions of the party, together with copies of the documentary exhibits the party intends to offer at the hearing. At least five days before the hearing, each party must deliver to each other party a copy of the memo and exhibits provided to the arbitrator and must make available any nondocumentary exhibits for evaluation by the other party.

Arbitration hearing. The arbitration hearing must be held within thirty days of the date of the written notice of referral to arbitration and not more than 180 days from the date of filing the answer or a reply to a counterclaim. Hearing arrangements are made by the ADR administrator. The hearing may be held at any convenient location.

Length of hearing. No information is currently available about the average duration of arbitration hearings.

Program features

Party roles and sanctions. Parties must attend the arbitration session. When a party's interest is represented by an insurance company, an authorized representative of the insurance company with full settlement authority must attend. The absence of a party is not grounds for a continuance. Sanctions may be imposed by a district judge for failure to attend or comply with the process.

Filing of award. Within ten days of the hearing, the arbitrator must file the award with the ADR administrator, who transmits it to the clerk for filing in the appropriate case file and who serves copies on the parties. Unless a party files a request for trial de novo, the arbitration decision becomes the judgment in the case. The decision is public unless ordered sealed by the court.

De novo request. Parties seeking trial de novo must file a request within thirty days of the filing of the arbitration decision. The assigned judge may assess costs of the trial, as provided in 28 U.S.C. § 1920, against any party who demands trial de novo but fails to obtain a judgment, exclusive of interest and costs, that is substantially more favorable to the party than the arbitration award and who, in the judgment of the assigned judge, sought trial de novo in bad faith. This requirement does not apply to any case involving the United States or one of its agencies.

Confidentiality. The content of any arbitration award is confidential and will 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 otherwise 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. The assigned judge will not admit at the trial de novo any evidence that there has been an arbitration hearing or the nature or amount of the award.

Neutrals

Qualifications and training. Members of the court's panel of neutrals are nominated by the court's CJRA advisory group and confirmed by the judges for a three-year period; reappointment is approved if continued qualification is demonstrated. Persons appointed to the court's roster must be lawyers who have been admitted to the practice of law for at least ten years and who are currently members of the bar of the district. The panel may also include non-lawyers or lawyers with less than ten years of practice or who are not admitted in the district if they possess special or unique expertise in a particular field or have substantial experience or training in one of the dispute resolution options offered by the court and are certified by the court for inclusion on the panel. All persons appointed to the court's roster must undergo training as directed by the court.

Selection for case. The parties select an arbitrator from a list of three names drawn from the court's roster of arbitrators. If the parties fail to make a selection within ten days, the ADR administrator randomly selects the arbitrator from the list submitted to the parties. In appropriate cases, the parties may request neutrals with subject matter expertise.

Disqualification. If the arbitrator becomes aware of or if a party raises an issue about the arbitrator's neutrality because of some interest in the case or because of a relationship or affiliation with one of the parties or attorneys, the arbitrator must immediately disclose to the parties the relevant facts giving rise to the alleged conflict of interest. If a party requests the arbitrator to withdraw because of the disclosed facts, the arbitrator may withdraw, and the parties must select another arbitrator from a list provided by the ADR administrator. If the challenged arbitrator determines that withdrawal is unwarranted, the arbitrator may continue, subject to an appeal to the assigned judge, who may permit the arbitrator to continue or may remove the arbitrator.

Immunity. The court believes that arbitrators have absolute immunity when performing duties within the scope of their official tasks.

Fees. Arbitrators receive no compensation for the first hour of service. Thereafter, the parties are equally responsible for the arbitrator's compensation at a rate agreed to by the parties but not to exceed \$150 per hour.

Program administration

The ADR administrator manages all the dispute resolution processes offered by the court under the ADR plan except the magistrate judge settlement conferences. The ADR administrator is part of the clerk's office but reports directly to the chief judge.

Mediation in Rhode Island

Overview

Description and authorization. Under the court's CJRA plan, effective December 1, 1993, the District of Rhode Island established a mediation program as part of the court's ADR and settlement plan. The program was implemented February 8, 1995. As an alternative to a mandatory settlement conference with a magistrate judge, litigants in any civil case may agree to have their case referred to mediation with an attorney-mediator selected from the court's roster. In this confidential process, the mediator helps the parties identify underlying interests and reach a mutually acceptable resolution. Mediators are court-trained attorneys or other experts, selected by the parties and serving for no fee for the

first hour of mediation. Thereafter, the parties compensate the mediator at a rate of not more than \$150 an hour. Procedures for mediation and the court's other ADR options are contained in the district's Alternative Dispute Resolution Plan.

Number of cases. Caseload information is not available.

Case selection

Eligibility of cases. All civil cases are eligible for mediation, but a case may be excluded from mediation by the assigned district judge.

Referral method. Every civil litigant is required to select one of the court's ADR options or, alternatively, appear before a magistrate judge for a settlement conference within 120 days of filing the answer or a motion to dismiss. To elect mediation, parties file a form order referring the case to ADR and indicating their proposed ADR method. Within ten days of the referral order, parties arrange a joint meeting with the ADR administrator to discuss the court's ADR plan, the facts and issues of the case, the proposed ADR method, and potential neutrals from the court's roster.

Opt-out or removal. A party may move to remove the case from mediation. Once a case is removed, the parties may select another of the court's ADR options or notify the ADR administrator that settlement efforts have reached an impasse and request that the case be returned to the trial track.

Scheduling

Referral. Parties receive information about the court's ADR requirements before the initial Rule 16 conference and may, by execution of a form order, select mediation before, during, or after the conference.

Written submissions. At least five days before the mediation session, each party must submit a short confidential summary of the case to the mediator, describing the nature and history of the dispute, the applicable legal theory, and any settlement discussions. The party may identify individuals whose presence at the mediation would be helpful. The summaries are confidential and are not included in any court files or exchanged with opposing parties or the assigned judge.

Mediation session. After receiving notice of his or her selection, the mediator schedules the mediation session and notifies the parties and ADR administrator of the session's time, place, and date. Unless otherwise ordered by the court, the mediation session must be held within thirty days of receipt by the mediator of the notice of his or her designation as mediator in the case.

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

Program features

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

Party roles and sanctions. In addition to counsel, all parties with full settlement authority must attend the mediation session. When a party's interest is represented by an insurance company, a representative of the insurance company with full settlement authority must attend. Sanctions may be imposed by a district judge for failure to attend or to comply with the mediation process.

Outcome. At the conclusion of the mediation process, the mediator must report to the ADR administrator whether the case settled, and if it did not settle, whether other ADR processes might be appropriate.

Confidentiality. Proceedings in all of the court's ADR programs are confidential. Rule 408 of the Federal Rules of Evidence applies to information, statements, and evidence generated in the course of any of the ADR process and makes inadmissible any evidence of conduct or statements made, unless these are otherwise discoverable. All memoranda and other work products, including files, reports, interviews, case summaries, and notes prepared by the neutral, are not subject to disclosure in any subsequent civil proceeding involving any of the parties, nor may the neutral be compelled to disclose in any subsequent civil proceeding any communication made to him or her in the course of, or relating to the subject matter of, any of the ADR sessions.

Disclosures to the mediator in private caucuses are treated confidentially unless the parties give permission to the mediator to reveal the disclosed information to the other party. No transcripts or recordings are made of the session. At the end of the mediation session, the mediator destroys any notes made during the session.

Neutrals

Qualifications and training. Members of the court's panel of neutrals are nominated by the court's CJRA advisory group and confirmed by the judges for three-year terms; reappointment is approved if continued qualification is demonstrated. Panelists are lawyers who have been admitted to the practice of law for at least ten years and who are currently members of the bar of the district. The panel may also include other professionals, lawyers with less than ten years of practice, or lawyers not admitted to the district, if they possess special or unique expertise or training in one of the court's dispute resolution options. All people selected as neutrals must complete dispute resolution training prescribed by the court.

Selection for case. The parties select a mediator from a list provided by the ADR administrator. If they are unable to agree on a mediator within ten days of receiving the list, the ADR administrator randomly selects a mediator from the list. The ADR administrator notifies all counsel and the mediator of the selection.

Disqualification. If the mediator becomes aware of or if a party raises an issue about the mediator's neutrality, the mediator must immediately disclose to the parties the relevant facts giving rise to the alleged conflict of interest. If a party asks the mediator to withdraw, the mediator must withdraw and the parties must select another evaluator from the list provided by the ADR administrator.

Immunity. The court believes that mediators have absolute immunity when performing duties that are within the scope of their official tasks.

Fees. The mediator receives no compensation for the first hour of service. Thereafter the mediator is paid at a rate of \$150 an hour or less, as agreed to and shared by the parties.

Program administration

The ADR administrator manages all the dispute resolution processes offered by the court under the ADR plan, except the magistrate judge settlement conferences. The ADR administrator is part of the clerk's office but reports directly to the chief judge.

Early Neutral Evaluation in Rhode Island

Overview

Description and authorization. Under its CJRA plan, effective December 1, 1993, the District of Rhode Island has established an ENE program as part of the court's ADR and settlement plan. The program was implemented February 8, 1995. As an alternative to a mandatory settlement conference with a magistrate judge, litigants in any civil case may agree to have their case referred to early neutral evaluation with an attorney evaluator selected from the court's roster. Under the ENE program, parties meet with a neutral-evaluator within thirty days of their ADR election. The purpose of the session is to help parties and counsel focus the issues, organize discovery, prepare the case for trial, and, to the extent possible, discuss settlement of the case. The evaluator, who may meet in private caucuses with the parties if appropriate, provides an expert assessment of disputed legal and factual issues and an estimate of the perceived value of the case. Evaluators serve without compensation for the first hour. Thereafter, the parties share a fee of \$150 per hour or less. Procedures for early neutral evaluation and the court's other ADR options are contained in the district's Alternative Dispute Resolution Plan.

Number of cases. Caseload information is not yet available.

Case selection

Eligibility of cases. The parties in any civil case may select early neutral evaluation. Individual cases may be exempted from the court's ADR program or from ENE by the assigned district judge.

Referral method. Every civil litigant is required to select one of the court's ADR options or, alternatively, appear before a magistrate judge for a settlement conference within 120 days of filing the answer or a motion to dismiss. To elect ENE, parties must file a form order referring the case to ADR and indicating their proposed ADR method. Within ten days of the referral order, the parties must arrange a joint meeting with the ADR administrator to discuss the court's ADR plan, the facts and issues of the case, the proposed ADR method, and potential neutrals from the court's roster.

Opt-out or removal. A party may move to remove the case from ENE. Once a case is removed, the parties may select another of the court's ADR options or notify the ADR administrator that settlement efforts have reached an impasse and request that the case be returned to the trial track.

Scheduling

Referral. Parties receive information about the court's ADR requirements before the Rule 16(b) conference and may, by execution of a form order, select ENE before, during, or after the conference.

Written submissions. No later than ten days before the evaluation session each party must submit to the evaluator and other parties a written evaluation statement, not to exceed ten pages, which must identify the people, in addition to counsel, who will attend the session as a representative of the party with decision-making authority; identify legal or factual issues whose early resolution might reduce the scope of the dispute or contribute to settlement; and describe the discovery that is contemplated. In addition to a written evaluation statement, the parties must prepare to respond fully and candidly in a private caucus to questions from the neutral concerning the estimated

costs of litigation, witnesses, damages, and plans for discovery. The written evaluation statements are not filed with or revealed to the court.

ENE session. Unless otherwise ordered by the court, the ENE session must be held within thirty days of the neutral's notice of appointment and should be held within seventy-five days of filing the answer. The neutral schedules the session at a time and place convenient to the participants.

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

Program features

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

Party roles and sanctions. Each party must be represented at the session by the attorney expected to be primarily responsible for handling the trial of the case. Parties must attend the ENE session. When a party's interest is represented by an insurance company, an authorized representative of such party or insurance company with full settlement authority must attend. Willful failure of a party to attend the ENE conference must be reported to the assigned magistrate or district judge, who may impose appropriate sanctions.

Outcome. The evaluator must report in writing to the ADR administrator that the ENE process has been completed, any agreements reached, and the neutral's recommendation, if any, as to any other ADR processes that might assist in resolving the dispute. Any subsequent ADR referrals must be coordinated with the supervising district or magistrate judge.

Confidentiality. Proceedings in all of the court's ADR options are confidential. Rule 408 of the Federal Rules of Evidence applies to information, statements, and evidence generated in the course of any of the ADR processes and makes inadmissible any evidence of conduct or statements made, unless these are otherwise discoverable. All memoranda and other work products, including files, reports, interviews, case summaries, and notes prepared by the neutral are not subject to disclosure in any subsequent civil proceeding, nor may the neutral be compelled to disclose in any subsequent civil proceeding any communication made to him or her in the course of or relating to the subject matter of any of the ADR sessions.

Neutrals

Qualifications and training. Members of the court's panel of neutrals are nominated by the court's CJRA advisory group and confirmed by the judges for a three-year period; reappointment is approved once continued qualification is demonstrated. Panelists are lawyers who have been admitted to the practice of law for at least ten years and who are currently members of the bar of the district. The panel may also include other professionals, lawyers with less than ten years of practice, or lawyers not admitted in the district, if they possess special or unique expertise or training in one of the court's dispute resolution programs. All neutrals must complete dispute resolution training prescribed by the court.

Selection for case. After the parties have notified the ADR administrator of their selection of ENE, the administrator sends them a list of the court's neutrals. The parties must select a neutral within ten days of receipt of the list. If they fail to do so, the administrator randomly selects the neutral and notifies the parties and neutral of the selection.

District of South Carolina

Disqualification. If the evaluator becomes aware of or if a party raises an issue about the evaluator's neutrality because of some interest in the case or because of a relationship or affiliation with one of the parties or attorneys, the evaluator must immediately disclose to the parties the relevant facts giving rise to the alleged conflict of interest. If a party requests the evaluator to withdraw because of the disclosed facts, the evaluator must withdraw, and the parties must select another evaluator from the list provided by the ADR administrator.

Immunity. The court believes that neutrals have absolute immunity when performing duties within the scope of their official tasks.

Fees. The evaluator receives no compensation for the first hour of service. Thereafter, the parties are equally responsible for compensating the evaluator, at a rate agreed to by the parties but not to exceed \$150 per hour.

Program administration

The ADR administrator manages all the dispute resolution processes offered by the court under the ADR plan except the magistrate judge settlement conferences. The ADR administrator is part of the clerk's office administratively but reports directly to the chief judge.

District of South Carolina

IN BRIEF

Process summary

Mediation. Under Local Rule 30.00, adopted July 12, 1995, the District of South Carolina has established a voluntary mediation program. See below.

Settlement week mediation. The court experimented with settlement week mediation in the fall of 1993. Several hundred trial-ready cases in two divisions were set on a settlement week calendar, and local attorneys selected and trained by the court conducted the mediation sessions pro bono. Although parties were permitted to remove their cases from the settlement week process, few did so. Because of the procedure's effectiveness, the court established its new mediation program.

Summary jury trial. The court has experimented on occasion with the summary jury trial. Cases are generally referred after discovery has been completed.

Judicial settlement conferences. Some magistrate judges who handle pretrial discovery for the district judges also hold settlement conferences.

Of note

Evaluation. The court's mediation rule authorizes the clerk to collect statistical data from mediators and parties.

For more information

Larry W. Probes, Clerk of Court, 803-765-5789

IN DEPTH

Mediation in South Carolina

Overview

Description and authorization. On July 12, 1995, the District of South Carolina adopted Local Rule 30.00, which authorizes a voluntary mediation program. The process relies on attorney-mediators, whose role is to encourage and facilitate settlement of disputes. The mediator is authorized to meet jointly and in private caucuses with the parties, but may not make a decision or impose a settlement. All civil cases filed in the district are subject to mediation, but referrals are made only with party consent. The mediation process is confidential and is paid for by the parties.

Number of cases. This information is not yet available.

Case selection

Eligibility of cases. All civil cases are eligible for mediation. No case type is presumed ineligible or inappropriate.

Referral method. Each judge determines whether mediation would be promising in a particular case. Referrals are made only with party consent.

Opt-out or removal. Parties may decline to participate in mediation by notifying the court.

Scheduling

Referral. A case may be referred to mediation at any time.

Written submissions. Before the session, the mediator may require the parties to provide memoranda of five pages or less setting forth their positions. With the consent of the parties, the memoranda may be exchanged by the parties.

Mediation session. Unless otherwise ordered, the initial mediation session must be held within thirty days of agreement on or appointment of a mediator. Mediation must be completed, unless otherwise ordered, within thirty days of the initial session. The mediator schedules the session.

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

Program features

Discovery and motions. Unless the court orders otherwise, the mediation conference does not delay other proceedings in the case, including completion of discovery, filing and hearing of motions, or any other matter that would delay the trial. The trial itself is not set during the time allotted for mediation. Extensions of time are granted only for good cause.

Party roles and sanctions. The following people must attend the mediation session: all individual parties; for corporate parties, an individual with full settlement authority; for the government, a representative with full authority to negotiate on behalf of the agency and to recommend settlement; for an insured against whom a claim is made, a representative of the insurance carrier who is not outside counsel and who has full settlement authority. If a person fails to attend, the court may impose on the party or the party's principal, sanctions, including payment of attorney's fees, mediator's fees, and expenses incurred by those people attending the session.

Outcome. Only the mediator may determine that the mediation session is at an impasse; the mediation cannot be terminated unilaterally by a party. If agreement is reached,

the parties must put it in writing and sign it before the mediation session is adjourned. If an additional, more formal agreement is envisioned, the mediator assigns one of the parties' attorneys to prepare, within ten days of the session, the agreement and the papers to be filed with the court. The mediator must report to the court in writing within ten days of the close of the session whether agreement was reached but may not disclose the substance, tenor, or other confidential matters. If agreement is reached, the mediator's report must state whether the case will be concluded by a consent judgment or voluntary dismissal and must identify the people designated to file the necessary papers.

Confidentiality. Mediation conferences are private. Others may attend only with permission of all parties and the mediator. All who attend must maintain the confidentiality of the mediation and may not rely on, introduce, or attempt to introduce any event, document, or communication into other proceedings. Confidential information given to the mediator in private caucuses during the mediation may not be disclosed to other parties, and such communications do not waive any attorney/client, work product, or other privilege. Except when ordered by the court in exceptional circumstances, the mediator may not be called as a witness or compelled by subpoena to divulge records or to testify in regard to the mediation.

Neutrals

Qualifications and training. To be certified for the court's roster of mediators, an applicant must (1) be approved by at least one district judge, (2) be admitted to practice law in South Carolina or in the highest court of another state or the District of Columbia, (3) have practiced law for at least five years, (4) have received a law degree from a law school approved by the American Bar Association or the South Carolina Supreme Court, (5) be a member in good standing in each jurisdiction where he or she is admitted to practice law, (6) not currently be disbarred or suspended or subject to pending disciplinary proceedings, (7) not have been denied admission to the bar for character or ethical reasons for the past five years, (8) agree, if not a member of the South Carolina bar, to be subject to state and district court rules of conduct, (9) demonstrate familiarity with the statutes and rules governing mediation in South Carolina, (10) be of good moral character, (11) pay any administrative fees established by the district court, and (12) agree to provide mediation to indigents without pay. Applicants must also complete a mediation training program approved by the South Carolina Supreme Court, this court, or any equivalent training program.

Selection for case. Unless otherwise ordered, the parties must select a mediator within twenty days of the date on which the court issues the order referring the case to mediation. If the parties cannot agree, the plaintiff's attorney must notify the court and request appointment of a mediator. The mediator may be on the court's roster or otherwise qualified by training or experience to mediate the case.

Disqualification. The mediator must advise all parties of any circumstances bearing on possible bias, prejudice, or partiality. Any party may move for an order disqualifying the mediator. If the mediator is disqualified, the court enters an order appointing a new mediator.

Immunity. Under the rules, the mediator is not liable to any person for any act or omission in connection with any mediation conducted under the court's rules.

Fees. When the parties select the mediator, the parties and mediator determine the fee. When the court appoints the mediator, the mediator is paid at an hourly rate agreed

to by the parties or set by the court. Unless otherwise agreed or ordered, the fee is shared equally by the parties. A party may move to be exempted from a fee because of indigence but must request exemption before the mediation conference.

Program administration

The clerk's office qualifies and maintains the court's roster of mediators. Each judge manages the assignment of mediators and the paperwork in his or her cases.

District of South Dakota

IN BRIEF

Process summary

Magistrate judge settlement conferences. The District of South Dakota is experimenting with a magistrate judge settlement program for complex cases. The district judges select appropriate cases and refer them, with consent of the parties, to a magistrate judge for settlement discussions. The referral may take place at any stage of the litigation that seems timely, and the parties are notified either by mailed written order or in person. Other case events are not stayed during the settlement process.

After receiving a referral, the magistrate judge meets with the parties in joint and individual sessions in an effort to help each side more fully understand the other side's case. In some cases, the magistrate judge may request confidential statements from the parties before the settlement conference. In most cases, representatives with full settlement authority must attend the settlement conference, although exceptions are made for people who must travel long distances and who can be available by telephone. Sanctions are imposed for failure to meet attendance requirements.

Settlement conferences usually last about a half day, but the magistrate judge will schedule longer or additional sessions as necessary. The sessions are confidential. No information is disclosed to the district judge unless the parties so request. Between January and October 1994, magistrate judge settlement conferences were held in twenty complex cases.

Judicial settlement conferences and minitrials. One judge encourages settlement conferences in all civil cases, and other judges use settlement conferences when requested by the parties. If a settlement conference is unsuccessful, the judges may recommend an abbreviated trial on liability, punitive damages, or other discrete issues. This process, called a minitrial by the court, entails an actual trial before a district or magistrate judge. Although the abbreviated trial process has been offered to several parties, it has not been used to date.

For more information

Marshall P. Young, U.S. Magistrate Judge, 605-343-6335

Eastern District of Tennessee

IN BRIEF

Process summary

Mediation. The Eastern District of Tennessee adopted a mediation program on December 1, 1994. See below.

Magistrate judge settlement conferences. When the court established the mediation program in late 1994, it phased out its successful magistrate judge settlement conferences, which had been in use for several years. The success of the magistrate judge settlement program was the impetus for the court-based mediation program. The transfer of settlement duties to lawyer mediations allows the magistrate judges to devote all their time to duties that can only be performed by a judge.

Of note

Obligations of counsel. Counsel must be prepared to discuss the mediation program with the judges at the initial Rule 16 scheduling conference.

Information from court. A brochure on the mediation program is available from the clerk and from the judge who conducts the Rule 16 scheduling conference.

Evaluation. The mediation program will be evaluated after one year. The University of Tennessee Center for Conflict Resolution is providing evaluation and research services.

For more information

Murry Hawkins, Clerk of Court, 615-545-4228

IN DEPTH

Mediation in Tennessee Eastern

Overview

Description and authorization. Under Local Rule 16.4, adopted December 1, 1994, the Eastern District of Tennessee has established a mediation program. Its purpose is to enhance communication, narrow issues, structure discovery, and encourage settlement at a stage in the litigation when mediation offers financial and other incentives to all parties. Any civil case may be referred to mediation if the parties consent. The parties pay a fee set by the mediator. Indigent parties may qualify for mediation at no cost to them. The Knoxville Bar Association administers the program in three court divisions, and the court administers it in one.

Number of cases. During December 1994, five cases were referred to mediation, four in the Knoxville Division and one in the Chattanooga Division.

Case selection

Eligibility of cases. Any civil case may elect to use mediation. The court may, in its discretion, withdraw from mediation any case not considered suitable for the process.

Referral method. At the initial scheduling conference, parties are notified of the availability of mediation. Cases are referred to mediation only with consent of the parties. If

the parties agree to mediate, they complete an application form and submit it and a \$100 administrative fee to the Knoxville Bar Association in the Knoxville, Greenville, and Winchester divisions and to the clerk's office in the Chattanooga Division.

Opt-out or removal. On its own initiative or on motion by a party, the court may withdraw a case from mediation for which the process would be inappropriate.

Scheduling

Referral. The case may be referred to mediation at the initial scheduling conference or at any other time proposed by the parties.

Written submissions. The mediators usually ask the attorneys to submit written statements before the mediation conference. The mediator normally seeks information regarding past settlement negotiations, if any, the attorneys' evaluations of the merits of their case, the probable range of any verdict that might be returned, the strengths and weaknesses of each party's case, and other information.

Mediation session. The date for the mediation session is established by the mediator, who is also responsible for making arrangements for it through the clerk's office. Mediation sessions are generally conducted at the courthouse but may be held elsewhere at the mediator's discretion.

Number and length of sessions. The length of mediation conferences and the number of such conferences are decided by the mediators and the parties.

Program features

Discovery and motions. Other case events are not tolled during the mediation process. The court sets dates for pretrial and trial independently of the mediation process.

Party roles and sanctions. The key decision makers must attend the mediation conference. Failure to comply with attendance or settlement authority requirements may subject a party to sanctions by the court.

Outcome. The mediator must file a report with the assigned judge, reporting (1) whether or not settlement occurred; (2) whether the mediation was continued with the consent of the parties; or (3) whether the mediation was terminated without a settlement.

Confidentiality. Mediation is confidential. No information about the process is provided to the trial judge or court staff. The mediation conference and all proceedings relating thereto, including statements made by any party, attorney, or other participant, are confidential and are inadmissible to the same extent that discussions of compromise and settlement are inadmissible under Fed. R. Evid. 408. No reporting or research requirement may require a mediator to divulge any confidence in violation of this rule.

Neutrals

Qualifications and training. If the court approves, a candidate may be certified to serve as a mediator if he or she (1) is licensed to practice in Tennessee and is admitted to practice in this district; (2) has practiced law at least five years; (3) agrees, for purposes of evaluating the mediation program, to decline any engagement as a mediator in any case pending in this court unless that mediation takes place as part of the mediation program; (4) has had formal mediation training, including at least twenty hours of mediation training approved by the court and such procedural training as the clerk of the court provides; (5) agrees to be available to conduct at least one mediation per year without compensation; (6) agrees to commit to at least one year of service on the me-

diation panel; (7) agrees to participate in the reporting and research requirements of the program as they may be developed; (8) agrees to comply with the provisions of Local Rule 16.4 and any standing order that may be entered in any division of the court for purposes of implementing Rule 16.4; and (9) agrees to provide to the court such biographical and other information as the court may require.

Selection for case. The parties must select a mediator from the court's panel of mediators.

Disqualification. Mediators must disclose any current, past, or expected representation or consulting relationship with any party or attorney involved in the case. Mediators must also disclose any pecuniary interest and any matter that would result in disqualification of a justice, judge, or magistrate judge under 28 U.S.C. § 455.

Mediator's contract with parties. Mediators operate as independent contractors and enter into written contracts with the parties for whom they conduct mediations.

Immunity. The court has not addressed this issue.

Fees. Mediators set their own fees, subject to court oversight for reasonableness. Parties also pay a \$100 administrative fee for each case put into mediation. If a party cannot afford to pay the fee, the party or the mediator may apply to a magistrate judge for approval of pro bono mediation.

Program administration

The mediation program is administered by the Knoxville Bar Association in the Greenville, Knoxville, and Winchester Divisions. It is administered by the clerk's office in the Chattanooga Division.

Middle District of Tennessee

IN BRIEF

Process summary

Judicial settlement conferences. The Middle District of Tennessee Local Rule 20, adopted March 1, 1994, formally authorizes judicial settlement conferences, procedures long used in the district. Any civil case may be referred for a settlement conference before a district or a magistrate judge, although Social Security, land condemnation, and student loan cases generally are not referred. Party consent is not required, but the court rarely refers a case without consent. Referral is made at any appropriate time. The referring judge generally enters an order setting the settlement conference and directing the parties to submit confidential settlement statements.

The settlement statements must be submitted to the settlement judge three days before the conference. For use by settlement judge only, each party's statement must assess the strengths and weaknesses of both sides in the case, appraise liability, and estimate the economic costs of proceeding to trial. They must also contain a statement of the settlement authority extended by the client to the attorney on the basis of the attorney's written evaluation of the case. The evaluation must be furnished to the client in sufficient time to obtain express written settlement instructions.

A judge who is not assigned to the case—usually a magistrate judge—conducts the

conference, which typically takes two to three hours (although some may last a day, and in some cases more than one conference may be held). Some magistrate judges use a facilitative mediation model, while others provide a valuation of the case and come closer to a neutral evaluation model. The case manager or the settlement judge may require that the parties or their representative with full settlement authority attend the settlement conference; the judges have generally required in-person attendance.

At the conclusion of the settlement process, the settlement judge may file a report with the court, but there is no requirement to do so. No part of the settlement discussions or any information submitted by the parties may be used by any party in litigating the case under discussion or any other case. These confidentiality protections include but are not limited to the protections provided by Federal Rules of Evidence 408 and 409. All disclosures to the settlement judge must also be kept in confidence.

Approximately forty-five cases were referred to settlement conferences between January and September 1994.

Other ADR. Local Rule 20 approves and encourages the use of ADR. Any civil case may be referred to mediation, early neutral evaluation, or any other nonbinding ADR method provided by the court, with or without party consent. The court has not yet determined whether and how it might establish court-based programs for other ADR forms, and it is awaiting the recommendations of a court-appointed ADR committee.

Of note

Obligations of counsel. Attorneys must discuss ADR with opposing counsel and must be prepared to discuss ADR with the judge. In their proposed case management plan, they must discuss whether ADR is suitable for the case.

Plans. Pursuant to the CJRA plan, an ADR committee has been appointed to make recommendations for adoption of additional ADR programs.

For more information

Juliet Griffin, U.S. Magistrate Judge, 615-736-5164

Robert L. Echols, U.S. District Judge, Chair, ADR Committee, 615-736-2774

Western District of Tennessee

IN BRIEF

Process summary

ADR generally. In the Western District of Tennessee, the CJRA plan, effective December 1, 1991, directs judges to review ADR suitability on a case-by-case basis at initial case management conferences. The court authorizes minitrials, summary jury and bench trials, and mediation by magistrate judges, retired judges, and attorneys. Court policy is to make early and repeated efforts to settle cases.

Judicial settlement conferences. The court relies heavily on settlement conferences, which may be conducted by the assigned judge, a magistrate judge, or another district judge who agrees to conduct a settlement conference at the request of the assigned judge.

Of note

Plans. The district's CJRA plan recommends adoption of an early neutral evaluation program, but the program has not been implemented. The CJRA advisory committee recommended two ENE formats. In the open format, parties would present their case in each other's presence and the evaluator would assess liability and the case's value, attempt to facilitate settlement discussions, and, in some cases, define the issues and streamline discovery. The other format contemplates no joint meetings or sharing of information between the parties. Although the ENE proposal has been fully developed, the court has not implemented it and is considering adopting a mediation program instead.

Evaluation. As one of the ten pilot courts established by the CJRA, the Western District of Tennessee 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

Robert R. Ditrolio, Clerk of Court, 901-544-4486

Eastern District of Texas

IN BRIEF

Process summary

Mediation. The Eastern District of Texas authorized a mediation program under its CJRA plan, effective December 31, 1991. See below.

Other ADR. On occasion the court appoints special masters for settlement purposes.

Judicial settlement conferences. Under the court's CJRA plan, a mandatory case management conference is held in each case, at which settlement may or may not be discussed.

Of note

Obligations of counsel. Attorneys must be prepared to discuss ADR with the judge at the case management conference.

Information from court. The court makes a mediation booklet available to counsel and litigants.

For more information

David Maland, Clerk of Court, 903-592-8195

IN DEPTH

Mediation in Texas Eastern

Overview

Description and authorization. Under its CJRA plan, adopted on December 31, 1991, the Eastern District of Texas established a mediation program, which was implemented in August 1992. Except for a few case types, all civil cases are eligible for referral by the assigned judge or may be referred at the request of all parties. The mediation session is

conducted by a certified neutral mediator selected from the court's roster by the parties or the court. The purpose of mediation is to promote conciliation and settlement of the case. The mediator may conduct both joint and private sessions with the parties and is compensated by the parties at a rate set by the court.

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

Case selection

Eligibility of cases. Almost all civil cases are eligible for mediation. The most commonly referred cases are personal injury, products liability, routine diversity, and civil rights cases, as well as cases in which the parties have a long-term relationship.

Ineligible for mediation are administrative appeals, habeas corpus cases, extraordinary writs, and bankruptcy appeals. Also considered unsuited to mediation are cases with multiple parties or unusual legal issues.

Referral method. Any eligible civil case may be referred to mediation by the assigned judge without party consent. Cases may also be referred by stipulation of all parties. An order of referral is entered by the assigned judge.

Opt-out or removal. A case may be withdrawn from mediation by the assigned judge at any time if the case is determined not suitable for mediation.

Scheduling

Referral. Referral to mediation can occur at any time. An order of referral is entered by the assigned judge, designating the mediator, setting time frames for the mediation, and designating a lead counsel who will be responsible for coordinating two alternative mediation dates.

Written submissions. At least ten days before the mediation conference, each party must submit to the mediator and opposing counsel a brief summary of the facts and issues in the case and a list of who will attend the mediation session. The submission is confidential and is not placed in the public record of the case.

Mediation session. The assigned judge sets the desired time frame for the mediation in his or her referral order. Generally, mediations are held about a month before trial. Specific dates for the session are proposed by counsel, which the assigned judge uses to schedule the session. Mediation sessions are usually held at the courthouse.

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

Program features

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

Party roles and sanctions. Unless excused by the assigned judge in writing, all parties, corporate representatives, and any other required claims professionals with full authority to negotiate a settlement must attend the mediation session. Failure to comply with the attendance or settlement authority requirements may result in sanctions.

Outcome. Within five days of the mediation conference, the mediator must file a report indicating whether all required parties were present and whether the case settled, was continued with the consent of the parties, or was declared at an impasse by the mediator. If the parties reach settlement, lead counsel must notify the court by filing a settlement agreement signed by the parties and the mediator within ten days of the mediation conference.

Northern District of Texas

Confidentiality. All mediation proceedings, including statements by any party, attorney, or other participant, are confidential. The proceedings may not be recorded, reported, placed in evidence, or made known to the judge or jury. A party is not bound by anything said or done at the mediation conference unless a settlement is reached.

Neutrals

Qualifications and training. An individual may be certified for the court's roster if he or she is (1) a former state court judge who presided in a court of general jurisdiction and was also a member of the bar in a state in which he or she presided; (2) a retired federal judge; or (3) a licensed attorney who has been a member of a state bar for at least ten years and is currently admitted to the bar of this court. The applicant must also complete forty hours of mediation training required by the court and must be deemed competent to serve as a mediator by the chief judge.

Selection for case. The court or the parties select the mediator from the court's roster. A judge may permit the parties to select a mediator from outside the roster.

Disqualification. Any person selected as a mediator may be disqualified for bias or prejudice as provided by 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.

Immunity. The court has not addressed this issue.

Fees. The parties equally share the mediator's fee, which is set by the court in a standing order and is revised from time to time. The current fee ranges from \$125 to \$250 per hour.

Program administration

Mediation referrals are individually administered by each district judge. The clerk's office provides some logistical support, such as accepting attorney-mediator applications and maintaining and distributing the list of certified mediators.

Northern District of Texas

IN BRIEF

Process summary

Mediation. Under its CJRA plan, effective July 1, 1993, the Northern District of Texas authorizes referral of civil cases to private providers of mediation and other ADR services. See below.

Other ADR. In its CJRA plan, the court also authorizes case-by-case referrals to minitrial, summary jury trial, or other ADR methods. Cases may be referred on the motion of any party, by agreement of all parties, or on the judge's motion. Any civil case is eligible for referral. Between July 1, 1993, and June 30, 1994, no cases were referred to these ADR processes.

Judicial settlement conferences. Under the CJRA plan, the court authorizes mandatory settlement conferences in civil cases and strongly favors early settlement discus-

sions. The assigned judge may host the settlement conference. In a nonjury case the judge will not discuss settlement figures unless requested by the parties.

Of note

Obligations of counsel. Attorneys are required to discuss ADR options with their clients.

Information from court. An ADR booklet for counsel and litigants describes the ADR processes offered by the court and answers commonly asked questions.

For more information

Michael Simon, Judicial Support Manager, 214-767-9551

IN DEPTH

Mediation in Texas Northern

Overview

Description and authorization. Under its CJRA plan, effective July 1, 1993, the Northern District of Texas authorizes referral of civil cases to private providers of mediation. A judge may refer a case to mediation on the motion of any party, on agreement of the parties, or on the judge's motion without party consent. Almost all civil case types are eligible for mediation, but referrals have been most common in contract and employment civil rights cases. The mediators are compensated by the parties at market rates.

Number of cases. Between January and September 1994, approximately 580 cases were referred to mediation.

Case selection

Eligibility of cases. Almost all civil cases are eligible for referral to mediation or other forms of ADR. Contract cases and employment civil rights cases constitute the majority of referrals. Prisoner cases and Social Security appeals are generally ineligible for mediation.

Referral method. A judge may refer a case to mediation on the motion of any party, on agreement of the parties, or on the judge's own motion without party consent. A written order of referral is entered.

Opt-out or removal. A party opposing the ADR referral or the appointed mediator may file written objections within ten days of the order of referral.

Scheduling

Referral. A case may be referred to mediation or other forms of ADR at any stage of the litigation.

Written submissions. The mediator or other ADR neutral may require written submissions from the parties.

Mediation session. The order of referral establishes a time frame for commencement and completion of the mediation process. The mediator makes the logistical arrangements for the mediation session, which is held at the mediator's office.

Number and length of sessions. A single mediation session is generally held, which lasts six to eight hours.

Program features

Discovery and motions. The referring judge determines whether other case activities go forward or are suspended during the ADR process.

Party roles and sanctions. In addition to counsel, party representatives with authority to settle must attend, as must all persons necessary to negotiate a settlement, including insurance carriers. Failure to comply with the attendance requirements can result in sanctions.

Outcome. At the conclusion of the ADR proceeding, the mediator must file a form with the court providing a list of attendees and their addresses, the type of case and ADR process used, whether the case settled, and the mediator's fee.

Confidentiality. All communications made during the mediation proceedings are confidential and protected from disclosure. The only contact permitted between the referring judge and the mediator is the submission of a summary form after the mediation is concluded.

Neutrals

Qualifications and training. ADR providers in Texas are regulated by state statute and must satisfy statutory requirements to practice. The Northern District of Texas uses mediators who have met the state's qualification and training requirements set forth in Tex. Civ. Prac. and Rem. Code § 154.052.

Selection for case. The mediator is appointed by the assigned judge and is named in the order of referral. The judge selects the mediator from a list of private providers. If the parties are dissatisfied with the court's appointment, they may agree on a different mediator and must notify the court of their choice within ten days of the order of referral.

Disqualification. No disqualification rules have been established by the court.

Immunity. The court has not addressed this issue.

Fees. The mediator is paid by the parties at the mediator's established professional rate.

Program administration

Mediation referrals are handled by each district judge and magistrate judge. The clerk's office maintains all records and provides an annual statistical analysis.

Southern District of Texas

IN BRIEF

Process summary

Mediation. The Southern District of Texas established a mediation program under the district's CJRA plan and Local Rule 20, both effective January 1, 1992 (in February 1994, Local Rule 20 was renumbered Local Rule 22). See below.

Neutral evaluation (arbitration). Local Rule 20 and the district's CJRA plan also authorize referrals to a hybrid neutral evaluation process, called arbitration by the court. See below.

Other ADR. On occasion, judges appoint special masters to settle cases or conduct summary jury or summary bench trials.

Judicial settlement conferences. Some judges hold settlement conferences on a case-by-case basis.

Of note

Obligations of counsel. Attorneys must discuss ADR with their clients and with opposing counsel and must demonstrate in their case management statement that they have done so. They must also discuss in the case management statement whether ADR is suitable for the case and must be prepared to discuss this topic with the judge.

Evaluation. The court conducts an annual evaluation of its ADR programs. As one of the ten pilot courts established by the CJRA, the court 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

Robbie Westmoreland, Administrative Analyst, 713-250-5436

IN DEPTH

Mediation in Texas Southern

Overview

Description and authorization. Through Local Rule 20 and the CJRA plan, both effective January 1, 1992, the Southern District of Texas authorized a mediation program (Local Rule 20 was renumbered to Local Rule 22 in February 1994). Any civil case may be referred to mediation by a judge or party at any time appropriate for the case. A single mediator meets with parties to try to reach settlement or, failing that, to help narrow issues. Direct discussions between parties may be encouraged, or shuttle diplomacy may be used. Some mediators offer evaluations of the case, but no dispositive decisions are given. Sessions lasting for more than one day occasionally occur, and the entire process is confidential. The mediator's fee is paid by the parties.

Number of cases. Between January and September 1994, 263 cases were referred to mediation.

Case selection

Eligibility of cases. All civil cases are eligible for referral to mediation. The most common referrals are contract, tort, civil rights, and labor cases. The only cases routinely not referred to mediation are those involving the United States or prisoners as parties.

Referral method. Before the initial scheduling conference in the case, counsel must discuss the appropriateness of ADR with their clients and opposing counsel. At the first conference, the parties must advise the court of the results of their discussion. At that time, and in subsequent conferences if necessary, the court will explore with the parties the possibility of using one of the court's ADR programs. If appropriate, the assigned judge may refer a case to mediation without party consent, or referral may be made at the request of one party. All parties to the case, including the mediator, are notified by mail once an order referring the case is entered.

Opt-out or removal. If the parties agree on an ADR method, the judge will respect

their choice unless the judge believes another ADR method would be better. A party opposing the referral to mediation must file written objections with the judge within ten days of receiving a notice of referral.

Scheduling

Referral. Referral to mediation may be made at the initial scheduling conference, after discovery has been completed, or at any time that seems appropriate.

Written submissions. There are no standard requirements regarding materials to be submitted before the mediation session. The mediator may request submission of specified materials when he or she arranges mediation with the parties.

Mediation session. There are no deadlines or timelines for completing the mediation session. The session is held either at the courthouse or at the neutral's office. The neutral, the parties, and court staff jointly make the arrangements for the mediation session.

Number and length of sessions. Questionnaires indicate that the average mediation proceeding lasts between seven and eight hours, although complex cases (as indicated by the presence of multiple parties) tend to require more time. Most mediation proceedings require only one session, concluded within a single day.

Program features

Discovery and motions. Other case activities go forward during the mediation process unless the judge specifically orders otherwise. Some judges routinely suspend scheduling deadlines for ADR, while other judges prefer to leave scheduling deadlines in place.

Party roles and sanctions. Attendance at the mediation session is required for party representatives with authority to settle and all other people necessary to negotiate a settlement, including insurance carriers. The sanctions available under Fed. R. Civ. P. 16(f) apply to any violations of the mediation rule.

Outcome. The mediator must file a memorandum with the clerk of court noting whether settlement occurred and describing the type of case involved, the amount of fees charged, and the names and addresses of participants in the proceeding.

Confidentiality. All communications made during mediation are confidential, are protected from disclosure, and do not constitute a waiver of any existing privileges and immunities.

Neutrals

Qualifications and training. The court maintains a panel of ADR neutrals. Applicants for the panel are reviewed by a three-member committee made up of a district judge, a professional mediator, and a member of the Southern District of Texas Advisory Group. To be eligible for the panel, providers must (1) be a member in the bar of this court; (2) be licensed to practice law for at least ten years; and (3) have completed at least forty hours of training in dispute resolution techniques in an ADR course approved by the State Bar of Texas Continuing Legal Education Department. Those on the panel are appointed for five years and must complete at least five hours of ADR-related training each year.

Selection for case. If the parties agree on a mediator, the assigned judge will respect the choice unless the judge believes another mediator would serve the needs of the case better. If the court selects the mediator and the parties object, they must do so in writing within ten days of receiving notice of the selection. Selections are made from the

court's panel of neutrals. On occasion, judges and parties select a neutral who has expertise in the subject matter of the case, although this is not a requirement for the process.

Disqualification. The disqualification standards for mediators are those spelled out in 28 U.S.C. § 455.

Immunity. The court believes that neutrals have immunity protections under existing law.

Fees. The parties pay the fee normally charged by the mediator, unless the mediator is ordered by the court to proceed for no fee. The court reserves the right to review the reasonableness of the fee.

Program administration

Clerk's office personnel maintain the list of approved mediators, collect information from parties, and perform the annual assessment of the program required by Local Rule 22. A judge serves as liaison with the clerk's office for ADR matters.

Neutral Evaluation (Arbitration) in Texas Southern

Overview

Description and authorization. Under its CJRA plan and Local Rule 20, both effective January 1, 1992, the Southern District of Texas established a nonbinding ADR process for settlement and issue narrowing (in February 1994, Local Rule 20 was renumbered to Local Rule 22). Called arbitration by the court, the hybrid process combines elements of neutral evaluation, mediation, and arbitration and is similar in most respects to the neutral evaluation process used in some other districts. Almost all civil cases are eligible for referral on the motion of one party, by agreement of all parties, or on the court's own motion. A single neutral, called an arbitrator, meets with the parties to try to reach a settlement and, failing that, to narrow issues. The neutral will offer an evaluation of the case but will not give a dispositive decision unless the parties voluntarily agree to accept it as the binding decision in the case. The neutral is paid by the parties at market rates.

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

Case selection

Eligibility of cases. Almost all civil cases are eligible for this process. The only cases routinely not referred are those involving the United States or prisoners as a party.

Referral method. The judge may refer a case to this process on the motion of one party, agreement of all parties, or on the court's own motion. All parties, including the neutral, are notified by mail once the referral order is entered.

Opt-out or removal. Any party opposing either the referral or the appointed neutral must file written objections within ten days of receiving notice of the referral or provider, explaining the reasons for the opposition.

Scheduling

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

Southern District of Texas

Discovery and motions. Other activities go forward during the ADR process unless specifically ordered otherwise. Some judges routinely suspend deadlines for ADR, while other judges prefer to leave scheduling deadlines in place.

Written submissions. Only those submissions requested by the neutral or required by order of the court in a particular case must be made before the ADR session.

ADR session. The ADR session may be held at the courthouse or at the neutral's office. Arrangements are made by court staff, the neutral, and the parties. Local Rule 22 does not specify a time frame within which the ADR session must take place, but the court may impose such a time frame by order.

Length of session. This information is not yet available.

Program features

Party roles and sanctions. Party representatives and all other people necessary to negotiate a settlement, including insurance carriers, must attend the ADR session. The sanctions available under Fed. R. Civ. P. 16(f) apply to any violation of the court's ADR procedures.

Filing of outcome. The neutral must file a memorandum with the clerk of court describing the results of the process, the type of case, the amount of fees charged, and the names and addresses of participants in the proceeding. The ADR memorandum to the clerk is a public document and is filed in the case file.

De novo request. There is no provision for requesting trial de novo because the goal of the process is settlement or issue narrowing, and a decision is not rendered unless the parties have agreed that the decision will be binding.

Confidentiality. All communications made during ADR proceedings are confidential, are protected from disclosure, and do not constitute a waiver of any existing privileges and immunities.

Neutrals

Qualifications and training. The court maintains a panel of ADR providers. Applicants for the panel are reviewed by a three-member committee consisting of a district judge, a professional mediator, and a member of the Southern District of Texas Advisory Group. To be eligible for appointment to the panel, ADR neutrals must (1) be a member of the bar of this court; (2) be licensed to practice law for at least ten years; and (3) complete at least forty hours of training in dispute resolution techniques in an ADR course approved by the State Bar of Texas Continuing Legal Education Department. Members of the roster must participate in at least five hours of ADR training each year and are appointed for five years.

Selection for case. This court assigns each case one attorney-neutral, selected by either the court or the parties from the court's roster or elsewhere. Judges and parties sometimes base their selection on the neutral's expertise in the subject matter of the case.

Disqualification. Neutrals are subject to disqualification in accord with 28 U.S.C. § 455 and the requirements of Local Rule 22.

Immunity. The court believes that neutrals have immunity protections under existing law.

Fees. The parties pay the neutral's market rate fees, unless the court orders the neutral to proceed pro bono.

Program administration

Clerk's office personnel maintain the list of approved neutrals, collect information from parties, and perform the annual assessment of the program required by Local Rule 22. A judge serves as liaison with the clerk's office for ADR matters.

Western District of Texas

IN BRIEF

Process summary

Arbitration. The Western District of Texas is one of ten courts authorized to provide mandatory, nonbinding court-annexed arbitration under 28 U.S.C. §§ 651–658 and Local Rule CV-87. See below.

Mediation. Local Rule CV-88, adopted January 1, 1993, authorizes use of several methods of ADR, including mediation. See below.

Other ADR. Local Rule CV-88 also allows for other types of ADR, including nonbinding arbitration for cases not subject to Local Rule CV-87, early neutral evaluation, minitrial, and moderated settlement conference. The court has no specific procedures for these ADR methods, and their use to date has been limited.

Judicial settlement conferences. District and magistrate judges conduct settlement conferences at the request of the parties.

Of note

Obligations of counsel. Attorneys must discuss ADR options with their clients and with the court. Additionally, attorneys must address in the case management statement or plan the suitability of ADR for the case and must certify that they have informed their clients of the different ADR procedures available in the district.

Evaluation. An evaluation of the district's arbitration program is reported in Barbara Meierhoefer, *Court-Annexed Arbitration in Ten District Courts* (Federal Judicial Center 1990).

For more information

Edward C. Prado, U.S. District Judge, 210-229-4060

Nancy Stein Nowak, U.S. Magistrate Judge, 210-229-6584

IN DEPTH

Arbitration in Texas Western

Overview

Description and authorization. The Western District of Texas is one of ten courts authorized by 28 U.S.C. §§ 651–658 to establish mandatory, nonbinding court-annexed arbitration. The program was established January 1, 1985, in the San Antonio and Austin divisions. Under Local Rule CV-87, cases involving monetary damages only of no more

than \$150,000, exclusive of interest, costs, and attorney's fees, are automatically referred to arbitration when the answer is filed. Other cases may also be referred at the request of the parties. Three arbitrators hear presentations by the parties and issue an arbitration award. The arbitrators' fees are paid by the court.

Number of cases. Between January and September 1994, twenty-two cases were referred to arbitration.

Case selection

Eligibility of cases. Eligible cases are those seeking money damages only of no more than \$150,000. Cases involving a request for injunctive relief are not referred to arbitration.

Referral method. All eligible cases are automatically referred. Court staff select the appropriate cases after reviewing the complaint and then notify the parties of the arbitration referral. Other cases may be referred at the request of the parties.

Opt-out or removal. At any time before the expiration of the twenty-day period following the filing of the last responsive pleading, the court, sua sponte or on motion by any party, may grant relief for good cause. Additionally, the assigned judge may exempt an action if the judge finds the existence of complex or novel questions of law or a predominance of legal issues over factual issues.

Scheduling

Referral. Referrals are made shortly after the answer is filed.

Discovery and motions. When filed no later than the answer, a motion to dismiss, a motion for judgment on the pleadings, a motion to join necessary parties, or a motion for summary judgment stays the arbitration process, unless the parties consent to proceed. The assigned judge retains authority to conduct status and settlement conferences, hear motions, and supervise the case in all other respects notwithstanding the referral to arbitration. Deadlines established in the scheduling order do not relieve the parties of compliance with the arbitration proceedings.

Written submissions. No submissions are required, but before the arbitration hearing the arbitrators may review the court's file.

Arbitration hearing. The arbitration hearing must begin no later than sixty days after filing of an answer. The arbitrators are authorized to change the date and time of the hearing provided it begins within thirty days of the hearing date set by the clerk. Any continuance beyond the thirty-day period must be approved by the assigned judge. The clerk must be notified immediately of any continuance. The arbitration process must be completed no later than sixty days after the answer is filed.

No later than twenty-four hours before the hearing, the parties must advise the arbitrators in writing if they have reached a settlement. Failure to do so may result in sanctions, including but not limited to the expenses of unnecessarily impaneling the arbitration panel.

Clerk's office staff arrange the arbitration hearings, which are generally held in the courtroom or any other room in any federal courthouse or office building made available to the arbitrators by the clerk's office.

Length of hearing. An arbitration session lasts less than half a day.

Program features

Party roles and sanctions. The arbitrators may order the parties to attend, but the hear-

ing may proceed in the absence of any party who, after notice, fails to be present. If a party fails to participate in the arbitration process in a meaningful manner or fails to appear at the date and time of the scheduled arbitration hearing, the arbitrators may impose sanctions against the party or the attorney.

Filing of award. The arbitration award is filed under seal with the clerk of court not more than ten days following the close of the hearing. If no timely request for trial de novo is made, the clerk enters the award as the judgment of the court.

De novo request. A party may file and serve a written demand for trial de novo within thirty days of the filing of the award. The moving party must deposit with the clerk an amount equal to the total arbitration fees for each arbitrator. The sum deposited is returned to the moving party in the event he or she obtains a final judgment, exclusive of interests and costs, more favorable than the arbitration award. If the moving party does not obtain a more favorable result, the deposited sum is paid to the U.S. Treasury.

Confidentiality. There may be no ex parte communication between an arbitrator and any counsel or party on any matter relating to the action except for purposes of scheduling or continuing the hearing. A neutral may communicate with an assigned judge if sanctions appear to be warranted. No evidence of or concerning the arbitration may be received into evidence at trial.

Neutrals

Qualifications and Training. The court maintains a list of certified arbitrators. To qualify for the roster, an applicant must (1) have been a member of the bar of the highest court of any state or the District of Columbia for at least five years; and (2) either be admitted in the district or be a member of the faculty of an accredited law school in Texas; and (3) be determined by the court to be competent to perform the duties of an arbitrator. Arbitrators are not required to go through any training.

Selection for case. The clerk provides the parties a list of five arbitrators selected from the court's roster. The parties then select three arbitrators by each striking one from the list. After a person has served as an arbitrator in an action, he or she may not serve again for at least four months.

Disqualification. No person may serve as an arbitrator in an action in which any of the circumstances specified in 28 U.S.C. § 455 or the Code of Judicial Conduct exist or may in good faith be believed to exist.

Immunity. The court has not addressed this issue.

Fees. The fee is \$75 per day per arbitrator, paid by the court.

Program administration

The arbitration program is handled by the clerk's office. A district judge serves as liaison judge.

Mediation in Texas Western

Overview

Description and authorization. Under Local Rule CV-88, the Western District of Texas established broad authorization to use ADR procedures, including mediation. Under the court's program, which was adopted December 1, 1993, any civil case may be referred to mediation by the court on its own motion or on motion of any party. Referral

is made at any time that seems appropriate for the case. A single attorney-mediator meets with the parties to try to reach settlement and may conduct additional meetings if necessary. The mediator offers no evaluation of the case. The parties pay the fee set by the neutral and may appeal to the court if they think the fee charged is unreasonable. Several magistrate judges have received training in mediation and are available for use in cases involving indigent parties.

Number of cases. The number of cases referred to mediation varies from judge to judge. Although court-wide referral records are not kept, the court believes a significant number of cases were referred to mediation from January to September 1994.

Case selection

Eligibility of cases. All civil cases are eligible for referral to mediation. No cases are presumed inappropriate or ineligible.

Referral method. In response to a court order entered early in the case, the parties must submit a report on case management issues and ADR. If the parties agree to use ADR, the report must include the method agreed on, the name of the neutral if the parties have agreed to one, and how the neutral will be compensated. The court on its own motion and without party consent may also order the parties to participate in nonbinding mediation.

Opt-out or removal. If a party shows good cause, it can obtain relief from an order compelling participation in mediation. Good cause may include a showing that the expenses relating to alternative dispute resolution would cause undue hardship to the party. The court may in its discretion appoint a neutral, including a qualified magistrate judge, to provide ADR services at no cost.

Scheduling

Referral. The referral may occur at any time appropriate for the case.

Written submissions. Other than the parties' report identifying the type of ADR selected, there are no specific requirements for written submissions before the mediation session.

Mediation session. The mediation proceeding begins at a date and time selected by the mediator but not later than forty-five days after entry of the order of referral to mediation or appointment of a mediator, whichever is later. Mediation sessions are arranged by the neutral, and sessions are held at the neutral's office.

Number and length of sessions. Mediation sessions generally last several hours to a full day.

Program features

Discovery and motions. Referral to mediation does not stay the deadlines otherwise established by the court.

Party roles and sanctions. Party representatives with settlement authority and all other people necessary to negotiate a settlement must attend the mediation. The sanctions available under Fed. R. Civ. P. 16(f) apply to any violations.

Outcome. At the conclusion of each ADR proceeding, the neutral submits to the court a notice indicating whether the mediation process resulted in settlement.

Confidentiality. Any communication relating to the subject matter of the dispute is confidential, as is any record made at a mediation. The participants and the neutral may not be required to testify in any proceeding relating to or arising out of the matter in

dispute and may not be subject to any process requiring disclosure of related confidential information or data.

Neutrals

Qualifications and training. The court appoints a three-member panel in each division to review applications and prepare an annual roster of qualified neutrals. Minimum qualifications for application include: (1) membership in the bar of this district or on the faculty of an accredited law school in Texas; and (2) membership in the bar of the highest court of any state or the District of Columbia for at least five years; and (3) completion of at least forty hours of training in dispute resolution techniques in a course approved by the State Bar of Texas Minimum Continuing Legal Education Department; and (4) agreement, if called on by the court, to accept mediation referrals on a pro bono basis.

Selection for case. If, after deciding to use mediation, the parties do not select a neutral on their own initiative, the court provides a list of neutrals qualified by the court and maintained by the clerk. The parties must then confer to see if they can agree on a neutral from the roster or someone else. If they cannot, the court makes the selection.

Disqualification. No person is allowed to serve as mediator if any of the circumstances specified in 28 U.S.C. § 455 or the Judicial Code of Conduct exist or if the neutral believes in good faith that such circumstances may exist.

Immunity. The court has not addressed this issue.

Fees. The parties pay the fee set by the neutral and may appeal to the court if they think the fee is unreasonable. If a party seeks relief from referral to mediation on grounds that it cannot afford the fee, the judge may appoint a neutral to serve pro bono.

Program administration

The program is handled by the clerk's office. A district judge serves as liaison judge.

District of Utah

IN BRIEF

Process summary

Mediation. The District of Utah established a court-based program for voluntary mediation under its CJRA plan, effective December 30, 1991, and Local Rule 212. The bankruptcy court in the District of Utah has also established a mediation program, which is administered in conjunction with the district court program. See below.

Arbitration. As one of ten voluntary arbitration pilot courts under 28 U.S.C. §§ 651–658, the District of Utah established a court-based program for voluntary arbitration. See below.

Judicial settlement conferences. Judicially hosted settlement conferences are authorized by Local Rule 204-2. The conferences are not mandatory and are not frequently used. Where appropriate, the assigned judge may ask another district judge or a magistrate judge to host a settlement conference.

Of note

Obligations of counsel. When the case is filed, counsel for each party must discuss the court's ADR program with their clients and explore with them resolution of the dispute through litigation, arbitration, or mediation. Each attorney is then required to complete and file with the court a certificate signed by the attorney and the party to certify that they have discussed the court's ADR program and to indicate whether the case should be referred to ADR. The certificate must be filed with the clerk at least ten days before the initial scheduling conference. Counsel must also be prepared to discuss the case's suitability for ADR with the assigned judge.

Information from court. The court provides litigants a booklet describing the court's ADR options. Parties may also make arrangements with the clerk's office to attend a brief ADR orientation session conducted by the ADR administrator.

Plans. The court intends to modify Local Rule 212 to streamline the ADR process and make it more efficient. In addition, the court may make bankruptcy appeals eligible for mediation and arbitration.

Evaluation. A Federal Judicial Center study of the court's voluntary arbitration program is reported in David Rauma & Carol Krafka, *Voluntary Arbitration in Eight Federal District Courts: An Evaluation* (Federal Judicial Center 1994). As one of the ten pilot districts established by the CJRA, the District of Utah 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

Markus B. Zimmer, Clerk of Court, 801-524-5160

Laura Gray, ADR Administrator, 801-524-5211, ext. 3406

IN DEPTH

Mediation in Utah

Overview

Description and authorization. Under its CJRA plan, effective December 30, 1991, the District of Utah offers mediation as one of its two ADR options. This experimental program was implemented in March 1993 under Local Rule 212. All civil cases, except those filed by prisoners or arising as a bankruptcy appeal, are eligible. Parties must file a notice of ADR preference before the initial scheduling conference. At the conference, the court's ADR options are discussed and the district or magistrate judge may, depending on the judge's assessment of the case and the parties' preferences, enter an order of referral to mediation. Within twenty days of the order, any party may freely opt out of the referral. Parties may also stipulate to mediation. The mediator, who may meet jointly or separately with the parties, serves as a facilitator only and does not decide issues or make findings of fact. The mediation process is confidential and is provided at no cost to parties.

Number of cases. From January to September 1994, thirty-four cases were referred to mediation.

Case selection

Eligibility of cases. All civil cases except pro se prisoner petitions and bankruptcy appeals may elect to use mediation. To date, mediation has been used by cases involving contracts, employment discrimination and other civil rights, trademark, copyright infringement, securities, and personal injuries.

Referral method. Each party is required to file a certificate at least ten days before the initial scheduling conference indicating whether or not the party elects to refer the case to arbitration or mediation. At the initial scheduling conference, the district or magistrate judge discusses with the parties their ADR or litigation preferences. If neither party elects to participate in ADR, the assigned judge retains the authority to refer the case to arbitration or mediation if the judge believes, after conferring with the parties, that their interests would be better served by arbitration or mediation than by litigation. If the judge determines that mediation is suitable for the case, he or she enters an order of referral. Any civil action may also be referred to mediation after the initial scheduling conference on the court's own motion or by stipulation of the parties.

Opt-out or removal. By written notice filed with the clerk and served on all parties not later than twenty days following entry of an order of referral, any party may opt out of the mediation referral. After the twenty-day period has expired, parties may opt out of the program only by leave of the court.

Scheduling

Referral. Referral to mediation usually occurs at the initial scheduling conference but may take place at any appropriate time in the case.

Written submissions. At least ten days before the scheduled mediation conference, each party must give the mediator a concise memorandum describing the party's position on the issues to be resolved through mediation. The mediator may direct the parties to exchange their memoranda.

Mediation session. Within ten days of being selected, the mediator consults with the parties and sets a place and time for the mediation conference. The clerk then sends notice of the place, which is usually the courthouse, and time to all participating parties. The mediator determines the length and timing of the sessions and the order in which issues are presented.

Number and length of sessions. Mediation sessions normally last about four hours. Only one session is usually required, but additional and longer sessions are held as needed.

Program features

Discovery and motions. Unless otherwise agreed by the parties or ordered by the court, discovery is stayed once an order referring the case to mediation is entered. However, if the assigned judge has entered a pretrial scheduling order, the dates and restrictions in that order remain in effect.

Party roles and sanctions. Parties are required to attend the mediation session. Those who fail to appear may be sanctioned by the court.

Outcome. Immediately after the mediation conference is held, the mediator files a mediation conference report with the clerk indicating the results. If the mediation was unsuccessful, the parties may request continuation of the mediation within thirty days. If settlement is reached on all issues during a mediation conference, the parties must

promptly prepare a written settlement agreement and file it with the clerk. If settlement is reached on some issues, the parties must file a stipulation as to those issues and identify the issues remaining in dispute.

Confidentiality. Information disclosed to the mediator by a party during the mediation session may not be disclosed to the other party without consent. All mediation proceedings are confidential, and information presented therein is not admissible as evidence for any other proceeding. Mediation sessions may not be recorded without prior consent of the parties and the mediator.

Neutrals

Qualifications and training. To be on the roster, an attorney must have ten years of practice experience, must be a member of the court's bar, and must complete the court's mediation training program. The court prefers applicants with prior mediation training.

Selection for case. The court has established a roster of qualified mediators from which parties must select a mediator. If the parties cannot agree, the clerk will make the selection. The court may also appoint, for a particular case only, people not on the roster but selected by the parties for their special knowledge or expertise related to the subject matter of the dispute.

Disqualification. The court has prepared a code of conduct for court-appointed mediators and arbitrators. It sets out lengthy ethical canons that neutrals must follow, including statements regarding the duty of neutrals to uphold the integrity and fairness of the ADR process, to avoid impropriety or the appearance of impropriety, to conduct the proceedings fairly and diligently, to avoid discriminatory mediating or arbitrating, and to secure the confidential nature of the ADR process. The code is set out in the court's *Manual on Alternative Dispute Resolution for Court-Appointed Arbitrators and Mediators*.

Immunity. The court addresses questions of court-appointed arbitrator and mediator liability in its *Manual on Alternative Dispute Resolution for Court-Appointed Arbitrators and Mediators*. In part, the court concludes, "even given the fact that the full extent of mediator liability has not been explored by many courts, several factors exist to support absolute immunity for mediators acting in their official capacity."

Fees. The court currently makes mediation available to litigants at no cost, and mediators serve without compensation. The court is seeking authorization from Congress to pay the mediators from the court's appropriations. The fee would be approximately \$100 per case.

Program administration

The court's ADR program is administered by the clerk's office under the guidance of the district court judges. Issues that arise are handled by the clerk of court, the ADR administrator, and the chief judge.

Arbitration in Utah

Overview

Description and authorization. The District of Utah is one of ten districts authorized by 28 U.S.C. §§ 651–658 to adopt a voluntary, nonbinding court-annexed arbitration

program. The court's program is further authorized by the CJRA plan, effective December 30, 1991, and Local Rule 212. The program was implemented in August 1993. In cases that choose or are assigned by a judge to arbitration, one or three arbitrator(s) hear the case and make an award. Although the judge assigned to the case retains oversight authority and responsibility, the arbitration panel is empowered by the court to hear argument, review evidence, set discovery schedules, rule on motions where appropriate, and determine awards. Assignment of the case to arbitration occurs at the initial case scheduling conference and is determined in part by party preferences and in part by the judge's assessment of the needs of the case. Any party may freely opt out of the arbitration referral within twenty days of the referral order. The court's Advisory Committee on Local Rules is considering substantial changes to the arbitration procedures in Local Rule 212. Recommendations are expected in 1995.

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

Case selection

Eligibility of cases. Almost all civil cases are eligible for arbitration. To date, it has been used in cases involving contracts, employment discrimination, and civil rights. Unless otherwise assigned by the judge, pro se prisoner petitions and bankruptcy appeals are excluded from arbitration.

Referral method. Each party is required to file a certificate at least ten days before the initial scheduling conference indicating whether or not the party elects to refer the case to arbitration or mediation. At the initial scheduling conference the district or magistrate judge discusses with the parties their ADR or litigation preferences. If neither party elects to participate in ADR, the assigned judge retains the authority to refer the case to arbitration or mediation if the judge believes, after conferring with the parties, that their interests will be better served by arbitration or mediation than litigation. If the judge determines that arbitration is suitable for the case, the judge enters an order of referral. Any civil action may also be referred to arbitration after the initial scheduling conference on the court's own motion or by stipulation of the parties.

Opt-out or removal. By written notice filed with the clerk and served on all parties not later than twenty days following entry of an order of referral, any party may opt out of participation in the ADR program. After the twenty-day period has expired, one or both parties may opt out of the ADR referral only with leave of court.

Scheduling

Referral. Cases are generally referred to arbitration at the initial scheduling conference.

Discovery and motions. Unless otherwise stipulated by the parties or ordered by the court, discovery is stayed once an order referring the case to arbitration is entered. A discovery schedule is then determined at an initial prehearing conference with the arbitrators, which is held within thirty days of selecting the arbitrators. The purpose of the conference is to review the case, to assist the parties in narrowing issues and determining the scope of discovery, and to schedule a hearing date.

Written submissions. The arbitrator(s) may determine what submissions must be made and when they are to be made (e.g., exchange of witness lists, designation of experts, etc.). Not less than twenty days before the hearing, a party intending to offer documentary evidence may, at the party's discretion, serve copies on all participating

parties. Not less than seven days before the hearing, parties may serve objections to the offered documentary evidence.

Arbitration hearing. The arbitration hearing must be held within 120 days of the date of the prehearing conference. Arbitration hearings are held at the courthouse and are arranged by the ADR administrator.

Length of hearing. Hearings usually last four to eight hours.

Program features

Party roles and sanctions. Either the parties or their counsel must attend the arbitration prehearing conference. Parties should also attend the arbitration hearing. The assigned judge retains supervisory authority over cases in arbitration and may issue sanctions, if necessary, for noncompliance with the arbitration process.

Filing of award. Within twenty days of the hearing, the panel must file with the clerk a notice of the award, which the clerk must mail to all parties. Unless the parties file a demand for trial de novo, the award becomes the judgment in the case once it is reviewed by the assigned judge and the judgment is entered.

De novo request. A request for trial de novo must be filed within thirty days of filing the arbitration award.

Confidentiality. No transcript, record, or award is admissible as evidence in a trial de novo or any subsequent proceeding unless the evidence is otherwise admissible or the parties stipulate.

Neutrals

Qualifications and training. To be eligible for inclusion on the court's arbitration roster, applicants must have ten years of practice experience, must be members of the court's bar, and must complete the court's ADR training program. The court prefers applicants who have been trained in arbitration.

Selection for case. Unless the parties indicate that they prefer one arbitrator, the court appoints three arbitrators from a roster of arbitrators maintained by the court. The court may also appoint, for a particular case only, people not on the roster but selected by the parties for their special knowledge or expertise related to the subject matter of the case.

Disqualification. The district has developed a code of conduct for its mediators and arbitrators. It includes guidelines regarding the duty of neutrals to uphold the integrity and fairness of the ADR process, to avoid impropriety or the appearance of impropriety, to conduct proceedings fairly and diligently, to avoid discriminatory mediating or arbitrating, and to maintain the confidentiality of the ADR process. The code is set out in the court's *Manual on Alternative Dispute Resolution for Court-Appointed Arbitrators and Mediators*.

Immunity. The court addresses questions of court-appointed arbitrator and mediator liability in its *Manual on Alternative Dispute Resolution for Court-Appointed Arbitrators and Mediators*. In part, the court concludes, "[T]he increasing number of cases recognizing arbitral immunity and the sound policy rationale for protecting arbitrators from suit when acting in their official capacity evidence a strong trend towards establishing arbitral immunity as the norm."

Fees. Arbitrators receive \$100 for the prehearing conference and \$100 for each day of the arbitration hearing, paid by the court.

Program administration

The court's ADR program is administered by the clerk's office under the guidance of the district court judges. Issues that arise are handled by the clerk of court, the ADR administrator, and the chief judge.

District of Vermont

IN BRIEF

Process summary

Early neutral evaluation (ENE). Under its CJRA plan adopted on December 1, 1993, and Local Rule 12, the District of Vermont established a mandatory, settlement-oriented early neutral evaluation program for certain categories of cases. See below.

Judicial settlement conferences. The court schedules mandatory settlement conferences with judges in almost all civil cases. The settlement conferences take place shortly before trial.

Of note

Evaluation. The court plans to evaluate the effectiveness of the ENE program by giving exit questionnaires to ENE participants, their counsel, and the evaluators.

For more information

Richard Paul Wasko, Clerk of Court, 802-951-6301

Marjorie E. Krahn, Chief Deputy Clerk, Acting ADR Administrator, 802-951-6301

IN DEPTH

Early Neutral Evaluation in Vermont

Overview

Description and authorization. On November 1, 1994, the District of Vermont implemented a mandatory ENE program designed to encourage early settlement in certain categories of contract, tort, property, and statutory civil cases. Eligible cases are automatically designated for ENE at filing, and parties in other cases may use the program voluntarily. In most cases, ENE sessions are held midway through the standard eight-month discovery period. The sessions are conducted by court-trained neutrals with subject matter expertise who are selected and paid by the parties. All parties and counsel must attend.

The purpose of the ENE session is to provide an early opportunity for realistic settlement negotiations or, in the absence of settlement, to narrow issues and prepare for trial efficiently. Settlement is explored using private caucusing and mediation techniques. The neutral also estimates, where feasible, the likelihood of liability and the range of damages. The ENE program is authorized by the district's CJRA plan, effective July 1, 1994, and is governed by Local Rule 12, adopted July 1, 1994, and effective for all cases filed on or after that date.

Number of cases. During the period from November 1, 1994, to December 1, 1994, approximately sixty cases were referred to ENE.

Case selection

Eligibility of cases. Local Rule 12 enumerates the following categories of cases for automatic ENE referral: contract, real property, personal injury and personal property torts, civil rights, labor, property rights, and other statutes. In addition, parties in any other civil case can elect to use ENE if all the parties consent. Case categories not enumerated by Local Rule 12 are excluded from automatic referral to ENE.

Referral method. All eligible cases are automatically designated for referral to ENE at the time of filing. Other cases may use ENE voluntarily.

Opt-out or removal. An eligible case may be excused from participation in ENE by a court order based on a showing of good cause.

Scheduling

Referral. Cases are automatically designated for ENE when the complaint is filed.

Written submissions. At least ten days before the evaluation session, each party must submit to the evaluator and all parties a statement of ten pages or less that (1) identifies the disputed legal and factual issues, (2) indicates whether early resolution of any issues or additional discovery would assist the settlement process, and (3) identifies the attorney who will represent the party at the ENE session as well as the party with decision-making authority who will attend the session. Parties must attach to their statement any key documents out of which the case arose (e.g., a contract) and other materials that will assist the evaluator (e.g., medical reports).

ENE session. ENE sessions are held about midway through the eight-month discovery period. The date set for ENE is included in the discovery schedule issued by the assigned judge and can be delayed only by court order for good cause. The evaluation session is generally scheduled by the parties and the neutral and is held at the neutral's office.

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

Program features

Discovery and motions. All other case activities must go forward during the ENE referral.

Party roles and sanctions. In addition to counsel, the parties are required to attend the ENE session. Where a corporation or governmental entity is party to the litigation, a person other than outside counsel and who has the authority to settle and to enter stipulations on behalf of the party must attend. In cases involving insurance carriers, the insurer representative with full settlement authority must attend; attendance of the insured party is not required. Attendance in person may be excused only on a showing of "unreasonable hardship." 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.

Outcome. Within fifteen days of the close of the ENE session, the evaluator must submit a report to the parties and the court. The report includes the date and duration of the session; the names and addresses of attendees; the date the evaluator received the parties' evaluation statements; notations showing whether each party did or did not make an oral presentation of its position; and the results of the session, stating whether full or partial settlement was reached and describing any agreements to narrow the

dispute, limit discovery, or facilitate future settlement. The evaluator's report does not disclose the evaluator's assessment of any aspect of the case or substantive matters discussed during the session, except to report agreements reached by the parties regarding further case activity or settlement.

Confidentiality. The program's confidentiality provisions invoke Fed. R. Evid. 408 and provide that all written and oral communications made in connection with or during the ENE process are confidential. In addition, no contact between the evaluator and the assigned judge is permitted. Excluded from the confidentiality shield are any stipulations or agreements that narrow the scope of the dispute, facilitate future settlement, or otherwise reduce cost and delay, as well as inquiries and information for court monitoring and evaluation of the program.

Neutrals

Qualifications and training. Candidates for the court's roster of evaluators must be either (1) an attorney, in practice for at least five years, who has significant trial experience and substantive experience that will serve the objectives of the ENE program; (2) a non-attorney; or (3) an attorney admitted to practice for less than five years who has expertise in a substantive or legal area that will serve the objectives of the ENE program. ENE candidates must participate in a mandatory, two-day training session sponsored by the court and conducted by ADR professionals.

Selection for case. The parties select an evaluator from a list of court-trained neutrals with subject matter expertise. If the parties cannot agree on a neutral, a striking system is used. The selection process occurs shortly after answer is filed.

Disqualification. A neutral-evaluator may not serve in any case in which any of the circumstances specified in 28 U.S.C. § 455 exist, unless there is a waiver by all parties. Evaluators are required to promptly disclose disqualifying circumstances to the ENE administrator. A party who believes that a potential or assigned evaluator has a conflict of interest must alert the ENE administrator within five days of learning about the possible conflict or be deemed to have waived the objection.

Immunity. The court believes that evaluators acting within the scope of their official duties are protected by quasi-judicial immunity.

Fees. The evaluator is compensated by the parties at a rate of \$500 per case, with the cost shared equally by the parties. In addition, Local Rule 12.5.b provides: "This fee assumes an ENE session of approximately half a day, related preparation and submission of an evaluator's report. If significantly more time is required for the ENE session, an additional session(s) is required or the parties request the evaluator to prepare a formal evaluation, the parties and the evaluator shall agree upon any additional compensation."

Program administration

The District of Vermont's ENE program is administered through the clerk's office by an ADR administrator, who is currently the chief deputy clerk. A full-time magistrate judge supervises the program. The district's CJRA subcommittee on alternative dispute resolution also provides oversight and policy guidance.

District of the Virgin Islands

IN BRIEF

Process summary

Mediation. Under its CJRA plan, adopted December 31, 1991, and Local Rule 3.2, the District of the Virgin Islands has authorized a mediation program. See below.

Judicial settlement conferences. The court encourages settlement discussions at all conferences in civil cases. The assigned district judge and magistrate judges will hold settlement conferences. Participation by the parties is voluntary.

Of note

Plans. The court is considering amending Local Rule 32(e)(2) to provide sanctions for failure of a party to participate in good faith in the mediation process.

For more information

Jeffrey L. Resnick, U.S. Magistrate Judge, St. Croix Division, 809-773-1601

Geoffrey W. Barnard, U.S. Magistrate Judge, St. Thomas Division, 809-773-5480

IN DEPTH

Mediation in the Virgin Islands

Overview

Description and authorization. The CJRA plan, adopted December 31, 1991, and Local Rule 3.2 authorize a mandatory mediation program. Any civil case may be ordered to mediation by a magistrate judge or the assigned judge. Cases may be referred at the scheduling conference or at any other appropriate time. Mediators are compensated by the parties.

Number of cases. During 1994, seventy-two cases were ordered to mandatory mediation. In addition, fourteen cases were referred to mediation based on party consent.

Case selection

Eligibility of cases. Any civil case is eligible for referral to mediation except appeals from administrative agency rulings, forfeitures, habeas corpus cases, any case assigned by the court to a multidistrict tribunal, cases involving declaratory relief, any litigation expedited by statute or law, and any other matter specified by order of a judge.

Referral method. The assigned judge may compel use of mediation, and parties may also stipulate to mediation.

Opt-out or removal. Within fifteen days of the order of referral, a party may move to dispense with mediation if the issue has already been mediated, the case presents a question of law only, or for other good cause.

Scheduling

Referral. A case may be ordered to mediation at the initial scheduling conference or at any other appropriate time.

Written submissions. Requiring or allowing written submissions by the parties is left to the discretion of the mediator.

District of the Virgin Islands

Mediation session. The first mediation conference must be held within sixty days of the referral, and the mediation process must be completed within forty-five days of the first mediation conference. The time period for mediation can be extended by the court or by stipulation by the parties, but it must not exceed ninety days.

Within ten days of the referral order, the court or the mediator notifies the parties in writing of the date, time, and place of the mediation conference. The conference takes place in a courtroom or at any other location designated by the referring judge.

Number and length of sessions. Generally, only one mediation session is held, lasting about three to six hours.

Program features

Discovery and motions. Discovery may continue throughout mediation but may also be delayed or deferred if the parties agree or the court orders.

Party roles and sanctions. Parties or their representatives with full settlement authority must attend the mediation conference. Failure to attend may result in sanctions, including mediator and attorney's fees and other costs. If a party to mediation is a public entity, a representative with full authority to negotiate and to recommend settlement to the appropriate decision makers must attend. Insurer representatives must have full and immediate authority to settle.

Counsel's role. By local rule, the mediator controls the extent of counsel's participation in the mediation session.

Outcome. If there is no agreement, the mediator must notify the court without comment or recommendation that settlement has not occurred. With the parties' consent, the mediator may advise the judge of pending motions, outstanding legal issues, or any other actions that might facilitate settlement. If settlement is reached, a written settlement or a joint stipulation of dismissal must be filed.

Confidentiality. Each party to the court-ordered mediation conference may refuse to disclose and to prevent any person present at the proceeding from disclosing communications made during such proceeding. Unless all parties agree, all communications made during the mediation process are inadmissible as evidence in subsequent proceedings.

Neutrals

Qualifications and training. Mediators certified for the court's list of mediators must be members in good standing of the Virgin Island Bar with at least five years experience; a retired judge who was a member of the bar in the state or territory in which the judge presided; or a person certified as a mediator by the American Arbitration Association or other national organization approved by the court. In addition, the mediator may hold a master's degree and be a member in good standing in his or her professional field with at least five years' experience in the Virgin Islands. Mediators must take the oath prescribed by 28 U.S.C. § 453.

Mediators must complete twenty hours of training and observe a minimum of four mediation conferences before being placed on the court's roster.

Selection for case. Within ten days of the referral order, the parties may accept the mediator selected by the court from its roster, or they may select, subject to review by the court, another qualified mediator. The court appoints mediators from the court roster by rotation or other procedure.

Western District of Virginia

Disqualification. Mediators must disqualify themselves for bias, prejudice, or impartiality as provided for by 28 U.S.C. § 144 and shall disqualify themselves 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. Mediators have a duty to disclose any fact that may be grounds for disqualification. Any party may move the court to disqualify the mediator for good cause. Mediators may disqualify themselves or refuse assignment.

Immunity. Local Rule 3.2(c)(3) provides that “[a] mediator appointed by the court . . . shall have judicial immunity in the same manner and to the same extent as a judge.”

Fees. In the absence of a written agreement providing for the mediator’s compensation, the mediator is compensated at the hourly rate set by the presiding judge in the referral order. Each party pays one half, unless the court determines that one party has not mediated in good faith.

Program administration

The magistrate judges make most of the referrals in their role as case managers and schedulers under Fed. R. Civ. P. 16 and Local Rule 16.1 and 16.2. Problems encountered in mediation or motions to enforce mediation are handled by the district judge to whom the case is assigned.

Eastern District of Virginia

IN BRIEF

Process summary

ADR generally. The Eastern District of Virginia has not established an ADR program.

Judicial settlement conferences. Settlement conferences are scheduled when requested by the parties. The conference is held by either a district or magistrate judge, depending on the case in question, the availability of a judge, and other criteria. Cases are handled on a case-by-case basis with no set assignment system. The parties are notified at the scheduling conference of the availability of magistrate judges for settlement conferences.

For more information

Norman Meyer, Clerk of Court, 703-557-5127

Western District of Virginia

IN BRIEF

Process summary

ADR and settlement generally. The Western District of Virginia has no formal ADR policy or programs. One judge in the district has on occasion used a court-sponsored minitrial. The scheduling orders prepared in each civil case are the court’s primary case management tool.

Arbitration. The Western District of Virginia is one of ten courts authorized by 28 U.S.C. §§ 651–658 to establish a voluntary, nonbinding court-annexed arbitration program. The court has chosen not to implement a program.

Judicial settlement conferences. Judicially hosted settlement conferences are used as needed.

For more information

Morgan E. Scott, Clerk of Court, 703-857-2224

Eastern District of Washington

IN BRIEF

Process summary

Mediation. Under Local Rule 39.1, the Eastern District of Washington has established a mediation process, which may be followed by either a hearing with a special master or an arbitrator. See below.

Arbitration. Local Rule 39.1 also authorizes the use of nonbinding, voluntary arbitration. Referral to arbitration usually occurs in cases that have participated in the court's mediation program but have failed to settle. See below.

Judicial settlement conferences. In cases in which discovery has been completed, individual judges conduct settlement conferences if requested by the parties. The judge may request a confidential memorandum from each party setting out the strengths and weaknesses of the case and the status of settlement negotiations. There is no written requirement that parties attend the settlement conference, but they are generally ordered to by the court. In cases subject to a bench trial, the trial judge does not conduct the settlement conference, but the trial judge may choose to do so for cases that will be tried to a jury. Magistrate judges may also conduct the settlement conferences.

Of note

Plans. The CJRA advisory group has recommended discussion of ADR at the initial scheduling conference and compensation by the court of attorney-mediators serving pursuant to Local Rule 39.1.

For more information

Wm. Fremming Nielsen, Chief U.S. District Judge, 509-353-2180

James R. Larsen, Clerk of Court, 509-353-2150

IN DEPTH

Mediation in Washington Eastern

Overview

Description and authorization. In 1988, the Eastern District of Washington established an ADR process. Authorized by Local Rule 39.1, the process begins with a referral to

mediation, which may occur in any civil case and may be ordered by the judge on his or her own motion or at the request of one or more parties. Within thirty days after a case is designated for mediation, the attorneys must meet in premediation sessions to discuss settlement among themselves. Within ten days after the premediation session, the parties must select a mediator from the court's roster of neutrals, or, if they cannot agree, the court selects a mediator from the roster. The mediator determines whether the parties must attend the mediation conference, which is confidential. If the mediation conference does not produce a settlement, the parties may agree to participate in a hearing with a special master or arbitrator.

Number of cases. In its 1993 report to the court, the CJRA advisory group reported that 12% of the court's cases were referred to mediation. Between January 1994 and December 1994, approximately 10% of civil cases were referred to mediation.

Case selection

Eligibility of cases. Local Rule 39.1 does not specify which cases are eligible for mediation. In practice, tort and contract cases are most frequently referred, while administrative and bankruptcy appeals are considered ineligible.

Referral method. Judges may order cases into mediation on their own initiative or at the request of a party. Parties may also volunteer to participate.

Opt-out or removal. Parties may petition the assigned judge for removal from mediation.

Scheduling

Referral. Local Rule 39.1 does not address this issue. In practice, referral to mediation may occur at any time appropriate to the case.

Written submissions. After selection of a mediator, parties must provide the mediator with a copy of the pretrial order. If there is no pretrial order, they must provide a copy of their pleadings. Each party must also give the mediator a memorandum presenting a concise statement, not exceeding ten pages, of contentions regarding both liability and damages. The memorandum must be served on all parties at least seven days before the mediation conference. The mediator may also request confidential memoranda from each party in which they must state the strengths, weaknesses, and settlement range of the case.

Mediation session. The mediation conference should occur no more than two months after the mediator has been selected. The mediator schedules the mediation session.

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

Program features

Discovery and motions. Tolling or continuation of case events during the ADR process is handled on a case-by-case basis.

Party roles and sanctions. The attorney primarily responsible for the case must attend and must be prepared to discuss all issues in good faith. The mediator determines whether parties should attend or should be available. A party represented by an insurance company need not attend, but the insurer's representative must attend and must have full settlement authority within the limits set by the insurer. Failure to attend must be reported to the court by the mediator and may be sanctioned.

Outcome. If settlement does not result from the mediation, the plaintiff must file with the clerk a certificate showing that there has been compliance with the mediation

process but that settlement has not occurred. If the mediator makes written suggestions regarding settlement, these may not be filed with the clerk or made available in any way to the court or jury.

Confidentiality. All proceedings of the mediation conference 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 said or done in the mediation session unless it is reduced to a written agreement.

Neutrals

Qualifications and training. The court selects attorneys for its register of neutrals from lists of qualified candidates submitted by the Federal Bar Associations of Eastern and Western Washington. Minimum qualifications are admission to the bar for at least five years and membership in the bar of either the Eastern or Western District of Washington. The court does not have a training requirement for the attorneys selected for its register.

Selection for case. Parties have ten days from the time of the required premediation session to select a mediator from the court's register of mediators, special masters, and arbitrators. If they cannot agree, the court selects the mediator from the register.

Disqualification. Local Rule 39.1 does not address this issue.

Immunity. The court believes that mediators have absolute quasi-judicial immunity under case law.

Fees. Mediators serve without pay.

Program administration

The mediation program is administered by the chambers of each judge.

Arbitration in Washington Eastern

Overview

Description and authorization. Nonbinding, voluntary arbitration is one of several forms of ADR adopted in 1988 in the Eastern District of Washington. Authorized by Local Rule 39.1, referral to arbitration usually occurs in cases that have participated in the court's mediation program but have failed to settle. In these cases, once the mediation process is completed, the mediator and/or judge explores with the parties whether appointment of an arbitrator might resolve the case. Parties to any other case may also use arbitration by stipulation and with approval of the court. In cases participating in arbitration, the parties select an arbitrator from the court's register of mediators, special masters, and arbitrators. After the arbitration hearing, which is conducted under oath and according to the Federal Rules of Evidence, a party must move for trial de novo within thirty days of filing the arbitration award or the award becomes the final judgment in the case.

Number of cases. Between January and December 1994, approximately 2 percent of the court's civil cases were referred to arbitration.

Case selection

Eligibility of cases. The court's Local Rule 39.1 does not specify either eligible or ineligible case types. In practice, primarily tort and contract cases are referred to the mediation/arbitration process. Cases in arbitration are only those in which the parties agree

to arbitration after mediation has not resolved the case. No case types are presumed to be excluded or inappropriate.

Referral method. Judges may order cases into the mediation or arbitration process, or both, on their own initiative or at the request of a party. Parties may also volunteer to participate in the process. For cases that reach the end of the mediation process without a settlement, the mediator or judge, or both, explores with the parties whether arbitration would help resolve the case. If the parties agree to arbitrate, they must prepare and file a written agreement.

Opt-out or removal. If a judge refers a case to ADR, a judicial order is required for removal.

Scheduling

Referral. Local Rule 39.1 does not address the timing of referral into the mediation or arbitration process or both. In practice, judges refer parties to the process at any stage in the litigation deemed appropriate for the case. The arbitration process occurs only after mediation has been used and has not resolved the case.

Discovery and motions. The arbitration hearing is conducted on the basis of the pleadings and discovery that are before the court at that time. Further proceedings in the case are stayed pending the hearing unless the arbitrator authorizes additional discovery.

Written submissions. The arbitrator determines the need for and scope of any prehearing submissions by the parties.

Arbitration hearing. The hearing occurs as early as possible consistent with the parties' need to prepare for it. The arbitrator determines the place and date of the hearing, in consultation with the parties.

Length of hearing. Arbitration hearings usually last one to two days.

Program features

Party roles and sanctions. Attendance at the arbitration hearing is required and enforced by the assigned judge. The court's rule does not specify whether or what type of sanctions might be imposed for failure to comply with the procedure's requirements.

Filing of award. The arbitrator files the award with the clerk's office "with reasonable promptness," and the clerk sends copies to the parties. If the parties do not request a modification of the award or that it be set aside altogether and a trial de novo take place, the award becomes the judgment.

De novo request. If a party demands trial de novo, the court may assess reasonable attorney's fees and costs against that party if he or she fails to win a judgment more favorable than the arbitration award.

Confidentiality. There may be no ex parte communication between the arbitrator and any counsel or party. A party may have a transcript made but must make it available to other parties if they request and pay for a copy. If the parties do not reach agreement, no transcript is admissible in any subsequent trial de novo except for impeachment purposes, and any evidence of or concerning the arbitration may not be admitted as evidence.

Neutrals

Qualifications and training. The Federal Bar Associations of Eastern and Western Washington submit to the court lists of qualified attorneys from which the judges select some

to be on the court's register. Minimum qualifications are admission to the bar for at least five years and membership in the bar of the Eastern or Western District of Washington. The court does not require or provide training for the neutrals on its roster.

Selection for case. Parties may select an arbitrator from the court's register of mediators, special masters, and arbitrators. If the parties do not want to select an arbitrator or cannot agree on one, the court makes the appointment from the register. When the court makes the appointment, it attempts to appoint an arbitrator with expertise in the subject matter of the case.

Disqualification. This subject is not addressed in the local rules.

Immunity. The court believes that arbitral immunity is provided by case law.

Fees. There is no monetary compensation for the arbitrators.

Program administration

Each judge administers ADR use and referral in his or her cases.

Western District of Washington

IN BRIEF

Process summary

Mediation. The Western District of Washington established a mediation program in 1979 under Local Rule 39.1(c). See below.

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

Judicial settlement conferences. All district and magistrate judges conduct settlement conferences, either at the request of the parties or at the direction of the trial judge. In mediated cases that do not settle, the trial judge frequently orders the parties to participate in a settlement conference with a district or magistrate judge.

Of note

Obligations of counsel. Attorneys are required to discuss ADR with opposing counsel and to indicate that they have done so in their case management statement. Counsel must also address in their case management plan the suitability of ADR for their case and be prepared to discuss this topic with the assigned judge.

Information from court. The court's brochure, *Alternative Dispute Resolution Procedures*, is given to counsel on request.

Evaluation. The court has conducted an evaluation of its mediation program and has prepared a written report. A Federal Judicial Center study of the court's voluntary arbitration program is reported in David Rauma & Carol Krafka, *Voluntary Arbitration in Eight Federal District Courts: An Evaluation* (Federal Judicial Center 1994).

For more information

Janet Bubnis, Chief Deputy Clerk, 206-553-5598

IN DEPTH

Mediation in Washington Western

Overview

Description and authorization. In 1979, Local Rule 39.1 established a mandatory mediation program in the Western District of Washington. Almost all civil cases are referred to mediation. Referral is generally made by the court at the scheduling conference or in the scheduling order. At least thirty days before the mediation session, the attorneys must meet to try to negotiate a settlement. Mediation sessions generally occur after discovery is completed.

Number of cases. The court does not keep statistics on mediation referral and use but notes that almost all civil cases are eligible for and are referred to mediation.

Case selection

Eligibility of cases. Almost all civil cases are eligible for mediation except Social Security cases, habeas corpus petitions, student loan recovery cases, Veterans Administration overpayment cases, and civil forfeitures.

Referral method. All eligible cases are referred by the assigned judge. Party consent is not required. Parties are notified of the referral through the scheduling order or in a separate referral order that accompanies the scheduling order.

Opt-out or removal. There are no written procedures for removing a case from mediation.

Scheduling

Referral. Referral is generally made by the assigned judge at the scheduling conference.

Written submissions. Before the mediation session, counsel for each case must send the mediator copies of the pretrial order. If there is no order, copies of the relevant pleadings must be submitted. Each party must also prepare a case summary of ten pages or less and must serve it on all parties and the mediator not less than seven days before the mediation conference. Each party must also give the mediator a confidential statement of its current offer or demand.

Mediation session. The mediation session generally is held after the close of discovery. It is held at the neutral's office and is arranged by the neutral and the parties.

Length and number of sessions. Mediation may take as little as an hour or two or may extend for substantially longer. Sometimes the parties and mediator may agree that one or more follow-up sessions would be fruitful.

Program features

Discovery and motions. At the time of the mediation session discovery is usually, but not always, completed. Dispositive motions may be pending.

Party roles and sanctions. In addition to counsel, parties and insurers with settlement authority must attend the mediation conference in person. Failure to attend or to comply with the rules regarding mediation or the directions of the mediator must be reported to the court in writing by the mediator and may result in sanctions.

Mediator recommendations. The mediator has no obligation but may in his or her discretion provide attorneys for the parties with written comments or recommendations regarding settlement. Counsel must forward the recommendations to their clients

and must comply promptly with any request by the mediator that a party be advised of such written recommendations. The memorandum may not be filed with the clerk or be made available to the judge or jury.

Outcome. Mediators do not file a report of the mediation session. They may, however, without disclosing any communications made at the mediation conference, advise the court in writing whether the appointment of a settlement judge or the use of other ADR procedures is advisable. Copies of any such advice must be provided to counsel.

Confidentiality. All proceedings of the mediation conference, including any statement made by any party, attorney, or any other participant, are in all respects 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 may be bound by anything done or said at the conference unless a settlement is reached, in which event the agreement must be reduced to writing and is binding on all parties to that agreement.

Neutrals

Qualifications and training. To become a mediator on the court's roster, an attorney must have been a member of the bar of a federal district court for at least seven years; be a member of the bar of this court; and devote a substantial portion of his or her practice to litigation. The court does not require training for mediators.

Selection for case. The parties must attempt to agree on a neutral from the court's roster. If they cannot, the court will designate a mediator and will send notice to the mediator and all attorneys of record.

Disqualification. There are no court rules regarding disqualification of neutrals.

Immunity. The court believes mediator immunity is provided by case law.

Fees. Although mediators provide their services pro bono, parties may agree to compensate the mediator.

Program administration

The program is administered by the clerk's office and overseen by a liaison judge.

Arbitration in Washington Western

Overview

Description and authorization. The Western District of Washington is one of ten courts authorized by 28 U.S.C. §§ 651–658 to establish voluntary, nonbinding court-annexed arbitration. Implemented in May 1992, under Local Rule 39.1(c), the procedure is authorized district-wide, but only one judge has referred cases to arbitration. The procedure takes place only if the parties consent and is nonbinding unless the parties agree otherwise. Before scheduling the arbitration hearing, the judge sets a trial date, which will be no later than the date that would have been set had the case not been submitted for arbitration. Generally, the arbitration hearing occurs no more than 180 days after answer is filed. A single arbitrator presides. Any party may demand trial de novo without prejudice within thirty days of the arbitration decision.

Number of cases. Two cases were referred between January and September 1994.

Case selection

Eligibility of cases. Parties in any case may consent to arbitration regardless of the amount in controversy or the nature of the relief sought, including adversary proceedings in bankruptcy. No cases are explicitly excluded, but cases excluded from mediation are also generally considered ineligible for arbitration.

Referral method. Referral to arbitration is based wholly on party consent. If the parties want to arbitrate, they sign a consent form provided by the court. An order of referral is then entered.

Opt-out or removal. The court may decline to refer any case to arbitration in which the objectives of arbitration would not be realized.

Scheduling

Referral. Referral to arbitration may occur at any time in the case.

Discovery and motions. The court sets a discovery schedule, a deadline for filing motions, and a deadline for beginning the arbitration hearing. No discovery is permitted during a period from ten days before the arbitration hearing until the award issues.

Written submissions. The arbitrator decides what written materials should be submitted.

Arbitration hearing. The arbitration hearing occurs no more than 180 days after answer was filed. The hearing is held at the courthouse and is arranged by the court staff and the arbitrator.

Length of hearing. No arbitration cases have yet gone to a hearing, so no average length has been established.

Program features

Party roles and sanctions. Client attendance at the arbitration hearing is not required by local rule, but it is generally ordered by the court. Failure to attend the arbitration hearing, to comply with the rules regarding ADR, or to comply with the directions of the arbitrator must be reported to the court by the arbitrator in writing and may result in the imposition of sanctions by the court.

Filing of award. The arbitrator's award is filed under seal and is retained in a separate location from the court file.

De novo request. Parties may request trial de novo within thirty days of the arbitrator's decision. Following trial de novo, the court may assess costs, pursuant to 28 U.S.C. § 1920, and reasonable attorneys' fees against a party demanding trial de novo if that party fails to obtain a judgment more favorable than the arbitration award and if the court determines that the party's conduct in seeking a trial de novo was in bad faith.

Confidentiality. No consent to arbitration will be made known to any district or magistrate judge unless all parties have consented to arbitration. The contents of any arbitration award will not be made known to any judge who might be assigned to the case (1) except as necessary to determine whether to assess costs or attorneys' fees; (2) until the district court has entered final judgment in the action or the action has been otherwise terminated; or (3) for purposes of preparing required reports.

Neutrals

Qualifications and training. To become an arbitrator on the court's roster, an attorney must have been a member of the bar of a federal district court for at least seven years;

must be a member of the bar of this court; and must devote a substantial portion of his or her practice to litigation. The court does not require training for arbitrators.

Selection for case. Within fourteen days of the referral to arbitration, the parties may select an arbitrator from the court's roster. If the parties do not select an arbitrator, the clerk selects one. Any selection must be approved by the assigned judge.

Disqualification. There are no court rules regarding disqualification of an arbitrator.

Immunity. The court believes arbitral immunity is provided by case law.

Fees. The court pays the arbitrator's fee of \$150 per day.

Program administration

The program is administered by the clerk's office and overseen by a liaison judge.

Northern District of West Virginia

IN BRIEF

Process summary

Settlement week. The Northern District of West Virginia developed its settlement week program in 1987 and currently holds settlement weeks two or three times a year. See below.

Other ADR. If the parties do not want to participate in the settlement week mediation session, they may select another form of ADR. The court authorizes use of arbitration, early neutral evaluation, minitrial, and summary jury trial.

Of note

Obligations of counsel. Counsel are required to discuss the court's settlement week program with their clients and explain its usefulness in resolving disputes.

Evaluation. As one of the five demonstration districts designated by the CJRA, the Northern District of West Virginia is included in the Federal Judicial Center study of the five demonstration districts, which will be reported to Congress by the Judicial Conference in 1996.

For more information

Wally A. Edgell, Clerk of Court, 304-636-1445

IN DEPTH

Settlement Week in West Virginia Northern

Overview

Description and authorization. In 1987, the Northern District of West Virginia developed a settlement week. Now authorized under the court's CJRA plan, effective December 18, 1991, settlement weeks are held two or three times each year. Each settlement week period generally lasts one to two weeks, during which the courtrooms are used

exclusively for mediation conferences. Each judge selects cases for settlement week mediation, generally selecting cases in which issue has been joined and some discovery has been completed. Parties in cases assigned to settlement week meet jointly and in private caucuses with an attorney-mediator assigned by the court to assist them in settlement discussions. The mediators serve without compensation. During settlement week, the judges remain available at the courthouse to give assistance if requested or required. The court considers the judges' support and availability an important factor in the program's effectiveness.

Number of cases. Between January and September 1994, 152 cases were referred to settlement week.

Case selection

Eligibility of cases. All civil cases are eligible for settlement week except student loan cases, overpayments of VA benefits, Social Security appeals, prisoner cases, habeas corpus petitions, appeals from bankruptcy court decisions, land condemnation cases, and asbestos product liability cases.

Referral method. Cases are referred to mediation by order of the assigned judge. Party consent is not required.

Opt-out or removal. Parties can, by motion, seek to remove a case from mediation. Grounds for removal include party agreement to pursue another form of ADR or a finding that no beneficial purpose would be served by requiring a settlement week conference.

Scheduling

Referral. The court may refer a case to settlement week mediation at any time that seems appropriate. Generally, cases are referred after issue is joined and some discovery has been completed. Parties are informed of their case's referral through a notice scheduling the conference.

Written submissions. Parties are not required to submit anything before the mediation session. The clerk of court provides the mediator copies of pleadings and other documents.

Settlement week. The mediation session takes place during one of the court's settlement weeks, generally held two or three times a year. The mediation session is held at the courthouse and is arranged by court staff.

Number and length of sessions. Mediation sessions generally last two to four hours. More than one session is held if it is needed and the parties agree to it.

Program features

Discovery and motions. Mediation may go forward despite pending motions.

Party roles and sanctions. In addition to counsel, the court requires that the client with full settlement authority attend the mediation conference. Failure to appear results in an order to demonstrate why sanctions should not be imposed. Failure to participate in good faith in any aspect of the mediation process is brought to the attention of the assigned judge.

Outcome. For administrative purposes, the mediator submits a conference report to the clerk. The report states whether the case settled; whether additional sessions will be held if the case did not settle; and what the best course for the case might be if no additional sessions are scheduled.

Confidentiality. The mediator may not discuss the case with the judge. Mediation sessions are held in strictest confidence. The mediator may not disclose any information divulged by any party or counsel during mediation discussions unless specifically authorized to do so by that party or counsel.

Neutrals

Qualifications and training. The mediator must be an attorney and must have completed training conducted by the West Virginia State Bar Association. The bar's training includes lectures, videotapes, and role plays. It is conducted by the law school faculty and members of the bar who have extensive training and experience in mediation.

Selection for case. The court assigns a single mediator from the court's roster of neutrals. The mediator is not necessarily selected for his or her subject matter expertise.

Disqualification. Following the tentative assignment of cases, the clerk of court provides the assigned mediator information about the case and the parties. Cases in which the mediator indicates a conflict of interest are reassigned.

Immunity. The court has not addressed this issue.

Fees. Mediators receive no compensation.

Program administration

The settlement week program is administered by the clerk's office.

Southern District of West Virginia

IN BRIEF

Process summary

Mediation. Under Local Rule 5.01, effective September 1, 1994, any civil case filed in the Southern District of West Virginia may be referred to mediation. See below.

Neutral evaluation. Local Rule 5.01 also authorizes an informal neutral evaluation program in which a judge serves as the evaluator.

Settlement conferences. A judicially hosted settlement conference is held in every case before trial.

Of note

Obligations of counsel. Attorneys are required to discuss ADR options with their clients and with each other and be prepared to discuss ADR options with the judge.

Information from court. The court is developing information for litigants about the court's new ADR services.

For more information

Ronald D. Lawson, Clerk of Court, 304-347-5169

IN DEPTH

Mediation in West Virginia Southern

Overview

Description and authorization. Under Local Rule 5.01, effective September 1, 1994, any civil case filed in the Southern District of West Virginia may be referred to mediation. In cases selected by the assigned judge mediation is mandatory. Any party may also suggest mediation by presenting to the clerk a completed mediation suggestion form. When a case is selected for mediation, the assigned judge appoints a mediator from the court's roster of attorneys or permits parties to select a mediator from among three mediators named by the judge. At the conclusion of each mediation conference, the mediator must report to the assigned judge whether the case was resolved and, if not, may make suggestions for early resolution of the case. There is no fee for the court's mediation service.

Number of cases. Between September 1994, when the program was implemented, and December 1994, no cases were referred to mediation.

Case selection

Eligibility of cases. Almost all civil case types are eligible for referral to mediation, except habeas corpus cases and motions attacking a federal sentence; procedures and hearings involving recalcitrant witnesses before federal courts or grand juries pursuant to 28 U.S.C. § 1826; actions for injunctive relief; review of administrative rulings and Social Security cases; 28 U.S.C. § 1983 prisoner cases and *Bivens*-type actions in which the plaintiff is unrepresented by counsel; condemnation actions; bankruptcy proceedings appealed to this court; collection and forfeiture cases in which the United States is the plaintiff and the defendant is unrepresented by counsel; and Freedom of Information Act proceedings.

Referral method. The assigned judge may refer a case to mediation without party consent. Parties may also request mediation by giving the clerk of court a mediation suggestion form. A request by one party will not be disclosed to anyone except the judge. After a case has been selected for referral, notice is sent by the assigned judge to all counsel and unrepresented parties.

Opt-out or removal. Cases may be excused from mediation if any party shows good cause.

Scheduling

Referral. The referral to mediation may occur at any time appropriate to the case.

Written submissions. At least ten days before the mediation conference, all parties must submit a written case summary of five pages or less to the clerk and to all other parties. Supporting documents may be attached. The clerk sends the materials to the assigned mediator, but they are not included in the court file.

Mediation session. The mediation session must occur before the final pretrial settlement conference in the case. The notice of referral to mediation sets the date, time, and place for the mediation conference, which is generally held at the courthouse.

Length and number of sessions. It is anticipated that generally one session will be held per case, lasting about three hours.

Program features

Discovery and motions. All other activities in the case go forward during the mediation process.

Party roles and sanctions. Attendance at the mediation conference is mandatory for all trial counsel and the parties or party representatives with full authority to make final, binding decisions. Failure to attend may result in sanctions.

Outcome. Once the mediation session is completed, the mediator must prepare a report and give it to the assigned judge. The report states whether the case was resolved and, if not, may make suggestions for early resolution of the case. A copy of the report is sent to all counsel of record and unrepresented parties but is not filed in the public case records. The mediator may not refer to or discuss with the assigned judge any information divulged by any party or counsel during the mediation conference unless he or she is authorized by that party or counsel to do so.

Confidentiality. All mediation proceedings, including any statements made by any party or attorney, are privileged and may not be reported, recorded, placed in evidence, made known to the assigned judge, or construed for any purpose as an admission. No party is bound by anything said or done in the mediation conference unless settlement is reached, reduced to writing, and signed by the parties.

Neutrals

Qualifications and training. To be admitted to the court's roster of approved mediators, an attorney must attend a mediation training program conducted by the state bar association.

Selection for case. The mediator is either selected by the assigned judge from the court's roster of attorneys or by the parties from among three mediators chosen from the roster by the assigned judge.

Disqualification. This subject has not been addressed by the court.

Immunity. The court has not addressed this issue.

Fees. Mediators provide their services without monetary compensation.

Program administration

The clerk's office administers the mediation program, with judicial oversight as needed.

Eastern District of Wisconsin

IN BRIEF

Process summary

Mediation. Under its CJRA plan, effective January 1, 1992, and Local Rule 7.12, the Eastern District of Wisconsin authorizes most forms of ADR. The primary form used in the district is mediation. See below.

Other ADR. Under Local Rule 7.12, the court has also used special settlement masters, minitrials, summary bench trials, and summary jury trials.

Judicial settlement conferences. The judges hold settlement conferences at their discretion.

Of note

Evaluation. As one of the ten pilot districts established by the CJRA, the Eastern District of Wisconsin 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

Judith Donegan, Law Clerk to Chief Judge, 414-297-3222

IN DEPTH

Mediation in Wisconsin Eastern

Overview

Description and authorization. Under its CJRA plan, effective January 1, 1992, and Local Rule 7.12, the Eastern District of Wisconsin authorized a mediation program. Referrals to mediation generally occur at the initial scheduling conference and may be made by the judge without party consent. Almost all civil cases can be referred to mediation, although the court most commonly refers cases involving business disputes. District judges, magistrate judges, or attorney-neutrals may serve as mediators. Attorney-mediators are compensated by the parties at a reasonable fee as directed by the court.

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

Case selection

Eligibility of cases. Any civil case may be referred to mediation. The most common referrals are cases involving business disputes. Certain case types are presumed not subject to mediation, including review of agency actions, habeas corpus petitions, collection cases, pro se prisoner cases, and cases not subject to mandatory discovery.

Referral method. District and magistrate judges select appropriate cases for mediation. Parties are notified of the referral either at the initial scheduling conference or by order of the court. Referrals may be without party consent.

Opt-out or removal. No opt-out or removal mechanism is provided by the court.

Scheduling

Referral. A case may be referred to mediation either at the initial scheduling conference or at any time that seems appropriate for the case.

Written submissions. The mediator may require the parties to submit preparatory materials if necessary.

Mediation session. The neutral and the parties set the time and place of the mediation session.

Program features

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

Party roles and sanctions. Parties must attend the mediation sessions. 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.

Outcome. The outcome is filed only if the judge requires it.

Confidentiality. Any documentation or proposal submitted in connection with the mediation session does not become part of the official court record.

Neutrals

Qualifications and training. The court has not established a roster of mediators. The assigned judge assesses a potential mediator's qualifications on a case-by-case basis. The court does not require that individuals appointed as mediators receive mediation training.

Selection for case. District judges, magistrate judges, and attorney-neutrals may serve as mediators. Judges may make referrals to persons or entities who, in the opinion of the judge, have the ability and skills needed to bring the parties together in settlement.

Disqualification. The judge who refers the case to mediation and appoints the mediator inquires into possible mediator conflicts of interest.

Immunity. The court has not addressed this issue.

Fees. When an attorney-mediator is appointed, parties pay reasonable fees and expenses as directed by the court.

Program administration

The program is administered by each individual judge.

Western District of Wisconsin

IN BRIEF

Process summary

Magistrate judge settlement. In the Western District of Wisconsin, magistrate judges are the primary settlement facilitators. Currently, one magistrate judge, who is also the clerk of court, conducts almost all of the court's settlement work. The trial judges never participate in settlement discussions. All civil cases are eligible for magistrate judge settlement assistance, except pro se litigation, collection cases, and cases in which the district court acts as an appeals court. A variety of facilitation or mediation techniques are used by the magistrate judges.

One judge requires counsel to send the magistrate judge a confidential settlement letter approximately six to eight weeks before the trial date. Once the magistrate judge receives these letters, he contacts counsel to explore the feasibility of settlement. The magistrate judge uses a variety of approaches to pursue settlement, depending on the desires of the parties and the needs of the case. He may conduct a series of telephone calls with counsel or schedule a settlement conference. At the conference, joint or separate sessions may be used. Clients generally do not participate in the telephone sessions, but may be asked to participate in a settlement conference at the courthouse. Settlement efforts may commence at any time suited to the case and last anywhere from fifteen minutes to five hours. All settlement efforts are confidential, and the trial judge is advised only of the likelihood of resolution.

Settlement intervention by the magistrate judge may be initiated by specific request of the trial judge or by request of one or all parties. The magistrate judge may also commence settlement overtures on his own initiative. On average, the clerk/magistrate judge participates in five to ten settlement efforts per month.

Early neutral evaluation (ENE). Under the court's CJRA plan, adopted December 31, 1991, the court authorized an experimental ENE program. See below.

Summary jury trial (SJT). On occasion, the court conducts a summary jury trial—generally only in cases that are headed for long trials. The assigned judge usually conducts the SJT, although a magistrate judge may preside. Summary jury trials are used only if the parties consent.

Of note

Obligations of counsel. Counsel are required to read the court's brochure on dispute resolution choices and to discuss the court's ADR options with their clients.

Information from court. The court distributes to all counsel a pamphlet that answers general questions about dispute resolution procedures and describes the various processes available in the district.

For more information

Joseph W. Skupniewitz, U.S. Magistrate Judge and Clerk of Court, 608-264-5156

IN DEPTH

Early Neutral Evaluation in Wisconsin Western

Overview

Description and authorization. The Western District Bar Association and the Western District of Wisconsin established a voluntary ENE program with volunteer attorney evaluators in May 1993. Under the program, which is experimental, the clerk advises counsel of the availability of the program and asks them to discuss the process with their clients. If all parties agree, the clerk helps the parties choose an evaluator from the roster of experienced attorney-volunteers assembled by the bar association. The ENE session, which is intended to enhance early settlement opportunities and case planning, generally occurs early in the pretrial period before the initial case management conference. The program is authorized under the district's CJRA plan, adopted December 31, 1991.

Number of cases. Approximately one case a month is referred to ENE.

Case selection

Eligibility of cases. If all parties consent, almost any civil case is eligible for ENE, although pro se litigants generally are excluded from ENE, as are collection cases and appellate cases.

Referral method. Participation in the district's ENE program is voluntary and requires the consent of all parties. Counsel are invited to consider the process by a letter from the clerk of court shortly after filing. Interested counsel set up a conference call with the clerk, and if all parties choose to participate, the referral is made.

Opt-out or removal. In this voluntary program, participants may opt out freely at any time.

Scheduling

Referral. A referral to ENE is generally made before the initial case management conference in the case.

Written submissions. Submissions are at the option of the evaluator. Experience to date is inadequate to tell whether written submissions will generally be required.

ENE session. The evaluation session is held shortly after referral. The evaluator makes the logistical arrangements for the sessions, which are held at his or her office.

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

Program features

Discovery and motions. All other case activities must go forward during the ENE process.

Party roles and sanctions. The evaluator may order the parties to attend the ENE conference. 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. Nothing is filed with the court at the conclusion of the ENE session.

Confidentiality. The evaluation session and the evaluator's assessment are confidential.

Neutrals

Qualifications and training. The evaluators are experienced attorneys in the district who have volunteered to serve as evaluators. No formal qualification or training requirements have been established by the court.

Selection for case. With the assistance of the clerk, counsel select an evaluator from the court's roster. Generally, evaluators with expertise in the legal area in dispute are selected.

Disqualification. There are no rules or guidelines in this area.

Immunity. The court has not addressed this issue.

Fees. The evaluators serve without compensation.

Program administration

The bar association set up the early neutral evaluation program by obtaining volunteer evaluators. The clerk of court advises counsel of the availability of the program and helps counsel select an evaluator. Thereafter all matters are handled by the evaluator working with the parties.

District of Wyoming

IN BRIEF

Process summary

ADR generally. The District of Wyoming authorizes ADR processes under Local Rule 101 and the district's CJRA plan, effective December 31, 1991, including nonbinding arbitration, mediation, and summary jury trials. The court prefers voluntary ADR use but authorizes mandatory referral. ADR referrals are made on a case-by-case basis at the request of the parties or, on rare occasions, by mandate of the assigned judge. Parties may select as ADR neutral a magistrate judge, a district judge other than the trial judge, a retired federal or state judge, or any attorney certified by the court to conduct alternative dispute resolution proceedings. The court has not to date established a formal court ADR program or a roster of neutrals. Between January and September 1994, no cases were referred to one of these forms of ADR.

Magistrate judge settlement conferences. The mainstay of the court's settlement efforts is the settlement conference with a magistrate judge, authorized by Local Rule 101(c) and the district's CJRA plan. The magistrate judge settlement process was established in November 1992. Mandatory referral by the assigned judge is authorized but rarely used. A party in any civil action may submit a request for a settlement conference to the clerk of court, who transmits it to the assigned judge. The judge encourages all parties to join in the request. If one or more parties declines, the judge may compel all parties to participate in the conference or may deny the settlement conference request.

In addition to counsel, parties with full settlement authority must attend the settlement conference. Insurer representatives must have full settlement authority. Representatives of corporate or governmental parties must have authority to settle equal to the last offer of the opposing party. Parties may participate by telephone only in exigent circumstances. Failure to comply with the attendance requirements may result in sanctions. Between January and September 1994, approximately twenty-five cases were referred to settlement conferences.

Of note

Plans. The court is working closely with the Wyoming State Bar Association to establish a court-sponsored mediation program.

For more information

Alan B. Johnson, Chief U.S. District Judge, 307-772-2104

William C. Beaman, U.S. Magistrate Judge, 307-772-2895

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About CPR Institute for Dispute Resolution

The CPR Institute for Dispute Resolution is a nonprofit organization of 500 major corporations and law firms established in 1979 to develop alternatives to the high cost of litigation. CPR's objective is to integrate alternative methods of dispute resolution, or ADR, into the mainstream of legal practice. CPR is engaged in a coordinated program of research and development, education, and conflict resolution services.

The CPR Judicial Project informs courts, policy makers, and counsel about ADR use in the public justice system through publications, education and training programs, technical assistance, and policy guidance. The CPR Judicial Project is guided by a fifty-member council of judges, legal academics, and lawyers. The CPR Ethics Project, under the leadership of a sixty-member CPR Commission on Ethics and Standards of Dispute Resolution Practice, addresses ADR quality and ethics issues.

CPR develops industry-specific programs to help resolve conflicts in industries such as banking, construction, food, franchise, health, insurance, oil and gas, securities, and utilities. CPR also publishes model ADR procedures for mediation, minitrial, arbitration, and multiparty disputes, as well as ADR processes for employment, technology, product liability, government contract, environmental, and other kinds of business and public disputes.

More than 4,000 companies subscribe to the *CPR Corporate Policy Statement on Alternatives to Litigation*, pledging to explore early settlement through ADR before pursuing full-scale litigation with other signatories, and 1,500 law firms have signed the *CPR Law Firm Policy Statement on Alternatives to Litigation*, pledging to be knowledgeable about ADR and to discuss ADR with clients.

The CPR Panels of Distinguished Neutrals provide mediators and other neutrals to help parties resolve major business and public disputes. The CPR Panels consist of leading lawyers, former judges, and law professors, and include twenty-five distinct rosters of national, international, regional, and specialized panels.

CPR's Training Program educates law firms, corporations, courts, government agencies, and other groups about ADR. CPR's publishing program includes books, model procedures and practice tools, and videotapes. CPR's newsmagazine *Alternatives* reports on ADR use by business, government, and the courts and tracks ADR policy and case law.

CPR collaborates with major legal, management, and judicial organizations in this country and abroad to foster understanding of ADR. In Europe and Canada, CPR is working with corporate counsel, law firms, and judges to explore ADR uses regionally and internationally. CPR also educates lawyers and judges from new democracies and developing countries.

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The Federal Judicial Center is the research, education, and planning agency of the federal judicial system. It was established by Congress in 1967 (28 U.S.C. §§ 620–629), on the recommendation of the Judicial Conference of the United States.

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Federal Judicial Center

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