RD 10/31; STILL NEED to review STATISTICS ✓

# ADR Subcommittee Recommendations

Draft for Discussion

October 16, 1991


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## Table of Contents

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Introduction

These recommendations are intended to satisfy two obligations recently undertaken by the District Court: to serve as a test site for voluntary arbitration, as provided in sections 651-658 of Title 28; and to serve as a pilot district for alternative dispute resolution processes other than arbitration, such as mediation, minitrial, and summary jury trial, as provided in section 473(a)(6) of the Civil Justice Reform Act.[1]

Although designed to meet the above statutory requirements, members of the Subcommittee unanimously feel these recommendations stand on their own merits and ought to be adopted by the District Court even if there were no statutory encouragements.

Though it is not particularly qualified to do so, the Subcommittee has not been able to identify any significant problems in terms of costs, delay, or outcomes in the District Court that call out for relief by ADR. For this reason, these recommendations are NOT offered as stop-gap measures or "next-best" alternatives, but on their own merits. They offer litigants in particular kinds of cases some advantages not ordinarily associated with the full trial of a case.

The most serious challenge for the Subcommittee has been the need to produce these

[1] Specifically, the Act specifies the Court's plan should include "authorization to refer appropriate cases to alternative dispute resolution programs that — (A) have been designated for use in a district court; or (B) the court may make available, including mediation, minitrial, and summary jury trial. Section 473(a)(6), Civil Justice Reform Act of 1990.

recommendations under two unavoidable handicaps. First, without benefit of the six or eight additional months it would take to digest what has been learned by various state and federal courts around the country as they have pursued various forms of ADR, which would allow us not only to learn more from others' mistakes, but more importantly, to resolve some of the conflicting results reported to date in the literature. Second, without benefit of intimate knowledge of the workings and personnel of the District Court.

On the other hand, the Subcommittee can confidently recommend a basic model that reflects the best experience nationally and yet is open and flexible enough to be modified over time in light of experience here and elsewhere.

Basic Proposal

1. Creation of a Development Subcommittee to draft the actual local rules and provisions that will constitute the recommended ADR programs. This Subcommittee will report to the ADR Subcommittee and will include at least one member of the Rules Committee, a judge or magistrate judge, and the Clerk of the Court.

2. Implementation of a voluntary arbitration program.[2]

3. Implementation of an experimental mediation program, to be implemented after the arbitration program has been operational for a period of time.

[2] There was discussion among the ADR subcommittee members concerning whether the arbitration program should be purely voluntary or have a small number of cases that would be subject to mandatory arbitration. After further consideration, the Subcommittee has decided that under the Congressional mandate of Title 28 §§ 651-658 mandatory arbitration would be outside of what Congress intended by enacting this statute. The District of Utah is required to have a voluntary arbitration program as one of ten districts responsible for producing results that can be compared with the ten additional courts that are required to implement mandatory arbitration.

Timetable

1. Appointment of Development Subcommittee: October 1991

2. Local Rule Completed re: Arbitration: December 1991

3. Pilot testing of Arbitration Program: May 1992

4. Implementation of Arbitration Program: September 1992

5. Local Rule Completed re: Mediation: December 1992

6. Pilot Testing of Mediation Program: May 1993

7. Implementation of Mediation Program: September 1993

Objectives (in modest proportions, in appropriate cases)

1. Lower discovery costs by reducing the amount of discovery[3]

2. Reduce attorneys fees by reducing the amount of time to disposition

3. More flexible outcomes (in mediation especially, parties can agree to "business-like solutions"; not limited to remedies available from the Court)

4. Offer opportunity to use third party neutrals with scientific or technical expertise as arbitrators or mediators in for cases turning on complex facts

5. Foster better relations between the parties, especially when tied to long-term relationships

6. Improving communication between parties, counsel and the court.

7. Improving the rationality of the thinking that informs each side's decisions about how to proceed and on what terms to resolve the matter.

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[3] For example, in a recent study, a majority of lawyers and arbitrators reported that Court-Annexed Arbitration discovery was reduced. Barkai and Kassebaum, Pushing the Limits on Court-Annexed Arbitration: The Hawaii Experience, 14 Just. Sys. J. 136-139 (1991).

8. Reducing party alienation from the trial process (the litigants who, after obtaining favorable verdict, say they still felt like the loser).

Arbitration Program

The voluntary arbitration program will be available to litigants in all civil cases in which the amounts being contested do not exceed a specified monetary ceiling, other excluded cases are Social Security cases, suits alleging violation of a right secured by the United States Constitution and suits in which jurisdiction is based on 28 U.S.C. § 1343 (bankruptcy). If a voluntary arbitration program is eventually adopted, then immediately after the answer is filed, the Clerk's Office will notify the attorneys concerning the option of arbitration in their particular case. Included with the notification will be a full description of the program and the benefits that may accrue from its use. Counsel are to then discuss the possibility of arbitration with their client/s. If both parties agree to submit to arbitration, then an arbitration hearing will be scheduled promptly.

Discovery will be limited for a certain time period and must be completed within that time (i.e. 90 days from time of answer). Experienced attorneys will be selected from a panel of lawyers previously approved by the Court, and will sit as arbitrator/s. Immediately after the hearing, the panel will make an award without opinion or findings of fact. Either party will have the option to request a trial de novo within 30 days. If a trial de novo is demanded, the case is set for trial as soon as possible. If the assigned judge is not available for a trial, the case will be reassigned to an available District Court Judge. If no trial de novo is requested within the 30 day period, the award will stand as a final and non-appealable judgement.

The program will be largely administered by the Clerk's Office. The Clerk's Office will

have an arbitration clerk who will be in charge of identifying eligible cases, calendaring, and tracking all arbitration cases. It should be noted, that the above description provides only a general framework of what is envisioned by the ADR Subcommittee and that the Development Subcommittee will be in charge of drafting the proposed local rules. The following are some of the areas that will have to de developed: (Suggestions that other courts have adopted are noted within the parenthesis)

1. Certification
    a. Who certifies the arbitrators? (Chief Judge)
    b. What qualifications required? (5 yrs member of court's bar)
    c. Procedure to certify?
2. Compensation
    a. per case? ($100)
    b. any allowance for additional if hearing protracted? (petition for additional expenses.)
3. Cases Eligible for Arbitration
    a. Monetary Ceiling? ($100,000 but allows for voluntary arbitration over $100,000 upon agreement of parties.)
    b. Which cases excluded? (S.S. cases, prisoner, violation of constitutional rights, others where issues of law dominate issues of fact.)
4. Scheduling Arbitration Trial
    a. After Answer? (clerk sends notice of hearing to be held within 120 days of answer.)
    b. Discovery completion (90 days after answer is filed discovery must be completed. Judge has discretion to alter if necessary.)

c. What size panel? (Three arbitrators, one designated as chairperson, unless parties agree to have one.)

d. Who chooses the arbitrators? (after creation and certification of panel by court there is random selection by clerk's office, one plaintiff oriented, one defendant oriented, one neutral.)

e. Judge schedules date, effect of motions pending? (30 days prior to dated scheduled, judge signs order setting forth date and time, if motions are pending judge does not sign order till motion is heard, if motion filed after order signed it shall not stay the arbitration proceedings.)

5. The Arbitration Proceeding

a. Where? (U.S. Courthouse)

b. Authorized to change date and time? (Parties may do so as long as trial is commenced within 30 days of Court's order. Burden on moving party to make arrangements.)

c. Can Arbitrators proceed absent a party? (Yes, arbitrators may proceed in the absence of any party who, after notice, fails to be present.)

d. Penalty for "non-meaningful" participation? (Court may impose appropriate sanctions, including but not limited to the striking of any demand for a trial de novo.)

e. Rule 45 FRCP re subpoenas? (applies to subpoenas requiring attendance and the production of documents.)

f. Rules of Evidence? (Used as a "guide".)

F. Arbitration Award and Judgment

a. Trial de novo (30 days)

b. Penalty for requesting trial de novo and not improving? (Forfeit arbitrators fees that are deposited with the clerk's office.)

Mediation Program

It is also recommended that the District of Utah adopt an experimental court-annexed mediation program. A certain number of cases assigned by the Clerk of the Court will be placed in the mediation program[4], except for Social Security cases, cases in which a prisoner is a party, cases which have elected arbitration, or cases that a judge determines sua sponte or on application by the mediator or a party, to be unsuitable for mediation.

Mediators must be members of the court's bar for a certain number of years (most likely longer than that required for arbitrators) and certified by the Chief Judge. After the first appearance for a defendant in an eligible case, the mediation clerk notifies counsel of the date, time and place for the mediation conference. At that time the mediator meets with counsel from each side for a mediation conference. The parties will be ready to discuss all liability issues, all damages issues, all equitable and declaratory remedies if such are requested, and the **position of the parties relative to settlement**. Counsel shall make arrangements with the client to be available by telephone or in person for the purpose of discussing settlement possibilities. If the parties do not settle at this initial mediation session, then an additional mediation conference will be scheduled within a certain time period (e.g. 30 days).

The program will also be largely administered by the Clerk's Office. The Clerk's Office will have an mediation clerk who will be in charge of identifying eligible cases, calendaring, and tracking all mediation cases. It should again be noted, that the above description is only a general framework of what is envisioned by the ADR subcommittee and that the Development

[4] How many cases that will actually be included within the pilot and implementation phases will be a consideration of the Development Subcommittee. The Eastern District of Pennsylvania currently places half of cases determined eligible for mediation in the program and half outside the program for statistical purposes.

Subcommittee will be in charge of drafting the proposed local rules. The following are some of the areas that will have to be developed: (Suggestions that other courts have adopted are noted within the parenthesis)

1. Certification

   a. Who certifies the mediators? (Chief Judge)

   b. What qualifications required? (15 yrs member of court's bar)

   c. Procedure to certify?

2. Compensation

   a. Monetary? (Pro Bono)

3. Cases Eligible for Mediation

   a. Monetary Ceiling? (No)

   b. Cases Excluded? (S.S. cases, prisoner, cases eligible for arbitration under local rule, asbestos cases, any case which a judge determines sua sponte or on application by an interested party (including the mediator), is not suitable for mediation.

4. Scheduling Mediation Conference

   a. After the first appearance of defendant (clerk sends notice to counsel setting forth a date, time, place for the mediation conference, the date shall be within thirty days from the date of the 1st appearance for the defendant is made.)

   b. Who chooses mediator? (random selection)

   c. Mediator authorized to change date and time of conference? (Yes, provided the conference takes place w\in 15 days of original date, any continuance beyond 15 days must be approved by judge to whom the case is assigned.)

5. The Mediation Conference

a. Where? (U.S. Courthouse or other place designated by the mediation clerk.)

b. Ready to discuss what? (all liability issues, all damages issues, all equitable and declaratory remedies if such are requested, and the **position of the parties relative to settlement.** Counsel shall make arrangements with the client to be available by telephone or in person for the purpose of discussing settlement possibilities.)

c. Sanctions for non-attendance? (Yes, but not specified.)

The Development Subcommittee

The Development Committee is to be comprised of a broad cross-section of the legal and general community and shall include at least one member of the existing rules committee, a judge or magistrate judge and the Clerk of the Court. The committee is to develop and propose the actual local rules and submit them for approval to the ADR subcommittee. After the ADR Subcommittee has approved the local rules the entire CJRA Advisory Committee will examine and vote on the proposed local rules.

In addition to drafting the proposed local rules for the ADR programs, the purpose of the Development Committee is also to ensure future participation in the ADR programs. The ADR programs that have been most successful have all had significant input from many sectors of the community during the development stages. Also by broadening the participation through the Development Committee, the District will reap the benefit of broader spectrum of experience.

## Appendix I. Listing of ADR Processes

A. Overview of ADR Processes

1. The Basic Processes:

   a. Neutral Fact Finding

   b. Early Neutral Evaluation

   c. Settlement Conference

   d. Mediation

   e. Arbitration

2. Variations:

   a. mandatory vs. voluntary

   b. binding vs. non-binding

3. The Hybrids:

   a. Med-Arb. (mediation & arbitration)

   b. Summary Jury Trial (non-binding, abbreviated trial to jurors)

   c. Summary Court Trial (non-binding, abbreviated trial to judge)

   d. Mini-Trial (abbreviated presentation of evidence to 3rd party neutral & corporate executives, plus negotiation & mediation, plus advisory opinion if requested)

   e. Other

## Appendix II. Glossary of ADR Terminology

**Alternative Dispute Resolution, or "ADR".** Means "alternatives" to a court trial; covers a broad spectrum of procedures, ranging from evaluation and issue defining techniques; through mediation and other "assisted negotiation" conferences; to various forms of arbitration; to the so-called "hybrid" procedures such as summary jury trial and mini-trial.[5]

**Arbitration.** A form of adjudication in which an expert (or a panel of three experts), selected by the parties, hears the case and renders a decision. The proceeding is less formal and time-consuming than a trial, because it does not require adherence to court rules of procedure, rules of evidence, etc. When ordered by the court, it is **non-binding** on the parties (see definition of **non-binding**).

**Mediation.** A form of "assisted negotiation" in which a neutral third person (the mediator) meets jointly, and sometimes separately, with the parties to facilitate communication and help them move toward a mutually agreeable outcome. Parties are under no obligation to agree; they retain full control over the process and outcome; the mediator has no authority to impose a solution on them. Judges and lawyers frequently confuse it with **arbitration** (see definition above).

**Moderated Settlement Conference.** Similar to neutral evaluation, but used when the case is closer to a trial date, intended to help the two sides toward a negotiated solution. Counsel, with the parties present, give their best summary of the case to a panel of neutral third parties (usually lawyers), who render a non-binding decision.

**Negotiation.** The most frequently used method of dispute resolution, in which counsel for the parties communicate by letter, telephone, and sometimes face-to-face to work out a mutually acceptable agreement. Clients are sometimes present during negotiations. The resulting agreement is typically entered by stipulation into the court record. In the District of Utah, about 97% of the federal civil docket is resolved in this manner.

**Neutral Fact-Finding.** A form of "assisted negotiation" in which an a neutral expert is appointed to investigate disputed facts or technical issues in a case and report the findings to the parties. The results are typically <u>not</u> binding on the parties; depending on prior agreement, they may be admissible in the event of trial.

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[5]. Paraphrase of Judge William W. Schwarzer, in his remarks on "Implementation of the Civil Justice Reform Act", at the Chief District Judges Conference in Naples, Florida, on May 13-16, 1991, page 3. Judge Schwarzer is Director of the Federal Judicial Center.

**Neutral Evaluation.** A form of "assisted negotiation" and "reality testing" typically used early in the litigation process. Lawyers with expertise in the subject area provide litigants and their counsel with an early, non-binding expert assessment of liability and dollar values of claims.

**Non-Binding.** Means that parties do not surrender their right of access to the courts when they agree to participate in ADR procedures; if they are not satisfied with the ADR result, they are entitled to a de novo trial of their case in District Court.[6]

**Mini-Trial.** Another private, consensual, non-binding process designed to assist the parties toward a negotiated outcome; originally used in disputes between corporations or other large entities. The lawyers present their best summary of the case to a panel that consists of a neutral expert, plus an officer and inside counsel of the disputing organizations. After hearing presentation of the case and asking questions, the officers and inside counsel retire to a conference room to see if they can work out a practical or "business solution" to the case. If they wish, they may call in the neutral expert and ask for an advisory opinion or otherwise benefit from his or her impressions of the case.

**Summary Jury Trial, or Summary Bench Trial.** An abbreviated form of adjudication intended to assist the parties toward a negotiated outcome. The lawyers, with the parties present in the courtroom, present their best summary of the case to a jury or judge. The jury or judge then renders a **non-binding** decision, and the parties and their counsel are encouraged to talk with the jurors and with the judge to learn their perception of the merits of the case.

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[6]. As a general rule, court-related ADR procedures are non-binding on the parties unless the parties themselves decide otherwise, and assuming they otherwise meet the procedural requirements. In my opinion, this is good policy, and it is directly responsive to the Act's mandate that the plan should, among other things, "facilitate deliberate adjudication of civil cases on the merits".

## Appendix III: Statistics of the Eastern District of Pennsylvania's Arbitration and Mediation Programs

## Appendix IV: Eastern District of Pennsylvania's Local Rules Arbitration and Mediation

U.S. DISTRICT COURT - EASTERN DISTRICT OF PENNSYLVANIA
MONTHS (2/01/78 - 8/31/91) OF COURT-ANNEXED COMPULSORY ARBITRATION

96617 civil cases were filed in a 163 month period

| | |
|---|---|
| 22275 of 96617 civil cases were in arbitration program | 23.0% |
| 21394 of 22275 cases have been terminated | 96.0% |

CASES TERMINATED

| | |
|---|---|
| 9901 of 22275 were terminated by settlement | 44.1% |
| 8086 of 22275 were terminated by Court order on motion | 36.0% |
| 1173 of 22275 were terminated by default judgment | 5.0% |
| 1686 of 22275 were terminated by judgment on arbitrators' award | 8.0% |
| 544 of 22275 were terminated by trial denovo | 2.0% |
| 885 of 22275 are pending cases | 4.9% |
| (Total) | 100.0% |

STATUS OF CASES PENDING IN ARBITRATION PROGRAM

153 of 885 pending - complaint not yet served

249 of 885 pending - answer not yet filed

64 of 885 pending - motions pending

96 of 885 pending - presently untriable in suspense file

230 of 885 pending - scheduled for arbitration hearing

21 of 885 pending - 30 days for denovo trial not expired

72 of 885 pending - scheduled for trial denovo

| | |
|---|---|
| 11298 of 22275 terminated prior to being sent to arbitrators | 51.0% |
| 4620 of 22275 arbitrators' awards filed | 21.0% |

426 arbitrators' awards filed in past 12 months

| | |
|---|---|
| 149 demands for trial denovo filed in past 12 months | 35.0% |

$1,190,142.00 paid to arbitrators in 163 months of compulsory arbitration.

$330,505.01 arbitrators fees forfeited to U.S. since August, 1983

1283 cases where judgement was not more favorable

$ 40.19 paid per case terminated.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

MEDIATION SUMMARY AS OF JUNE 30, 1991

COMPARISON OF ODD AND EVEN NUMBERED CASES TO DATE

| | Total # Cases Filed | Total # of Cases Eligible | Total # of Eligible Cases Pending | Total # of Cases Closed |
|---|---|---|---|---|
| Odd Number | 2064 | 955 | 736 | 219 |
| Even Number* | 2080 | 978 | 835 | 143 |

* Local Rule 15 provides that even numbered cases are not eligible for referral to mediation. These figures indicate the number of cases which would have been eligible for mediation had they not been assigned an even number.

BREAKDOWN OF THE TOTAL NUMBER OF DISPOSITIONS

| | # of Cases Closed | Default Judgment | Transferred /Remanded | Voluntarily Dismissed | Dismissed/ Settled | Placed in Suspense |
|---|---|---|---|---|---|---|
| Odd # | 219 | 19 | 29 | 20 | 145 | 6 |
| Even # | 143 | 20 | 16 | 22 | 76 | 9 |

## SUMMARY OF MONTHLY MEDIATION REPORTS AND TOTAL AS OF JUNE 30, 1991

| | January | February | March | April | May | June | Total |
|---|---|---|---|---|---|---|---|
| Total Civil Cases Filed | 714 | 594 | 744 | 708 | 681 | 686 | 4,127 |
| Total Cases Eligible | 173 24% | 141 24% | 156 21% | 179 25% | 169 25% | 137 20% | 955 23% |
| Cases Scheduled | 0 | 0 | 23 | 26 | 30 | 51 | 130 |
| Cases Terminated Prior to Conference | 0 | 0 | 5 | 1 | 2 | 5 | 13 |
| Cases Term. During Conference | 0 | 0 | 1 | 4 | 4 | 2 | 11 |
| Cases Term. After Conf. | 0 | 0 | 0 | 2 | 0 | 0 | 2 |
| Dispos'ns | 0 | 0 | 6 | 7 | 6 | 7 | 26 |
| Conf. Resched. | 0 | 0 | 5 | 5 | 8 | 19 | 37 |

REPORT OF
ODD NUMBER CASES FILED
JANUARY 1, 1991 THROUGH JUNE 31, 1991

TOTAL # OF ODD-NUMBERED CASES FILED: 2,087

TOTAL # OF ODD-NUMBERED CASES ELIGIBLE FOR MEDIATION: 979

OF THOSE 979 CASES ELIGIBLE FOR MEDIATION:

760 STILL PENDING

219 CLOSED

Breakdown of Dispositions:

| | |
|---|---|
| Default Judgments | 19 |
| Transferred/Remanded | 29 |
| Voluntarily Dismissed | 20 |
| Dismissed/Settled | 145 |
| Placed in Suspense | 6 |

## Appendix IV: Eastern District of Pennsylvania's Local Rules Arbitration and Mediation

**Rule 8 - ARBITRATION - THE SPEEDY CIVIL TRIAL**

1. Certification of Arbitrators.

A. The Chief Judge shall certify as many arbitrators as he determines to be necessary under this rule.

B. Any individual may be certified to serve as an arbitrator if: (1) he/she has been for at least five years a member of the bar of the highest court of a state or the District of Columbia, (2) he/she is admitted to practice before this court, and (3) he/she is determined by the Chief Judge to be competent to perform the duties of an arbitrator.

C. Any member of the bar possessing the qualifications set forth in subsection B, desiring to become an arbitrator, shall complete the application form obtainable in the office of the Clerk and when completed shall file it with the Clerk of Court who shall forward it to the Chief Judge of the Court for his determination as to whether the applicant should be certified.

D. Each individual certified as an arbitrator shall take the oath or affirmation prescribed by Title 28 U.S.C. §453 before serving as an arbitrator.

E. A list of all persons certified as arbitrators shall be maintained in the office of the Clerk.

F. Any member of the Bar certified as an arbitrator may be removed from the list of certified arbitrators for cause by a majority of the judges of this Court.

2. Compensation and Expenses of Arbitrators.

The arbitrators shall be compensated $100 each for services in each case assigned for arbitration. Whenever the parties agree to have the arbitration conducted before a single arbitrator, the single arbitrator shall be compensated $100 for services. In the event that the arbitration hearing is protracted, the court will entertain a petition for additional compensation. The fees shall be paid by or pursuant to the order of the director of the Administrative Office of the United States courts. Arbitrators shall not be reimbursed for actual expenses incurred by them in the performance of their duties under this rule.

3. Cases Eligible for Compulsory Arbitration.

A. The Clerk of Court shall, as to all cases filed on or after May 18, 1989, designate and process for compulsory arbitration all civil cases (including adversary proceedings in bankruptcy, excluding, however, (1) social security cases, (2) cases in which a prisoner is a party, (3) cases alleging a violation of a right secured by the U.S. Constitution, and (4) actions in which jurisdiction is based in whole or in part on 28 U.S.C. § 1343) wherein money damages only are being sought in an amount not in excess of $100,000.00 exclusive of interest and costs. All cases filed prior to May 18, 1989 which were designated by Clerk of Court for compulsory arbitration shall continue to be processed pursuant to this Rule.

B. The parties may by written stipulation agree that the Clerk of Court shall designate and process for arbitration pursuant to this rule any civil case (including adversary proceedings in bankruptcy) wherein money damages only are being sought in an amount in excess of $100,000.00, exclusive of interest and costs.

C. For purposes of this rule only, damages shall be presumed to be not in excess of $100,000.00, exclusive of interest and costs, unless:

(1) Counsel for plaintiff, at the time of filing the complaint, or in the event of the removal of a case from state court or transfer of a case from another district to this court, within ten (10) days of the docketing of the case in this district filed a certification that the damages sought exceed $100,000.00, exclusive of interest and costs; or

(2) Counsel for a defendant, at the time of filing a counterclaim or cross-claim filed a certification with the court that the damages sought by the counterclaim or cross-claim exceed $100,000.00, exclusive of interest and costs.

(3) The judge to whom the case has been assigned may "sua sponte" or upon motion filed by a party prior to the appointment of the arbitrators to hear the case pursuant to section 4(C), order the case exempted from arbitration upon a finding that the objectives of an arbitration trial (i.e.,

a motion for judgment on the pleadings, or a motion to join necessary parties, the judge shall not sign the order until the court has ruled on the motion, but the filing of such a motion on or after the date of said order shall not stay the arbitration unless the judge so orders.

D. Upon entry of the order designating the arbitrators, the arbitration clerk shall send to each arbitrator a copy of all the pleadings, including the order designating the arbitrators, and the guidelines for arbitrators.

E. Persons selected to be arbitrators shall be disqualified for bias or prejudice as provided in Title 28, U.S.C. § 144, and shall disqualify themselves in any action in which they would be required under Title 28, U.S.C. § 455 to disqualify themselves if they were a justice, judge, or magistrate.

F. The arbitrators designated to hear the case shall not discuss settlement with the parties or their counsel, or participate in any settlement discussions concerning the case which has been assigned to them.

5. The Arbitration Trial

A. The trial before the arbitrators shall take place on the date and at the time set forth in the order of the Court. The trial shall take place in the United Sates courthouse in a room assigned by the arbitration clerk. The arbitrators are authorized to change the date and time of the trial provided the trial is commenced within thirty (30) days of the trial date set forth in the Court's order. Any continuance beyond this thirty (30) day period must be approved by the judge to whom the case has been assigned. The arbitration clerk must be notified immediately of any continuance.

B. Counsel for the parties shall report settlement of the case to the arbitration clerk and all members of the arbitration panel assigned to the case.

C. The trial before the arbitrators may proceed in the absence of any party who, after notice, fails to be present. In the event, however, that a party fails to participate in the trial 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.

providing litigants with a speedier and less expensive alternative to the traditional courtroom trial) would not be realized because (a) the cases involve complex legal issues, (b) because legal issues predominate over factual issues, or (c) for other good cause.

4. Scheduling Arbitration Trial.

A. After an answer is filed in a case determined eligible for arbitration, the arbitration clerk shall send a notice to counsel setting forth the date and time for the arbitration trial. The date of the arbitration trial set forth in the notice shall be a date about one hundred twenty (120) days (5 months for cases filed prior to May 18, 1989) from the date the answer was filed. The notice shall also advise counsel that they may agree to an earlier date for the arbitration trial provided the arbitration clerk is notified within thirty (30) days of the date of the notice. The notice shall also advise counsel that they have ninety (90) days (120 days for cases filed prior to May 18, 1989) from the date the answer was filed to complete discovery unless the judge to whom the case has been assigned orders a shorter or longer period for discovery. In the event a third party has been brought into the action, this notice shall not be sent until an answer has been filed by the third party.

B. The arbitration trial shall be held before a panel of three arbitrators, one of whom shall be designated as chairperson of the panel unless the parties agree to have the hearing before a single arbitrator. The arbitration panel shall be chose through a random selection process by the clerk of the court from among the lawyers who have been certified as arbitrators. The clerk shall endeavor to assure insofar as reasonably practicable that each panel of three arbitrators shall consist of one arbitrator whose practice is primarily representing plaintiffs, one whose practice is primarily representing defendants, and a third panel member whose practice does not fit either category. The arbitration panel shall be scheduled to hear not more than four (4) cases on a date or dates several months in advance.

C. The judge to whom the case has been assigned shall at least thirty (30) days prior to the date scheduled for the arbitration trial sign an order setting forth the date and time of the arbitration trial and the names of the arbitrators designated to hear the case. In the event that a party has filed a motion to dismiss the complaint, a motion for summary judgment,

D. Rule 45 of the Federal Rules of Civil Procedure shall apply to subpoenas for attendance of witnesses and the production of documentary evidence at the trial before the arbitrators. Testimony at the trial shall be under oath or affirmation.

E. The Federal Rules of Evidence shall be used as guides to the admissibility of evidence. Copies or photographs of all exhibits, except exhibits intended solely for impeachment, must be marked for identification and delivered to adverse parties at least ten (10) days prior to the trial and the arbitrators shall receive such exhibits into evidence without formal proof unless counsel has been notified at least five (5) days prior to the trial that the adverse party intends to raise an issue concerning the authenticity of the exhibit. The arbitrators may refuse to receive into evidence any exhibit, a copy or photograph of which has not been delivered prior to trial to the adverse party, as provided herein.

F. A party may have a recording and transcript made of the arbitration hearing at the party's expense.

6. Arbitration Award and Judgment.

The arbitration award shall be filed with the court promptly after the trial is concluded and shall be entered as the judgment of the court after the thirty (30) day time period for requesting a trial de novo has expired, unless a party has demanded a trial de novo, as hereinafter provided. The judgment so entered shall be subject to the same provisions of law, and shall have the same force and effect as a judgment of the court in a civil action, except that it shall not be the subject of appeal. In a case involving multiple claims and parties, any segregable part of an arbitration award concerning which a trial de novo has not been demanded by the aggrieved party before the expiration of the thirty (30) day time period provided for filing a demand for trial de novo shall become part of the final judgment with the same force and effect as a judgment of the court in a civil action, except that it shall not be the subject of appeal.

7. Trial De Novo.

A. Within thirty (30) days after the arbitration award is entered on the docket, any party may demand a trial de novo in the district court. Written notification of such a demand shall be served by the moving party upon all counsel of record or other parties. Withdrawal of a demand for a trial de novo shall not reinstate the arbitrators' award and the case shall proceed as if it had not been arbitrated.

B. Upon demand for a trial de novo and the payment to the Clerk required by paragraph E, infra, the action shall be placed on the trial calendar of the court and treated for all purposes as if it had not been referred to arbitration. In the event it appears to the judge to whom the case was assigned that the case will not be reached for de novo trial within ninety (90) days of the filing of the demand for trial de novo, the judge shall request the Chief Judge to reassign the case to a judge whose trial calendar will make it possible for the case to be tried de novo within ninety (90) days of the filing of the demand for trial de novo. Any right of trial by jury which a party would otherwise have shall be preserved inviolate.

C. At the trial de novo, the court shall not admit evidence that there had been an arbitration trial, the nature or amount of the award, or any other matter concerning the conduct of the arbitration proceeding unless the evidence would otherwise be admissible in the Court under the Federal Rules of Evidence.

D. To make certain that the arbitrators' award is not considered by the Court or jury either before, during or after the trial de novo, the arbitration clerk shall, upon the filing of the arbitration award, enter onto the docket only the date and "arbitration award filed" and nothing more, and shall retain the arbitrators' award in a separate file in the Clerk's office. In the event no demand for trial de novo is filed within the designated time period, the arbitration clerk shall enter the award on the docket and place it in the case file.

E. Upon making a demand for trial de novo, the moving party shall, unless permitted to proceed in forma pauperis, deposit with the Clerk of Court a sum equal to the arbitration fees of $ 100.00 for each arbitrator as provided in Section 2. The sum so deposited shall be returned to the party demanding a trial de novo in the event that party obtains a final judgment, exclusive of interest and costs, more favorable than the arbitration award. In the event the party demanding a trial de novo does not obtain a judgment more favorable than the arbitration award, the sum so deposited shall be paid to the Treasury of the United States.

Rule 15 **Court-Annexed Mediation (Early Settlement Conference)**

Purpose--The court adopts this Rule for the purpose of determining whether a program of court-annexed mediation will provide litigants with a speedier and less expensive alternative to the burdens of discovery and the traditional courtroom trial. As hereinafter provided, commencing January 1, 1991, (and continuing until further action by the court) those cases which have been assigned an "odd" number by the Clerk of Court will be placed in the program with the understanding that thereafter a study will be made to determine whether this program should be continued in the interest of providing a more expeditious resolution of litigation.

1. Certification of Mediators

(a) The Chief Judge shall certify as many mediators as he determines to be necessary under this rule.

(b) An individual may be certified to serve as a mediator if: (1) he/she has been for at least fifteen (15) years a member of the bar of the highest court of a state or the District of Columbia; (2) he/she is admitted to practice before this court; and (3) he/she is determined by the Chief Judge to be competent to perform the duties of a mediator.

(c) Any member of the bar possessing the qualifications set forth in subsection (b), and desiring to become a mediator, shall complete the application form obtainable in the office of the Clerk and when completed shall file it with the Clerk of Court who shall forward it to the Chief Judge of the Court for his determination as to whether the applicant should be certified.

(d) Each individual certified as a mediator shall take the oath or affirmation prescribed by Title 28, U.S.C. §453 before serving as a mediator.

(e) A list of all persons certified as mediators shall be maintained in the office of the Clerk.

(f) A member of the bar certified as a mediator may be removed from the list of certified mediators for cause by a majority of the judges of this Court.

2. Compensation and Expenses of Mediators

Mediators shall receive no compensation for services and shall not be reimbursed for expenses. The services and expenses of a mediator shall be considered a pro bono service in the interest of providing litigants with a speedier and less expensive alternative to the burdens of discovery and a courtroom trial.

3. Cases Eligible for Mediation

The Clerk of Court shall, as to all cases filed on or after January 1, 1991, designate and process for mediation all civil cases to which the Clerk of this Court has assigned an "odd" (not "even") number, except (1) social security cases, (2) cases in which a prisoner is a party, (3) cases eligible for arbitration pursuant to Local Civil Rule 8, (4) asbestos cases, and (5) any case which a judge determines, sua sponte, or on application by an interested party (including the mediator), is not suitable for mediation.

4. Scheduling Mediation Conference

(a) After the first appearance for a defendant is made in a case determined eligible for mediation, the mediation clerk shall promptly send a notice to counsel and any unrepresented party setting forth a date, time and place for the mediation conference, and the name, address, and telephone number of the mediator. The date of the mediation conference set forth in the notice shall be a date within thirty (30) days from the date the first appearance for a defendant is made.

(b) The mediation conference shall be held before a mediator selected by a random selection process by the Clerk of Court from the list of lawyers certified as mediators.

(c) Upon mailing the notice pursuant to 4(a), the mediation clerk shall send to the mediator copies of the complaint and any motion(s) or pleading(s) that as of the date of the mailing of the notice have been filed in response to the complaint.

(d) A mediator is authorized to change the date and time for the mediation conference, provided the conference takes place within fifteen (15) days of the date set forth in the notice pursuant to 4(a), and the mediation clerk is notified. Any continuance of the conference beyond this fifteen (15) day period must be approved by the judge to whom the case is assigned.

(e) Persons selected as mediators shall be disqualified for bias or prejudice as provided by Title 28, U.S.C. §144, and shall disqualify themselves in any action in which they would be required under Title 28, U.S.C. §455 to disqualify themselves if they were a justice, judge, or magistrate.

5. The Mediation Conference

(a) The mediation conference shall take place on the date and at the time set forth in the notice pursuant to 4(a), or as changed pursuant to 4(d). The mediation conference shall take place in a courthouse, a courtroom in the United States Customs House, or at such other place designated by the mediation clerk.

(b) Counsel primarily responsible for the case and any unrepresented party shall attend the mediation conference, and shall be prepared to discuss: (1) all liability issues; (2) all damages issues; (3) all equitable and declaratory remedies if such are requested; and (4) the position of the parties relative to settlement. Counsel shall make arrangements with the client to be available by telephone or in person for the purpose of discussing settlement possibilities. Willful failure to attend the mediation conference shall be reported to the Court and may result in the imposition of sanctions.

(c) All proceedings at any mediation conference authorized by this Rule (including any statement made by a party, attorney, or other participants) shall 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 shall be bound by anything done or said at the conference unless a written settlement is reached and signed by the parties or their counsel.

(d) In the event the mediator determines that no settlement is likely to result from the mediation conference, he shall terminate the conference and promptly thereafter send a report to the mediation clerk and the judge to whom the case is assigned stating that there has been compliance with the requirements of this Rule, but that no settlement has been reached. In the event, however, that a settlement is achieved at the mediation conference, the mediator shall send a report to the mediation clerk and the judge to whom the case has been assigned stating that a settlement was achieved.

(e) No one shall have a recording or transcript made of the mediation conference.

(f) This rule shall not be construed as modifying the provisions of Federal Rule of Civil Procedure 16 or Local Civil Rule 21.

6. Revisions to this Rule

The court may, in order to further the purposes of court-annexed mediation, revise the text of this rule after consultation with the Federal Courts Committee of the Philadelphia Bar Association and the Lawyers' Advisory Committee for this court.