

## **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

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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.

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**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.

**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

## **CPR Institute for Dispute Resolution**

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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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