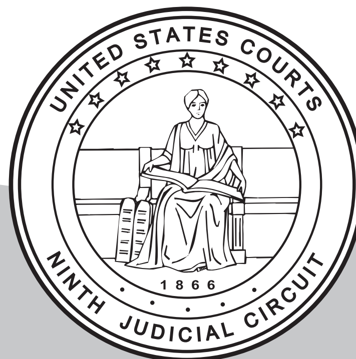
ADR Guidebook

Prepared by the Ninth Circuit Standing Committee on Alternative Dispute Resolution



June 2003

The ADR Committee expresses its appreciation to the Office of the Circuit Executive, and particularly to Assistant Executive Robin Donoghue, Legal Administrative Assistant Alex Clausen and Judicial Extern Kathleen Hunt, for their assistance with this publication.

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Dear Colleagues:

On behalf of the Ninth Circuit Standing Committee on Alternative Dispute Resolution, I am pleased to present this ADR Guidebook. It is a response to 2002 Ninth Circuit Judicial Conference Resolution No. 1, that requested development of educational materials on ADR for distribution to the Judicial Council, Chief District Judges, and Chief Bankruptcy Judges within the circuit. The committee decided to make this information available to our entire court family of judges, judicial staff, and lawyer representatives - all of whom have key roles to play in the delivery of ADR services to the public.

There is a wealth of ADR local rules, forms, and procedures available throughout the Ninth Circuit. Rather than add bulk to the Guidebook, the committee chose to include a list of court web sites and links where this information can readily be accessed. In addition, I direct your attention to the list of ADR resources contained within. The members of the ADR Committee are eager to assist you in developing or expanding ADR programs, and we hope that you will call upon us with your questions or concerns.

Finally, plans are underway to initiate an ADR Committee web page, accessible from the Ninth Circuit Intranet web site (www.circ9.dcn), which will be updated regularly with helpful reports, articles, and news items. We welcome your ideas for other ways the committee may serve you.

Sincerely,

Dorothy W. Nelson

Dorothy W. Nelson
Chair, Standing Committee on
Alternative Dispute Resolution

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EXECUTIVE SUMMARY

What is Alternative Dispute Resolution (ADR)?

- ♦ Any process or procedure, other than adjudication by the judge assigned to the case, in which a neutral third party helps parties try to resolve matters in controversy
- ♦ Usually non-binding
- ♦ Participation may be mandated or voluntary
- ♦ Programs typically include one of more of the following:
  - mediation
  - early neutral evaluation (ENE) or voluntary dispute resolution (VDRP)
  - non-binding arbitration
  - non-binding summary jury or bench trials
  - settlement conferences in conjunction with any of the above

Section 1 of this Guidebook includes descriptions of each of these processes, as well as a summary chart that compares which benefits the different ADR methods best deliver.

Why should courts incorporate ADR into their programs?

- ♦ Congress mandated it, through the ADR Act of 1998, 28 U.S.C. §§ 651-658
- ♦ Saves time and money
- ♦ Provides valuable service for litigants and lawyers
- ♦ Allows conflict resolution to be tailored to parties' underlying needs and interests
- ♦ Strengthens public confidence in the courts

More information on the legal and legislative history of ADR is available in Section 2.

What kind of ADR program should the court adopt?

- ♦ At least one ADR process should be available for most civil cases
- ♦ No single program works best in all court settings
- ♦ Programs evolve over time
- ♦ Must meet requirements of ADR Act (identified in Section 2)
- ♦ Courts may select among major design variables (see Section 1, within), including
  - which kind or kinds of processes to sponsor or offer
  - which kinds of cases to serve
  - whether to make participation voluntary or presumptively mandatory
  - whether the neutrals should be paid

Doesn't a commitment to ADR mean abandoning the jury trial?

- ♦ Resolving many disputes through ADR enables shorter time to trial in other cases
- ♦ Improves fairness of litigation process

Studies have established no causal connection between declining trial rates and increasing interest in ADR. If anything, informal surveys reveal that the trial rate tends to be higher in areas with strong ADR programs, as addressed in greater depth in Section 2.

How much time and money is required to initiate or maintain a court ADR program?

- ♦ Resources vary, depending on the nature of the program
- ♦ Programs can "start small" without "new" money
- ♦ Programs need not be administered directly by judges

Section 3 describes some of the program design options.

Will ADR affect my case management or make it more difficult to preserve trial dates?

- ♦ ADR can actually be used to advance cases
- ♦ Trial dates are easy to preserve when ADR deadlines are set early and enforced consistently

Who can administer a court ADR program?

- ♦ Various court employees or judicial officers
- ♦ Time required varies, depending on the type of program

Some examples are found in Section 4.

Where can we turn for more information, suggestions, or hands-on help?

- ♦ This guidebook, including the Appendices
- ♦ The Ninth Circuit ADR Committee document library, available online at www.circ9.dcn/web/ocelibra.nsf[1]
- ♦ Members of the Ninth Circuit ADR committee (including site visits)
- ♦ Training materials, including videotaped lectures, panel discussions, and role plays
- ♦ The Federal Judicial Center, including guides and a panel of expert consultants

How do I get started?

- ♦ See the checklist in Section 5
- ♦ Investigate other resources, such as the rest of this Guidebook

Section One
Definitions

What is Alternative Dispute Resolution?

Alternative Dispute Resolution (ADR) can be any process or procedure, other than an adjudication by the judge assigned or the jury called to the case, in which a neutral third party participates to assist in the resolution of issues in controversy. Some successful programs have included settlement conferences and other forms of active case management in conjunction with arbitration, summary trials, early neutral evaluations, mediation, or any combination of these ADR techniques.

All ADR proceedings, including documents generated solely for the proceedings and communications within the scope of the proceedings, are confidential. Generally, they are not provided to a judge of the court who is not the settlement judge in the dispute. Information which is otherwise discoverable or admissible does not lose that characteristic merely because of its use in the ADR proceedings.

Unless otherwise noted, ADR procedures are non-binding. If no resolution is reached, the case remains on the litigation track.

Mediation is a flexible, confidential process in which a neutral lawyer-mediator facilitates settlement negotiations. The informal session typically begins with presentations of each side's view of the case, through counsel or clients. The mediator, who may meet with the parties in joint or separate sessions, works to:

- improve communication across party lines
- help parties clarify and communicate their interests
- if asked, probe the strengths and weaknesses of each party's legal positions
- identify areas of agreement and help generate options for a mutually agreeable resolution

The mediator generally does not give an overall evaluation of the case. Assisted mediation can extend beyond traditional settlement discussion to broaden the range of resolution options, often by exploring litigants' needs and interests that may be independent of the legal issues in controversy.[2]

Arbitration may be binding or nonbinding. In the ADR context, however, it is usually nonbinding. Arbitration is a process whereby an impartial third party (an arbitrator or panel of arbitrators) hears and considers the evidence and testimony of the disputants and others with relevant knowledge and issues a decision on the merits of the dispute. The arbitrator makes an award on the claim(s) presented for decision. This process has been used widely in the commercial setting by parties who wish to avoid some aspect of litigation but want a third party

to make a [binding] decision.[3]

Mediation-Arbitration is a combination of the above two techniques. The parties first try to reach agreement through mediation. If they fail, the mediator or another third party evaluates the issue(s) and makes a decision. While this can create conflicts for the mediator, who may have difficulty keeping these two distinct roles separate, it can also create additional incentives for the parties to settle on their own terms. However, the parties may have difficulty honestly discussing their relative positions, and the strengths and weaknesses of each, if they are inhibited by the knowledge that their "third-party neutral" may also be their judge. For this reason, full disclosure in advance of the inherent risks of this process is necessary.

Early Neutral Evaluation involves using the services of a third-party neutral or settlement judge knowledgeable in the subject matter of the litigation to assess the strengths and weaknesses of the parties' positions. The lawyers present their cases to this legal expert, who then predicts what the outcome would be in court. In this manner, the parties may gain a more realistic view of their prospects for success. This process can also be used to narrow the issues and facilitate settlement.

A summary/mini trial is a flexible, abbreviated procedure in which the parties present their case, or a portion of it, to a third-party neutral or settlement judge, or in some cases, a mock jury. In a mini-trial, lawyers for each side present a synopsis of their entire case, through argument and sometimes through key witnesses and documents. The parties, along with a neutral legal expert, listen to the presentation and then begin negotiations. In a summary jury trial, lawyers present the case, in telescoped form, to a sample jury panel, which renders a non-binding decision.

These techniques are intended to help the parties and the lawyers gain a more realistic view of their likelihood of success at trial, thus positioning them to discuss settlement realistically.

Settlement Conferences should be conducted by a settlement judge (any judge of the court other than the judge assigned to the case). Appointment of a settlement judge permits the parties to engage in a frank, in-depth discussion of the strengths and weaknesses of each party's case before a judicial officer without the inhibitions that might exist before the judge assigned to the case. A settlement judge may act both as a mediator and as a neutral evaluator. However, it should be noted that judicial settlement conferences alone are insufficient to quality for funding credits.

Matching Cases to ADR Processes[4]

	Mediation	Arbitration	Early Neutral Evaluation	Summary/mini trial
Parties have continuing relationship	XX		X	
Dispute caused by poor communication	XX		X	
Complex legal issues	X		X	X
Creative solutions needed	XX			
One or more parties refuse to compromise		XX	XX	XX
Inexperienced counsel	X	X	XX	X
Little discovery needed	XX	XX	XX	
Limited amount in controversy	XX	XX	X	
High animosity between parties	XX	X	X	
One or more parties wants a “day in court”		XX	X	
Outcome depends on question of fact		XX	X	X
Realistic evaluation of case needed		XX	XX	XX

Section Two
Rationale

Legal History

In 1990, Congress passed the Civil Justice Reform Act (CJRA) in an effort to "facilitate deliberate adjudication of civil cases on the merits, monitor discovery, improve litigation management, and ensure just, speedy, and inexpensive resolutions of civil disputes."[5] Under the CJRA, federal courts were instructed to consider referring "appropriate cases to [such] alternative dispute resolution programs that . . . the court may make available, including mediation, minitrial, and summary jury trial."[6] Further, Congress encouraged courts to provide "a neutral evaluation program for the presentation of the legal and factual basis of a case to a neutral court representative selected by the court at a nonbinding conference conducted early in the litigation."[7] Finally, Congress specifically directed several federal districts to "experiment with various methods of reducing cost and delay in civil litigation, including alternative dispute resolution," with the results of the experiment to be reported to the Committees on the Judiciary of the Senate and the House of Representatives by the end of June, 1997.[8]

The final report included a recommendation "that local districts continue to develop suitable ADR programs, including non-binding arbitration."[9] The findings provided further support for the Judicial Conference's previous recommendation that district courts should be "encouraged to make available a variety of alternative dispute resolution techniques, procedures, and resources to assist in achieving a just, speedy, and inexpensive determination of civil litigation."[10]

Shortly thereafter, Congress passed the Alternative Dispute Resolution Act (the "ADR Act"), which the President signed into law in October 1998. The ADR Act requires the federal judiciary to "devise and implement its own alternative dispute resolution program, by local rule adopted under section 2071(a), [and] to encourage and promote the use of alternative dispute resolution in its district."[11] Congress based this legislation on its findings that ADR "has the potential to provide a variety of benefits, including greater satisfaction of the parties, innovative methods of resolving disputes, and greater efficiency in achieving settlements."[12] In addition, Congress explained that ADR techniques, "including mediation, early neutral evaluation, minitrials, and voluntary arbitration, may have potential to reduce the large backlog of cases now pending in some Federal courts throughout the United States, thereby allowing the courts to process their remaining cases more efficiently."[13]

Research Summary

Statistics indicate that roughly 90% of all civil lawsuits will be resolved through settlement, rather than by adjudication in a court of law.[14] However, these matters continue to occupy the time, attention, and space of the court system during their journey towards settlement.

Both parties and court management systems can benefit from making that journey as speedy, efficient, and painless as possible. A 2001 study conducted by the District of Nevada, for instance, found that cases assigned to Early Neutral Evaluation (ENE) during the previous two years lasted an average of 264 days, compared to an average length of 317 days for non-ENE cases.[15] In addition, almost twice as many motions were filed in the non-ENE cases as in the ENE cases. These factors may help explain why the mean cost of non-ENE cases was nearly triple the mean cost of the ENE cases.[16]

Through ADR programs, courts provide litigants and lawyers with services that are highly valued - especially when litigation's cost and complexity compromise parties' access to justice and often seem disproportionate to what is at stake in the particular case. High percentages of lawyers and clients approve of and are thankful for court sponsored ADR programs, which offer important opportunities that traditional litigation does not offer. In addition, ADR has been shown to be an efficient solution to the problems of overcrowded dockets and dissatisfied litigants. Thoughtful application of ADR approaches can save both time and money, and allow conflicts to be resolved in a way that is entirely tailored to the underlying needs and interests of the parties.

In contrast to a common misperception linking ADR to declining trial rates, an informal survey of courts suggests that a higher percentage of cases may go to trial in areas with strong ADR programs. For instance, the trial rate in one Ninth Circuit district court, with very active ADR programs in the court as well as in the private sector, experienced only a minimal rate of decline (1.9% in 1990 to 1.4% in 2000). Meanwhile, the trial rate in another Ninth Circuit district court with minimal private ADR and no court-annexed ADR dropped more than twice as much, plunging from 2.0% in 1990 to a mere .8% in 2000.[17]

It may be that parties have a clearer idea of the risks and benefits of trial after going through the ADR process. It may be that ADR allows parties "to determine more reliably whether trial is really necessary to achieve their ends," by encouraging them to carefully examine their best alternatives. Or it may be simply the fact that ADR promotes a more intimate involvement with the resolution of disputes than may be possible through traditional litigation. Whatever the individual reasoning, the net result is that parties can achieve much greater satisfaction, in addition to the improved public perception of the legal system as a whole, where ADR programs are in place.[18]

Limitations

Nearly all civil cases are eligible for ADR. However, under the ADR Act, no matter may be referred to arbitration in particular if any of the following three circumstances apply: "(1) the action is based on an alleged violation of a right secured by the Constitution of the United States; (2) jurisdiction is based in whole or in part on section 1343 of this title; or (3) the relief sought consists of money damages in an amount greater than $150,000."[19] In addition, Title IX is specifically exempted from application of the ADR Act.[20]

Individual districts may choose to exempt specific cases or categories of cases from other alternative dispute resolution processes. In defining these exemptions, each district court shall consult with members of the bar, including the United States Attorney for that district."[21] Similarly, cases may be inappropriate for ADR "where important public policy questions reaching beyond the narrow interests of the parties to the case are at issue."[22]

Finally, any court that chooses to mandate the use of ADR in certain cases "may do so only with respect to mediation, early neutral evaluation, and, if the parties consent, arbitration."[23]

Section Three
Range of Court Programs

Requirements

As illustrated by the charts below, there are many different kinds of ADR programs and many different ways to administer them. For instance, ADR may be appropriate to consider for all civil disputes, or only in certain types of cases. Alternately, a court may choose to mandate only the "active consideration" of ADR by the parties, allowing the court to order participation in an ADR program as needed on an individual basis. Within the restrictions of the ADR Act, set out in Section 2 of this guidebook, there is nearly unlimited latitude in the selection of cases that a court may consider suitable for ADR.

Administration varies as well. The ADR Act of 1998 requires each court to appoint a judge, clerk, attorney, or other knowledgeable employee of the court to provide the necessary oversight for a court's ADR program. This can be a full-time job or a part-time responsibility, depending on the size and nature of the program. Some courts prefer to create an ADR program that is supervised entirely by court personnel, including an Administrator or Coordinator, a panel of court-appointed neutrals, and/or specially-designated judicial officers (such as District Judges or Magistrate Judges). In other districts, it is more effective to coordinate the court's ADR program with the local Federal Bar Association, allowing the bulk of the management to come from an agency or organization outside the court itself.

Taken together, choices regarding cases types and administration can determine the type and amount of resources that will be needed to create or maintain an ADR program. A larger program which utilizes more court personnel may be eligible for staffing credits as further discussed in Section 4, within. A program which relies on referrals to a court-appointed panel of outside neutrals likely will require little judicial oversight. Thus, each court is encouraged to allocate available time and resources in the most efficient way possible, based on its own unique circumstances.

District Courts

	Program(s) Offered	Elective / Mandatory	Staffing	Current Budget	# of Cases Active During Year
District of Alaska contact: Hon. James A. Von der Heydt Senior District Judge 907 271 5582	Mediation; settlement conferences; "other ADR"	Parties must consider mediation or other ADR court may assign	1 (Administrator)		1
District of Arizona	Arbitration (nonbinding or binding); private ADR OK	Elective	arbitration clerk(s); panel of arbitrators (paid) [attys are exempted from duty to represent indigents if on this panel]	staffing credit	87
Central District of California contact: Lydia Yurtchuk Special Programs Analyst 213 894 8249	Mediation; settlement conferences	Mandatory in some types of cases: parties must "exhaust all possibilities of settlement" in **all** cases	1 (Program Coordinator); court panel of neutrals (unpaid)	staffing credit	329
Eastern District of California contact: Joyce Del Pero VDRP Administrator 916 930 4042	ENE; mediation; settlement conferences; private ADR OK	Parties must consider court may assign	2 (ADR Judge; VDRP Admin.) + court panel of neutrals (unpaid)	staffing credit	182 (2002)
Northern District of California contact: Hon. Wayne D. Brazil Magistrate Judge 510 637 3324	Arbitration; ENE; mediation; settlement conferences; summary trials; private ADR OK	Presumptively Mandatory	4 (ADR Magistrate Judge; Director of ADR Programs; ADR Program Counsel; ADR Administrator); "such attorneys, case administrators and support personnel as the Court may authorize"; court panel of neutrals	staffing credit	3423

Note: A blank space indicates that information was not available at publication time.

Southern District of California contact: Hon. Louisa S. Porter Presiding Magistrate Judge 619 557 5383	ENE; mediation; arbitration	Mandatory	magistrate judges assigned	staffing credit	937
District of Guam contact: Judith Hattori Law Clerk 671 473 9200	settlement conferences	Voluntary	neutral judge (or judge assigned to the case with written stipulation from all parties)		
District of Hawaii contact: Prigden “Jud” Watkins Chief Deputy Clerk 808 541 1178	Settlement conferences; mediation	Mandatory Settlement Conference; parties must consider mediation or other ADR court may assign	1 Magistrate Judge (ADR Administrator & Mediation Judge); mediation committee; court panel of mediators (paid)		
District of Idaho contact: Denise Asper ADR Coordinator 208 334 1631	Arbitration (nonbinding); mediation; settlement conferences	Parties must consider court may assign	1 (ADR Coordinator); 2 “settlement judges”; court panel of neutrals (both paid and unpaid)	staffing credit	22
District of Montana contact: Leandra Kelleher Chief Deputy Clerk 406 542 7261	ENE	Parties “must consider” court may assign	court panel of neutrals (paid); all docs through assigned judge & clerk of court		
District of the Northern Mariana Islands	Summary jury trials (nonbinding); arbitration	Mandatory at court’s discretion			

District of Nevada contact: Jake Herb Management Analyst 702 686 5850	ENE; settlement conferences; summary trial	Mandatory for employment discrimination cases; court may assign other cases		staffing credit	211
District of Oregon contact: Hon. Ann Aiken District Judge 541 465 6409	Mediation; settlement judge; private ADR OK	Parties must consider court may assign	1 (ADR Administrator); court panel of mediators (unpaid)	staffing credit	195
Eastern District of Washington contact: James R. Larsen District Court Executive 509 353 2150	Mediation; settlement conferences, arbitration (nonbinding or binding); private ADR OK	Parties must consider court may assign	court panel of neutrals (both paid and unpaid)	staffing credit	47
Western District of Washington contact: Janet Bubnis Chief Deputy 206 553 5598	Mediation; arbitration; summary trials; ENE; settlement conferences; private ADR OK	Parties must consider court may assign	court panel of neutrals (both paid and unpaid); administered by Clerk of Court, working with the ADR Committee of the local Federal Bar Association	staffing credit	1315

Bankruptcy Courts

	Program(s) Offered	Elective / Mandatory	Staffing	Budget	# of Cases Active During Year
District of Alaska Bankruptcy Court contact: Jamilia George Chief Deputy 907 271 2655 x 2649	Mediation	Mandatory for employment cases			4
District of Arizona Bankruptcy Court contact: Hon. Redfield T. Baum 602 640 5850					
Central District of California Bankruptcy Court contact: Hon. Barry Russell 213 894 6091	Mediation; negotiation; ENE; settlement conferences	Generally voluntary court may assign	court panel of mediators (both paid and unpaid); 1 Program Administrator; documents handled by Clerk's Office or other assigned court staff		
Eastern District of California Bankruptcy Court contact: Hon. Jane Dickson McKeag 916 930 4522	Mediation; negotiation; ENE; settlement conferences	Generally voluntary court may assign	court panel of neutrals (unpaid); 1 Administrator or Designated Judge; 1 assigned court staff		

Northern District of California Bankruptcy Court contact: Clarissa Cagawan Human Resources Specialist 415 268 2336	Mediation; negotiation; ENE; settlement conferences	Generally voluntary court may assign	court panel of neutrals (paid $100 fee per each side)		
Southern District of California Bankruptcy Court contact: Dave Grube Chief Deputy Clerk 619 557 6582					
District of Guam Bankruptcy Court					
District of Hawaii Bankruptcy Court contact: Michael Dowling BDR Administrator 808 522 8100 x 109					
District of Idaho Bankruptcy Court contact: see District Court					
District of Montana Bankruptcy Court contact: Bernard McCarthy Bankruptcy Court Clerk 406 782 3354	Mediation; ENE; any form of ADR	Voluntary	District court panel of neutrals for ENE; referrals to Bankruptcy section of local Bar		

District of Nevada Bankruptcy Court contact: Hon. Gregg W. Zive Chief Bankruptcy Judge 775 784 5017					
District of Oregon Bankruptcy Court contact: Rose Thrush Legal Analyst 503 326 2231 x 143					
Eastern District of Washington Bankruptcy Court contact: Theodore S. McGregor Bankruptcy Court Clerk 509 353 2404					
Western District of Washington Bankruptcy Court contact: Hon. Thomas T. Glover Bankruptcy Judge 206 553 1626					

Section Four
Resources: Personnel, Training, Funds

Overview

A neutral third party is a necessary participant for all ADR processes and procedures. Each district court is required to promulgate its own procedures and criteria for the selection of neutrals.[24] For this purpose, the district court may use, among others, magistrate judges who have been trained to serve as neutrals in alternative dispute resolution processes, professional neutrals from the private sector, and any persons who have been trained to serve as neutrals in alternative dispute resolution processes.[25]

There are many people and organizations available to assist with the creation or maintenance of a court ADR program. For instance, part of the mission of the Ninth Circuit Standing Committee on ADR Programs is to "[s]erve as a resource for each court in the circuit with respect to the development and refinement of ADR programs in those courts."[26] To that end, the Committee has provided a Model Local Rule that may be adapted for use by any court.[27] In addition, the American Bar Association Section of Dispute Resolution includes 27 committees dedicated to ADR; one is focused exclusively on court-annexed programs.[28]

As noted in Section 3 of this guidebook, anyone may administer a court ADR program. If a court prefers to be actively involved in case management, with close judicial oversight at each step of the way, a magistrate judge or district judge may be the designated Administrator. If judicial time is scarce, a different Administrator may be designated, including a law clerk; if the case load is not expected to be excessive, the Clerk of the Court may be able to assimilate the work into his/her regular duties. In some circumstances, a court may prefer to arrange a partnership with the local Bar association or other ADR association. In such a case, the existing staff of the court may distribute initial forms and/or provide emergency oversight, while the partnering organization takes responsibility for the requisite scheduling, training, structure and on going administration of the program.

Qualification and training of neutrals

Here, too, there are many possibilities. Many courts rely on a panel of neutrals who are recruited from outside the court itself, whom the court may "screen" to some extent. Mediators and other aspiring court neutrals submit applications to be included on the court list of referrals. Inclusion on such a list may require a minimum period of experience in a specified field of law or as a neutral (five years is typical), an oath of neutrality, and even a commitment to provide some or all services for the court on a pro bono basis. To assist courts in creating and maintaining such panels, and as part of an ongoing effort to improve the quality of ADR programs, the American Bar Association Section of Dispute Resolution released a Report on Mediator Credentialing and Quality Assurance in October 2002.[29] For those courts that prefer to employ their own roster of

neutrals directly, appropriate standards and other resources can be found through the American Bar Association, the American Arbitration Association, and the Federal Judicial Center.

Training for judges and other court staff

There is an abundance of material available for judges, particularly from the Federal Judicial Center.[30] The CPR Judicial Project also offers free individualized training and consulting assistance to courts considering or implementing ADR.[31] The Ninth Circuit's ADR Committee is another resource that is available to district courts.

Administration and oversight

Congress has stated only that each court "shall designate an employee, or a judicial officer, who is knowledgeable in alternative dispute resolution practices and processes to implement, administer, oversee, and evaluate the court's alternative dispute resolution program."[32] This individual can be someone who is already part of the court, such as a judge or clerk, or may be someone new. In either case, the amount of time required for this position may vary greatly, depending on the size and scope of the ADR program.

Some courts employ full-time professional ADR staff to handle such issues as the selection of eligible cases, oversight of the panel of neutrals, and any ethical concerns that may arise. In addition, designated ADR staff members may provide a useful buffer between parties, neutrals, and the assigned judge. Nonetheless, a district or magistrate judge can do an excellent job performing these important functions where additional dedicated staff members are not desired or simply not an option.[33] The specific level of oversight required will depend on the type(s) of ADR techniques employed.

Funding options

In many cases, staffing credit may be available for an ADR program. The Judicial Conference of the United States has adopted a staffing factor for "robust" and "basic" ADR programs that meet defined criteria and are therefore entitled to staffing allocations for ADR. More information is available from the Administrative Office of the U.S. Courts. Another possibility includes forming partnerships with organizations outside the court itself, such as a local Bar Association or local ADR groups. Coordinating with such organizations can reduce the need for significant expenditures of time or money by the court. Alternately, some courts may be able to distribute the workload among existing staff, thus avoiding increased personnel costs. Finally, "self-administered" ADR may be feasible under the court's supervision.[34]

Section Five
Getting Started

Following are initial steps to take in developing or expanding a court-based ADR program.

- ❑ Meet with key judges and staff to determine interest in specific programs
- ❑ Meet with lawyer representatives and other key local lawyers to get their input and solicit assistance
- ❑ Review Model Rule (Appendix B)
- ❑ Contact a member of the ADR Committee for possible assistance
- ❑ Contact FJC, ABA, local law schools, or other courts for input
- ❑ Consult Local Rules and forms developed by other courts (available online at each court's website)
- ❑ Amend Local Rules accordingly
- ❑ Launch the program with the training, support, and structure appropriate to the type of program adopted.

ENDNOTES

1. Available at http://www.circ9.dcn/web/ocelibra.nsf, under the Alternative Dispute Resolution heading.

2. Definition courtesy of ADR booklet of Northern District of California.

3. Definition courtesy of Local Rule 16.2(d)(1) of the Eastern District of Washington.

4. *See* Elizabeth Plapinger & Margaret Shaw, *Court ADR: Elements of Program Design* (CPR Judicial Project 1992); Plapinger, Shaw, & Stienstra, eds., *Judge's Deskbook on Court ADR* (CPR Judicial Project 1993).

5. 28 U.S.C. § 471.

6. 28 U.S.C. § 473(a)(6).

7. 28 U.S.C. § 473(b)(4).

8. 28 U.S.C. § 471.

9. Judicial Conference of the United States, *The Civil Justice Reform Act of 1990: Final Report* 6 (May 1997).

10. Judicial Conference of the United States, *Long Range Plan for the Federal Courts*, Recommendation 39 (1995).

11. 28 U.S.C. § 651(b).

12. 28 U.S.C. § 651.

13. *Id.*

14. *See e.g.,* American Arbitration Association, *Mediation: Frequently Asked Questions,* www.http://www.adr.org/, under Resources, Roster of Neutrals, then AAA Mediation: FAQ (accessed Feb. 25, 2003) (indicating that "85% of commercial matters and 95% of personal injury matters end in written settlement agreements.").

15. United States District Court, District of Nevada, *State of the Court 2001* 27, http://www.nvd.uscourts.gov/nvd/courtinfo.nsf/, under Public Notices (accessed Apr. 7, 2003).

16. *Id.*

17. These figures are from the 2000 Annual Report of the Director of the Administrative Office of the United States Courts.

18. *See* Yasuhei Taniguchi, *Mediation in Japan and Mediation's Cross Cultural Viability*, n. 17, available at WIPO Arbitration and Mediation Center http://arbiter.wipo.int/events/conferences/1997/October/taniguchi.html#8 (accessed Feb. 25, 2003) ("A psychological relationship between participation and sense of fairness has been established by a series of studies by socio legal psychologists.").

19. 28 U.S.C. § 654(a).

20. 28 U.S.C. § 651(e).

21. 28 U.S.C. § 652(b).

22. Niemic, Stienstra & Ravitz, *Guide to Judicial Management of Cases in ADR* 26 at n. 55 (Federal Judicial Center 2001).

23. 28 U.S.C. § 652(a).

24. 28 U.S.C. § 653(a).

25. 28 U.S.C. § 653(b).

26. Ninth Circuit ADR Standing Committee, *Mission Statement* ¶ 5, available at http://www.circ9.dcn/web/ocelibra.nsf, under ADR heading, then Mission of the Ninth Circuit ADR Standing Committee (accessed Mar. 24, 2003).

27. Available at http://www.ce9.uscourts.gov/web/OCELibra.nsf, under ADR heading, then Model Local Rule (accessed Mar. 10, 2003).

28. The Court ADR committee is designed "to support research, education, administration, and information exchange in court ADR. To this end, the committee promotes analysis of court based ADR processes, assists in the dissemination of information about court ADR programs, and provides court administrators, judges, researchers, and providers and users of court based ADR a forum for discussion and assistance." ABA Section of Dispute Resolution, *Description of Committees*, available at http://www.abanet.org/dispute/committees.html (accessed Mar. 10, 2003).

29. Available at http://www.abanet.org/dispute/taksforce report 2003.pdf (accessed Mar. 10, 2003).

30. *See e.g.* Niemic, Stienstra & Ravitz, *Guide to Judicial Management of Cases in ADR*; Plapinger & Stienstra, *ADR and Settlement in the Federal District Courts: A Sourcebook for Judges and Lawyers* (1996). Links to many additional sources may be found in the document library of the Ninth Circuit ADR Standing Committee, available at http://www.circ9.dcn/web/ocelibra.nsf (accessed Mar. 24, 2003).

31. For instance, the CPR Institute for Dispute Resolution includes a specialized CPR Judicial Project, as well as CPR's "one half day intensive introduction to the major ADR processes . . . and refresher sessions for judges and other court officials" and/or "two day intensive mediation training to prepare lawyers to serve as mediators in federal and state court ADR programs." *See* CPR Institute for Dispute Resolution, available at http://www.cpradr.org/ (accessed Mar. 11, 2003).

32. 28 U.S.C. § 651(d).

33. Niemic, Stienstra & Ravitz, *Guide to Judicial Management of Cases in ADR* 155 156.

34. *See* James F. Henry, *Mediation without Administration*, CPR Institute for Dispute Resolution, available at http://www.cpradr.org/ (accessed Mar. 11, 2003).

APPENDIX A

UNITED STATES CODE ANNOTATED
TITLE 28. JUDICIARY AND JUDICIAL PROCEDURE
PART III COURT OFFICERS AND EMPLOYEES
CHAPTER 44 ALTERNATIVE DISPUTE RESOLUTION

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Current through P.L. 107 377 (End) approved 12 19 02

§ 651. Authorization of alternative dispute resolution

(a) Definition. For purposes of this chapter, an alternative dispute resolution process includes any process or procedure, other than an adjudication by a presiding judge, in which a neutral third party participates to assist in the resolution of issues in controversy, through processes such as early neutral evaluation, mediation, minitrial, and arbitration as provided in sections 654 through 658.

(b) Authority. Each United States district court shall authorize, by local rule adopted under section 2071(a), the use of alternative dispute resolution processes in all civil actions, including adversary proceedings in bankruptcy, in accordance with this chapter, except that the use of arbitration may be authorized only as provided in section 654. Each United States district court shall devise and implement its own alternative dispute resolution program, by local rule adopted under section 2071(a), to encourage and promote the use of alternative dispute resolution in its district.

(c) Existing alternative dispute resolution programs. In those courts where an alternative dispute resolution program is in place on the date of the enactment of the Alternative Dispute Resolution Act of 1998, the court shall examine the effectiveness of that program and adopt such improvements to the program as are consistent with the provisions and purposes of this chapter [28 U.S.C.A. § 651 et seq.].

(d) Administration of alternative dispute resolution programs. Each United States district court shall designate an employee, or a judicial officer, who is knowledgeable in alternative dispute resolution practices and processes to implement, administer, oversee, and evaluate the court's alternative dispute resolution program. Such person may also be responsible for recruiting, screening, and training attorneys to serve as neutrals and arbitrators in the court's alternative dispute resolution program.

(e) Title 9 not affected. This chapter [28 U.S.C.A. § 651 et seq.] shall not affect title 9, United States Code.

(f) Program support. The Federal Judicial Center and the Administrative Office of the United States Courts are authorized to assist the district courts in the establishment and improvement of alternative dispute resolution programs by identifying particular practices employed in successful programs and providing additional assistance as needed and appropriate.

APPENDIX B

Judicial Council of the Ninth Circuit

Standing Committee on Alternative Dispute Resolution Programs

Model Local ADR Rule

December 1, 1999

This model local rule was prepared by the Standing Committee on Alternative Dispute Resolution Programs of the Ninth Circuit. Courts are free to adopt such parts of the rule, if any, as they deem appropriate. Copies of the rule may be obtained from the address listed below.

ADR Standing Committee
Office of the Circuit Executive
Ninth Circuit Judicial Council
P.O. Box 193939
San Francisco, CA 94119 3939
telephone (415) 556 6158
fax (415) 556 6179
website: *www.circ9.dcn/web/oceliba.nsf*

Local options are shown in *bold italics within [brackets].*

Provisions of the Act are set out in the endnotes with quotations from the Act in italics.

PROCEDURES FOR ALTERNATIVE DISPUTE RESOLUTION

(Revised December 1, 1999)

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(a) INTRODUCTION.

(1) Purposes. Pursuant to the findings and directives of Congress in 28 U.S.C. § 651 *et seq*., this Local Rule provides parties to civil cases in this district with opportunities to use alternative dispute resolution (ADR) procedures. This Local Rule is intended to provide parties access to the dispute resolution process that best serves their needs and fits their circumstances, to reduce the financial and emotional burdens of litigation, and to enhance the court's ability to timely provide traditional litigation services.[1] Through this Local Rule, the court authorizes and regulates the use of court-sponsored ***[mediation] [early neutral evaluation] [consensual mini-trial] [arbitration under § 654, et seq.] [and/or] [other appropriate ADR process].***[2]

(2) Scope.

(A) Cases Pending Before a District Judge or Magistrate Judge. This Local Rule applies to all civil cases pending before any district judge or magistrate judge in this district ***[except that cases in the following categories are exempt from presumptive inclusion: _______, _______, _______, or _______].***[3] ***[The fact that a case falls in a category that is exempt from presumptive applicability of this Local Rule neither (1) precludes the parties to such a case from agreeing to participate in an ADR process, nor (2) deprives the court of authority to compel participation in an appropriate ADR proceeding.]***

(B) Proceedings Pending Before a Bankruptcy Judge. Parties to proceedings pending before any bankruptcy judge in this district also may be afforded an opportunity to participate in ADR, but because of the unique circumstances that attend proceedings in bankruptcy, the provision of ADR services in the bankruptcy court is governed separately by ***[Bankruptcy Local Rules].***[4]

(3) Rules Specific to Individual ADR Processes. While many of the provisions of this Local Rule apply to all ADR processes conducted under its auspices, there are differences among ADR processes that require some process-specific prescriptions. Rules that are applicable only to a particular process are set forth in sections (r-u) below.

(4) Parties Retain Right to Secure ADR Services Outside the Programs

Sponsored by the Court. Nothing in this Local Rule precludes the parties from agreeing to seek ADR services outside the court's program. ADR proceedings conducted outside this Local Rule, however, will not be subject to the enforcement, immunity, or other provisions of this Local Rule.[5]

(5) Parties May Request an ADR Process at any Time. Notwithstanding any other provision of this Local Rule, parties, individually or in any combination, retain the right to ask the assigned judge, at any stage in the proceedings, to refer the case, in whole or in part, to an appropriate ADR process. Any reference made in response to such a request must be consistent with the provisions of sections (c) (Selection of an Appropriate ADR Process) and (i) (Integration with Case Management). ***[The court will enter an order of reference only if all parties voluntarily agree to the proposed reference.]***

(b) PROGRAM ADMINISTRATION.

(1) ADR Judge.

(A) Appointment. A ***[district or magistrate]*** judge will be appointed to serve as ADR Judge of this Court. When necessary, the Chief District Judge shall appoint another judge to temporarily perform the duties of the ADR Judge.

(B) Duties. The ADR Judge shall serve as the primary liaison between the Court and the ADR staff, consulting with that staff on matters of policy, program design and evaluation, education, training, and administration. ***[The ADR Judge shall rule on all requests by parties to be excused from appearing in person at any ADR proceeding and shall hear and determine all complaints alleging violations of this Local Rule.]***[6]

(2) Director of the ADR Program/ADR Administrator. The ***[Director of the ADR Program or ADR Administrator]*** shall be responsible for implementing, administering, overseeing, and evaluating the ADR program and procedures covered by this Local Rule.[7] These responsibilities shall extend to educating litigants, lawyers, judges, and court staff about the ADR program and rules. In addition, the ***[director or administrator]*** shall assure that appropriate systems are maintained for recruiting, screening, and training neutrals, as well as for maintaining on an ongoing basis the neutrals' ability to provide role-appropriate and effective services to the parties.

(3) Rules and Materials Available. The Clerk of Court shall make pertinent rules and explanatory materials available to the parties.

(c) SELECTION OF AN ADR PROCEDURE.

(1) Early ADR Selection Process.

(A) The Parties' Duty to Consider ADR,[8] Confer, and Report. ***[Within ___ days following filing/service of the complaint] [___ days prior to the case management conference /Rule 16 scheduling conference] [No fewer than ___ calendar days before a scheduling order is due under Fed. R. Civ. P. 16(b)],*** unless otherwise ordered, in every case to which this Local Rule applies, the parties[9] must meet and confer about:

(i) whether they might benefit from participating in some ADR process;

(ii) which type of ADR process, if any, is best suited to the specific circumstances in their case; and

(iii) when the ADR session, if any, should be held

The parties must report in their case management statement ***[or in a statement filed separately]*** their shared or separate views about the utility of ADR, which ADR procedure, if any, would be most appropriate, and when the ADR session should occur. In these reports or statements, counsel must certify expressly that they understand and have explained to their clients the local ADR rules and process options and that, with their assistance, their clients have carefully considered whether their case might benefit from participation in any of the available ADR programs. If any party recommends using ADR, this report or statement must be accompanied by a Proposed ADR Order of Reference in conformity with section (h), below.

[Option A]

(B) Designation of Process. After considering the parties' submissions, the court may order the parties, on appropriate terms and in conformity with section (i) (Integration of Case Management) below, to participate in ***[mediation or early neutral evaluation]***.[10] If all parties consent, the court may refer the case to arbitration under 28 U.S.C. § 654 *et seq.*, to a

non-binding mini-trial, to an advisory summary jury or bench trial, or to an ADR procedure which, by stipulation of all parties, has been tailored to meet the specific needs of the case.

[Option B]

(B) Voluntary Selection of Process. If, after considering all pertinent circumstances, all parties voluntarily agree that referral to a particular ADR process is appropriate, the court may issue an order of ADR reference to the stipulated ADR process. The order will comply with section (i) (Integration of Case Management) below.

(2) Selection of ADR Process at Any Time After Issuance of Initial Case Management or Scheduling Order.

[Option A] Notwithstanding the provisions of subsection (c)(1) above**,** at any time before entry of final judgment the court may, on its own motion or at the request of any party, after affording the parties an opportunity to confer and to express their views, order the parties to participate in ***[mediation or early neutral evaluation]***[11]***[and/or] [with the consent of all parties, refer the case to a mini-trial, an arbitration under 28 U.S.C. § 654, et seq., or an advisory summary jury or bench trial, or a specially tailored ADR proceeding].***

[Option B] At any time after issuance of the initial case management or scheduling order and before entry of final judgment, if all parties voluntarily agree that referral to a particular ADR process is appropriate, the court may issue an order of ADR reference to the stipulated ADR process. The order will comply with section (i) (Integration of Case Management) below.

(3) Protection Against Unfair Financial Burdens. Assigned judges will take appropriate steps to assure that no referral to ADR results in an imposition on any party of an unfair or unreasonable economic burden. A party who cannot afford to pay any fee normally charged under this Local Rule shall be excused from paying or shall be ordered to pay at an appropriately reduced rate.

(d) PANELS OF NEUTRALS; SELECTION OF NEUTRALS.

(1) Panels of Neutrals. For each type of ADR procedure authorized under this Local Rule, the court shall assure that a separate panel is maintained of

persons who are trained and otherwise qualified to serve as neutrals for that ADR process. Only persons who agree to serve on the terms set forth in this Local Rule and in any pertinent General Orders, and whose background, training, and skills satisfy the requirements that the court establishes for the particular type of ADR procedure, shall be admitted to and remain as members of the panel for that process.[12]

(2) Selection of the Neutral. The following procedures shall apply to selection of the neutral.

(A) Parties to Confer about Selection of Neutral and Confirm Neutral's Availability. Unless otherwise ordered, the parties must confer about and attempt to agree on a neutral at the same time they confer, under subparagraph (c)(1)(A), above, for the purposes of selecting an ADR process and suggesting the time frame in which the ADR session should be held. If authorized by the assigned judge, the parties may nominate a neutral who is not on the court-approved panel for the kind of ADR process that the parties propose to use.[13] Before nominating a neutral, the parties must have confirmed his or her availability and willingness to serve within the time frame they propose.

(B) Appointment of the Neutral When Parties Agree. If the parties agree on a neutral and confirm his or her availability, they must identify their nominee in the case management statement ***[or in a separate filing that meets these purposes]***. Absent substantial countervailing considerations, the assigned judge will appoint the neutral whom the parties have jointly nominated and who is willing to serve.

(C) Appointment of a Neutral When Parties Disagree. If the parties cannot agree on a neutral, they shall so state in their case management statement ***[or in a statement filed separately]***. Upon being so advised, the assigned judge will select an available neutral from the panel or order the ***[Director of the ADR Program] [the ADR Administrator] [the designated judicial officer]*** to select an available neutral from the appropriate panel.[14]

(D) Documents Provided *[by the Court] [by the Plaintiff]* to the Neutral. Promptly after the neutral is designated, ***[the Director of the ADR Program] [the ADR Administrator] [a designated judicial officer] [the Plaintiff]*** shall provide her or him with a copy of:

(i) the Order of ADR Reference (see sections (h) and (i), below);

(ii) each party's most recent pleading; and

(iii) any other order or document from the court file that sets forth requirements or stipulations related to the ADR proceedings.

****

As an alternative* to** the paragraphs that make up subsection **(d)(2)**, above, the following provision is suggested for courts that elect to have ***court staff assign neutrals to cases -- instead of trying to get the parties to select an agreed-upon neutral.

(2) Selection of Neutral by the Court *[Director of the ADR Program] [the ADR Administrator] [designated judge].*

(A) Assignment of Neutral from Appropriate Panel. After the ADR process that will be used in a particular case has been approved or selected by the court, the ***[Director of the ADR Program] [the ADR Administrator] [a designated judicial officer]*** shall assign a neutral from the appropriate panel who is available to serve during the period the session should be held and who has no disqualifying conflict of interest.

(B) Documents Provided by the Court to the Neutral. Promptly after the neutral is designated, the ***[Director of the ADR Program] [the ADR Administrator] [a designated judicial officer] [designated counsel]*** shall provide her or him with a copy of:

(i) the Order of ADR Reference;

(ii) each party's most recent pleading; and

(iii) any other order or document from the court file that sets forth requirements or stipulations related to the ADR proceedings.

(e) DISQUALIFICATION OF NEUTRALS.

(1) Applicable Standards. No person may serve as a neutral in an ADR proceeding under this Local Rule in violation of:

(A) the standards set forth in 28 U.S.C. § 455;

(B) any applicable standard of professional responsibility or rule of professional conduct; or

(C) any additional standards adopted by the court.[15]

(2) Mandatory Disqualification and Notice of Recusal. A prospective neutral who discovers a circumstance requiring disqualification shall immediately submit to the parties and to the ***[Director of the ADR Program] [the ADR Administrator] [a designated judicial officer]*** a written notice of recusal. The parties may not waive a basis for disqualification that is described in 28 U.S.C. § 455(b).

(3) Disclosure and Waiver of Non-Mandatory Grounds for Disqualification. If a prospective neutral discovers a circumstance that would not compel disqualification under rules of professional conduct or under 28 U.S.C. § 455(b), but that might be covered by 28 U.S.C. § 455(a) (impartiality might reasonably be questioned), the neutral must promptly disclose that circumstance in writing to all counsel and to the ***[Director of the ADR Program] [the ADR Administrator] [a designated judicial officer]***. A party may waive a possible basis for disqualification that is premised only on 28 U.S.C. § 455(a), but any such waiver must be in writing and delivered to the ***[Director of the ADR Program] [the ADR Administrator] [a designated judicial officer]*** within ten days of the party's receiving notice of the possible basis for disqualification.

An alternative to subsection (e)(3), above, regarding waiver of disqualification under § 455(a): A party who has not delivered a written objection to the ***[Director of the ADR Program] [or the ADR Administrator] [a designated judicial officer]*** within ten days of receiving written notice from a prospective neutral of a possible ground for disqualification based only on 28 U.S.C. § 455(a) shall be deemed to have waived any such objection.

(4) Objections Not Based on Disclosures by Neutral.

(A) One Peremptory Objection Permitted. Each party has the right to disqualify one proposed neutral by making a peremptory objection (*i.e.*, without stating a basis for the objection) to that person's appointment. The right to make a peremptory objection is waived unless exercised by delivering the objection in writing to the ***[Director of the ADR Program] [the ADR Administrator] [a designated judicial officer]*** within seven days of learning the identity of the proposed neutral.

(B) Objections for Cause. Within seven days of learning the identity of a proposed neutral, a party who objects for cause to service by that neutral must deliver to the ***[Director of the ADR Program] [the ADR Administrator] [a designated judicial officer]*** and to all other counsel a writing that specifies the basis for the objection. Any party who wishes to take exception to the objection must do so in a writing that is delivered to the ***[Director of the ADR Program] [the ADR Administrator] [a designated judicial officer]*** and to all other counsel within five days of receiving the objection. Promptly after the close of the period for submitting exceptions, the ***[Director of the ADR Program] [the ADR Administrator] [a designated judicial officer]*** shall determine whether the proposed neutral will serve or whether another neutral should be selected.

(f) COMPENSATION OF NEUTRALS.

[Option A] Subject to subsection (c)(3) (Protection Against Unfair Financial Burdens), above, neutrals shall be compensated by the parties[16] at a rate specified by general order of this court[17] or otherwise by law, or at a different rate if all parties so agree.[18] In every case where the parties and neutral agree to a rate of compensation that differs from the rate set by the court, the neutral must disclose in writing to the ADR Administrator, before the ADR session is held, all the fee, expense, and reimbursement terms and limitations that will apply to the service by that neutral. ***[Any neutral may voluntarily serve on a pro bono basis].*** Actual transportation expenses reasonably incurred by neutrals ***[and/or arbitrators] [will] [will not]*** be reimbursed ***[by the court] [by the parties]***.[19]

[Option B] Neutrals shall serve without compensation. Actual transportation expenses reasonably incurred by neutrals ***[and/or arbitrators] [will] [will not]*** be reimbursed ***[by the court] [by the parties]***.

[Option C] Neutrals shall not be compensated ***[for preparation time before the ADR proceeding] and/or [for the first ______[20] hours of the ADR session]***. After ***[some specified number of]*** hours in session, the neutral may ***[continue to serve without compensation] or [give the parties the option of concluding the proceeding or paying the neutral for additional time]*** at ***[a mutually agreeable hourly rate]*** *or* ***[at an hourly rate fixed by General Order of this court]***. In every case where the parties and the neutral agree to a rate of compensation for time the neutral commits after the first ______ hours of session that differs from the rate set by the court, the neutral must disclose in writing to the ADR Administrator all the fee, expense, and

reimbursement terms and limitations to which the parties and neutral have agreed. This written disclosure must be made no more than ten days after the agreement about compensation is reached. Actual transportation expenses reasonably incurred by neutrals ***[and/or arbitrators] [will] [will not]*** be reimbursed ***[by the court] [by the parties]***.

(g) IMMUNITY OF NEUTRALS. All persons serving as neutrals under this Local Rule are deemed to be performing quasi-judicial functions and are entitled to the immunities and protections that the law accords to persons serving in such capacity.[21]

(h) PROPOSED ORDER OF ADR REFERENCE.

(1) File with Case Management Statement. If any party recommends using ADR, pursuant to section (c) of this Local Rule, Counsel must attach to their Case Management Statement ***(or to the statement they file separately to comply with this Local Rule)*** a Proposed Order of ADR Reference.

(2) Contents of Proposed Order. The Proposed Order of ADR Reference must:

(A) identify the type of ADR process that the parties have agreed is most appropriate for their circumstances;

(B) ***[identify by name and organizational affiliation the available neutral whom they nominate to serve in their case];***[22]

(C) if different from rates or terms fixed by the court, specify the proposed rate of compensation for the neutral, terms for reimbursement of the neutral's expenses, and any proposed limitations on compensation or expense reimbursement;

(D) specify the time frame within which they propose the ADR process will be completed and the date by which the neutral must file written confirmation of that completion; and

(E) suggest and explain any modifications or additions to the case management plan that would be advisable because of the reference to ADR.

(i) INTEGRATION WITH CASE MANAGEMENT

(1) Contents of Order of ADR Reference. Every order referring a case to an ADR process under this Local Rule must specify:

(A) the ADR process to be used;

(B) ***[if known, the identity of the neutral who will serve in the case];***[23]

(C) if different from rates or terms fixed by generally applicable rule or order, specify the rate of compensation for the neutral, terms for reimbursement of the neutral's expenses, and any limitations on compensation or expense reimbursement;

(D) the dates by which the ADR proceedings must be completed and by which the neutral must file a confirmation of that completion;

(E) the date by which the parties must notify the court, in a jointly filed statement, whether all or part of the case has been resolved; and

(F) any pretrial activity, *e.g.,* specified discovery or motions, that shall be completed before the ADR session is held or that shall be stayed until the ADR session is concluded.

(2) Protection Against Unreasonable Delay. In fixing deadlines in its Order of ADR Reference, the referring court will assure that the time allotted for completing the ADR process is no more than is appropriate and that the referral does not cause unreasonable delay in case development, in hearing motions, or in commencing trial.

(3) Assigned Judge's Continuing Responsibility for Case Management. Neither the parties' agreement to participate in an ADR procedure nor the court's referral of an action to ADR shall reduce the assigned judge's power and responsibility to maintain overall management control of a case before, during, and after the pendency of an ADR process.

(j) TELEPHONE CONFERENCE WITH NEUTRAL BEFORE ADR SESSION. Promptly after being appointed to serve in a case, the neutral shall hold a brief joint telephone conference with all counsel to discuss:

(1) fixing a convenient date and place for the session;

(2) the procedures that will be followed during the session;

(3) who shall attend the session on behalf of each party;

(4) what material or exhibits should be provided to the neutral before the session or brought by the parties to the session;

(5) any issues or matters that it would be especially helpful to have the parties address in their written pre-session statements;

(6) page limitations for the pre-session statements; and

(7) any other matters that might enhance the utility of the ADR proceeding.

(k) WRITTEN PRE-SESSION STATEMENTS

(1) Deadline for Submission. No later than ten calendar days before the first ADR session, each party must serve on all other parties and deliver directly to the neutral a written ADR statement.

(2) Prohibition Against Filing. The parties' written ADR statements must not be filed and the assigned judge shall not have access to them.

(3) Content of Statement. Unless otherwise approved by the neutral during a telephone conference under section (j), above, each ADR statement must:

(A) not exceed the number of pages allowed by the neutral;

(B) identify by name and title or position:

(i) the person(s) with decision-making authority who, in addition to counsel, will attend the ADR session on behalf of the party; and

(ii) person(s) connected with a party opponent, if known, whose presence at the ADR session might substantially improve the productivity of the proceeding;

(C) describe briefly the substance of the litigation, addressing key liability and damages issues and discussing the most significant evidence;

(D) identify any discovery or motion activity that is likely either to significantly affect the scope of the litigation or to enhance the parties' ability to assess the case's settlement value or, for other reasons, to improve prospects for settlement;

(E) describe the history and current status of any settlement negotiations;

(F) identify any other considerations, and set forth any additional information, that the party believes might enhance the utility of the ADR session; and

(G) if allowed by the neutral, attach copies of documents likely to be useful during the ADR session.

(l) FOR MEDIATIONS ONLY,[24] SEPARATE *EX PARTE* WRITTEN STATEMENTS

(1) Contents. Only if the ADR procedure being used is mediation, each party may submit directly to the mediator, for his or her eyes only, a separate, *ex parte* confidential written statement describing any additional interests, considerations, or matters that the party would like the mediator to understand before the mediation session begins.

(2) Timing. Any such additional *ex parte* written statement must be delivered to the mediator at the same time the party delivers the written statement required under section (k) of this Local Rule.

(m) ATTENDANCE AT THE ADR SESSION

(1) In Person Attendance. All parties and their lead counsel, having authority to settle and to adjust pre-existing settlement authority if necessary, are required to attend the ADR session in person unless excused under section (2), below. Insurer representatives also are required to attend in person, unless excused, if their agreement would be necessary to achieve a settlement.

(A) Corporations and Other Non-Governmental Entities. A corporation or other non-governmental entity satisfies this attendance requirement if represented by a person (other than outside counsel) who has authority to settle, as defined above, and who is knowledgeable about the facts of the case.

(B) Governmental Entities. A unit or an agency of government satisfies this attendance requirement if represented by a person who has, to the greatest extent feasible, authority to settle, and who is knowledgeable about the facts of the case, the governmental unit's position, and the procedures and policies under which the governmental unit decides whether to accept proposed settlements.

(2) Requests to be Relieved of Duty to Appear in Person.

(A) Duty to Confer. No one may ask the court ***[or the neutral]*** to be relieved of the duty to attend an ADR session in person, unless that person first has conferred about the matter with the other parties ***[and the neutral]*** who would be participating in the session.

(B) Standard. A person may be excused from attending an ADR session in person only on a showing that personal attendance would impose a serious and unjustifiable hardship.

(C) Timing and Content of Request; Proposed Order. No fewer than 15 days before the date set for the session, a party seeking to be relieved of the duty to attend in person must submit a letter to the ADR Judge ***[or the neutral]*** (copying all other parties) that sets forth all considerations that support the request, states realistically the amount in controversy in the case, and indicates whether the other parties ***[and the neutral]*** support or oppose the request. ***[Each such letter request must be accompanied by a proposed order.]***

(3) Participation by Telephone When Appearance in Person Is Excused. Every person who is excused from attending an ADR session in person must be available to participate by telephone, unless otherwise directed by the ***[ADR Judge] [assigned judge] [the neutral].***

(n) CONFIDENTIALITY OF ADR PROCEEDINGS

(1) Generally Applicable Provision. Except as provided in this Local Rule or by 28 U.S.C. § 657 (arbitrations),[25] and except as otherwise required by law[26] or as stipulated in writing by all parties and the neutral, all communications made in connection with any ADR proceeding shall be confidential and may be privileged.[27]

(2) Limitations on Communication With Assigned Judge. No person may disclose to the assigned judge any communication made, position taken, or opinion formed by any party or neutral in connection with any ADR proceeding under this Local Rule except as otherwise:

(A) stipulated in writing by all parties and the neutral;

(B) provided in this Local Rule;

(C) provided in 28 U.S.C. § 657 (for arbitrations); or

(D) ordered by the court -- after application of pertinent legal tests that are appropriately sensitive to the interests underlying ADR confidentiality[28] in connection with proceedings to determine:

(i) whether, if a record or a signed writing is produced that appears to constitute a binding agreement, the parties entered an enforceable settlement contract at the end of the ADR session, or

(ii) whether a person violated a legal norm, rule, court order, or ethical duty during or in connection with the ADR session.[29]

(3) Authorized Studies and Assessments of Program. Nothing in this Local Rule shall be construed to prevent any participant or neutral in an ADR proceeding from responding to an appropriate request for information duly made by persons authorized by the court to monitor or evaluate any aspect of the court's ADR

program or to enforce any provision of this Local Rule. The identity of the sources of such information provided for purposes of monitoring or evaluating the ADR programs shall be appropriately protected.

(o) NEUTRAL'S REPORT THAT ADR PROCESS HAS BEEN COMPLETED.

(1) Timing and Limited Content. No more than five days after the ADR process has been completed, and by the deadline fixed in the Order of ADR Reference, the neutral must file (copying all parties) a form that reports ***[only]*** the date on which the parties completed the ADR process.

(2) Prohibition on Disclosure of Confidential Communications or Neutral's Opinions. Absent a written stipulation signed by all parties, in making this report the neutral must not disclose to the assigned judge any confidential ADR communication or any opinions or thoughts the neutral might have about the merits of the litigation, about how it should be managed, or about the character of any party's participation in the ADR proceeding.

(p) PARTIES' JOINT REPORT AFTER THE ADR PROCEEDING. By the deadline fixed in the Order of ADR Reference, or, if no such deadline was fixed, no later than ten days after the ADR session has been concluded, the parties must jointly file a statement in which they report to the assigned judge:

(1) whether they have settled all or part of the case; and

(2) any proposals in which all parties join for case development, further exploration of settlement, motion practice, discovery, or trial.

(q) VIOLATIONS OF THIS LOCAL RULE

(1) **Complaints Alleging Material Violations.** A complaint alleging that any person[30] or party has materially violated this Local Rule must be presented in writing, under seal, directly to ***[the ADR Judge] [a judge who has been designated by the Chief Judge to hear the matter and to whom the underlying case is not assigned (the "designated judge")]***.[31] Copies of any such complaint must be sent to all counsel

and the neutral at the time they are presented under seal to the ***[ADR Judge] [designated judge]***. Any such complaint must be accompanied by a competent declaration, must not be filed, and must not be presented to the judge to whom the underlying case is assigned for litigation.

(2) **Proceedings in Response to Complaint.** Upon receipt of an appropriately presented and supported complaint of material violation, the ***[ADR Judge] [designated judge]*** shall determine whether the matter warrants further proceedings. If further proceedings are warranted, the ***[ADR Judge] [designated judge]*** shall issue an order to show cause why sanctions should not be imposed. Any such proceedings shall be conducted on the record but under seal. The ***[ADR Judge] [designated judge]*** shall afford all interested persons an opportunity to be heard before deciding whether to impose or recommend a sanction.

RULES SPECIFIC TO PARTICULAR FORMS OF ADR

(r) MEDIATION.

(1) Definition.[32]

[Option A] Mediation is a process whereby an impartial third party (the *mediator)* facilitates communication between negotiating parties attempting to reach an agreed settlement of their dispute. In some mediations, the neutral may spend some time meeting separately and privately with one party or side at a time. When appropriate the mediator may also offer an evaluation of the case and/or recommend a settlement. Whether a settlement results from a mediation is within the sole control of the parties.

[Option B] Mediation is a process in which an impartial third party (the mediator) facilitates communication between parties and assists them in their negotiations (*e.g.,* by clarifying underlying interests) as they attempt to reach an agreed settlement of their dispute. In some mediations, the neutral may spend some time meeting separately and privately with one party or side at a time. Whether a settlement results from mediation and the nature and extent of the settlement are within the sole control of the parties.

(2) Criteria for Inclusion on the Panel of Mediators. In order to qualify for appointment to the court's Panel of Mediators, the applicant shall certify that he or she:[33]

(A)

(B)

(C)

****

(s) EARLY NEUTRAL EVALUATION.

(1) Definition. Early neutral evaluation (ENE) is a procedure in which the parties and their counsel, in a confidential session, present summaries of their cases to an experienced and impartial lawyer, judge, or retired judge, who evaluates the parties' legal positions and provides the parties and their counsel with a non-binding evaluation of the case. The evaluator may also help the parties identify areas of agreement, provide case-planning guidance, and, if requested by all parties, assist in negotiating a settlement of the dispute.

(2) Criteria for Inclusion on the Panel of Evaluators. In order to qualify for appointment to the court's Panel of Evaluators, the applicant shall certify that he or she:

(A)

(B)

(C)

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(t) CONSENSUAL MINI-TRIAL.

(1) Definition. A mini-trial is a process containing both conciliatory and non-binding adjudicative elements. A mini-trial is consensual, non-binding, and non-judicial, as in negotiation or mediation, yet one of its primary features is an adversarial presentation of each party's case, as in arbitration or litigation.

In a mini-trial, each party's best case is presented in summary form to the parties themselves or to party representatives with authority to settle the dispute. Following the presentations, the parties enter into negotiations, typically with a neutral acting as a facilitator. The facilitator may act as an evaluator of the case if the parties so designate.

(2) Criteria for Membership of the Panel of Mini-trial Facilitators. In order to qualify for appointment to the court's panel of mini-trial facilitators, the applicant shall certify that he or she:

(A)

(B)

(C)

****

(u) ARBITRATION.

(1) Definition. Arbitration is a process whereby an impartial third party (the *arbitrator*) hears and considers the evidence and testimony of the disputants and others with relevant knowledge and issues a decision on the merits of the dispute. The arbitrator makes an *award* on the issue(s) presented for decision. The arbitrator's award is binding or non-binding as the parties may agree in writing.

(2) Criteria for Inclusion on the Panel of Arbitrators. In order to qualify for appointment to the court's panel of arbitrators, the applicant shall certify that he or she:[34]

(A)

(B)

(C)

(3) Standards for Certification of Arbitrators. All arbitrators shall be certified to perform services in accordance with the following standards:[35]

(A) The arbitrator shall take the oath or affirmation described in 28 U.S.C. § 453; and

(B) The arbitrator shall be subject to the disqualification rules under 28 U.S.C. § 455.

(4) Eligibility of Cases for Referral to Arbitration. No civil action shall be referred to arbitration except upon written consent of all parties. Notwithstanding the parties' request or consent to refer a case to arbitration, the court shall decline to make such referral if it finds that:[36]

(A) the action is based on an alleged violation of a right secured by the Constitution of the United States;

(B) jurisdiction is based in whole or in part on 28 U.S.C. § 1343;

(C) the relief sought includes money damages in an amount greater than $150,000;[37] or

(D) the objectives of arbitration would not be realized for any other reason.

(5) Procedure for Consenting to Arbitration. Any request for reference to arbitration shall be in writing, signed by all parties and their counsel, and directed to the judge to whom the case is assigned. All such requests shall:

(A) State whether the parties desire that the entire case be referred to arbitration. If the parties desire that only certain issues or portions of the case be referred to arbitration, the parties shall identify with particularity those issues or portions of the case and state the reason(s) why such a request should be granted;

(B) State whether the arbitrator's award will be binding, with trial *de novo* waived, or non-binding, with trial *de novo* permitted if a request therefor is timely served and filed;

(C) Propose a discovery plan, a timetable for completion of the proposed discovery, and the date by which the arbitration shall be completed;

(D) Acknowledge that the arbitration shall be governed by the provisions of Title 28 U.S.C. chapter 44, as the same may be amended from time to time, and, to the extent applicable, 9 U.S.C. § 1 *et seq.*;

(E) Contain a certification that the parties have been provided access to materials describing the arbitration program, and that they agree to arbitration freely and knowingly;[38] and

(F) Provide such other information as may assist the court in determining whether to grant the request.

(6) Conduct of the Hearing; Protection Against Prejudice for Declining to Go to Arbitration.

(A) Unless otherwise ordered, all arbitrations under this Local Rule will be held before a single arbitrator who shall have the power to:[39]

(i) conduct the arbitration hearings;

(ii) administer oaths and affirmations; and

(iii) make awards based upon the facts and the law.

(B) The provisions of 28 U.S.C. chapter 44, as the same may be amended from time to time, shall govern all aspects of the arbitration proceeding authorized.

(C) ***[Option one: The arbitrator will apply the Federal Rules of Evidence with respect to all evidence offered by any party.] [Option Two: In receiving evidence, the arbitrator shall be guided by the Federal Rules of Evidence, but shall not thereby be precluded from receiving evidence which the arbitrator considers relevant and trustworthy and which is not privileged.]***

(D) The arbitrator shall apply Federal Rule of Civil Procedure 45 with respect to subpoenas for the attendance of witnesses and the production of documentary evidence at an arbitration hearing under this Local Rule.[40]

(E) No party or attorney may be prejudiced in any way for refusing to participate in arbitration.[41]

(7) The arbitrator shall make his or her award in writing and shall file the award under seal with the Clerk of Court promptly after the arbitration hearing is closed together with proof of service on all other parties by United States mail, addressed to the parties or, if represented, to the parties' attorney(s) of record. Unless the parties have waived trial *de novo,* the clerk shall seal the award, and the award shall remain sealed and the contents thereof not made known to any judge who might be assigned the case until the time has expired for a party to seek a trial *de novo* with no party timely serving and filing such a demand; *provided, however,* that the award may be unsealed after final judgment has been entered in the case or the action has otherwise been terminated.[42]

(8) If, in any non-binding arbitration conducted under this section, a resolution of all aspects of the dispute does not result and the case proceeds to trial, no reference to the arbitration proceeding, or the result thereof, may be made to the trier of fact; *provided however,* that nothing in this Local Rule shall prevent a party from presenting or using at the trial evidence presented in the arbitration proceeding, if such evidence is otherwise admissible under the Federal Rules of Evidence or the parties have stipulated to its use.[43]

(9) If trial *de novo* has not been waived by all parties, any party may demand a trial *de novo* of the issues referred to arbitration by serving and filing a request therefor within thirty (30) calendar days after service of the award. If a demand for trial *de novo* is timely served and filed, the case will be treated for all purposes, and the trial shall be conducted, as if no arbitration had occurred.[44]

(10) Nothing in this Local Rule limits any party's right to agree to arbitrate any dispute, regardless of the amount involved, pursuant to title 9, United States Code, or any other provision of law.[45]

1. The Alternative Dispute Resolution Act of 1998, 28 U.S.C. §§ 651 658, requires each federal district court to *authorize by local rule the use* of [at least one] ADR process in all civil actions, including adversary proceedings in bankruptcy, *except that the use of arbitration may be authorized only as provided in Section 654* of the Act. Congress found that there is a *continued growth of federal appellate court annexed mediation programs which suggests that this form of alternative dispute resolution can be very effective; therefore, the district courts should consider including mediation in their local alternative dispute resolution program.* Section 651(c) states that *those courts with existing ADR programs shall examine the effectiveness* of their programs and *adopt such improvements* as are consistent with the Act.

2. Section 652(a) requires each district court *to provide litigants with at least one ADR process.* Section 651(a) includes *early neutral evaluation, mediation, mini trial, and arbitration under § 654* in a non exhaustive list of ADR processes that district courts may consider adopting. This listing does not restrict the district from offering other alternatives such as advisory mini trials, advisory summary jury trials, or advisory summary bench trials.

There are two significant questions about the meaning of these fundamental components of the statute to which the Committee has given focused consideration. The first question is about "outsourcing" to what extent does the Act permit district courts to "outsource" part or all of their ADR programs? The Committee believes that the Act reflects a decision by Congress that each district court should be actively involved in the design, implementation, and oversight of its own ADR program and, therefore, that a district court would not be in compliance if it delegated responsibility for all aspects of its ADR program to some entity or group outside the court. We note, for example, that in § 651(d), the Act requires each court to "designate an employee, or a judicial officer, who is knowledgeable in alternative dispute resolution practices and processes to implement, administer, oversee, and evaluate the court's [ADR] program." This provision, and others, indicate that Congress wants each court to be responsible in fact for the program it sponsors and sanctions to assure, among other things, that the program is of high quality and that service by neutrals conforms to apapropriate ethical norms.

It does not follow, however, that there are no sub parts of its program that a district court could appropriately "outsource." A court might well determine, for example, that to provide its neutrals with the best possible training it is necessary to engage the training services of an outside entity. Similarly, a court might decide appropriately that to assure that the statutorily mandated "evaluation" of its program is as objective and reliable as possible it is necessary to engage professionals outside the court to conduct an independent assessment. Thus, the Committee believes that the Act would permit individual courts to "outsource" the front line work that is required to fulfill some of the duties the statute imposes. But each court retains, under the statute, ultimate responsibility for assuring that the quality and content of any delegated work satisfy the objectives contemplated in the Act. So before "outsourcing" any task, each court must take steps to assure itself that the work by the outside entity or professionals will conform to appropriate standands and will achieve the mandated ends.

The second broad question to which the Committee gave special attention relates to the role Congress expected magistrate judges to play in the ADR programs adopted under the Act. The Committee believes that a court clearly would not comply with the Act if its "ADR program" consisted of nothing more than making magistrate judges available to host settlement conferences. Magistrate judges have been doing extensive settlement conference work in many courts for many years a fact well known by Congress before it enacted this legislation. No statute was necessary to sanction or promote such work and the Act never mentions settlement conferences. An ADR program that was limited to referring cases to magistrate judges for settlement conferences clearly would not "encourage and promote the use of alternative dispute resolution in [the] district" which, according to Congress' express declaration in the statute, is to be the primary purpose of each district court's ADR program. Moreover, because the Act requires each court to make at least one ADR process available to every civil case (except in limited categories of cases exempted by local rule), a district court whose ADR "program" consisted only of judicial settlement conferences would clearly be out of compliance unless it made such conferences available in all non exempt cases. But the district courts do not have sufficient magistrate judge hours available to staff any such program and the Committee believes that one of the purposes of the Act was to free up judge time for other work by encouraging the development of ADR programs in which persons other than judges would serve as the neutrals.

None of this means that magistrate judges have no role to play under the Act. While Congress called expressly for the creation of "panels" of "neutrals," Congress also made it clear that such panels might well include magistrate judges as long as they "have been trained to serve as neutrals in alternative dispute resolution processes." Thus, a court could include magistrate judges in its panel of mediators or early neutral evaluators as

long as the court first ensured that the particular judges involved had received specialized training in the particular role contemplated.

As the Model Rule makes clear, the Committee believes that magistrate judges could play another, very significant role in complying with the Act. A magistrate judge might well be a particularly appropriate "judicial officer" to be designated to "implement, administer, oversee and evaluate the court's alternative dispute resolution program." It might be easier to "earmark" a portion of a magistrate judge's time for this work than a portion of a district judge's time and assigning these kinds of larger scale responsibilities to a judicial officer instead of a clerk's office employee might well enhance the standing of the program in the community and within the court itself and improve its vitality and quality. Assigning responsibility to enforce the ADR rules to a magistrate judge also offers significant advantages in saving the time of the district judges and in insulating them from the possibility of exposure to sensitive settlement related communications.

3. Each district court may identify here those categories of civil cases, if any, that the court has concluded, after consulting with the local bar and the United States Attorney, should not automatically be subject to this Local Rule.

Section 652(b) permits courts to identify *cases or categories of cases* in which ADR would not be appropriate and to *exempt* from these requirements those categories of cases. Section 652(b) further directs that before deciding which types of cases should be exempt, *each district court shall consult with members of the bar and with the local United States Attorney.*

4. The relationship between the ADR Act and matters that remain in bankruptcy courts is unclear. There seems to be a consensus that Congress intended the Act to apply to adversary proceedings in bankruptcy matters where the reference to the bankruptcy court has been withdrawn so the adversary proceeding is being handled directly by the district court. It is not clear whether Congress intended the Act to apply to matters that proceed within the bankruptcy courts.

The Model Rule encourages bankruptcy courts to provide ADR opportunities to participants in bankruptcy proceedings but the Model Rule does not regulate or govern ADR programs that bankruptcy courts establish. Rather, the Model Rule recognizes that ADR programs in bankruptcy courts should be regulated by separately crafted sets of rules, rules tailored to fit the special circumstances that obtain in the bankruptcy setting.

5. ADR proceedings are not deemed to be "conducted outside this Local Rule" when the district court orders the parties to participate in ADR under this Local Rule (without their freely given consent) but permits the parties to select a neutral who is not on the roster of neutrals that the court has approved. Nor is an ADR proceeding deemed to be "conducted outside this Local Rule" when all parties voluntarily consent to participate under this Local Rule and the assigned judge enters an order of reference approving service by a specifically identified neutral whom all parties want to serve but who is not on the roster of neutrals the court has approved.

However, the Ninth Circuit's ADR Committee does not recommend approval by district judges of service by neutrals not on the roster the court has approved because this practice can jeopardize quality control and give rise to immunity issues.

Courts that permit parties to use a neutral who is not on the roster the court has approved should give active consideration to requiring each non roster neutral, as a condition to serving, to (1) certify that he or she meets the qualifications the court has set for neutrals to be included on its roster, (2) take the oath in 28 U.S.C. § 453, and (3) expressly agree, in a writing that is filed before the neutral begins his or her service, to be bound by the provisions of the Court's Local ADR Rule, including particularly (but not exclusively) the provisions related to compensation and disqualification.

6. A district court may delete or modify the last sentence if the district determines that requests to be excused should be decided by the neutral or by the assigned judge, or that complaints alleging violations should be heard and determined by the assigned judge.

Choices among these options, as with many other decisions under the ADR statute, will vary with local practice and culture.

Some commentators believe that it is unwise to have the assigned judge hear and determine complaints

about alleged violations of the ADR rules, in part because resolving such matters could require disclosure to the judge of sensitive settlement communications. And apprehension that such matters might be disclosed to a judge with power over their case might make some parties less forthcoming during the ADR proceedings.

7. Section 651(d) requires the district to *designate an employee or a judicial officer who is knowledgeable in ADR to implement, administer, oversee, and evaluate* the local program. The same section of the statute authorizes the designee to be responsible for recruiting, screening, and training neutrals. The ADR judge may also serve as the program administrator.

8. Section 652(a) directs each district court *to require all litigants (*except in certain cases exempted by the district) *to consider the use of ADR.*

The process of "considering" whether or not ADR might be helpful has two components first, "within" a side (or party) and second, across party lines.

Focusing first on the duty to consider ADR within a party or side, the Committee emphasizes that each lawyer has a duty to teach and advise her or his client thoroughly about the relative value of each ADR option in the specific setting of the case at bar. Toward this end, district courts might add a requirement that both counsel and client certify (*e.g.*, in the case management statement) that they have read specified court materials explaining ADR processes and have discussed the possible value of each of the available dispute resolution options.

One district court, for example, includes the following section in the standard form "Joint Case Management Statement and Proposed Order" that all parties must submit before the first Rule 16 conference:

SIGNATURE AND CERTIFICATION BY PARTIES AND LEAD TRIAL COUNSEL

Pursuant to Civil L.R. 16 6, each of the undersigned certifies that he or she has read the brochure entitled "Dispute Resolution Procedures in the Northern District of California," discussed the available dispute resolution options provided by the court and private entities, and has considered whether this case might benefit from any of the available dispute resolution options.

Dated:

[Typed name and signature of each party and lead trial counsel]

The second component of "considering" ADR involves communication across party lines. Generally, it is preferable to involve the parties themselves in this communication, but in some instances it may be appropriate for counsel to conduct the meet and confer without direct client participation. See endnote 9 to this Local Rule.

9. In this context, the word "parties" does not necessarily mean the litigants themselves. While the Committee believes that the litigants should play a major and active role in the processes through which participation in ADR is considered, the Committee also recognizes that in some instances that participation need not include direct involvement in the "meet and confer" session that the Model Rule requires. When counsel have discussed the pertinent considerations and process options thoroughly with their clients in advance, there may be no need to have the clients also directly involved in the "meet and confer. The wisdom of direct client involvement in the meet and confer also may depend on the level of client familiarity with ADR, as well as the client's general sophistication about litigation in federal court. Courts and counsel must be careful, however, not to assume too much in these arenas a surprising percentage of clients who are quite knowledgeable about litigation (e.g., repeat institutional players) think they know more about ADR than they really do.

10. Section 652(a) provides that *any district court that elects to **require** the use of alternative dispute resolution in certain cases may do so only with respect to mediation [or] early neutral evaluation.* (Emphasis added.)

Within the Ninth Circuit, the only district court that is statutorily authorized to require parties (to certain kinds of cases) to participate in arbitration under Section 654(d) of the ADR Act of 1998 is the Northern District of California.

11. Id.

12. Section 653(a) requires each district to *adopt appropriate processes for making neutrals available for use by the parties for each category of process offered* and *to promulgate its own procedures and criteria for the selection of neutrals on its panels.* Section 653(b) directs courts to establish training and credential criteria for each neutral panel. These criteria could be set out in a general order or in the sections of this Local Rule devoted to the specific ADR processes. Examples of requirements that courts might impose for ADR neutrals are set forth in endnote 33.

13. See endnote 5 above, for comments about the use of neutrals who are not on the roster already approved by the court.

14. Courts should consider whether the designation of a neutral should ordinarily be done by someone other than the assigned judge. Some commentators have suggested that the following kinds of concerns can arise when the assigned judge selects the ADR neutral.

This practice might cause the parties to worry more that the neutral will disclose confidential ADR matters to the judge.

Being selected by the assigned judge might make the neutrals feel more pressure to "deliver" in the ADR process and thus might distort the role the neutral is supposed to play *e.g.,* might cause the neutral to put pressure on the parties to settle.

The assigned judge might not have thorough knowledge of the panel of neutrals, and so might not make the best informed selection, or might tend to appoint repeatedly the same small group leading to concerns about an elite club of lawyers who enjoy a special level of trust by the judge.

The fact that the judge has selected a particular neutral might be construed by other members of the bar as an expression of special confidence by the judge in that lawyer leading other lawyers to question the levelness of the playing field when they appear before that judge and their adversary is a lawyer the judge has selected for this important work.

Similarly, selection of the neutral by the judge might lead other members of the bar to worry that the judge feels indebted to the lawyer who served as the neutral (owes him or her a favor), especially if that lawyer neutral was not compensated or helped settle some of the cases the judge otherwise would have been required to try.

15. In section 653(b) the Act requires each court to *issue rules . . . relating to the disqualification of neutrals.* The duty to issue such local rules attaches, under the statute, until national rules are promulgated on this subject but it is likely to be years before pertinent national rules are adopted. "Arbitrators" are the only neutrals that the Act expressly subjects to the disqualification rules set forth in 28 U.S.C. § 455.

16. "Arbitrators" serving in programs formerly authorized under Title IX of the Judicial Improvements and Access to Justice Act) are compensated with public funds, not by the parties.

17. Section 658(a) requires each court, subject to regulations approved by the Judicial Conference, to *establish the amount of compensation, if any, that each arbitrator or neutral shall receive for services rendered* in each ADR process. At its meeting in September of 1999, the Judicial Conference adopted one binding regulation and two non binding sets of guiding "principles" related to compensation of ADR neutrals in court annexed programs. The regulation states:

COMPENSATION OF ADR PROVIDERS:

a. Approve for inclusion in the *Guide to Judiciary Policies and Procedures* the following regulation regarding the compensation of alternative dispute resolution neutrals (including arbitrators):

All district courts must establish a local rule or policy regarding the compensation, if any, of neutrals for services rendered under Chapter 44 of Title 28, United States code, §§ 651 658. Discretion remains with the court as to whether that rule or policy should provide that neutrals serve *pro bono* or for a fee. As long as funding is not provided pursuant to the Act, the Judicial Conference does not encourage courts to institute rules or policies providing for court funded, non staff alternative dispute resolution neutrals.

b. Adopt the two principles and accompanying commentary as set out [below].

The recommended principles are as follows:

(a) Where an ADR program provides for the neutral to receive compensation for services, the court should make explicit the rate of and limitations upon compensation.

Commentary: Methods of compensation for ADR neutrals vary widely from court to court. Some courts use a panel of neutrals who serve completely *pro bono*. Other courts use a modified program, where a certain number of hours are provided free of charge, with a fixed hourly rate thereafter to be paid by the parties, while still others have a fixed per case payment schedule. Other programs have left the matter of compensation to the participants themselves, for negotiation with the neutral. Whatever funding mechanism is decided upon, the court's rule should minimize undue burden and expense for parties electing to use ADR.

(b) *When an ADR program provides for neutrals to receive compensation, the court should require both the neutrals and the parties to disclose all fee and expense requirements and limitations in the ADR process. A participant who is unable to afford the cost of ADR should be excused from paying.*

Commentary: Where courts permit neutrals to charge a fee to ADR participants, fee disputes can be prevented through disclosure of the fee arrangements. If the court intends to require a certain level of *pro bono* service in order to participate as a neutral in a court annexed ADR program, the level of the *pro bono* commitment should be explicitly defined.

See also note 33, ¶ 9, below.

18. As pointed out in the preceding note, at its meeting in September of 1999, the Judicial Conference of the United States approved a non binding "principle" urging district courts whose programs provide for compensation of neutrals to "make explicit the rate of and limitations upon compensation."

In the spirit of this "principle," the Committee observes that several kinds of problems can ensue when courts leave the rate of compensation to be negotiated between the parties and the prospective neutral. First, the court risks losing control over the rate. In so doing, the court increases the risk that the ADR proceedings conducted in its name will impose unjustifiable economic burdens on the parties.

This risk is magnified by the second potential problem: a litigant who is "negotiating" with the person who will serve as the neutral might fear that the neutral will be angry or resentful if the litigant expresses any reluctance to pay whatever fee the neutral proposes, or if the litigant proposes a rate of compensation that could be construed as ungenerous or unflattering to the neutral. A litigant in that position has no real bargaining power and would justifiably be resentful of being put in this position by a court rule (a position in which the litigant could be taken advantage of unfairly).

Finally, many good mediators feel that "negotiating" a fee can put a strain on their relationship with the parties and either distort their role or make it more difficult for them to build the kind of trust from the parties that they need to serve effectively.

19. Section 658(b) directs that each district court *may reimburse arbitrators and other neutrals for actual transportation expenses . . . incurred*, under regulations prescribed by the Director of the AO.

20. For example, in the Northern District of California, the neutrals are expected to serve without compensation for the first four hours of the ADR session.

21. In the Act, Congress explicitly conferred "quasi judicial function" immunity only on "arbitrators." See 28 U.S.C. § 655(c). There is, however, case law authority for the view that court appointed mediators and early neutral evaluators are agents of the judicial process performing functions sufficiently similar to and integral with the judicial function to warrant entitlement to this immunity. See, e.g., Wagshal v. Foster, 28 F.3d 1249 (D.C. Cir. 1994). A good many states also have conferred immunity on neutrals serving in ADR programs in state courts. *See, e.g., Col. Rev. Stat. Ann. § 13 22 507 (West 1998) [Immunity]; Fla. Stat. Ann § 44.107 (West 1998) [Immunity for Arbitrators & Mediators]*; *Ga. Code Ann. ADR VII(B) [Confidentiality and Immunity]; Me. Rev. Stat. Ann. Tit. 4, § 1506 (West 1997) [Immunity from Civil Liability].*

Immunity is a privilege that should be conferred only when a court has met its responsibility to undertake reasonable steps to assure quality control over the neutrals who serve under the court's auspices. Such steps should include:

(a) imposing specific background, experience, training, and skill qualifications on all neutrals who serve in the court's program;

(b) establishing mechanisms to assure that neutrals maintain their skills and knowledge at an appropriate level;

(c) providing means by which parties and lawyers can give feedback to the court about how the neutrals performed and for addressing shortfalls in performance by additional training or by removing persons from the rosters of approved neutrals;

(d) requiring each neutral to take the oath of office in 28 U.S.C. § 453; and

(e) requiring each neutral to comply with all pertinent disqualification norms, including those set forth in 28 U.S.C. § 455.

22. This provision would not apply if the court, *e.g.,* through an ADR Administrator, designates the neutral without earlier input from the parties.

23. In some ADR programs, the assigned judge will not know the identity of the neutral who will serve when the judge issues the Order of ADR Reference *e.g.,* because a program administrator will designate the neutral later, after locating someone from the roster who is available during the contemplated time frame, who has the appropriate subject matter expertise, and who clears the disqualification rules.

24. The Model Rule provides for submission of separate statements only when the ADR process will be "mediation" because in no other ADR process is it appropriate for the parties to communicate with the neutral *ex parte* (except about scheduling) before the ADR session.

25. Sections 657(a), (b) and (c) of the Act govern the confidentiality of arbitration proceedings and awards. If a timely demand is made for trial *de novo*, the action will be *restored to the docket of the court and treated for all purposes as if it had not been referred to arbitration,* and the arbitration award *shall not be made known to any judge who might be assigned to the case until the district court has entered final judgment . . . or the action has otherwise terminated.*

26. See, e.g., Rinaker v. Superior Court, 62 Cal.App.4th 155 (3d Dist. 1998).

27. Section 652(d) provides that until nationally applicable rules are promulgated under chapter 131 of Title 28, *each district court shall, by local rule adopted under section 2071(a), provide for the confidentiality of the alternative dispute resolution process and prohibit disclosure of confidential dispute resolution communications.* National rules on this subject are not likely to be in effect for several years.

The Rules Enabling Act, 28 U.S.C. § 2074(b), provides that any rule that is promulgated through the rule making process and that creates or modifies 'an evidentiary privilege shall have no force or effect unless approved by Act of Congress.' This provision, understood in connection with the history and substance of Federal Rule of Evidence 501, raises serious questions about whether a district court has authority to adopt a federal 'evidentiary privilege' through the local rule making process.

By contrast, Rule 501 clearly acknowledges the legitimacy of the recognition of federal evidentiary privileges by federal courts through the common law. See Trammel v. United States, 445 U.S. 40, 47 (1980). At least two opinions by individual judges have held that there is a federal common law privilege that offers protections to mediation communications. See Folb v. Motion Picture Industry Pension & Health Plans, 16 F.Supp. 2d 1164 (C.D. CA 1998), and Sheldone v. Pennsylvania Turnpike Commission, 104 F.Supp.2d 511 (W.D. PA 2000). But see In re Grand Jury Subpoena Dated December 17, 1996, 146 F.3d 487 (5th Cir. 1998) (assumed there was no federal common law mediation privilege), and FDIC v. White, 1999 WL 1201793 (N.D. TX 1999) (trial court within Fifth Circuit also assumed there was no federal common law mediation privilege).

28. See, e.g., Olam v. Congress Mortgage, F.Supp. (N.D. Cal., October , 1999).

29. To reduce the risks that can attend disclosure of otherwise confidential ADR communications to the assigned judge, it generally would be preferable to have a judge to whom the underlying case is not assigned conduct proceedings to determine whether a party has violated a rule or committed some other wrong during an ADR session. Parties who fear that their settlement communications will be disclosed to the assigned judge are likely to participate less fully in the ADR process. And if the case is still being litigated after the ADR session, there is a risk that the assigned judge would be exposed to matters that might raise concerns about his or her impartiality if he or she heard and determined motions alleging violations of rules or other norms during the ADR session. If counsel know that such motions will be heard by the assigned judge, there also is a risk that such motions will be filed for tactical reasons.

30. The word "person" in this section includes any lawyer or other representative of a party as well as any person serving as a neutral in a court sanctioned proceeding.

31. For reasons described in endnote 29, above, it is generally preferable for a judge other than the judge to whom the underlying case is assigned to hear and determine motions alleging violations of the rules or other wrongs during or in connection with the ADR session.

32. <u>In some states, statutes define "mediation" and/or "mediators."</u>

33. Section 653(a) requires each district court to *promulgate its own procedures and criteria for the selection of neutrals on its panels.* Section 653(b) requires *each person serving as a neutral in an alternative dispute resolution process [to] be qualified and trained to serve as a neutral in the appropriate alternative dispute resolution process.* Each district *may use, among others, magistrate judges who have been trained to serve as neutrals in alternative dispute resolution processes, professional neutrals from the private sector, and persons who have been trained to serve as neutrals in* ADR.

The following are examples of the kinds of requirements for inclusion in a panel of neutrals that some courts impose:

(1) Must have been a member of the bar *[or some other licensed professional organization]* in good standing for *[5], [7], [10], [15]* years; and/or

(2) Must have successfully completed a court approved *[or court conducted]* training course *[or a specified number of hours of court approved or conducted training]* in *[the specific ADR process in which the neutral would serve, e.g., in mediation, in ENE, in arbitration, etc.]* The training must have included:

(a) instruction about the purposes and philosophy of the court's ADR program, as well as instruction in the court rules that are relevant to the neutral's service (including especially rules related to confidentiality, integration with case management, restrictions on communication with the assigned judge, and limits on the neutrals' powers and responsibilities);
(b) instruction in the characteristics and purposes of the particular ADR process (including the features that distinguish it from other ADR processes), the procedures and methods that it appropriately includes;
(c) monitored role playing with feedback and evaluation of performance and assessment by faculty of the candidate's suitability for the particular neutral role (appropriate temperament, patience, demeanor, listening and communication skills, etc.); and
(d) instruction in pertinent ethical issues and norms, e.g., how to identify ethical issues that might arise during service and suggested ways to respond, as well as standards for conflicts of interest and disqualification.

(3) Must have conducted or observed/co conducted at least *[5] [10] [20] [mediations], [arbitrations], [early neutral evaluations];*

(4) Must take the oath in 28 U.S.C. § 453;

(5) Must abide by the disqualification rules of 28 U.S.C. § 455;

(6) Must agree to participate *[annually] [semi annually] [periodically]* in court approved refresher training or advanced training;

(7) Must agree (A) to permit participants in the ADR sessions they host to give feedback to the court about how the process was conducted and (B) to respond appropriately to suggestions about how to enhance the value of the process;

(8) ***[For early neutral evaluators and for arbitrators:]***
Must have substantial practice experience in and knowledge of the subject matter that will predominate in the kinds of cases in which the neutral will serve;

(9) ***[For courts that elect to require some pro bono service by members of their panels of neutrals:]***
Must agree to serve on a pro bono basis in *[two] [four]* cases per year, or must agree to provide *[15] [20]* hours of pro bono service as a neutral per year.

For more detailed discussion of issues related to qualifying people to serve in court connected ADR programs, and for descriptions of standards imposed in a variety of different courts, see, e.g., *Qualifying Dispute Resolution Practitioners: Guidelines for Court Connected Programs* (published by the State Justice Institute and Society of Professionals in Dispute Resolution, Washington, D.C. ca. 1997); *National Standards for Court Connected Mediation Programs* (published by the State Justice Institute, Washington, D.C. ca. 1993); and *ADR and Settlement in the Federal District Courts: A Sourcebook for Judges and Lawyers* (published by the Federal Judicial Center and the CPR Institute for Dispute Resolution in 1996). See also the standards for service by ADR neutrals that are being developed jointly by the CPR Institute for Dispute Resolution (NY) and the Georgetown University Law School.

34. The ADR Act of 1998 does not specify criteria to qualify to be on the panel of arbitrators. Instead, Section 653(a) authorizes each district court to *promulgate its own procedures and criteria for the selection of neutrals on its panels.* Section 653(b) requires *each person serving as a neutral . . . [to] be qualified and trained to serve as a neutral in the appropriate alternative dispute resolution process.*

35. Section 655(b) requires each district that authorizes arbitration under the Act to establish standards of certification for arbitrators and to certify those who serve in this capacity.

36. Section 654(a) specifically provides for the four exceptions listed.

37. See subsection (u)(10) of this Local Rule.

38. Section 654(b)(1) specifically directs the court to establish procedures ensuring that the parties' *consent to arbitration is freely and knowingly obtained* . . . .

39. Section 655(a) sets out the specific powers of the arbitrator as listed.

40. Section 656 specifically applies to subpoenas for the attendance of witnesses and the production of documentary evidence at an arbitration hearing under this chapter.

41. Section 654(b)(2) specifically directs that the court shall establish procedures ensuring that the parties' shall not *be prejudiced in any way for refusing to participate in arbitration.* Section 654(d), however, permits courts that were previously authorized to establish presumptively mandatory arbitration programs to continue such programs.

42. Section 657(a) and (b) provides for filing and sealing an arbitration award.

43. Section 657(c)(3)(A) (B) provides for the exclusion of the evidence of arbitration.

44. Section 657(c)(1)(2) provides for the trial *de novo* of arbitration awards.

45. Section 651(e) provides: *This chapter shall not affect title 9, United States Code.*

APPENDIX C

RESOURCES

District and Bankruptcy Court Websites

Alaska
District: http://www.akd.uscourts.gov/, under US District Court, then Local Rules
Bankruptcy: http://www.akb.uscourts.gov/LBRindex.htm

Arizona
District: http://www.azd.uscourts.gov/, under Operations and Filing: ADR
Bankruptcy: http://156.131.12.151/, under Local Arizona Rules/BAP Rules

California, Central
District: http://www.cacd.uscourts.gov/CACD/LocRules.nsf/Local+Rules?OpenView
Bankruptcy: http://156.131.26.114/cacb/Welcome.nsf/main/page/
under Procedures/Rules/Forms, then Local Bankruptcy Rules and Forms

California, Eastern
District: http://www.caed.uscourts.gov/caed/staticOther/page 455.htm,
under Local Rules
Bankruptcy: http://www.caeb.circ9.dcn/formpubs/local rules.asp

California, Northern
District: http://www.cand.uscourts.gov/, under Local Rules, then ADR
Bankruptcy: http://www.canb.uscourts.gov/, under Local Rules

California, Southern
District: http://www.casd.uscourts.gov/, under Rules, then Local Rules
Bankruptcy: http://www.casb.uscourts.gov/html/law library.htm,
under Bankruptcy Local Rules

Guam
District: http://www.gud.uscourts.gov/lrules/RULES.htm

Hawaii
District: http://www.hid.uscourts.gov/, under Local Rules
Bankruptcy: http://www.hib.uscourts.gov/, under Local Rules

Idaho
District: http://www.id.uscourts.gov/, under Rules, then Local Rules
Bankruptcy: http://156.128.4.233/ADR rules.htm

Montana
District: http://www.mtd.uscourts.gov/mtd/documents.nsf/local+rules
Bankruptcy: http://www.mtb.uscourts.gov/rules.htm

Nevada
District: http://www.nvd.uscourts.gov/, under Local Rules
Bankruptcy: http://www.nvb.uscourts.gov/, under Local Rules

Northern Mariana Islands
District: http://www.nmid.uscourts.gov/, under Local Rules

Oregon
District: http://ord.uscourts.gov/Rules/LRTableofContents.htm
Bankruptcy: http://www.orb.uscourts.gov/ORB/lrgo.nsf/main/page

Washington, Eastern

District: http://www.waed.uscourts.gov/localrules/default.htm
Bankruptcy: http://www.waeb.uscourts.gov/waeb/welcome.nsf/main/page, under Local Rules

Washington, Western

District: http://www.wawd.uscourts.gov/wawd/documents.nsf/main/page, under Local Rules
Bankruptcy: http://www.wawb.uscourts.gov/wawb/documents.nsf/main/page, under Local Rules

Organizations and Websites

American Arbitration Association www.adr.org

ABA Section of Dispute Resolution http://www.abanet.org/dispute/committees.html

CPR Institute for Dispute Resolution http://www.cpradr.org

CRInfo, ADR Resources for Federal Government Users http://www.crinfo.org/federal/

Federal Judicial Center http://www.fjc.gov/fsje/home.nsf

Interagency Alternative Dispute Resolution Working Group http://www.http:usdoj.gov/adr/

Mediation Information & Resource Center http://www.mediate.com/government/index.cfm

Ninth Circuit ADR Standing Committee http://www.circ9.dcn

RAND Institute for Civil Justice http://www.rand.org/icj/research/adr.html

U.S. Court Site locator http://www.ce9.uscourts.gov/web/sites.nsf/main/page

U.S. Office of Personnel Management, ADR Resource Guide http://www.opm.gov/er/adrguide/toc.asp

Publications

American Bar Association Section of Dispute Resolution, *Dispute Resolution Magazine* (example: *Focus on the RAND Report & Federal Court ADR,* Summer 1997 issue)

James F. Henry, *Lawyers as Agents of Change,* Into the 21st Century: Thought Pieces on Lawyering, Problem Solving and ADR 50 (January 2001)

Niemic, Stienstra & Ravitz, *Guide to Judicial Management of Cases in ADR* (2001)

Plapinger & Stienstra, *ADR and Settlement in the Federal District Courts: A Sourcebook for Judges and Lawyers* (1996)

Sanders & Goldberg, *Fitting the Forum to the Fuss*, 10 Neg. J. 49 (1994)

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