KAREN ENGRO AND HON. LISA PUPO LENIHAN

# Alternative Dispute Resolution in the Western District of Pennsylvania *Everything You Need to Know But Were Afraid to Ask!*

**On June 1, 2006, the U.S. District Court for the Western District of Pennsylvania initiated a pilot Alternative Dispute Resolution (ADR) Program. The purpose of the program was to abide by the congressional mandate that the federal courts** courts explore ADR[1] and to fulfill the mission of the court, which includes providing an impartial and accessible forum for the *timely and economical* resolution of legal proceedings.[2]

Four district court judges[3] volunteered to participate in the pilot program, which was designed to test a proposed ADR program protocol to see if the experiences of the parties in the courthouse were actually enhanced by their participation. The court adopted revised Local Rule 16.2 for application to cases filed on or after June 1, 2006, and are assigned to any of the pilot program judges (hereinafter referred to as pilot judges). The more detailed policies and procedures applicable to the program were published on the court's Web site, www.pawd.uscourts.gov. In this way, the court could have the flexibility to enhance ADR policies and procedures as the pilot program progressed.

In every case filed in this district, the parties are required to conduct an initial "Meet and Confer" conference pursuant to Local Rule 26(f). Cases in the pilot program are required to include some additional items for discussion in their Rule 26(f) report. These additional items are a choice of the ADR process and a choice of the neutral party. If the parties cannot agree, the designation is left to the judicial officer at the subsequent Rule 16 conference.

All cases in the pilot program must complete discovery within 150 days. The ADR process—either mediation or early neutral evaluation—is expected to take place within the first 60 days of this discovery period. If the chosen ADR process is arbitration, the time period for completing discovery will be 120 days, with the arbitration taking place within the first 90 days. Certain limited discovery can take place prior to the ADR process, but the court's goal is to keep expenditures to a minimum and to allow only the discovery that is necessary for any decision about a potential resolution. If the case does not reach a resolution, the case will proceed in accordance with the case management order, which may include the filing of dispositive motions and eventual trial.

In the first 16 months of the program,[4] 302 cases have been referred to ADR pursuant to the pilot program. Mediation has been the most commonly used form of ADR since the program's inception. By October 2007, 222 cases—73.5 percent of the cases referred to ADR—had proceeded to mediation, probably because this process is the one the parties and counsel understand most clearly. Mediation—a process in which an impartial neutral individual, who is selected by the parties, facilitates negotiations between the parties to help reach a mutually acceptable agreement—is nonadjudicative and involves an impartial neutral person, who can be, but does not have to be, an attorney. If the parties reach an agreement, it must be mutually agreeable to all parties.

The mediator's primary function should be to enhance communication between the parties. The role of the mediator is not to evaluate the case or to force either party to agree to something with which the party is not comfortable. For this reason, a mediator need not be schooled in the particular law of a case. Rather, it is more important for the mediator to be educated and/or trained in methods of facilitation. This further explains why mediators who are not lawyers may be a good choice in some cases.[5] It is, of course, entirely possible that the parties may believe that someone educated in a particular area of the law or a former judge would be more effective in helping the parties resolve their dispute. This choice is left to the parties in the case.

The second, and less frequently used, option is early neutral evaluation Thus far, the parties in 63 cases—21 percent of the cases referred to ADR—have chosen this option. The court suspects that the reason for the more moderate use of this process is that many parties and lawyers do not truly understand it. Early neutral evaluation is a process whereby the parties select an impartial attorney with subject matter expertise, and the evaluator provides a nonbinding evaluation of the case and is then available to assist the parties in reaching agreement if they so choose. Early evaluation is a good choice when one or both parties

truly believe that the case cannot be settled or needs to proceed through dispositive motions.

In the common process of early neutral evaluation, the parties and their counsel hold a confidential session in which they make compact presentations of their claims and defenses, including key evidence that has been developed at that juncture. The parties submit a written statement of their case in advance of the session. With all parties and counsel present, the evaluator then provides a nonbinding evaluation of the case. Parties can also request a written evaluation. If the parties and counsel so desire, the neutral evaluator may assist with settlement or mediation discussions. We have been advised that this process is also particularly useful when a lawyer or client is overestimating either the value of the case or ways it can be defended. The evaluator may help identify areas of agreement, assess strengths or weaknesses, and suggest possible resolutions. This ADR method works best when the parties or counsel want guidance or direction toward settlement based on the applicable law, industry practice, or technology and the evaluator has the requisite training and experience.

The final court-suggested process is arbitration, which is nonbinding unless the parties agree otherwise, and is usually handled through the court at no cost to the parties.[6] Arbitration has been chosen in 17 cases—5.5 percent—of the cases referred to ADR. A single arbitrator or a panel consisting of three arbitrators can be used. The court may encourage the use of a single arbitrator simply for ease of scheduling, but this is not mandatory. Arbitration is an expedited, adversarial hearing, and the program procedures do not allow the arbitrators to become involved in settlement discussions. In addition to court-sponsored arbitration, litigants are always free to choose private arbitration at their own expense.

In order to assist in using the ADR process, the court has developed a pool of potential neutrals. This list includes mediators, evaluators, and arbitrators. Each is listed with a short biography on the court's Web site under the ADR heading and each one screened by the ADR coordinator and a judicial panel in advance. Minimum qualifications for attorney mediators are seven years of practice, substantial experience in civil litigation in federal court, and 40 hours of mediation training, with at least 16 hours of simulation experience.[7] Mediators who are not attorneys are required to have appropriate credentials in another discipline, undergo 40 hours of mediation training, and have experience mediating a minimum of five cases.

Early neutral evaluators must have been active in the practice of law for a minimum of 15 years and have substantial expertise in the subject matter of the cases assigned to them. Both mediators and evaluators are required to have the temperament and training to listen well and to facilitate communications across party lines as well as the ability to assist the parties with settlement negotiations. Rates for mediators and evaluators are determined by the individual neutral.

Arbitrators, who are paid by the court and not the parties, are required to have been admitted to the practice of law for a minimum of 10 years, to have committed 50 percent or more of their practice for the last five years to litigation, or to have substantial experience in serving as a neutral.

It is important to note that the list of neutrals is provided as a courtesy to litigants; parties are not obligated to choose someone on the court's list. If the parties agree on a neutral who is not on the list, they simply need to provide the name and information to the court at the Rule 16 conference and/or in the Rule 26(f) report so that an appropriate referral order can be entered.

All civil actions filed with the four judges in the pilot program are presumed to be part of the ADR process with two exceptions: appeals in Social Security compensation cases and prisoners' civil rights cases. Exemptions are granted on a case-by-case basis by a showing of good cause to the judge at the case management conference and/or by a motion. Thus far, 20 cases have been exempted from the process across a variety of case types.[8]

To date, litigants in 794 cases have participated in the ADR pilot program. Of these, 576 have been resolved—436 before the initial case management conference, 81 after the ADR conference, and 59 after a court order referring the case to an ADR process but without the filing of a report by a neutral evaluator (and therefore, it is not possible to track whether the ADR process actually took place in these 59 cases). Of the remaining 218 cases, 120 are still pending and 81 have used different neutrals.

What does this all mean? The District Court for the Western District of Pennsylvania believes that the statistics show that the program is working. Nationwide statistics indicate that 98.2 percent of all cases filed in federal courts do not go to verdict; in the Western District of Pennsylvania, this number is 97.5 percent. The Western District's ADR program shifts this paradigm away from the courthouse steps, leading to an earlier—and presumably fair and less expensive—resolution. It is the court's hope that this process will result in happier litigants and, therefore, happier clients. Undoubtedly, if a case is resolved through this process, the litigants will have more control over their disputes as well as the eventual resolution.

The court is continuing to evaluate the program and sincerely wants feedback, either via the evaluation forms for those who have participated in the program or via e-mails to the ADR coordinator at PAWD_ADRCoordinator@pawd.uscourts.gov. (The policies and procedures are posted on the court's Web site and are open to revision; comments and suggestions on these are greatly appreciated as well. The court has been engaged in outreach activities to

**ADR** *continued on page 56*

**ADR** *continued from page 25*

the legal community, speaking to groups of neutrals, various organizations within the bar, frequent users of the program, and individual law firms. Opinions and suggestions are needed and the profession's support and understanding of the program is crucial if it is to be a success. **TFL**

---

*Karen Engro is the alternative dispute resolution coordinator for the U.S. District Court for the Western District of Pennsylvania as well as the executive director of the Judicial Council for the Supreme Court of Pennsylvania. Hon. Lisa Pupo Lenihan is a U.S. magistrate judge appointed to the court for the Western District of Pennsylvania in 2004. Both authors were instrumental in the development of the court's ADR program and continue to work on its improvement and implementation.*

### Endnotes

[1]Civil Justice Reform Act of 1990, 28 U.S.C. § 471 et. seq., and Alternate Dispute Resolution Act of 1998, 28 U.S.C. § 651.

[2]The mission of the U.S. District Court for the Western District of Pennsylvania is to preserve and enhance the rule of law while providing an impartial and accessible forum for the just, timely, and economical resolution of legal proceedings within the court's jurisdiction, so as to protect individual rights and liberties, promote public trust and confidence in the judicial system, and maintain judicial independence.

[3]The original judges who participated in the pilot program were Judges Donetta Ambrose, David Cercone, Thomas Hardiman, and Arthur Schwab. Following Judge Hardiman's elevation to the Third Circuit Court of Appeals, Judge Nora Barry Fischer took his place in the pilot program.

[4]As of Oct. 9, 2007.

[5]The court's list currently has more than a dozen mediators who are not attorneys and have a variety of backgrounds, including medicine and psychology.

[6]The rates paid by the court to the arbitrator(s) were set by the Judicial Conference in 1990 and remain at $250 per single arbitrator and $100 per arbitrator for a panel of three.

[7]This requirement has been extended to Dec. 31, 2007, for completion.

[8]Types of exempted cases included those dealing with ERISA, bankruptcy, interpleadings, personal injury, tax, withdrawal of reference, Americans with Disabilities Act, and other cases involving statutory regulations, civil rights, contracts, and exoneration/limitation of liability.