Guide to Judicial Management of Cases in ADR

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Preface

The purpose of this publication is to offer guidance to federal trial and bankruptcy courts on when and how to refer appropriate cases to ADR and how to manage cases referred to ADR. We wrote this guide for a number of reasons. First, district, magistrate, and bankruptcy judges have stated a need for it. Second, the Alternative Dispute Resolution Act of 1998 heightens that need. In addition, our research found that although much has been written about basic ADR concepts, little comprehensive, easily accessible advice on ADR referrals had been written from the court's perspective.

As we drafted this guide, we received advice and direction from an advisory committee consisting of five federal judges and a director of a federal court ADR program, all experienced ADR users. Throughout the guide we try to present a balanced discussion of the issues. For many issues, we present a range of views on how the issues could be handled and provide several options. In a few instances, the guide, with concurrence of our advisory committee, identifies a preferred practice that falls squarely within well-accepted judicial norms or that clearly appears preferred in light of developments in the ADR field. Nonetheless, readers should keep in mind that the guide does not represent an official position of the Federal Judicial Center or any member of the advisory committee.

To facilitate use of the guide as a reference work, we have included a comprehensive Table of Contents at the beginning of the book and a detailed outline at the beginning of each section. We hope these will serve as checklists to guide judicial practice in ADR at the same time that they point to more detailed discussions of the various topics.

Although the guide is suggestive of important elements of a well-designed court ADR program, such as establishing a panel of qualified ADR neutrals, it is not a guide for designing and implementing court ADR programs. Other sources are available that speak directly to that point, including guidelines developed by the Judicial Conference's Committee on Court Administration and Case Management, which are reproduced *infra* Appendix D.

As with the introduction of any new procedure, there are likely to be bumps along the way as judges incorporate ADR into their case management practices. We hope this guide will help minimize those bumps.

The guide reflects research through late 2000.

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I. ADR in the Federal Courts

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B. Scope of this guide
C. Definitions of the principal types of federal court-based ADR
D. Some key concepts

During the 1980s and 1990s, many federal courts implemented alternative dispute resolution (ADR) procedures and began providing services such as mediation, arbitration, and early neutral evaluation. These developments occurred in all three types of courts—district,[1] bankruptcy,[2] and appellate[3]—and reflected both a general societal trend toward greater use of ADR and specific statutory authorization to use ADR.[4] By 1997, the courts' experience with ADR prompted the Judicial Conference to recommend, at least with regard to the district courts, "that local districts

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1. For a district-by-district description of ADR and settlement programs in the federal district courts, see Elizabeth Plapinger & Donna Stienstra, ADR and Settlement in the Federal District Courts: A Sourcebook for Judges and Lawyers (Federal Judicial Center & CPR Institute for Dispute Resolution 1996).

2. For a description of bankruptcy mediation programs, see Robert J. Niemic, Mediation in Bankruptcy, the Federal Judicial Center Survey of Mediation Participants: Report to the Advisory Committee on Bankruptcy Rules (Federal Judicial Center 1998); Ralph R. Mabey, Charles J. Tabb & Ira S. Dizengoff, *Expanding the Reach of Alternative Dispute Resolution in Bankruptcy: The Legal and Practical Bases for the Use of Mediation and the Other Forms of ADR*, 46 S.C. L. Rev. 1259, 1314–28 (1995).

3. For a description of appellate court programs, see Robert J. Niemic, Mediation and Conference Programs in the Federal Courts of Appeals: A Sourcebook for Judges and Lawyers (Federal Judicial Center 1997).

4. The Civil Justice Reform Act of 1990 required thirteen district courts to adopt ADR programs and required all other district courts to "consider" using ADR. Civil Justice Reform Act of 1990, Pub. L. No. 101-650, § 103(a)–(b), 104 Stat. 5089, 5090–96 (amended 1991, 1994, 1996, 1997, 2000) (CJRA). The Judicial Improvements and Access to Justice Act of 1988 authorized arbitration in twenty districts. Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, § 901(a), 102 Stat. 4642, 4659–63 (1988) (amended 1993, 1994, 1997) (previously codified at 28 U.S.C. §§ 651–658 (1994)); *see also infra* Appendix A.2.

continue to develop suitable ADR programs . . . ."[5] Based in part on the courts' experiences with ADR, in 1998 Congress passed and the President signed the Alternative Dispute Resolution Act of 1998 (ADR Act).[6]

Although the ADR Act appears to give federal courts substantial authority to use ADR, some questions remain, and therefore we begin with a discussion of the sources of authority under which district and bankruptcy courts may refer cases to ADR. We will then provide some basic definitions and concepts regarding ADR before turning, in section II, to the process of referring cases to ADR.

For a reproduction of the ADR Act as codified, see *infra* Appendix B, and for a summary of the ADR Act, see *infra* Appendix C.

A. Authority to refer cases to ADR processes

Because the sources of authority to use ADR differ for district and bankruptcy courts, we discuss them separately below. In addition, for a discussion of authority to refer cases to ADR without party consent, see *infra* section V.A.2. For a discussion of authority to require client attendance at ADR sessions, see *infra* section V.B.4.

1. U.S. district courts

The ADR Act of 1998 requires that "[e]ach . . . district court shall authorize, by local rule . . . , the use of alternative dispute resolution processes in all civil actions, including adversary proceedings in bankruptcy, in accordance with [the ADR Act]."[7] Twenty district courts retain authority to refer cases to arbitration under a 1988 Act.[8] See *infra* Appendix A.2 for a discussion of these statutory provisions for arbitration.

Before the effective date of the ADR Act, district judges looked to various sources for authority to refer cases to ADR, including Federal Rule of Civil Procedure 16, local rules, inherent authority, and the cost

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5. Judicial Conf. of the U.S., The Civil Justice Reform Act of 1990 Final Report: Alternative Proposals for Reduction of Cost and Delay, Assessment of Principles, Guidelines & Techniques 38 (1997) [hereinafter CJRA Final Report].

6. Alternative Dispute Resolution Act of 1998, Pub. L. No. 105-315, 112 Stat. 2993 (codified at 28 U.S.C. §§ 651–658 (Supp. 1998)).

7. 28 U.S.C. § 651(b) (Supp. 1998).

8. Section 901(a), 102 Stat. at 4659–63 (previously codified at 28 U.S.C. §§ 651–658 (1994)).

and delay reduction plans required under the Civil Justice Reform Act of 1990 (CJRA).[9] Under these authorities, many district courts established ADR procedures for civil cases.

Under the ADR Act, "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 . . . ."[10] The list of ADR types authorized by the ADR Act appears to be illustrative, not exclusive. Those who may serve as ADR neutrals under the ADR Act include, "among others, magistrate judges who have been trained to serve as neutrals in [ADR] processes, professional neutrals from the private sector, and persons who have been trained to serve as neutrals in [ADR] processes."[11]

Although the authority given in the ADR Act is broad, inherent power is a source of authority for circumstances not proscribed or specifically addressed in the Act.[12] To invoke inherent power in the context of ADR referrals, the judge or court needs to determine that the steps being contemplated are necessary to the effective and efficient administration of justice, which can be done either case by case or on a court-wide basis through local rules.[13] The extent of inherent power in the area of ADR is evolving.[14]

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9. § 103(a), 104 Stat. at 5090–96. Although sections of the CJRA relevant to cost and delay reduction plans (previously codified at 28 U.S.C. §§ 471–475, 477–478 (1994)) have sunset, the statutory requirement for semiannual reporting remains in effect (see 28 U.S.C. § 476 (1994)).

10. 28 U.S.C. § 651(a) (Supp. 1998).

11. *Id.* § 653(b).

12. *See* Chambers v. NASCO, Inc., 501 U.S. 32, 46–47 (1991) (finding that the existence of a statute that governs a certain area of the law does not necessarily divest the court of its inherent power in that area).

13. Federal Rule of Civil Procedure 83 governs the promulgation of local rules and practices, requiring that they be consistent with acts of Congress and national rules. Fed. R. Civ. P. 83.

14. *See* Bouchard Transp. Co. v. Florida Dep't of Envtl. Protection, 91 F.3d 1445, 1448–49 (11th Cir. 1996) (determining that the district court abused its discretion by using its inherent authority to require the State of Florida to participate in mediation before ruling on the State's claim of Eleventh Amendment immunity); Tiedel v. Northwestern Mich. College, 865 F.2d 88, 94 (6th Cir. 1988) (holding that "a district court is not empowered to enact a local rule giving itself

Although the ADR Act now provides broad authority to use ADR, it does not necessarily address the concerns of some that ADR may undermine the right to a jury trial.[15] A number of cases, all decided before passage of the ADR Act, have held that the right to a jury trial is not infringed when cases are referred to properly structured, nonbinding ADR procedures.[16]

2. U.S. bankruptcy courts

The extent to which the ADR Act applies to bankruptcy matters is subject to interpretation. One interpretation is that the ADR Act does not apply to bankruptcy matters in the bankruptcy courts but rather to bankruptcy matters where the reference has been withdrawn, that is, where the district court has withdrawn a case or proceeding that the district court had previously referred to the bankruptcy court under 28 U.S.C. § 157. This interpretation rests on the ADR Act's repeated mention of district courts. There are only two mentions of adversary proceedings; both are made in the context of explaining the term *civil action*.[17] A second interpretation is that the parties to an adversary proceeding in a bankruptcy court may use any ADR program established by the district court if the bankruptcy court does not have its own ADR program. A third interpretation is that

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the authority to award attorneys' fees" as part of its "Michigan mediation" program). *See also infra* notes 129–30 and accompanying text for pre-ADR Act cases on inherent power in the context of the summary jury trial and *infra* notes 159–61 and accompanying text for cases on inherent power in the context of pretrial conferences.

15. *See, e.g.*, G. Thomas Eisele, *Differing Visions—Differing Values: A Comment on Judge Parker's Reformation Model for Federal District Courts*, 46 SMU L. Rev. 1935, 1972–79 (1993); *see also* Dwight Golann, *Making Alternative Dispute Resolution Mandatory: The Constitutional Issues*, 68 Or. L. Rev. 488, 493–94, 505–10 (1989). *But see id.* at 552–56. *See also infra* text accompanying note 236.

16. *See, e.g.*, Rhea v. Massey-Ferguson, Inc., 767 F.2d 266, 268–69 (6th Cir. 1985) (holding that the district court's local rule providing for referral to "Michigan mediation" did not violate the Seventh Amendment right to jury trial, because it did not infringe on the fundamental right to have a jury ultimately determine unresolved issues); New Eng. Merchants Nat'l Bank v. Hughes, 556 F. Supp. 712, 714 (E.D. Pa. 1983) (holding that referral under a mandatory, nonbinding pretrial arbitration program with a provision for a trial de novo did not violate the Seventh Amendment right to a jury trial).

17. 28 U.S.C. §§ 651(b), 654(a) (Supp. 1998).

the ADR Act's requirements, including that of setting up a separate ADR program, apply to both bankruptcy and district courts because bankruptcy courts are units of the district courts. The Judicial Conference has neither considered the question of whether the ADR Act's requirements apply to the bankruptcy courts nor suggested how the requirements should be interpreted. What is clear, however, is that the ADR Act does not prohibit bankruptcy courts from establishing ADR programs.

About a third of the ninety bankruptcy courts have local rules, general orders, or other guidelines that govern the referral of bankruptcy matters to mediation.[18] In addition, other bankruptcy courts use the ADR programs of their respective district courts or refer bankruptcy matters to ADR on an ad hoc basis without the structure of an ADR program.

Although the bankruptcy courts cannot with certainty look to the ADR Act for authority to use ADR, for many years prior to the ADR Act they found such authority in several other sources.[19] These include, for example, Federal Rule of Bankruptcy Procedure 7016, which makes Federal Rule of Civil Procedure 16 applicable in adversary proceedings, and Federal Rule of Bankruptcy Procedure 9014, under which the bankruptcy court may make Bankruptcy Rule 7016 applicable in contested matters. Other sources of authority include sections 105(a)[20] and 105(d)[21] of the

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18. *See* Niemic, *supra* note 2, at 5–6.

19. *See generally In re* Sargeant Farms, Inc., 224 B.R. 842, 847 (Bankr. M.D. Fla. 1998) (stating that "it is quite apparent the bankruptcy court has the authority and power to promulgate rules associated with court-annexed mediation and, where necessary, to require the parties to participate in same"); Robert B. Millner & Elizabeth L. Perris, *Bankruptcy Disputes*, *in* Alternative Dispute Resolution: The Litigator's Handbook 327, 328-30 (Nancy F. Atlas et al. eds., American Bar Association, Section of Litigation 2000) (describing sources of authority for bankruptcy courts to require mediation and other nonbinding ADR techniques).

20. Congress has given bankruptcy courts a functional equivalent of inherent power in section 105, which provides that "[t]he court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of [the bankruptcy statute]." 11 U.S.C. § 105(a) (1994 & Supp. 1998)*; see In re* Rainbow Magazine, Inc., 77 F.3d 278, 284 (9th Cir. 1996) (stating that "Congress impliedly recognized that bankruptcy courts have the inherent power to sanction that *Chambers* recognized exists within Article III courts"); Jones v. Bank of Santa Fe (*In re* Courtesy Inns, Ltd.), 40 F.3d 1084, 1089 (10th Cir. 1994) (holding that section 105 is "intended to imbue the bankruptcy courts with the inherent power recognized by the Supreme Court in *Chambers*"). *See supra* notes 12–13 and accompanying text.

Bankruptcy Code, Code provisions authorizing the use of examiners,[22] and Code provisions governing the confirmation of plans of reorganization.[23] The Federal Rules of Bankruptcy Procedure provide that a bankruptcy court may authorize a matter to be submitted to final and binding arbitration on the stipulation of the parties.[24]

Federal Rule of Civil Procedure 16(c) authorizes the judge to "take appropriate action" at a pretrial conference with respect to "settlement and the use of special procedures to assist in resolving the dispute when authorized by statute or local rule."[25] The advisory committee's note accompanying the 1993 amendments to Rule 16(c) indicates that the term *special procedures* includes such processes as "minitrials, summary jury trials, mediation, neutral evaluation, and nonbinding arbitration that can lead to consensual resolution of the dispute without a full trial on the merits."[26]

Because settlements in bankruptcy cases can affect the rights of entities that are not parties to the immediate dispute, ADR settlements in

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21. Section 105(d) provides broad authority regarding any bankruptcy case or proceeding to "issue an order at any [status] conference prescribing such limitations and conditions as the court deems appropriate to ensure that the case is handled expeditiously and economically . . . ." 11 U.S.C. § 105(d) (1994 & Supp. 1998)*; see* 140 Cong. Rec. H10764 (daily ed. Oct. 4, 1994) (providing section-by-section analysis of provisions of Bankruptcy Reform Act of 1994).

22. 11 U.S.C. §§ 1104, 1106 (1994). See *infra* notes 195–97 and accompanying text for a discussion of the issues involved if an examiner serves as a mediator.

23. 11 U.S.C. § 1123(a)(3)–(4), (b)(6) (1994). Sections 1123(a)(3) and (4) require a plan of reorganization to specify and provide for the treatment of classified claims. Section 1123(b)(6) allows the plan to "include any other appropriate provision not inconsistent with the applicable provisions of [the bankruptcy statute]." Bankruptcy courts have confirmed plans of reorganization that include nonbinding ADR processes to determine the amounts of creditors' claims. *See* Mabey, Tabb & Dizengoff, *supra* note 2, at 1291–93; *infra* note 87 and accompanying text.

24. Fed. R. Bankr. P. 9019(c).

25. Fed. R. Civ. P. 16(c)(9).

26. Fed. R. Civ. P. 16(c) advisory committee's note (1993 amendments). Note that the Advisory Committee specifies nonbinding arbitration. *But see supra* note 24 and accompanying text.

some bankruptcy matters are subject to the notice and hearing provisions of Federal Rule of Bankruptcy Procedure 9019.[27]

B. Scope of this guide

In this guide we discuss issues that may arise before, during, and after the referral of cases to ADR. When we use the term ADR, we are using it in the broad sense in which it was defined in the ADR Act of 1998. As stated earlier, the Act defines ADR as "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 . . . ."[28] Among these procedures are those that are relatively familiar and frequently used, such as mediation, and those that are perhaps less familiar and less frequently used, such as the minitrial.

Arguably, judicial settlement conferences are the most familiar and frequent of all settlement processes. They have been an invaluable tool for many years and will continue to be so. Even so, we do not include the traditional judicial settlement conference in our definition of ADR or in our discussions in the guide. We recognize, however, that many judges use ADR techniques when they conduct settlement conferences; some magistrate and bankruptcy judges, for example, are trained in and use mediation techniques to settle disputes. See *infra* section VI.E.2 for a discussion of magistrate judges serving as ADR neutrals. For purposes of this guide, when a judge conducts a settlement conference and uses ADR techniques, we consider that conference to be ADR.

Our discussion is limited to ADR that is court-based, which, like the terms *court-connected* and *court-annexed*, refers to programs that are authorized, implemented, and administered by a court. The guide does not include ADR conducted by parties on their own initiative outside the

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27. Fed. R. Bankr. P. 9019(a) ("On motion by the trustee and after notice and a hearing, the court may approve a compromise or settlement."); Fed. R. Bankr. P. 2002(a)(3); *see also* 11 U.S.C. §§ 901(a), 1123(b)(3)(A) (1994) (stating that under Chapter 9 or 11 the plan may provide for "the settlement of any claim or interest belonging to the debtor or to the estate"); 11 U.S.C. §§ 1222(b)(11), 1322(b)(10) (1994) (stating that under Chapter 12 or 13 the plan may "include any other appropriate provision not inconsistent with [the Bankruptcy Code]").

28. 28 U.S.C. § 651(a) (Supp. 1998). Arbitration in this definition refers to arbitration as provided in sections 654–658 of the ADR Act.

context of federal court litigation or proceedings, nor does it cover arbitration conducted pursuant to an arbitration clause in a contract.

C. Definitions of the principal types of federal court-based ADR

The definitions below give the basic purpose and nature of the principal types of ADR procedures used in the federal courts. For a more detailed discussion of how and when each procedure is used, see *infra* Appendix A. For a discussion of the types of cases typically identified as suitable for each ADR procedure, see *infra* section IV.B.

Mediation. In court-based mediation, a neutral third party facilitates discussions among the parties to assist them in finding a mutually acceptable resolution of the case. The goal of the mediator, who may meet with the parties jointly and separately, is to help them identify their underlying interests, improve communications, and generate settlement options. Mediation sessions are informal, confidential, generally attended by both attorneys and clients, and may occur at any point in the litigation.

Arbitration. In a hearing attended by attorneys and their clients, one or three arbitrators hear adversarial presentations by each side in the case, then issue a decision based on the facts and applicable law. The parties may accept the decision, in which case it becomes the judgment of the court, or they may request a trial de novo. Arbitration generally occurs after at least core discovery has been completed. Although witnesses frequently are not called and the Rules of Evidence may be relaxed, the arbitration hearing is a fairly formal process.

Early Neutral Evaluation. In a confidential session attended by attorneys and their clients, a neutral third party hears presentations by each side in the case, then gives the parties a nonbinding assessment of the strengths and weaknesses of their positions. The evaluator, who is often an attorney with expertise in the subject matter of the case, also may assist the parties in settlement discussions or development of a discovery plan. Early neutral evaluation is generally used early in the litigation and is aimed more at streamlining the case than at settlement.

Summary Jury Trial and Summary Bench Trial. The summary jury trial and summary bench trial are distinguished from each other by the presence or absence of a jury. In this trial-like proceeding, presided over by a judge, each party presents an abbreviated version of its case, usually

relying on exhibits rather than live witnesses. After receiving an advisory verdict from a jury or the judge, the parties may use the verdict as a basis for settlement discussions or may proceed to trial. This form of ADR is generally used after discovery is complete.

Minitrial. In a court-based minitrial, each side presents a brief version of its case to party representatives who have settlement authority. A judge or other third party may preside and may assist in settlement negotiations if asked to do so after the presentations are made. The goal is to put the case before each party's decision makers, such as the senior executives of corporate parties, who may be relatively uninformed about the case.

Settlement Week. During a settlement week, the court sets aside all trial activity and uses the courthouse space for mediation of trial-ready cases. Volunteer mediators conduct the confidential mediation sessions.

Case Evaluation. In this arbitration-like process, each side presents its arguments at a hearing before a panel of three neutral attorneys. The panel then issues a written, nonbinding assessment of the case. Parties may accept the assessment as the settlement value of the case, use the assessment for further negotiations, or ask to proceed to trial. Used by the federal courts in Michigan, this process is often referred to as "Michigan mediation."

Med-Arb. This process begins with mediation and, if the parties reach impasse, proceeds, with their agreement, to arbitration.

D. Some key ADR concepts

Understanding the distinctions described below can be important in using ADR effectively.

Voluntary vs. Mandatory Referrals to ADR. These words describe the method by which cases enter ADR. If a judge or court refers cases to ADR only with consent of the parties, the referral is voluntary. If participation in ADR is required by the court, whether by an individual judge's order or by a court rule that certain types of cases will automatically be referred to ADR, the referral is presumptively mandatory. We say "presumptively" because local rules generally provide a mechanism by which the parties, individually or jointly, may request to have their case removed from ADR after a mandatory referral. For a discussion on whether to make an ADR referral with or without party consent, see *infra* section V.A.

Binding vs. Nonbinding. These words describe the type of outcome in ADR. Federal court ADR processes are nonbinding; that is, parties are not bound by the outcome unless they agree to be bound by it. In adjudicatory processes such as arbitration and summary jury trial, where a decision is rendered, the decision has no force unless the parties agree to accept it.[29] Likewise, in a process such as mediation, referral to the process does not require the parties to settle the case but only to meet to discuss settlement. Whether a settlement is reached is fully in their control.

Interest-based vs. Rights-based. Interest-based dispute resolution processes expand the discussion beyond the parties' legal rights to look at underlying interests, deal with emotions, and seek inventive solutions. The focus of these processes is on clarifying the parties' real motivations or underlying interests in the dispute. Mediation, for example, is a process that traditionally focuses mainly on underlying interests. Rights-based processes, on the other hand, narrow issues, streamline legal arguments, and predict judicial outcomes or render decisions based on assessments of fact and law. Arbitration is a rights-based process. ADR processes can contain both interest-based and rights-based elements, depending on the structure of the process (e.g., a summary jury trial can involve both outcome prediction and facilitated negotiation) or the style of the neutral (e.g., some mediators predict legal outcome as well as facilitate negotiations).[30]

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29. Parties might agree beforehand to be bound by the decision rendered in a process such as arbitration, but this would be solely at their initiative. *See, e.g.*, N.D. Cal. ADR R. 4-13.

30. Judge's Deskbook on Court ADR 33 (Elizabeth Plapinger, Margaret L. Shaw & Donna Stienstra, eds., Center for Public Resources/CPR Legal Program 1993) (photo. reprint Federal Judicial Center 1993) [hereinafter Deskbook]. This paragraph was extracted from the Deskbook and modified with permission.

II. Considering the Use of ADR: How and When

A. How and when might the court raise the subject of ADR with the parties?
B. At what stage of the litigation might an ADR referral be made?
   1. Mediation
   2. Early neutral evaluation (ENE)
   3. Arbitration or summary jury trial
C. Will ADR interfere with the overall schedule set for the case?
D. How much, if any, discovery is necessary before or during the ADR process?
E. What might the court do if it appears that a ruling on a particular issue would facilitate use of ADR?
F. What might the court do if a dispositive motion has been filed?

In this section, we discuss when and by what means the court might initiate consideration of ADR and at what stage of the case the court might make an ADR referral. Most judges decide which cases should be referred to ADR on a case-by-case basis, although some courts automatically send specified types of civil cases to ADR.[31] See *infra* sections III and IV, respectively, for discussions on selecting cases appropriate for ADR and matching the ADR process to the case. See *infra* section V.A for discussion on deciding whether to refer cases with or without party consent.

As the judge weighs the various factors that go into a decision to refer a case to ADR, the judge might consider how and when the court's ADR staff can be of assistance. The ADR Act of 1998 requires each district court to "designate an employee, or a judicial officer, who is knowledgeable in [ADR] practices and processes to implement, administer, oversee, and evaluate the court's [ADR] program."[32] This individual, whom we will refer to as the ADR administrator, can be helpful in many ways; where relevant we will note the role they can play.

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31. *See infra* notes 46–48 and accompanying text.
32. 28 U.S.C. § 651(d) (Supp. 1998).

A. How and when might the court raise the subject of ADR with the parties?

If the decision whether to refer a case to ADR is made on a case-by-case basis, the court will need to know something about the case before making this decision. An initial Rule 16 conference, either in person or by telephone, provides an excellent opportunity for making an early assessment of a case's readiness for and the attorneys' posture toward ADR. Knowing about the case and the lawyers will make it easier for the court to decide whether and how to raise the use of ADR. The discussions at this conference may suggest that early use of ADR might be helpful. Even if the court decides that use of ADR should occur later in the case, discussion of ADR at the earliest possible moment in the case will signal to the attorneys the court's willingness to help them find an appropriate method for resolving the case, will help the judge and the attorneys incorporate ADR effectively into the case schedule, and will provide an opening for attorneys to discuss ADR. Such an opening may be especially helpful if the attorneys are unfamiliar with ADR or are worried that raising the use of ADR might suggest lack of confidence in their case.

Keep in mind that the ADR Act of 1998 directs district courts to "require [by local rule] that litigants in all civil cases consider use of an alternative dispute resolution process at an appropriate stage in the litigation."[33] To ensure that parties think about whether and when ADR may be useful, the court could, for example, include consideration of ADR on the list of items the parties must address in their case management statement or at the first case management conference.[34]

If the judge does not hold an early Rule 16 conference, consider assessing the appropriateness of an ADR referral based on the complaint or other written materials submitted by the parties. These materials may be limited in their usefulness, however. Consider also whether a brief telephone conference with the attorneys might be worthwhile.

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33. *Id.* § 652(a).

34. *See, e.g.,* N.D. Ala. Civ. R. 16.1 (allowing a judge, in a scheduling order or separate order, to direct litigants to engage in ADR procedures); W.D. Mich. Civ. R. 16.1 (identifying deadlines for ADR as one of the deadlines a judge may set in the case management order).

To help the parties consider the use of ADR in a particular case, the judge might ask at a conference some of the questions listed below.[35]

- Have the parties considered using ADR, as required by the ADR Act?
- Do the parties know what ADR options the court offers and how each one works?
- Have the parties made a decision about use of ADR?
- If the parties have decided to use ADR, what process do they prefer?
- Do the parties have a particular ADR neutral in mind?
- If the parties have decided against ADR, what has led to that decision?
- If some issues are not appropriate for ADR, might some of the other issues be appropriate?
- Have the parties already tried to settle the case?
- Are any rulings needed before an ADR process can be productive?
- Is there certain information that, if exchanged promptly, would make an early ADR process more productive?
- Have the attorneys spelled out for their clients the potential cost and time commitments of litigating the case?

To encourage litigants and attorneys to use ADR, some judges try to educate them about ADR and its potential benefits.[36] Others might ask the court's ADR administrator—if such responsibilities have been assigned to the administrator—or a properly selected neutral to meet with the parties to explain ADR and answer their questions.

B. At what stage of the litigation might an ADR referral be made?

When ADR first began to be implemented in court settings, the prevailing view was that ADR procedures should not be used until discovery was well under way, if not completed. This view was based on a belief that

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35. *See generally* Wayne D. Brazil, *For Judges: Suggestions About What to Say About ADR at Case Management Conferences—and How to Respond to Concerns or Objections Raised by Counsel*, 16 Ohio St. J. on Disp. Resol., 165 (2000).

36. *See, e.g.,* Patrick F. Kelly, *Mediation: A Settlement Conference Format That Works*, *in* ADR and the Courts: A Manual for Judges and Lawyers 133, 133 (Erika S. Fine ed. & Elizabeth S. Plapinger asst. ed., CPR Legal Program 1987) [hereinafter ADR and the Courts].

each party had to have a solid understanding of its case before ADR could be effective.[37] In that context, by the time the case was "ripe" for ADR, the judge would have substantial information about the case to help him or her decide whether to make a referral. If the judge wanted to consult with counsel about a referral, a late-stage status or pretrial conference provided an opportunity to do so.

Although this view may still be appropriate for adjudicatory ADR processes such as arbitration and summary jury trial, the prevailing view appears to be shifting with regard to other processes, like mediation. To some extent, the timing of an ADR referral depends on the type of ADR that the court or the parties think is most suitable for the case, as described below. See also *infra* section II.D for a discussion of staying or limiting discovery.

1. Mediation

Mediation, with its goal of helping parties find the best resolution of their case, can occur at any point in the litigation. Conventional wisdom has held that mediation is more likely to be effective if key discovery has been done, and later rather than early referral appears to be the more typical practice in the federal courts. Some district courts, however, specifically authorize early referral to mediation.[38] Because there is some evidence that early referrals can be beneficial,[39] the court might want to

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37. *See, e.g.*, Marvin E. Aspen, *Special Masters as Mediators: Intensive Ad Hoc Mediation*, *in* ADR and the Courts, *supra* note 36, at 225, 228.

38. *See* W.D. Mo. Civ. R. app., para. II.B. (providing, in section dealing with Early Assessment Program, for initial early assessment meeting to be held within thirty days after completion of responsive pleadings); E.D. Pa. Civ. R. 53.2.1(4)(a) (providing for initial mediation conference to be held within sixty days of first appearance for a defendant).

39. Note, for example, the experience of the Early Assessment Program (EAP) in the Western District of Missouri, where the mediation session is held thirty to sixty days after the answer is filed and where the court employs a mediator on staff: 38% of referred cases settled at the EAP session, an additional 19% settled within thirty-one days after the session, and another 17% settled within thirty-two to ninety days after the session. *See* Donna Stienstra, Molly Johnson & Patricia Lombard, Report to the Judicial Conference Committee on Court Administration and Case Management: A Study of Five Demonstration Programs Established Under the Civil Justice Reform Act of 1990, at 244–45 (Federal Judicial Center 1997). Median disposition time for cases mandatorily referred to

consider the feasibility of early referral. Earlier use of mediation may bring about earlier settlements, and cost and time savings may be greater when considerable resources have not yet been sunk into the case, especially if costly discovery procedures can be avoided. An early referral may also catch the parties at a point where they are not firmly entrenched in their positions on certain issues and thus can be more flexible in negotiations. See *infra* Appendix A.1 for a description of the mediation process.

2. Early neutral evaluation (ENE)

If the parties would benefit from an early evaluation of the strengths and weaknesses of their case, consider referral to early neutral evaluation, perhaps even before the first Rule 16 conference. The court might determine the appropriateness of this referral by examining the complaint. A short telephone conference with the attorneys also could help the court assess the value of such a referral. If ENE is conducted early in the case, it probably will be most productive in cases where the neutral's evaluation is not dependent on substantial discovery. See *infra* section IV.B.3 for a discussion of the types of cases in which ENE might be effective. See *infra* Appendix A.3 for a description of the ENE process.

3. Arbitration or summary jury trial

Adjudicatory processes such as arbitration and summary jury trial require sufficient discovery to enable the attorneys to present a well-argued and documented case to the decision maker. If the case would benefit from such an advisory decision the judge might want to schedule the ADR process after discovery necessary for the ADR process has been completed. See *infra* sections IV.B.2 and IV.B.4 for a discussion of the types of cases in which arbitration or summary jury trial might be effective. See *infra* Appendix A.2 and A.4, respectively, for descriptions of arbitration and summary jury trial.

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the court's mediation program was 7.0 months, and median disposition time for cases not permitted to use the court's mediation program was 9.7 months. *See id.* at 242–44. Eleven percent of attorneys who participated in the mediation process said it occurred too early in the case. *See id.* at 237.

C. Will ADR interfere with the overall schedule set for the case?

A widely held view is that cases referred to ADR should continue to be subject to the pretrial schedule set by the assigned judge; under this view, parties generally would not be precluded from filing pretrial motions or pursuing discovery during the ADR process.[40] The objective is to complete the case without undue delay or cost. Furthermore, if parties know that deadlines are fast approaching for discovery, motions, hearings, conferences, or trial, the existence of the schedules can be an inducement to settlement.

Some courts do not require parties to proceed with the litigation process while engaged in ADR; in these courts, for example, the pretrial and discovery periods may be tolled for a specified time or until completion of ADR.[41] The purpose of such an approach is to permit complete concentration on the ADR process without the distraction of other activities in the case. This may be particularly useful if the ADR process is likely to be short or the prospect of settlement is high.

A number of courts have adopted local rules that establish time periods within which the ADR session must be held.[42]

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40. *See, e.g.,* E.D. Mo. Civ. R. 16-6.02 (referral to ADR does not delay or defer scheduled dates, including trial date, unless otherwise ordered); W.D. Mich. Civ. R. 16.3(f) (cases referred to voluntary facilitative mediation shall continue to be subject to management by the assigned judge; parties may file motions and engage in discovery).

41. *See, e.g.,* D.N.J. Civ. R. 301.1(e)(5) (all proceedings, including motions and discovery, shall be stayed for sixty days after date of referral to mediation).

42. *See, e.g.,* W.D. Mich. Civ. R. 16.3(e) (providing that: within fourteen days of issuance of the referral order, the mediator shall set the time and place for the mediation session; the first mediation session shall be held within sixty days of the referral order; and the mediator shall determine the length and timing of the session(s)); D.R.I. Amended ADR Plan § IX.D.2.a (stating that, unless ordered otherwise by the court, the mediation session must be held within thirty days of the mediator's receipt of the notice of designation as mediator); D. Neb. Civ. R. 53.2(d) (requiring the mediation session to be held no later than sixty days after entry of the referral order).

D. How much, if any, discovery is necessary before or during the ADR process?

Whether to permit Rule 26 discovery/disclosure before or during the ADR process depends on the facts and circumstances of the case.

Reasons for permitting at least limited discovery before ADR begins include:

- Discovery/disclosure may help the parties evaluate the soundness of their positions and those of their opponents and give parties more confidence in their ability to recognize a reasonable settlement offer.
- Targeted discovery can be done, with an objective to give parties the most critical information they need.
- As discovery costs go up, parties may feel a greater incentive to settle.
- Some believe that, without enough information, a case generally cannot settle for fair value, and any settlement for other than a fair value may not endure.

Considerations with respect to permitting some discovery during the ADR process, in addition to those listed above, include:

- ADR neutrals, particularly mediators and early neutral evaluators, might be able to help the parties make informal exchanges of discovery materials.
- Discovery during ADR allows the parties to return to litigation without undue delay if ADR does not result in full settlement.

The amount of discovery permitted may depend on the type of ADR process:

- Mediation: If mediation is scheduled early in the litigation, consider limiting discovery to production of certain key documents needed for the mediation or to a small number of depositions of critical persons. Having the parties negotiate or specify such documents may establish a positive foundation for further agreement.
- Early neutral evaluation: Somewhat more discovery may be necessary for an evaluative process like ENE, where the attorneys must give a fairly comprehensive presentation of the issues in the case.
- Arbitration: Because arbitrators must decide the merits of the case, the parties must be permitted sufficient discovery to give a sound presentation of their case. To conserve party costs, consider limit-

ing discovery to certain critical witnesses and issues that are necessary for arbitrators to make a decision.[43]

- Summary jury trial, summary bench trial, and minitrial: Generally these ADR processes will require full discovery.

Reasons for staying discovery during the ADR process include:

- The discovery schedule will not distract the parties from focusing on settlement or create additional disputes during the ADR process.
- Impending discovery costs could provide an incentive for parties to settle, whereas pre-ADR discovery costs could work as an incentive or commitment to litigate.
- If the case settles, there would be little need for the information obtained during discovery or the costs incurred.

Some judges stay discovery only if both parties want it stayed.

E. What might the court do if it appears that a ruling on a particular issue would facilitate use of ADR?

Sometimes parties may be reluctant to use ADR because they believe ADR has potential only if they know how the court will rule on a particular issue in the case. The judge can ask the parties—during a Rule 16 conference, for example—if there are any issues keeping them from using ADR. If there are, the court might ask for briefing of those issues, decide them, and then consider the use of ADR for the remaining issues in the case.

F. What might the court do if a dispositive motion has been filed?

Cases in which a dispositive motion has been filed may or may not be appropriate for referral to ADR at the time the motion is pending. Should the judge decide the motion first or go ahead and make the ADR referral?

The court could refer the case to ADR and continue to deliberate on the motion. Under this approach, the court could place a time limit on the ADR process or inform the parties that the judge intends to hand

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43. *See* Edward F. Sherman, *The Impact on Litigation Strategy of Integrating Alternative Dispute Resolution into the Pretrial Process*, 168 F.R.D. 75, 81–83 (1986).

down a ruling on the motion by a specific date. See *infra* section X.B for a discussion of setting deadlines and *infra* section X.E for a discussion of ruling on a dispositive motion that is filed while ADR is under way. On the other hand, the court could refer the case to ADR with a stay on briefing and deliberation.

Issues to consider in deciding whether to stay a decision on a dispositive motion are set out below.

- If the motion is stayed, the parties and their attorneys will not be distracted by motions practice and may be better able to focus on the ADR process.
- A stay permits the parties to negotiate without concern that a decision on the motion could make their settlement efforts fruitless; a stay also could preclude the possibility of settlement and a ruling occurring simultaneously.[44]
- A stay could increase the overall time and expense of the litigation if the dispositive ruling would end the litigation quickly.
- In the absence of a stay, however, a party's concerns about the possibility of an adverse ruling may be an incentive to settle the case.

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44. *See, e.g.,* Sheng v. Starkey Labs., Inc., 117 F.3d 1081, 1084 (8th Cir. 1997) (holding that, where a summary judgment decision is handed down just before the parties reached an agreement on all material aspects of a settlement, the agreement is binding on the parties, notwithstanding the fact that they reached the agreement while unaware of the summary judgment decision).

III. Selecting Cases Appropriate for ADR

A. Party characteristics
  1. Can the parties benefit from ADR?
     a. Is ADR likely to lead to a better outcome for the parties?
     b. Is ADR likely to save the parties time and money?
     c. Do the parties have and wish to maintain a personal or business relationship?
  2. Who are the parties and their attorneys, and can they use ADR effectively?
  3. Is there a pro se party in the case?
  4. Is a governmental entity a party?
  5. Does settlement depend on information parties want to keep confidential?

B. Case characteristics, generally
  1. Does the case involve novel legal issues, ambiguous precedent, constitutional issues, or public policy? Would a judgment contribute to development of the law?
  2. Should the public have information about the case and its resolution?
  3. Does the case have many issues or few issues?
  4. Are there multiple parties?
  5. Have the parties already attempted settlement and failed?
  6. Is the case of a type that would generally be decided on the papers?

C. Complex cases
  1. What if the case is a class action?
  2. What if the case is a mass tort case?

D. Bankruptcy matters

In the federal courts, the most common approach for selecting cases appropriate for ADR is to refer them on a case-by-case basis.[45] Thus, the judge will very likely be a key participant in the decision about whether to use ADR.

Most federal courts with ADR programs define by local rule the types of cases eligible for referral to ADR. A common practice, at least with regard to mediation, is to define most case types as eligible, with cases such as Social Security appeals and pro se cases exempt from the ADR

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45. *See* Plapinger & Stienstra, *supra* note 1, at 7–8.

process.[46] The ADR Act permits each district court to exempt specific cases or categories of cases from ADR.[47]

In some courts, limited for the most part to courts authorized to refer cases to mandatory arbitration, eligibility for referral is based on specified objective criteria, such as the nature or size of damages. *See infra* Appendix A.2; *infra* section IV.B.2. Some argue that basing the referral of cases on objective criteria, such as nature or size of damages, is not the preferred approach because such criteria lack an individual assessment of which ADR process best meets the needs of the particular case and litigants.[48]

In this section, we outline the many case and party characteristics the court might consider in deciding whether to refer a case to ADR. No characteristic is an absolute indicator that ADR should or should not be used; rather, the characteristics are factors to weigh when deciding whether to use ADR. Identifying an appropriate case and selecting a suitable ADR process will very likely occur almost simultaneously. For a discussion of matching the ADR process to the case, see *infra* section IV. For a discussion on deciding whether to refer cases with or without party consent, see *infra* section V.A.

A. Party characteristics

1. Can the parties benefit from ADR?

a. Is ADR likely to lead to a better outcome for the parties?

In ADR, especially mediation and, to some extent, early neutral evaluation, the neutral can probe beneath the legal issues, rights, and positions to help identify interests that can give rise to solutions more satisfactory to the parties. The claimant in a sexual harassment case, for example,

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46. *See, e.g.*, S.D. Fla. Civ. R. 16.2(C) (listing types of cases not subject to mediation); *see also* Plapinger & Stienstra, *supra* note 1, 36–56 tbls.4–7, 71–308 (providing court-by-court descriptions of case eligibility criteria).

47. *See* 28 U.S.C. § 652(b) (Supp. 1998). In defining these exemptions, the court must consult with the bar, including the U.S. attorney.

48. *See, e.g.*, Carrie J. Menkel-Meadow, *Judicial Referral to ADR: Issues and Problems Faced by Judges*, FJC Directions, Dec. 1994, at 8, 8 (noting that the problem with objective criteria is that, unless there exists a procedure for "opt-in" or "opt-out," there is little case-by-case assessment of which ADR processes will be better for particular case types or litigants).

may be more interested in stopping offensive conduct and retaining his or her job than in pursuing litigation to a final outcome, whereas the employer may be most interested in avoiding the costs and adverse publicity of litigation. Other outcomes that generally do not result from litigation include defendant contributions to charities or public interest organizations, exclusive contracts for some defined period, and apologies.

b. Is ADR likely to save the parties time and money?

Generally one would not want to refer a case to ADR unless the parties' costs for ADR and the time spent in the process promise to be no more than the costs and time spent litigating the case. Among the cost-related factors are the neutral's fees, the costs of counsel during the ADR process, the costs of party attendance at ADR sessions, and whether pro bono services are available. Research findings regarding ADR's effects on litigation time and costs have been mixed, with some studies finding positive effects[49] and others finding little effect.[50] The research findings are so inconclusive in the aggregate that one should probably not rely on them as a guide for a particular case, especially since ADR's effects are very

49. *See, e.g.*, Joshua D. Rosenberg & H. Jay Folberg, *Alternative Dispute Resolution: An Empirical Analysis*, 46 Stan. L. Rev. 1487, 1505–10 (1994) (reporting that, in the authors' study of the Northern District of California's early neutral evaluation (ENE) program, "ENE shortened the pendency time in almost half the cases that went through the process"); Stienstra et al., *supra* note 39, at 215-18, 240-53 (reporting, in FJC study of CJRA demonstration programs, that median disposition time for cases mandatorily referred to the court's mediation program was 7.0 months, and median disposition time for cases not permitted to use the court's mediation program was 9.7 months, in the Western District of Missouri's mediation program where cases are referred shortly after answer is filed and are mediated by a staff mediator); Barbara S. Meierhoefer, Court-Annexed Arbitration in Ten District Courts 6–7 (Federal Judicial Center 1990) (finding that "[a]rbitration programs can, but do not always, reduce disposition times").

50. *See, e.g.*, James S. Kakalik, Terence Dunworth, Laural A. Hill, Daniel McCaffrey, Marian Oshiro, Nicholas M. Pace & Mary E. Vaiana, An Evaluation of Mediation and Early Neutral Evaluation Under the Civil Justice Reform Act 4 (Institute for Civil Justice, RAND Corporation 1996) (reporting no statistically significant impact, either positive or negative, of ADR on litigation costs or time in RAND's evaluation of four mediation and two early neutral evaluation pilot programs under CJRA). For comment and recommendations made by the Judicial Conference with respect to the FJC and RAND research findings on CJRA cited above, see CJRA Final Report, *supra* note 5, at 35–38.

likely closely linked to how a particular program is designed and managed. At a minimum, however, the court will want to avoid making referrals that would increase the parties' overall time and costs, unless there is a compelling reason for using ADR. Some commentators have been particularly critical of courts that have, in their view, adopted procedures that increase litigants' costs in order to save court resources.[51] *See infra* sectionVII.C.

c. Do the parties have and wish to maintain a personal or business relationship?

In many cases, there may be more at stake than the monetary value of the claim. In a dispute over a business contract, for example, assess whether the parties place any value on continuing the business relationship. Where they do, use of ADR rather than traditional litigation may reduce hostility between the parties, help them find a resolution that benefits both sides, and thus help them maintain their business relationship.

2. Who are the parties and their attorneys, and can they use ADR effectively?

When deciding whether to refer a case to ADR, assess the attitudes and capabilities of the attorneys and their clients. If one or both attorneys are known to be exceedingly uncooperative or to skirt ethical propriety, consider whether they would try to subvert the ADR process. Run-of-the-mill lack of cooperation, however, should not necessarily make a case ineligible for ADR. All mediators tell stories of settlements achieved even when the attorneys maintained, well into the proceedings, that the case could not be settled.

In some cases, it may be the clients who appear incapable of using ADR effectively because, for example, they refuse to cooperate with the other side or are "out of touch with reality." In such situations ADR may

51. *See, e.g.,* Lisa Bernstein, *Understanding the Limits of Court-Connected ADR: A Critique of Federal Court-Annexed Arbitration Programs,* 141 U. Pa. L. Rev. 2169, 2215 (1993) (noting that, unless they strongly discourage requests for a trial de novo, court-based arbitration programs reduce neither the potential litigation costs nor the amount of delay the parties can threaten to inflict on each other and may well increase such costs).

be especially helpful to the attorney who is looking for a way to help a client face the facts realistically.

Sometimes clients lack the mental capacity to engage effectively in the ADR process. This is not necessarily an argument against an ADR referral, although it may suggest that the party should not be required to attend the ADR session. When such a party is not represented by counsel, of course, different considerations apply. *See infra* section III.A.3.

If a party is willing to use ADR, the court might be more inclined to make a referral, but one should not assume that such willingness is always well-motivated. For example, an attorney who is not ready for trial may propose the use of ADR as a delay mechanism. Or a defendant who sees an unfavorable judgment coming may propose ADR to delay the judgment or to achieve a settlement more favorable than the ruling expected from the court. Other attorneys, even though they are convinced ADR is inappropriate and would be wasteful in their case, may agree to ADR because they want to please the court.

3. Is there a pro se party in the case?

For a number of reasons, most courts do not refer cases with a pro se party to ADR, especially if the other side is represented. The principal concern is that the ADR provider's neutrality will be compromised if a pro se party seeks legal advice from the neutral. Neutrals may find it difficult to withhold such advice because pro se litigants often are at a serious disadvantage in terms of legal skills and other resources. Whether or not such assistance is actually given, if the other side thinks the neutral is advising or showing sympathy to the pro se litigant, the ADR process may break down altogether or be perceived as unfair.

The process also may appear to be unfair—at least to the pro se litigant—if counsel on the other side appears to be friendly with the neutral, which may be the case if both practice in the same jurisdiction. Actual unfairness is also a risk if, for example, the pro se litigant accepts a settlement that is not in his or her best interest or agrees to a settlement without really understanding its terms. Finally, the pro se party may breach confidentiality because he or she does not understand the confidentiality rules and their significance.

On the other hand, to deny a pro se party access to a court ADR program, especially a pro bono program, also may be perceived as unfair.

One approach to address this is appointment of counsel for the limited purpose of representation during ADR proceedings.[52]

Some believe that ADR may be appropriate for cases involving two pro se parties of roughly equal legal sophistication and a small amount in controversy. The pressures on the neutral may be greater, however, if both parties press the neutral for legal advice.

Some bankruptcy courts routinely refer certain types of matters to mediation—for example, certain types of dischargeability matters—even if one party is pro se.

4. Is a governmental entity a party?

Some judges have found it productive to refer cases involving the government to ADR, whereas other judges have not. Federal government entities and U.S. attorneys may be more receptive to use of ADR in their cases as a consequence of an Executive Order encouraging greater use of ADR in government cases.[53] Also, in 1995 the Attorney General created the Office of Dispute Resolution within the Department of Justice to promote broader appropriate use of ADR in cases litigated by that department and other federal agencies.[54] See *infra* section V.B.3 for a discussion of requiring attendance by a governmental official with settlement authority.

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52. Two districts—the District for the District of Columbia and the Northern District of California—are establishing special pro bono panels for representation of pro se litigants in ADR proceedings. Representation will not extend to other matters in the case.

53. Exec. Order No. 12,988, 61 Fed. Reg. 4729 (1996) [hereinafter Executive Order] ("Where the benefits of [ADR] may be derived, and after consultation with the agency referring the matter, litigation counsel should suggest the use of an appropriate ADR technique to the parties. It is appropriate to use ADR . . . [if warranted and] such use will materially contribute to the prompt, fair, and efficient resolution of the claims."); Memorandum of Guidance on Implementation of the Litigation Reforms of Executive Order No. 12,988, 62 Fed. Reg. 39,250, 39,252 (1997) [hereinafter DOJ Regulations].

54. Janet Reno, Attorney General of the U.S., *Order OBD 1160.1, dated April 6, 1995, Promoting the Broader Appropriate Use of Alternative Dispute Resolution Techniques* (visited Sept. 5, 2000) <http://www.usdoj.gov/crt/adr/agorder.html> [hereinafter DOJ Order].

5. Does settlement depend on information that parties want to keep confidential?

The court may want to refer a case to ADR when the case involves sensitive information and the dispute resolution process will be aided by privacy. In ADR sessions, parties often feel they can speak candidly because their comments will not be heard by a jury, become part of the official record, or be reported by the media. In some cases, they may want to convey to the other side information or emotions that should not be heard by the trier of fact because they are sensational or irrelevant to the issues of the case. ADR also may be appropriate where the case involves trade secrets or persons intimidated by a formal, public court proceeding. For a discussion of balancing the need for confidentiality and the need for disclosure of information to the public, see *infra* sections VIII.C and X.F.

B. Case characteristics, generally

1. Does the case involve novel legal issues, ambiguous precedent, constitutional issues, or public policy? Would a judgment contribute to development of the law?

Consider whether the benefits of ADR are outweighed by such factors as the need to protect or address the scope of constitutional rights or the need to set legal precedent in a particular area of law. Some statutes, court rules, and individual judges exclude from ADR cases involving constitutional issues and statutory rights related to public policy.[55] One rationale for excluding these cases is that privatization of these disputes may impede the vindication of important rights.[56] A primary function of

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55. Under the ADR Act of 1998, for example, a case may not be referred to federal court-based arbitration if the action is based on alleged violations of a constitutional right or if jurisdiction is based on alleged deprivation of civil or elective franchise rights. 28 U.S.C. § 654(a) (Supp. 1998). Also, district courts may exempt cases or categories of cases from ADR. *Id.* § 652(b).

56. *See generally* National Standards for Court-Connected Mediation Programs § 4.2 & commentary (Center for Dispute Settlement & Institute of Judicial Administration) [hereinafter National Mediation Standards] (setting out national standards to assist courts in the design and operation of mediation programs). *See also* José A. Cabranes, *Arbitration and U.S. Courts: Balancing Their Strengths*, N.Y. St. B.J., Mar.–Apr. 1998, at 22, 23–24 ("Particularly where important public policy questions reaching beyond the narrow interests of the parties to the case are at issue, there is some danger that pervasive arbitration of disputes will begin

federal courts is to issue rulings that declare and apply the law, and this function is especially important with respect to constitutional and some statutory claims.

However, the needs of the litigants who have to bear the economic and emotional burden of the case may sometimes be in tension with broader public policy concerns. Although at first glance ADR may seem inappropriate for cases with novel legal questions or that present an opportunity to set or clarify existing precedent, the need for precedent can run counter to the specific needs of the litigants, many of whom, for financial or personal reasons, do not want to proceed to trial. Judges will want to consider whether a case should be used as an instrument for establishing precedent when parties would prefer an ADR referral.

2. Should the public have information about the case and its resolution?

The court may want to consider whether a confidential settlement will limit public dissemination of critical facts or issues, such as the safety of certain products or devices. Because ADR is usually a confidential process driven by the parties' needs, it can place the public decision-making function of the courts in the hands of individuals who act outside the public's direct purview. For a discussion of balancing the need for confidentiality and the need for disclosure of information to the public, see *infra* sections VIII.C and X.F.

Concerns such as these have always been the reality of litigation since traditionally most cases, even some of public importance, have been resolved by lawyer-negotiated settlements. Judges would not generally require parties to litigate these cases for the purpose of generating public awareness.

3. Does the case have many issues or few issues?

At first glance, it may seem that a case with few issues is most amenable to ADR, but settlement is sometimes easier when there are more issues in a case because this can increase the settlement options and bargaining possibilities available to the parties. Also, ADR can bring to the table dis-

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to impoverish the body of legal doctrine whose development and gradual refinement is a primary responsibility of the federal judiciary.").

putes and bargaining positions from outside the case at hand, whether they be other pending cases between the parties, other unresolved issues, external trade-offs, or new business arrangements between the parties.

In some cases with many issues, the court may decide to refer only some of the issues to ADR. This approach could be useful, for example, when there is a threshold issue, the resolution of which might make further proceedings unnecessary. There may, for instance, be many issues before a bankruptcy court when deciding whether to confirm a plan of reorganization. Some of these issues may take significant time to try. A useful approach might be to refer to ADR only valuation or interest rate issues where it might be easier for the parties to reach agreement. If they reach agreement on these issues, it could reduce the time and expense of trial. Also, after reaching agreement on some of the issues, the parties may then be more willing to mediate the other issues.

4. Are there multiple parties?

Despite logistical and other challenges, ADR has been used in multiparty cases with positive effects. In the 1970s, many maintained that ADR should not generally be used when more than two parties are involved. This thinking has changed for certain types of cases, and ADR processes in recent years have been used for cases involving several to hundreds and even thousands of claimants.

If ADR is voluntary, however, it may be difficult to get all the parties to agree to an ADR procedure. Some considerations in a case with multiple parties are set out below.[57]

- From the standpoint of defendants, group settlements are generally less expensive than individual ones.[58]
- By joining together in the ADR process, the parties, including parties on the same side who might have conflicting interests, have an opportunity to work together to evaluate their claims and develop a cohesive settlement strategy. This opportunity might not have been

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57. *See generally* CPR Model ADR Procedures and Practices: Multiparty ADR & Cost-Effective Practices 33–54, pt. III-8 (CPR Institute for Dispute Resolution 1990 & Update 1994) [hereinafter Multiparty Practices] (describing the late-1980s settlement process—and the lessons learned therefrom—in the Dupont Plaza Hotel Fire Litigation in the District of Puerto Rico).

58. *Cf. id.* pt. I-4 to I-9 (Update 1994) (discussing the pros and cons of collaborative defense efforts in multiparty litigation).

available or encouraged without ADR. When the resolution of one set of claims may have an effect on another set of claims within the case, a mediator can help define these linkages and factor them into the mediation.

- If some but not all of the parties agree to pursue ADR, the court can refer those parties to ADR. Sometimes all that is needed to move the settlement process forward is for one set of litigants to break off from the others and pursue ADR. Other co-parties may be prompted to join the ADR effort as a result of discomfort and speculations about decisions being made without them.
- Because of the need for a detailed agreement acceptable to all parties, a mediation process in a multiparty case can involve long, arduous negotiations, depending on the number of parties and the complexity of issues. The court will have to consider this when determining how much time to allow for ADR.
- The court might consider proposing that the parties use a multistep settlement process, with each individual claimant and the defendant engaging initially in a series of offers and counteroffers. If this first stage fails, mediation could follow. If mediation does not produce a settlement, the parties might proceed with a third step, such as arbitration. If the parties decline to arbitrate a particular claim, those parties can take that claim to litigation. This process has been used in bankruptcy reorganization proceedings where a bankruptcy trustee must settle similar, but separate, multiple claims.[59] It also has been used in employment discrimination class action cases[60] and mass tort cases.[61]

For a discussion of complex cases, see *infra* section III.C.

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59. *See infra* note 89 and accompanying text.

60. *See, e.g.*, Margaret L. Shaw & Lynn P. Cohn, *Employment Class Action Settlements Provide Unique Context for ADR*, Disp. Resol. Mag., Summer 1999, at 10, 11.

61. *See* Deborah Hensler, *A Glass Half Full, a Glass Half Empty: The Use of Alternative Dispute Resolution in Mass Personal Injury Litigation*, 73 Tex. L. Rev. 1587, 1617 (1995); *In re* A.H. Robins Co., 88 B.R. 742 (E.D. Va. 1988) (confirming plan that provided for submission of Dalkon Shield personal injury claims to ADR for resolution), *aff'd*, 880 F.2d 694 (4th Cir. 1989).

5. Have the parties already attempted settlement and failed?

Although some view a failed settlement effort as a sign that ADR will be futile, others see it as an indicator that ADR should be used. Sometimes litigants and attorneys become so locked into their adversary roles that the assistance of a third party neutral may be necessary to move them to further negotiation.

At the extreme, of course, some parties may be so intractable that a referral to ADR would appear to be a waste of everyone's time. Even then, some would refer the case to ADR, in the hope that exposure to an ADR process will soften the parties' resistance. Where the court is convinced, however, that the parties are absolutely deadlocked, the case should not be referred to ADR. See the discussion of good faith participation *infra* section V.C.

6. Is the case of a type that would generally be decided on the papers?

The federal courts seldom refer to ADR the types of cases that are usually decided on briefs or other papers without a hearing, such as cases involving habeas corpus or extraordinary writs. In many of these cases, there may be a pro se party, which some consider to be another reason for not referring such cases. See *supra* section III.A.3 for a discussion of pro se parties.

C. Complex cases

A number of published papers and reports are available describing how ADR has been used in complex cases. These sources provide a wealth of information on the use of ADR in complex cases generally,[62] class actions,[63] employment discrimination class actions,[64] and mass tort cases.[65]

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62. *See generally* Manual for Complex Litigation § 23.1 (3d ed. 1995) [hereinafter MCL 3d] (discussing settlement of complex cases generally, with subsections on mediation, summary jury trial, and minitrial); *id.* § 33.73 (discussing settlements under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)). *See also* Francis McGovern, *Strategic Mediation: The Nuances of ADR in Complex Cases*, Disp. Resol. Mag., Summer 1999, at 4, 5–6 (providing examples of the use of ADR methodologies in five complex cases).

63. *See generally infra* notes 67–72.

64. *See* MCL 3d, *supra* note 62, § 33.55 (discussing settlement in employment discrimination class actions); *see also*, Shaw & Cohn, *supra* note 60, at 10–12.

For a discussion of cases that involve multiple parties but are not complex, see *supra* section III.B.4.

When deciding whether to use ADR in a complex case, the following might be considered.

- The court could refer all issues in the case to ADR or only some issues.
- The court could use dispute resolution processes that incorporate one or more forms of ADR.[66]
- The court could appoint more than one neutral.
- The possibility of reducing costs through ADR may have only a small influence on the parties' willingness to use ADR if the amount in controversy is disproportionately larger than the potential legal fees.
- The parties may want or need a neutral with special, technical knowledge, who may be helpful in providing an opinion or determining the information necessary to assess any unclear issues relevant to the case. This may allow the parties to better evaluate their relative positions and the merits of resolution. See *infra* section IV.3 and Appendix A.3 for a discussion of ENE. See *infra* section VI.D.3 for a discussion of selecting a neutral with subject matter expertise and *infra* section VI.E.3 for a discussion of appointing a special master. A neutral with special, technical knowledge is likely to demand fairly high fees, so the court should carefully assess the parties' willingness to assume the costs. Expert neutrals also may have strong views about the subject matter of the case; thus, the court will want to ensure the neutral's ability to remain unbiased.
- Even if a case is not settled in ADR, the ADR process can help the parties and the court establish priorities for pretrial development, including identification and possible resolution of some important issues, such as medical, scientific, or critical liability issues.
- Parties may decide that the case will require such a long trial and will present such complicated legal issues and facts that jury confusion is a real possibility, making the outcome of the case difficult to predict even when the parties have great confidence in their legal positions.

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65. *See generally infra* notes 72–85.
66. *See supra* notes 59–60 and accompanying text.

1. What if the case is a class action?

Some additional considerations apply in class action cases, such as those listed below.[67] See *infra* section III.C.2 for a discussion of mass tort cases.

In recent years, ADR has been used with increasing frequency to manage and resolve individual causation issues and damages in class actions.[68] Parties in a class action can, for example, use an outside neutral to help develop an administrative process to assess potential claims. That process itself might include one or more ADR procedures. A neutral evaluator could be used, for example, to prescreen claims; upon reviewing the evaluator's findings, the defendant could decide which claims it is willing to pay. Or the parties could agree to a multistep claims process that uses several ADR procedures[69] or that includes the use of a damages table linking settlement amounts to certain characteristics of individual damage claims.

Efforts toward a comprehensive resolution of a class action may be delayed significantly if the defendant is uncertain about its ability to fund a settlement. ADR can assist defendants and their insurers in assessing potential coverage issues that might affect early resolution of the case. For a discussion of whether a representative of the insurer should attend the ADR sessions, see *infra* section V.B.2.

Conflicts among the plaintiffs' lawyers relating to fees, ego, involvement in settlement, or other nonsubstantive matters can decrease the likelihood that ADR will produce a settlement. ADR is unlikely to be successful, for example, if entered into while the plaintiffs' lawyers are still seeking more clients and fear that an early settlement could affect their future revenue.

Given the multitude of parties involved in most class actions, the real parties to the dispute often will have to count on their legal representatives to protect their interests while the case is in ADR, which may appear to be in conflict with the notion of actual party participation that is viewed as an important component of the traditional ADR process.[70] Some have argued that claimants have accepted inadequate settlements

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67. *See generally* MCL 3d, *supra* note 62, § 30.4 (discussing settlement of class actions).

68. *See* Herbert B. Newberg & Alba Conte, Newberg on Class Actions §§ 9.67, 20.16 (3d ed. 1992).

69. *See supra* notes 59–60 and accompanying text.

70. *See generally* MCL 3d, *supra* note 62, § 30.43.

in class actions when faced with the uncertainty of a long, expensive trial and no way to participate directly in the ADR process.[71] At least one study suggests that claimants in one large class action had to look to sources other than their lawyers and the courts for information about the settlements being negotiated on their behalf.[72]

2. What if the case is a mass tort case?

Mass tort[73] litigation places significant burdens on both the litigants and the judicial system in terms of financial costs, duplicative litigation, and the potential for inadequacy of judgment.[74] In most of the major mass tort cases that have produced group settlements, either a special settlement master or a settlement-oriented judge helped in the process. See *infra* section VI.E.3 on the use of special masters for ADR. Some believe that dispute resolution processes that incorporate one or more forms of ADR can be attractive options for courts and parties involved in mass tort litigation.[75] There also can be difficulties in using ADR in these cases. Re-

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71. *See generally* John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 Colum. L. Rev. 1343 (1995). *But see* Georgene M. Vairo, *The Dalkon Shield Claimants Trust: Paradigm Lost (or Found)?*, 61 Fordham L. Rev. 617, 634 (1992) (noting that the $725 payment the trustees offered under one settlement option "provided a speedy mechanism for paying those with de minimis injuries"). *See also* Newberg & Conte, *supra* note 68, § 11.01–.75 (discussing class action settlements).

72. *See, e.g.*, Karen M. Hicks, Surviving the Dalkon Shield IUD: Women v. the Pharmaceutical Industry 51, 103 (1994).

73. The term *mass tort* generally refers to litigation involving cases, often numbering in the thousands, that arise from widespread exposure to an allegedly harmful product or substance. *See* MCL 3d, *supra* note 62, § 33.2. The key concept in these cases is the presence of similar factual issues connected to the design and manufacture of a product or substance that leads to a high volume of repetitive litigation. *See id.*

74. *See* Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 597–99 (1997) (discussing asbestos litigation and the problems such cases pose to courts and litigants).

75. *See, e.g.*, George Friedman, *Task Force on Alternative Dispute Resolution and Mass Torts, Insurance Coverage Litigation: Recovery in the 1990s and Beyond*, 577 Practising L. Inst./Litig. 395, 405 (1998) (discussing recommendations of task force consisting of lawyers and judges from around the country, which recommendations were intended to encourage an expanded role for ADR in managing and resolving mass tort litigation); Howell Heflin, *Using the ADR Toolbox to Re-*

cent mass tort experience suggests that the primary use of ADR has been the administration of large settlement funds or the resolution of individual damages claims after scientific questions relating to causation have been resolved.

In addition to the considerations discussed above for complex cases and class actions, a number of other issues should be kept in mind when weighing the use of ADR in mass tort cases.[76] These issues are discussed below.

Assuming the scientific issues have been adjudicated—or that scientific evidence is relatively clear from the outset—many agree that ADR can play a major role in resolving individual claims for damages alleged to have been caused by individual exposure to defective products or substances.[77] A recent example of such use can be found in the Dalkon Shield Claimants Trust.[78]

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pair Mass Torts, Disp. Resol. J., Feb. 1998, at 25; William L. Norton, Jr., Norton Bankruptcy Law and Practice 2d § 146:16 (1997) (discussing the use of ADR for mass claims against the Chapter 11 estate).

76. *See generally* MCL 3d, *supra* note 62, § 33.29 (mass tort settlements generally); *id.* § 33.73 (CERCLA settlements); Thomas E. Willging, *Mass Torts Problems and Proposals: A Report to the Mass Torts Working Group*, 187 F.R.D. 328, 381–87 (1999); S. Elizabeth Gibson, *Mass Torts Limited Fund & Bankruptcy Reorganization Settlements: Four Case Studies*, *in* Advisory Comm. on Civil Rules & Working Group on Mass Torts, Report on Mass Tort Litigation app. E, at 26–27, 44–45 (1999); *ADR Recommendations for Mass Torts*, Disp. Resol. J., Spring 1997, at 78-82 (setting forth guidelines adopted by American Arbitration Association Task Force on Alternative Dispute Resolution and Mass Torts); CPR Model ADR Procedures and Practices: Product Liability and Toxic Torts ADR (CPR Institute for Dispute Resolution 1994); Hensler, *supra* note 61.

77. *Cf., e.g.,* Jack B. Weinstein, *Some Benefits and Risks of Privatization of Justice Through ADR*, 11 Ohio St. J. on Disp. Resol. 241, 288 (1996) (discussing ADR's place in resolving the "residual disputes" that remain after an aggregated settlement, such as allocating shares of responsibility among defendants or arbitrating individual damage claims against a settlement fund); Barry F. McNeil & Beth L. Fancsali, *Mass Torts and Class Actions: Facing Increased Scrutiny,* 167 F.R.D. 483, 506 (1996) (stating that "*valuation* of claims is perhaps particularly suitable for mediation and arbitration," because "a facilitator can commit time and attention to reviewing considerable data and understanding the basis of each claim, in a manner and on a schedule simply unavailable to the court"); Carrie Menkel-Meadow, *Ethics and the Settlement of Mass Torts: When the Rules Meet the Road,* 80 Cornell L. Rev. 1159, 1204–05 (1995) (recommending use of "fast-track ADR procedure[s]"); Coffee, *supra* note 71, at 1439 (suggesting "combining the class action with arbitration (and/or other alternative dispute resolution tech-

Use of ADR in mass tort cases may permit some complex issues to be resolved before trial, thus leaving fewer issues for juries to consider, but there is no consensus on this type of use in dealing with issues of the capacity of a product to cause the alleged injuries. Although some suggest that unclear scientific and medical issues should be addressed and perhaps resolved through ADR, others stress that taking up these issues in ADR can have adverse consequences for mass tort litigants. A concern for some parties, for example, is that any effort to resolve scientific or medical issues at an early stage in the litigation process would be prejudicial because scientific understanding of the claims, or evidence thereon, is incomplete.[79] Others oppose the use of evaluative ADR processes to assess scientific or medical evidence on the ground that such processes do not provide for full presentation and consideration of scientific evidence.[80] These concerns have constrained the use of ADR for causation issues in mass tort litigation.

Cases involving latency issues—that is, cases where the injuries alleged may not manifest themselves until long after the plaintiff has been exposed to the product—may be ill-suited to ADR, but recent developments suggest a possible role for ADR. Mass tort defendants have traditionally been reluctant to negotiate a settlement that leaves them exposed to future claims.[81] But recent Supreme Court decisions invalidating class settlements[82] may change defendants' postures concerning settlement in

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niques) on the limited issues of damages and individual causation"). *See generally* Willging, *supra* note 76, at 383–87.

78. *See* Georgene M. Vairo, *Georgine, the Dalkon Shield Claimants Trust, and the Rhetoric of Mass Tort Claims Resolution*, 31 Loy. L.A. L. Rev. 79, 153–56 (1997).

79. *See ADR Recommendations for Mass Torts*, Disp. Resol. J., Spring 1997, at 78, 81 (setting forth guidelines adopted by AAA Task Force on ADR and Mass Torts).

80. *See id.*

81. *See* Coffee, *supra* note 71, at 1422 (noting that "[t]he utility of the mass tort class action to the defendant today probably hinges on its ability to resolve future claims").

82. *See, e.g.*, Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 625–26 (1997) (holding that the district court improperly granted settlement class certification because the proposed class did not meet the common issue predominance and adequacy of representation requirements of Fed. R. Civ. P. 23).

other cases.[83] At the same time, however, any process that seeks to address both present and future claims has to contend with certain conflict-of-interest and fairness issues. Using funds to settle present claims may result in smaller funding for potential future claims. The same conflict of interest can exist between currently injured plaintiffs and exposure-only categories of plaintiffs who have already filed suit.[84] The presence or absence of future claims also can affect the timing of ADR. The greater the number of unknown and unknowable future claims and the more difficult it is to predict the injuries future claimants will sustain, the more difficult it might be to achieve early settlement through ADR.

Some argue that using ADR to resolve mass tort cases is inappropriate because it results in the privatization of public issues.[85]

D. Bankruptcy matters

Generally in bankruptcy cases, the considerations for referring an adversary proceeding or a contested matter to ADR are similar to those discussed above for non-bankruptcy cases. The issue of ADR in the bankruptcy courts, however, has special pertinence because bankruptcy itself is a form of alternative dispute resolution. By design, bankruptcy is a summary process for the resolution of multiple claims in a single forum.

Some consider routine bankruptcy matters to be especially suited for mediation.[86] However, judges also have referred bankruptcy matters to

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83. *See In re* Diet Drugs Prods. Liab. Litig., MDL No. 1203, Civ. No. 99-20593, 2000 WL 1222042, at *69–*72 (E.D. Pa. Aug. 28, 2000) (certifying and approving a nationwide settlement class, including intermediate and back-end opt-out options for future claimants in fen-phen litigation); Bowling v. Pfizer, Inc., 143 F.R.D. 141, 170 (S.D. Ohio 1992) (approving settlement in which a future claimant did not have to exercise a right to reject the settlement terms and litigate until after that individual's heart valve fractured); Jay Tidmarsh, Mass Tort Settlement Class Actions: Five Case Studies 39–40 (Federal Judicial Center 1998) (describing handling of future claimants in *Bowling*).

84. In *Amchem,* the U.S. Supreme Court pointed to the fact that the interests of those within the class were not aligned, noting that the interests of the currently injured plaintiffs differed significantly from those of exposure-only plaintiffs. *Amchem,* 521 U.S. at 626. The former were primarily interested in immediate and generous payments, whereas the latter sought an inflation-protected fund for the future. *See id.*

85. *See* Menkel-Meadow, *supra* note 77, at 1162.

mediation to settle complex disputes and, occasionally, to formulate or help resolve disputes over reorganization plans.[87] For some plan impasses, the court has asked another bankruptcy judge to function as the mediator.[88]

In some Chapter 11 cases where the bankruptcy trustee needs to settle similar, but separate, multiple claims, some bankruptcy judges have proposed that parties use a multistep settlement process. Such a process might include negotiation, mediation, and, if no settlement is reached on an individual claim, arbitration.[89] *See supra* section III.B.4.

For a discussion of authority to use ADR in bankruptcy courts, see *supra* section I.A.2 and *infra* sections V.A.2.b, V.B.4. For a discussion of certain other issues relating specifically to bankruptcy courts, see *infra* sections V.A, VI.E.4, VII.B.4, VIII.A, X.F, X.I.1, and *supra* section III.B.3.

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86. *See* Millner & Perris, *supra* note 19, at 351-56 (describing a broad range of bankruptcy disputes that may be suitable for ADR). *See also* Steven Hartwell & Gordon Bermant, Alternative Dispute Resolution in a Bankruptcy Court: The Mediation Program in the Southern District of California 2–4, 39–41 (Federal Judicial Center 1988); Norton *supra* note 75, § 146:2; William J. Woodward, Jr., *Evaluating Bankruptcy Mediation*, 1999 J. Disp. Resol. 1, 5 (reporting on evaluation of bankruptcy mediation in the Eastern District of Pennsylvania).

87. *See* Norton, *supra* note 75, section 146:17. *See also* Niemic, *supra* note 2, at 33 (reporting that in bankruptcy mediation 19% of mediator-respondents indicated that they formulated a plan or facilitated plan negotiations).

88. Chapter 11 Theory and Practice: A Guide to Reorganization § 36.33 (James F. Queenan, Jr., et al. eds., 1994 & Supp. 1998) [hereinafter Chapter 11 Theory and Practice].

89. *See id*. § 36.27–32. *See also* Lisa Hill Fenning, *Using ADR Tools to Resolve Litigation-Driven Chapter 11 Cases*, Norton Bankr. Law Adviser (forthcoming Feb. 2001) (describing claims resolution facilities used in recent bankruptcy cases); Francis Flaherty, *The* Greyhound *ADR Process*, 10 Alternatives to High Cost Litig. 119, 119 (1992) (describing claims resolution process that required thousands of bankruptcy claimants to participate in ADR before pursuing their claims in court); Greyhound Lines, Inc. v. Rogers (*In re* Eagle Bus Mfg., Inc.), 62 F.3d 730, 733–34 (5th Cir. 1995) (referring to ADR process in confirmed plan of reorganization); Kubicik v. Apex Oil Co. (*In re* Apex Oil Co.), 884 F.2d 343, 345 (8th Cir. 1989) (describing a procedure that required either mediation or negotiation and, failing resolution, either binding arbitration or trial).

IV. Matching the ADR Process to the Case

A. Who might select the ADR process?
   1. Selection by the parties
   2. Selection by court ADR staff
   3. Selection by the judge
B. What criteria can the court use to match a case to an ADR process?
   1. Mediation
   2. Arbitration
      a. Voluntary arbitration
      b. Mandatory arbitration
   3. Early neutral evaluation (ENE)
   4. Summary jury trial
   5. Minitrial

In selecting an ADR process for a particular case, the court faces two decisions: first, who might select the process; and second, which process would be most effective, assuming the court does not automatically assign certain types of cases to specified types of ADR?

A. Who might select the ADR process?

1. Selection by the parties

Allowing the parties the opportunity to discuss among themselves the appropriate ADR process may foster a spirit of cooperation that could be a catalyst toward settlement. If the parties are well-informed about their ADR options and the potential benefits or drawbacks of each, the parties may be the best ones to decide on the process.[90] The court can help the parties in this process by describing the various ADR options or by providing a written description. If the parties cannot agree on an ADR proc-

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90. In a district with multiple ADR processes, research found that the ability to choose was related to attorney evaluations of the ADR program. Attorneys who were permitted to select their process were more likely than attorneys whose process was selected by the court to report that the ADR process lowered litigation costs, that it reduced the amount of discovery and number of motions, that the process was fair, that the case settled because of the process, and that the benefits of the process outweighed the costs. *See* Stienstra et al., *supra* note 39, at 22.

ess or the judge disagrees with their choice, the court may want to help them make the selection. Some courts have developed brochures that describe ADR options available through the court or in the community.[91]

2. Selection by court ADR staff

One way to assist parties is to have trained and experienced court ADR staff advise them in their selection. One court's ADR administrators, for example, hold conference calls with parties to provide guidance, while leaving final decisions concerning ADR to the parties themselves.[92] ADR administrators in some courts have very sophisticated legal and ADR skills and are capable of a broad range of responsibilities. Some argue, however, that once court staff responsibilities go beyond merely identifying cases within certain categories, judges themselves need to be involved, particularly if the selection of a process affects case scheduling or discovery.

3. Selection by the judge

Judicial selection of the ADR process may legitimize the process in the eyes of the parties and help the court maintain greater control over the case. The judge also may know more about the case than the court staff and thus be able to make a better and quicker decision about an ADR referral. In making the decision, the judge may find it helpful to consult with the parties about which ADR process to use, even when the judge intends to compel use of ADR.[93]

B. What criteria can the court use to match a case to an ADR process?

Although it is difficult to generalize, certain types of cases are usually seen as more suitable than others to particular kinds of ADR processes. Below we identify the types of cases typically viewed as suitable for each

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91. *See, e.g.,* Your Day in Court: The Federal Court Experience (E.D. Ark. & W.D. Ark. 1992); Mediation in the United States District Court for the District of Columbia (D.D.C.); Dispute Resolution Programs (D.D.C.); Alternative Dispute Resolution Procedures Manual (E.D. Mo.).

92. *See* N.D. Cal. ADR R. 3-5(f).

93. *See supra* note 90.

of the major types of court-based ADR.[94] Treat these lists as rough guidelines only. Experience with ADR and consultation with parties will be the best guide in selecting appropriate ADR processes. For a more general discussion of whether ADR is beneficial for certain types of cases (e.g., cases with a pro se party), see *supra* section III.

1. Mediation

Mediation is considered appropriate for most kinds of civil cases, and in some district courts, referral to mediation is routine in most general civil cases. In other courts, use of the process is targeted at specific kinds of disputes or is determined by the judge on a case-by-case basis. Most courts exclude certain categories of cases from mediation, such as cases involving a pro se party, prisoner civil rights cases, and Social Security cases. Some bankruptcy courts, however, routinely refer some types of matters to mediation, such as certain dischargeability matters, even if one party is pro se. See *infra* Appendix A.1 for a description of the mediation process.

2. Arbitration

Although mediation has become the favored ADR method in federal courts, a number of courts offer arbitration. Since 1988, arbitration programs in the federal courts have been regulated by statute. Within that statutory context, the distinction between voluntary and mandatory arbitration was and remains important. See *infra* Appendix A.2 for a description of court-based arbitration processes and a discussion of the authorizing statutes. See *supra* section I.D for a discussion of the distinction between voluntary and mandatory ADR.

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94. For further discussion of the types of factors to consider in matching cases to particular ADR processes, see Frank E.A. Sander & Stephen B. Goldberg, *Fitting the Forum to the Fuss: A User-Friendly Guide to Selecting an ADR Procedure*, 10 Negotiation J. 49 (1994). For a summary of this article, in the context of a framework for judicial analysis of ADR choices, see Deskbook, *supra* note 30, at 53–60. *See also* Elizabeth Plapinger & Margaret Shaw, Court ADR: Elements of Program Design 19–36 (CPR Institute for Dispute Resolution 1992) [hereinafter Elements of Program Design].

a. Voluntary arbitration

Referral to voluntary arbitration is now authorized, with certain exceptions, for all district courts. Under authorization granted by the ADR Act of 1998, a district court may refer any civil case to nonbinding arbitration where consent to arbitration is freely and knowingly obtained and where no party or attorney is prejudiced for refusing to participate in arbitration,[95] with the exceptions listed below.[96]

> The action is based on an alleged violation of a right secured by the U.S. Constitution.
>
> Jurisdiction is based in whole or in part on 28 U.S.C. § 1343.[97]
>
> The relief sought consists of money damages in an amount greater than $150,000.
>
> There is a provision of law to the contrary.

In addition, certain courts were authorized to provide voluntary arbitration under a 1988 Act. *See infra* Appendix A.2. Those courts may refer to nonbinding arbitration any civil case—not exempted under procedures established by local rule—where consent to arbitration is freely and knowingly obtained and where no party or attorney is prejudiced for refusing to participate in arbitration unless there is a provision of law to the contrary.[98]

Listed below are examples of cases traditionally considered appropriate for voluntary arbitration:

- Cases involving small money damages claims; and
- Cases in which technical or scientific questions are involved and an arbitrator with expertise in the field would be beneficial to resolution and is available to serve as arbitrator.

Cases that are traditionally considered inappropriate for voluntary arbitration include the following:[99]

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95. 28 U.S.C. §§ 654(a)–(b), 652(b) (Supp. 1998).

96. *Id.* § 654(a).

97. This statute grants the district courts original jurisdiction over certain actions involving civil rights and elective franchise rights. *Id.* § 1343 (1994).

98. Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, § 901(a), 102 Stat. 4642, 4659–60 (1988) (amended 1993, 1994, 1997) (previously codified at 28 U.S.C. § 652(a) (1994)).

99. Deborah R. Hensler, *Court-Annexed Arbitration*, *in* ADR and the Courts, *supra* note 36, at 23, 42–43; Elements of Program Design, *supra* note 94, at 27–29;

- Cases exempted by statute or local rules;[100]
- Cases in which the parties want help in improving communications, finding common ground, or arriving at a creative solution to the dispute;
- Cases in which equitable relief is sought;
- Cases involving complex or novel legal issues;
- Cases where legal issues predominate over factual issues;
- Class actions;[101] and
- Administrative agency appeals.

b. Mandatory arbitration

Ten district courts were authorized to establish mandatory arbitration programs under the 1988 Act.[102] Under the ADR Act of 1998, no additional courts may establish mandatory arbitration programs, but authorization continues for the ten originally authorized district courts.[103] Some of these courts no longer use this authority, however. *See infra* Appendix A.2. Courts authorized to have mandatory arbitration programs may order nonbinding arbitration of any civil case not exempted under procedures established by local rule, with the statutory exceptions listed below.[104]

> The action is based on an alleged violation of a right secured by the U.S. Constitution.
>
> Jurisdiction is based in whole or in part on 28 U.S.C. § 1343.[105]

Judges Guide to ADR § 68 (California Center for Judicial Education and Research 1996) [hereinafter California ADR Guide].

100. *See supra* note 96 and accompanying text.

101. But see *supra* section III.C.1 for a discussion of claims procedures that might include arbitration.

102. Section 901(a), 102 Stat. at 4659–63 (previously codified at 28 U.S.C. §§ 651–658 (1994)); *see infra* Appendix A.2; *see generally* Meierhoefer, *supra* note 49.

103. 28 U.S.C. § 654(d) (Supp. 1998); *see also infra* text accompanying notes 315, 321.

104. *See* § 901(a), 102 Stat. at 4659–60 (previously codified at 28 U.S.C. § 652(a)–(c) (1994)). *See, e.g.*, E.D. Pa. Civ. R. 53.2.3.A (all cases of specified types are referred to arbitration).

105. *See supra* note 97.

The relief sought consists of money damages in excess of the amount set by the statute or local rule.

There is a provision of law to the contrary.

3. Early neutral evaluation (ENE)

Like mediation, ENE is generally thought to be applicable to civil cases of varying kinds and complexity. Some courts select cases for ENE according to case type; types of cases targeted include not only routine cases, but also more complex cases, such as fraud, antitrust, banking, environmental, copyright, patent, trademark, and labor/employment cases.[106] See *infra* Appendix A.3 for a description of the ENE process.

Listed below are examples of the kinds of cases generally considered appropriate for ENE:

- Cases in which subject matter expertise may be helpful in narrowing issues or simplifying them at trial;
- Cases in which issues raised in papers filed in the case indicate that one or more of the attorneys in the case are inexperienced or poorly prepared;
- Cases in which a party refuses to confront the weaknesses in its case and has unrealistic expectations regarding the amount of damages involved;
- Cases with complex legal issues;
- Cases involving multiple parties with diverse interests and numerous cross claims, as opposed to merely multiple defendants with the same or similar interests; and
- Cases in which discovery will be substantial.

Examples of cases generally considered inappropriate for ENE include the following:

- Class actions;
- Cases in which there are significant personal or emotional barriers to settlement that might be better addressed in mediation;
- Cases in which the decision will turn primarily on the credibility of witness testimony; and
- Cases needing substantial discovery before an evaluation can be made .

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106. *See* D.Vt. Civ. R. 16.3(b) (listing cases that are subject to the court's ENE procedure).

4. Summary jury trial

Because the summary jury trial (SJT) is a resource-intensive ADR process, it is most often used for fairly large cases that would involve long jury trials. Generally, the more complex and potentially protracted a case is, the greater the potential that a summary jury trial will result in reduced costs for the parties when compared with traditional litigation. Some proponents of the process believe, however, that it also can be used effectively in cases expected to have short trials. The process has been used in a wide variety of cases from simple negligence and contract actions to complex mass tort and antitrust suits.[107] See *infra* Appendix A.4 for a description of the summary jury trial.

In considering whether to use a summary jury trial, the decision may turn more on case-specific dynamics than on the substantive legal aspects of the controversy.[108] *The Manual for Complex Litigation, Third* offers the following advice: "Because of the time and expense involved, and because the process is less likely to be productive with unwilling parties, it is not advisable to hold an SJT without the parties' consent."[109] In addition, a practice committee in the Second Circuit advised that, to ensure a more effective summary jury trial, the parties should have completed or have nearly completed discovery.[110]

Listed below are examples of the kinds of cases generally considered appropriate for a summary jury trial:

- Cases in which the parties disagree substantially over how a jury will view the evidence or apply the legal standards to the facts;
- Cases in which one or more of the parties have an unrealistic view of the merits of the case or of the damages;
- Cases in which strong party emotions pose an obstacle to settlement and where a summary jury trial, by providing litigants with an abbreviated "day in court," may prove cathartic; and

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107. *See* Thomas D. Lambros, *Summary Jury Trial: A Flexible Settlement Alternative*, *in* ADR and the Courts, *supra* note 36, at 79, 80.

108. *See id.*

109. MCL 3d, *supra* note 62, § 23.152. See *infra* notes 123–30 and accompanying text for a discussion of the ADR Act's limitations on mandatory referral.

110. *See* Standing Comm. on the Improvement of Civil Litig., Judicial Council of the U.S. Court of Appeals for the Second Circuit, Settlement Practices in the Second Circuit 82 (1988) [hereinafter Settlement Practices Report].

- Cases in which a defendant-insurer concedes liability but wants an advisory verdict on the question of damages before it can approve or disapprove a settlement.

Cases that are generally considered inappropriate for a summary jury trial include the following:

- Cases in which there appears to be little possibility of settlement and the costs required by a summary jury trial should be avoided;
- Cases in which the amount at stake does not warrant the time and resources that a summary jury trial would demand;
- Cases in which less expensive ADR processes have not yet been explored; and
- Cases in which abbreviated presentations of complicated evidence are not feasible.
- Cases in which the dispute turns on the credibility or persuasiveness of expert or lay testimony, unless the summary jury trial is structured to include their live or taped testimony.

When referring a case to summary jury trial, the court will have to decide whether or not to tell the jurors, who are selected from the court's regular venire, that they are serving in an advisory capacity. If the judge tells the jurors, they may not approach their task as seriously, but if they are not told until they return their verdict, they may feel deceived by the entire process.

5. Minitrial

Although some judges have developed their own version of the minitrial, the process is rarely used in the federal courts. Based on experience in the private sector, however, some generalizations are possible regarding the kinds of cases in which the minitrial is and is not likely to be effective.[111] See *infra* Appendix A.5 for a description of the minitrial.

Listed below are examples of cases generally considered appropriate for a court minitrial:

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111. *See* California ADR Guide, *supra* note 99, § 45; Settlement Practices Report, *supra* note 110, at 86 n.93; CPR Model ADR Procedures and Practices: Minitrial pt. I-3 (CPR Institute for Dispute Resolution 1994); *cf.* The Effectiveness of the Mini-Trial in Resolving Complex Commercial Disputes: A Survey 41–42 (Subcommittee on Alternative Means of Dispute Resolution, American Bar Association 1986).

- Cases involving potentially long trials, since minitrials are elaborate and fairly resource-intensive processes;
- Cases in which the principal decision makers for each party have the time and willingness to listen to presentations, perhaps detailed, about the case and to negotiate with each other;
- Cases in which the parties are having difficulty communicating constructively with each other;
- Cases in which one or both of the parties are not assessing their positions realistically;
- Large commercial cases that could, because of the dispute's technical complexity and the parties' resources, turn into a "battle of experts" at trial; and
- Cases that arise out of complex, long-term, and ongoing undertakings, such as joint ventures, major construction projects, and technology arrangements, where the parties have an interest in resolving the dispute amicably and quickly, with as little damage to the business relationship as possible.

Cases generally considered inappropriate for a court minitrial include the following:

- Cases in which the amount at stake does not warrant the time and resources necessary for a minitrial;
- Cases in which resolution hinges primarily on questions of law or on an assessment of witness credibility; and
- Cases in which one or more of the decision makers in the process—for example, executives of two disputing companies—will be individuals who were personally involved in the events giving rise to the dispute.

Keep in mind that, in the process of matching cases to ADR processes, any single factor, such as case complexity or number of parties, is usually not determinative. To some extent the choice of process may depend on the stage at which ADR is used in the case (*see supra* section II.B), the parties' preferences and resources, and the availability of suitable neutrals. The choice also will depend primarily on the judge's goals and the parties' goals in using ADR. Each ADR process was designed for a different purpose. *See infra* Appendix A. Consider what the court and the parties wish to achieve through ADR and select the process that is most likely to help reach that goal. In some cases, more than one process

may be useful, but more typically a single, well-chosen process will be most effective.

V. Deciding on Party Consent, Client Attendance, and Degree of Party Participation

A. Referring cases to ADR with or without party consent
   1. Considerations in making a mandatory or voluntary referral
   2. Sources of authority for making a referral without party consent
      a. U.S. district courts
      b. U.S. bankruptcy courts
   3. If the court prefers party consent, what can be done to ensure informed consent?
B. Requiring client attendance at ADR sessions
   1. Attendance by clients generally
   2. Attendance by insurance companies when not the primary party
   3. Attendance by officials from governmental entities or large organizations
   4. Authority to require client attendance at ADR sessions
C. What type and degree of participation might be required of parties who attend ADR sessions?
D. What materials might the parties submit to the neutral before the ADR session begins?

In this section we discuss several other factors the court might consider in making the ADR referral—for example, whether to make the ADR referral with or without party consent, who should attend the ADR sessions, whether to require good faith or meaningful participation, and what materials the parties might prepare for the ADR neutral.

A. Referring cases to ADR with or without party consent

For judges whose local rules give them discretion over the ADR referral, one of the key decisions they must make when referring a case to ADR is whether the referral will be with or without consent of the parties—that is, whether ADR will be voluntary or mandatory. Many district courts' local rules give individual judges authority on a case-by-case basis to order cases to ADR sua sponte or on motion of a party, whereas some courts provide for presumptively mandatory and automatic referral of specified types of cases to ADR, and a few courts permit referral only

with consent of all parties.[112] See *supra* section I.D for a discussion of the distinctions between voluntary and mandatory referrals to ADR.

A number of bankruptcy courts, by local rule or general order, permit judges to order cases to ADR with or without the consent of all parties.[113] In some reorganization plans in bankruptcy cases, claimants have been required to participate in ADR procedures.[114]

For the discussion below, it is important that we distinguish between mandating use of ADR and compelling party acceptance of a settlement.[115] All ADR procedures in the federal courts, even those where participation is mandatory, are nonbinding. Whether or not they consent to

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112. *See, e.g.,* S.D. Fla. R. 16.2(D) (every civil case not on the list of excepted cases is referred to mediation); D. Mass. R. 16.4(C)(4) (the judge may refer cases to mediation only with consent of all parties); E.D. Mo. R. 16-6.02 (the judge may, sua sponte or on motion of a party, order a case to ADR); E.D. Pa. Civ. R. 53.2.3.A (all cases of specified types are referred to arbitration). *See generally* Plapinger & Stienstra, *supra* note 1, at 36–56 tbls.4–7, 71–308 (providing district-by-district descriptions of court rules on referral of cases to ADR).

113. *See, e.g.,* Second Amended General Order No. 95-01 para. 5.2 (Bankr. C.D. Cal. Aug. 24, 1999 (authorizing referral over objections of the parties); E.D. Pa. Civ. R. 53.2.3.A (district court rule on mandatory referral to arbitration, including referral of "adversary proceedings in bankruptcy" that meet the referral criteria); Bankr. E.D. Pa. R. 9019.2 (related bankruptcy rule); *see also* Form of General Order on Mediation in Bankruptcy § 2.0 & cmt. (American Bar Association May 27, 1997) [hereinafter Form of General Order] (providing for sua sponte referral); Niemic, *supra* note 2, at 28–31 (finding that in bankruptcy mediation 34% of counsel-respondents indicated that a bankruptcy judge referred at least one matter to mediation without a request from a party and that 8.5% indicated referral over the objection of a party).

114. *See*, *e.g.,* Greyhound Lines, Inc. v. Rogers (*In re* Eagle Bus Mfg., Inc.), 62 F.3d 730 (5th Cir. 1995). (requiring thousands of claimants to participate in ADR before pursuing their claims in court); Kubicik v. Apex Oil Co. (*In re* Apex Oil Co.), 884 F.2d 343, 345 (8th Cir. 1989) (describing a procedure that required tort claimants to participate in either mediation or negotiation and, failing resolution, either binding arbitration or trial); Dore & Assocs. Contracting, Inc. v. American Druggists' Ins. Co. (*In re* Dore & Assocs. Contracting, Inc.), 43 B.R. 717, 718 (Bankr. E.D. Mich. 1984) (stating that the confirmed plan of reorganization, which provided for referral of all claims to a "Michigan mediation" panel, is binding). *But see In re* Filex, Inc., 116 B.R. 37, 40 (Bankr. S.D.N.Y. 1990) (stating that a proposed liquidation plan was "patently unconfirmable" under Chapter 11 because claims would be resolved by an arbitrator and not the court).

115. For a discussion of constitutional issues, see *supra* notes 15–16 and accompanying text and *infra* text accompanying note 236.

participate, parties are free to reject settlements proposed in court-based ADR[116] and, in the federal court-based arbitration programs, parties have a right to a trial de novo. *See supra* section I.D.

1. Considerations in making a mandatory or voluntary referral

Judges generally make decisions on whether referrals are to be mandatory or voluntary on a case-by-case basis. Some judges are not reluctant to order cases to ADR without the consent of all parties, making such orders either sua sponte or on the motion of one of the parties.[117] Judges recognize, for example, that a litigant's lack of consent may not constitute a refusal to use ADR or to settle the case. Lack of familiarity with ADR, fear of appearing weak in the eyes of the opponent, as well as personal animosity and distrust between attorneys or parties, cause many litigants to be hesitant about suggesting or consenting to ADR.

Many believe that parties often benefit from ADR even when their participation is not voluntary.[118] Many, if not most, professional mediators can recall cases where the parties announced at the beginning of their first mediation session that they were not participating voluntarily and were unwilling to compromise their positions in any way. Despite these initial expressions of intransigence, such mediations often result in settlements acceptable to both sides. Some research has found that party satisfaction and other measures of program effectiveness can be high

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116. *See, e.g.,* Kothe v. Smith, 771 F.2d 667 (2d Cir. 1985) (declaring that "pressure tactics [involving a pretrial judicial settlement conference] to coerce settlement simply are not permissible"); Dawson v. United States, 68 F.3d 886, 897 (5th Cir. 1995) (holding that the district court abused its discretion by requiring settlement offers from parties); Fed. R. Civ. P. 16(c) advisory committee's note (1983 amendment). *See generally* Nancy H. Rogers & Craig A. McEwen, Mediation: Law, Policy & Practice § 7:05 (2d ed. 1994).

117. *See supra* notes 112–13; *see generally* Donna Stienstra & Thomas E. Willging, Alternatives to Litigation: Do They Have a Place in the Federal District Courts? (Federal Judicial Center 1995) (discussing pros and cons of mandatory referral of cases to ADR); Elements of Program Design, *supra* note 94, at 13-17 (discussing pros and cons of voluntary and mandatory referral).

118. *See, e.g.,* Edward F. Sherman, *Court-Mandated Alternative Dispute Resolution: What Form of Participation Should Be Required?,* 46 SMU L. Rev. 2079, 2088 (1993); *see also* Eric R. Max, *Bench Manual for the Appointment of a Mediator*, 136 F.R.D. 499, 504 (1990).

even when there is a presumption or requirement that parties will use some form of ADR.[119]

Although some judges believe that judges should not hesitate to order or encourage participation in ADR, others believe that judges should do no more than make parties aware of ADR options. Some question the fairness of compelling litigant participation in ADR and believe that it burdens a litigant's constitutional right to a jury trial.[120] Some judges are uncomfortable about compelling participation in ADR when the parties have to pay fees to the mediator as well as to their attorneys for the process. See *infra* section VII.C for a discussion on requiring ADR use and requiring parties to pay fees. The quality of the neutral becomes particularly important if referral to ADR is mandatory. See *infra* section VI.A for a discussion on qualifications and standards of conduct for the neutral.

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119. *See, e.g.*, Stienstra et al., *supra* note 39, at 22, 199–207, 238–52, 273–79 (finding that the "mandatory nature [of three district court ADR programs appears] not to be an impediment to program effectiveness"); Meierhoefer, *supra* note 49, at 5-8, 11, 63-64, 77-81 (finding, in a study of mandatory arbitration programs in ten federal district courts, 80% of parties reported that procedures used overall were fair, 81% of parties and 92% of attorneys reported that the arbitration hearing was fair, and 84% of attorneys reported that they approved of the arbitration programs implemented in their districts). *See also* Roselle L. Wissler, *The Effects of Mandatory Mediation: Empirical Research on the Experience of Small Claims and Common Pleas Courts*, 33 Willamette L. Rev. 565, 601 (1997) (finding, in two state court mediation settings, that "the manner in which the case entered mediation produced few differences in parties' assessments of the mediator, the mediation process, and the outcome"). *But see infra* notes 120-21.

120. *Cf.* Eisele, *supra* note 15, at 1979. *See also* Richard C. Reuben, *Constitutional Gravity: A Unitary Theory of Alternative Dispute Resolution and Public Civil Justice*, 47 UCLA L. Rev. 949, 963-69, 1091-99 (2000) (contending that the informal structures and absence of certain procedural safeguards in ADR can serve to reinforce power imbalances between the parties); Woodward, *supra* note 86, at 4-8 (suggesting that "dispute processing costs" and power imbalances are reasons why mandatory referral might not be appropriate for certain bankruptcy matters). *But cf.* Wissler, *supra* note 119, at 565-566 (1997) (finding, in two state court mediation settings, that there is little support for concerns about pressures to accept unfair settlements in mandatory mediation); Meierhoefer, *supra* note 49, at 119-20 (finding that mandatory referral in the federal district court arbitration programs did not present significant barriers to trial); *see also supra* note 119.

Some argue that parties who consent to ADR are more likely to approach the process in good faith.[121] Some judges, however, are skeptical about the emphasis placed on party consent because some parties, even when they consent to or request ADR, may do so for reasons unrelated to a desire to settle. A party might, for example, consent only because it wants to impose on the other party additional attorneys' fees or another procedural hurdle.

Another view is that party consent may reduce the likelihood that parties will later criticize the process or challenge it by appeal. And consent may lessen any public perception that the courts, by referring cases to ADR, are abrogating their constitutional role as adjudicators or compromising litigants' rights for the sake of judicial efficiency. See *infra* section V.A.3 for a discussion on ensuring informed consent when referrals to ADR are made only with party consent.

Although some judges or courts may prefer a uniform approach (i.e., all referrals of certain types of cases will be mandatory or all will be with consent), most judges might find a mandatory referral appropriate in some cases and not in others and exercise their discretion accordingly.

Although some judges prefer to limit the use of ADR in their cases, the ADR Act instructs the district courts that they must, by local rule, require litigants in all civil cases to consider the use of ADR at an appropriate stage in the litigation.[122]

2. Sources of authority for making a referral without party consent

Some may ask what the basis is for making a referral without party consent. Because the sources of authority to mandate ADR differ for district and bankruptcy courts, we discuss them separately below. For a discus-

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121. *See* Elements of Program Design, *supra* note 94, at 13-17 (discussing pros and cons of voluntary and mandatory referral). Some research has found somewhat higher settlement rates under voluntary, as opposed to mandatory, mediation. *See, e.g.,* Jeffrey M. Senger, *Turning the Ship of State*, 2000 J. Disp. Resol. 79, 90 (stating that in voluntary mediation the Department of Justice settled 71% of its cases, while in court-ordered mediation only 50% have settled); Wissler, *supra* note 119, at 581 (finding "[m]andatory mediation cases were marginally less likely to settle (46%) than were voluntary mediation cases (62%)"). *But see supra* note 119.

122. 28 U.S.C. § 652(a) (Supp. 1998).

sion of whether courts have the authority to require parties to pay for mandatory ADR processes, see *infra* section VII.C.

a. U.S. district courts

The ADR Act permits the district courts to refer cases to ADR without party consent but restricts this authority to certain forms of ADR. The ADR Act states that "[a]ny district court that elects to require the use of alternative dispute resolution in certain cases may do so only with respect to mediation, early neutral evaluation, and, if the parties consent, arbitration."[123] The Act is particularly emphatic that arbitration is to be used only with party consent and emphasizes that consent must be "freely and knowingly" given.[124] These provisions parallel the Judicial Conference's longstanding opposition to authorizing mandatory arbitration for any courts other than the ten courts originally authorized by the 1988 Act.[125] The ADR Act of 1998 does not affect the authority granted under the 1988 Act to require the use of arbitration in certain cases in these ten courts.[126] See *infra* Appendix A.2 for a discussion of the ten courts authorized by the 1988 Act to use mandatory arbitration.

Some commentators interpret the ADR Act to mean that courts may require parties to use mediation and early neutral evaluation, but not any other ADR process.[127] This interpretation implies that under the statute judges and courts do not have authority to order cases to summary jury trial without party consent. The House of Representatives report on the ADR Act states: "If a court requires the use of ADR by local rule, it may

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123. *Id.*

124. *Id.* § 654(b)(1).

125. *See, e.g., Alternate Dispute Resolution and Settlement Encouragement Act; Federal Courts Improvement Act, and Need for Additional Federal District Court Judges: Hearing on H.R. 2603 & H.R. 2294 Before the Subcomm. on Courts and Intellectual Property of the House Comm. on the Judiciary,* 105th Cong. 13–17 (1997) (statement of Hon. D. Brock Hornby, Chief Judge, U.S. District Court for the District of Maine). The Alternate Dispute Resolution and Settlement Encouragement Act (H.R. 2603) was an earlier version of the ADR Act of 1998.

126. 28 U.S.C. § 654(d) (Supp. 1998).

127. *See, e.g.,* John Bickerman, *Great Potential: The New Federal Law Provides Vehicle, If Local Courts Want to Move on ADR*, Disp. Resol. Mag., Fall 1999, at 3, 4; William W Schwarzer, A. Wallace Tashima & James M. Wagstaffe, California Practice Guide: Federal Civil Procedure Before Trial ch. 15-B, § 15:89.2 (Steven J. Adamski contrib. ed., 1999).

only do so with respect to mediation or early neutral evaluation. Courts may not require litigants to participate in minitrials or arbitration."[128] See *infra* Appendix A for a discussion of the distinctions and similarities between summary jury trial, minitrial, and other ADR procedures. Before the 1993 amendments to Federal Rule of Civil Procedure 16, case law was split over whether a court had authority to order parties to summary jury trial.[129] Subsequently, a court found that the 1993 amendments to Rule 16 authorized mandatory referral to summary jury trials, but this case predated the ADR Act.[130]

b. U.S. bankruptcy courts

Since the bankruptcy courts cannot with certainty look to the ADR Act for authority to order parties to use ADR,[131] these courts might look to other authorities when they believe it appropriate or necessary to refer a case to ADR without party consent.

One source is Federal Rule of Bankruptcy Procedure 7016, which incorporates by reference Federal Rule of Civil Procedure 16.[132] Subdivision (c) of Civil Rule 16 authorizes the court to "take appropriate action" at a

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128. H.R. Rep. No. 105-487, at 8 (1998).

129. *Compare In re* NLO, Inc., 5 F.3d 154, 157–58 (6th Cir. 1993) (holding that the district court's "[r]equiring participation in a summary jury trial, where such compulsion is not permitted by the Federal Rules, is an unwarranted extension of the judicial power" and that "[r]eliance on the pure inherent authority of the court [to justify mandatory summary jury trials] is . . . misplaced"), *and* Strandell v. Jackson County, 838 F.2d 884, 886–88 (7th Cir. 1987) (holding that the parameters of Rule 16 and inherent authority do not permit the court to compel parties to participate in a summary jury trial), *with* Arabian Am. Oil Co. v. Scarfone, 119 F.R.D. 448, 448–49 (M.D. Fla. 1988) (holding that, under Rule 16, the court may require parties to participate in a summary jury trial), *and* Federal Reserve Bank v. Carey-Can., Inc., 123 F.R.D. 603, 606–07 (D. Minn. 1988) (holding that, under Rule 16, the court has power to compel attendance at nonbinding summary jury trial).

130. *See In re* Southern Ohio Correctional Facility, 166 F.R.D. 391, 395, 397–98 (S.D. Ohio 1996) (denying motion to vacate summary jury trial, and stating that 1993 amendments to Rule 16 effectively overruled decision in *In re NLO* and provide courts authority for mandatory referral to summary jury trial).

131. *See supra* note 17 and accompanying text.

132. Federal Rule of Bankruptcy Procedure 7016 applies in adversary proceedings, and the court may direct that it apply in any contested matter under Federal Rule of Bankruptcy Procedure 9014.

pretrial conference with respect to "settlement and the use of special procedures to assist in resolving the dispute." *See supra* section I.A.2. The Advisory Committee on Civil Rules stated that the phrase "appropriate action" was added to Rule 16(c) in 1993 "to clarify the court's power to enter appropriate orders at a conference notwithstanding the objection of a party" and also noted that the 1993 amendment "acknowledges the presence of statutes and local rules or plans that may authorize use of [ADR processes], even when not agreed to by the parties."[133] Rule 16 does not, however, attempt to resolve questions about the extent of a court's inherent authority to require parties to participate in ADR procedures,[134] is not intended to limit the reasonable exercise of the court's inherent powers, and does not limit the powers of the court to compel ADR participation when authorized to do so by statute.[135]

At a status conference regarding any bankruptcy case or proceeding, the judge has broad authority to issue an order that the "court deems appropriate to ensure that the case is handled expeditiously and economically . . . ."[136] Some commentators have said that this provision can be interpreted to provide authority for the use of mandatory, nonbinding ADR procedures.[137]

3. If the court prefers party consent, what can be done to ensure informed consent?

If the court prefers not to refer a case to ADR unless all parties consent, consider whether consent has been freely and knowingly given. By statute, if the referral is to arbitration in a district that is not one of the ten

133. Fed. R. Civ. P. 16(c) advisory committee's note (1993 amendments).

134. See *supra* note 20 for discussion of bankruptcy court inherent power.

135. Fed. R. Civ. P. 16(c) advisory committee's note (1993 amendments); *see also* H.R. Doc. No. 103-74, at 123 (1993) (communication from the Chief Justice of the United States transmitting amendments to the Federal Rules of Civil Procedure and Forms).

136. 11 U.S.C. § 105(d) (1994 & Supp. 1998). See *supra* note 21 for discussion of the legislative history.

137. *See, e.g.,* Mabey, Tabb & Dizengoff, *supra* note 2, at 1289. Millner & Perris, *supra* note 19, at 328-330 (describing sources of authority for bankruptcy courts to require mediation and other nonbinding ADR techniques). *See also In re* Sargeant Farms, Inc., 224 B.R. 842, 847 (Bankr. M.D. Fla. 1998) (stating that "it is quite apparent the bankruptcy court has the authority . . . , where necessary, to require the parties to participate in [mediation]").

districts authorized to compel arbitration, the court must make sure that consent is freely and knowingly given.[138]

The question of what information about the case and the ADR process is required for informed consent is a difficult one. If a gap in information can be reduced through limited discovery or disclosure under Rule 26, the court may wish to postpone ADR while more discovery/disclosure is undertaken. *See supra* section II.D.

Pro se parties present a particular problem if the court wishes to get informed consent. A pro se party may not, for example, understand what the ADR process is and how it relates to the litigation track. Pro se parties generally lack legal sophistication and therefore may be at a disadvantage in ADR, especially if the opposing side is represented by counsel. Yet ADR can be advantageous to pro se parties because of its potential for cost savings as well as its less formal nature as compared with traditional litigation. See *supra* section III.A.3 for a discussion of referring pro se cases to ADR.

B. Requiring client attendance at ADR sessions

It is widely believed that client attendance at ADR sessions is essential to their success. At minimum, clients bring to the sessions settlement authority that might otherwise be lacking. On the other hand, compelling client attendance may cause additional expense and could cause complications—for example, when settlement authority rests in the hands of high-level officials of large organizations. In sections below we discuss who should attend ADR sessions and judges' authority to require attendance.

1. Attendance by clients generally

Typically, court ADR programs require that the attorney primarily responsible for the case attend the ADR sessions; many local ADR rules also require attendance by the clients or other party representatives with full settlement authority.[139] Some local rules leave to the neutral's discre-

138. *See supra* notes 95, 98 and accompanying text.

139. *See, e.g.,* M.D. Fla. Civ. R. 9.05(c) (mediation); N.D. Cal. ADR Civ. R. 6-9(a) (mediation), 5-10(a) (ENE); W.D. Mich. Civ. R. 16.3(e)(iv) (voluntary facilitative mediation); N.D. Ohio Civ. R. 16.6(f) (mediation); S.D. Tex. Civ. R. 20(F)

tion whether to require attendance of the attorney primarily responsible for each party's case as well attendance of a party representative with full settlement authority.[140]

Consider the following arguments for and against requiring client attendance at ADR sessions:

Benefits of requiring client attendance:[141]

- Gives clients an opportunity to tell their stories in their own words, thus providing the "day in court" many seek.
- Directly informs clients of the strengths and weaknesses of the arguments on both sides of the case.
- Directly informs clients of the strengths and weaknesses of the attorneys and party witnesses in the case, including their own.
- Provides information to help each side identify opportunities for creative problem solving and resolution.
- Improves the likelihood of prompt resolution, because the ultimate decision maker is present.

Risks in requiring client attendance:[142]

- May increase tensions and harden positions through direct party-to-party communications.
- May be inconvenient and costly for clients who have to travel long distances.
- May create a perception that a voluntary ADR program is, in fact, coercive.

It is generally believed that client attendance has a beneficial effect, for many of the reasons listed above. In one study of two districts, a size-

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(ADR generally); *see also* Form of General Order, *supra* note 113, § 8.3.1 & cmt. (stating that most bankruptcy court mediation rules require party attendance with special provisions for government entities). Some local rules also provide procedures for persons to be excused from attending. *See, e.g.,* N.D. Cal. ADR R. 6-9(e) (mediation), 5-10(d) (ENE). Other rules provide procedures for persons to participate by telephone. *See, e.g.*, N.D. Cal. ADR R. 6-9 (mediation), 5-10(e) (ENE).

140. *See, e.g.,* D.N.J. Civ. R. 301.1(e)(3) (counsel and parties shall attend all mediation sessions unless otherwise directed by the mediator); *see also* Amended General Order M-143 para. 3.2 (Bankr. S.D.N.Y. Oct. 20, 1999) (mediator has "discretion to require that the party representative or a non-attorney principal of the party with settlement authority be present at any conference").

141. *See generally* Leonard L. Riskin, *The Represented Client in a Settlement Conference: The Lessons of* G. Heileman Brewing Co. v. Joseph Oat Corp., 69 Wash. U. L.Q. 1059, 1099–1102 (1991).

142. *See id.*

able majority (70%) of attorneys reported that client attendance was helpful, although in one of the two districts there were occasional complaints about inconvenience and cost.[143] Of course, there will be cases where requiring attendance of the litigant would not be practical, such as cases where final authority rests with a body such as a board of directors or city council.

2. Attendance by insurance companies when not the primary party

A common practice in court ADR programs is to require attendance by an insurance company if its agreement is necessary to achieve a settlement.[144] Efforts at resolution of a case may be delayed significantly if the defendant is uncertain about its ability to fund a settlement or is unsure of the extent of its insurance coverage. Similarly, the defendant and its insurer may disagree as to their respective liabilities. Some argue that this kind of disagreement between defendants and their insurers can itself be successfully addressed through the ADR process.[145] In any case, involving the insurer in the ADR process at an early stage might help remove doubts about coverage, thereby facilitating settlement.

3. Attendance by officials from governmental entities or large organizations

Requiring attendance may become problematic when the case involves a governmental entity or large organization. Government attorneys, for example, often cannot secure in advance sufficient authority to negotiate

143. *See* Stienstra et al., *supra* note 39, at 21, 250–51, 277.

144. *See, e.g.,* N.D. Cal. ADR R. 6-9(c) (mediation), 5-10(c) (ENE); S.D. Fla. Civ. R. 16.2(E) (mediation); W.D. Mich. Civ. R. 16.3(e)(iv) (voluntary facilitative mediation); S.D. Tex. Civ. R. 20(F) (ADR generally). *See also In re* Novak, 932 F.2d 1397, 1408 (11th Cir. 1991) (concluding that "[b]ecause . . . nonparty insurers have a real stake in the litigation . . . district courts may rely on their power to order named parties to produce individuals with full settlement authority at pretrial conferences to coerce cooperation from nonparty insurers") (citation omitted); *In re* La Marre, 494 F.2d 753, 756 (6th Cir. 1974) (concluding that the court had the power to order insurance company representative to attend pretrial session and, on refusal, to enforce the order by contempt proceedings).

145. *See generally* Harold J. Moskowitz & David S. Sheiffer, *Evaluating Mediation for Coverage Cases*, 14 Alternatives to High Costs Litig. 107 (1996).

and settle a case.[146] Such problems also may arise for corporations, universities, or other large organizations where ultimate settlement authority lies with a board or commission. Furthermore, many governmental bodies are subject to "open meetings" or "sunshine" acts that would require the ADR process to be open to the public if the sessions are likely to involve persons with ultimate settlement authority and are likely to lead to a settlement or decision.[147]

Nonetheless, some local rules do require in-person attendance by a government representative with full settlement authority.[148] If the judge thinks that a case would benefit from ADR and an attorney from a government or large organization argues that it is impossible to have someone with full settlement authority present, the judge might try to get assurances from the attorney that a person with full settlement authority will at least be available by telephone during the ADR sessions.[149] Alternatively, in situations where a high-level board or commission has to decide the settlement, the court might set a deadline for responding to a settlement offer.

In a case concerning settlement conferences, the U.S. Court of Appeals for the Fifth Circuit recognized the unique position of the Attorney General and the special problems that the Department of Justice faces in

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146. *See, e.g.,* DOJ Regulations, *supra* note 53, at 39,252 (stating that "litigation counsel . . . normally should not be expected to have the authority to bind the government finally. . . . Final settlement authority is governed by regulations and may be exercised only by the officials designated in those regulations." (citing Fed. R. Civ. P. 16(c) advisory committee's note)).

147. *See infra* notes 293, 295 and accompanying text.

148. *See, e.g.,* W.D. Mich. Civ. R. 16.3(e)(iv) (when a "government entity is a party to the litigation, a person other than outside counsel and who has the authority to settle and to enter stipulations on behalf of the party must attend" voluntary facilitative mediation sessions). U.S. Department of Justice regulations provide: "Some courts, . . . by local rule or by order, may require that persons with full settlement authority be present at settlement conferences. Nothing in [this] Order should be construed to relieve litigation counsel or agencies of their obligation to comply with such a requirement." DOJ Regulations, *supra* note 53, at 39,252.

149. *See, e.g., In re* United States, 149 F.3d 332, 334 (5th Cir. 1998) (recommending that the district court consider, as an alternative to ordering the United States to be represented at mediation by a person with full settlement authority, ordering the United States to have a person with full settlement authority available by telephone to discuss settlement at the time of mediation).

handling the government's large volume of litigation. The court of appeals concluded that the district court abused its discretion in routinely requiring a representative of the government with ultimate settlement authority to be present at all pretrial and settlement conferences.[150] Although the court did not suggest that the district court could never issue such an order, it declared that the district court should consider "less drastic steps" before doing so.[151]

The court of appeals set forth examples of less drastic steps that the district court should consider, such as requiring the government to declare whether the case could be settled under the authority of the U.S. attorney and, if so, ordering the U.S. attorney either to attend the conference personally or to be available by telephone to discuss settlement at the time of the conference. In those cases in which routine litigation cannot be settled under the authority of the U.S. attorney, "and the failure of the government to extend settlement authority is a serious, persistent problem, substantially hampering the operations of the docket," the district court could take additional action, such as "requiring the government to advise it of the identity of the person or persons who hold such authority and directing those persons to consider settlement in advance of the conference and be fully prepared and available by telephone to discuss settlement at the time of the conference."[152]

Finally, the court indicated that if the district court's reasonable efforts to conduct an informed settlement discussion in a particular case are thwarted because a government official with settlement authority will not communicate with government counsel or the court in a timely manner, the district court, "as a last resort," can require the appropriate officials

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150. *See In re* Stone, 986 F.2d 898, 904–05 (5th Cir. 1993). *Cf.* United States v. City of Garland, No. Civ.A. 3:98-CV-0307, 2000 WL 1597901, at *2 (N.D. Tex. Oct. 25, 2000) (upholding required attendance by mayor and two (less than quorum) city council members and stating that "[t]he requirement of *Stone* that the district court 'give individualized attention to the hardship that the order will create' has . . . been satisfied"); Schwartzman, Inc. v. ACF Indus., 167 F.R.D. 694, 699 (D.N.M. 1996) (ordering sanctions against U.S. Department of Justice, because government lawyers failed to comply with pretrial conference order, including failing to send lawyers with final settlement authority or to arrange a means to reach others with that authority during the conference).

151. *Stone*, 986 F.2d at 905.

152. *Id.*

with full settlement authority to attend a pretrial conference.[153] Although this case involved settlement conferences—not an ADR procedure—and is precedent in only one federal circuit, we cite it because of the guidance it may give to trial courts.

In general, in cases involving the federal government much depends on the culture and regulations of the agency and often on the culture and ADR experience of the regional or district office handling the case. Some judges continue to report success in referring cases involving certain agencies to ADR, whereas judges in other parts of the country report resistance from the same agencies. Keep in mind the advice of the Advisory Committee on Civil Rules:

> Particularly in litigation in which governmental agencies or large amounts of money are involved, there may be no one with on-the-spot settlement authority, and the most that should be expected is access to a person who would have a major role in submitting a recommendation to the body or board with ultimate decision-making responsibility.[154]

Recent changes in federal government policies concerning ADR may have an impact on the effectiveness of ADR when the government is a party.[155] See *supra* section III.A.4 for a discussion of selecting a case for ADR when a governmental entity is a party.

4. Authority to require client attendance at ADR sessions

The ADR Act is silent on the question of whether the court may compel clients to attend ADR sessions. District, as well as bankruptcy, judges thus must look to other sources, such as Federal Rule of Civil Procedure 16, for such authority.

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153. *Id.*

154. Fed. R. Civ. P. 16 advisory committee's note (1993 amendments to subdivision (c)); *see* Local 715, United Rubber, Cork, Linoleum & Plastic Workers v. Michelin Am. Small Tire, 840 F. Supp. 595, 597 (N.D. Ind. 1993) (ordering a vote of union membership on settlement proposals so that the union could send a person with authority to participate in settlement discussions).

155. *See, e.g.,* Executive Order, *supra* note 53; DOJ Regulations, *supra* note 53, at 39,252; DOJ Order, *supra* note 54.

Rule 16(c) states: "If appropriate, the court may require that a party or its representative be present or reasonably available by telephone [at any conference held under Rule 16] in order to consider possible settlement of the dispute."[156] "Whether [a party or its representative] would be the individual party, an officer of a corporate party, a representative from an insurance carrier, or someone else would depend on the circumstances . . . ."[157] Rule 16's authority is limited, however, because its subject is the pretrial conference, which may include discussion of "settlement and the use of special procedures"[158] but is not by itself an ADR procedure.

The advisory committee's note accompanying the 1993 amendments to Rule 16(c) states that "[t]he explicit authorization in the rule to require personal participation in the manner stated is not intended to limit the reasonable exercise of the court's inherent powers . . . ."[159] The advisory committee cited a 1989 court of appeals opinion, *G. Heileman Brewing Co. v. Joseph Oat Corp.*,[160] which held that a district court has inherent power to order represented parties to appear at a pretrial settlement conference despite the fact that Rule 16(a) provides only that a court could direct the parties' attorneys and unrepresented parties to attend the conference.[161] *G. Heileman Brewing* was decided in the context of a pretrial judicial settlement conference, not ADR.

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156. Fed. R. Civ. P. 16(c).

157. Fed. R. Civ. P. 16(c) advisory committee's note (1993 amendments).

158. Fed. R. Civ. P. 16(c)(9).

159. Fed. R. Civ. P. 16(c) advisory committee's note (1993 amendments). See *supra* section I.A.1 for a discussion of district court inherent power and *supra* note 20 for a discussion of bankruptcy court inherent power.

160. 871 F.2d 648 (7th Cir. 1989) (en banc).

161. *Id.* at 650–53 (relying on Link v. Wabash R.R., 370 U.S. 626, 629–33 (1962) (holding that a court's inherent power to manage its docket includes the power to sanction a party for failure to prosecute, as evidenced in part by the failure of that party's attorney to attend a pretrial conference)). *See also In re* Novak, 932 F.2d 1397, 1407 (11th Cir. 1991) (concluding that "the power to direct parties to produce individuals with full settlement authority at pretrial settlement conferences is inherent in the district courts"). *But see In re* Stone, 986 F.2d 898, 903–05 (5th Cir. 1993) (holding that a standing order requiring federal representatives to be present at pretrial conferences was an abuse of discretion because of "major inconvenience" to at least one of the parties). Although decided before the 1993 amendments to Rule 16, the court in *Stone* acknowledged that "subject to the abuse-of-discretion standard, district courts have the general inherent power

Another source of authority for compelling litigants to attend ADR sessions is the court's local rules, to the extent that they conform with the requirements of Federal Rule of Civil Procedure 83.[162] Currently, in many district and bankruptcy courts, the local ADR rules require attendance by the attorney primarily responsible for each party's case and a party representative with full settlement authority, usually the client.[163] Any district court local rule compelling attendance at ADR sessions must, of course, be consistent with the ADR Act as well. See *supra* section V.A for a discussion on referring cases with and without party consent.

Absent statutes, national rules, or case law that speak directly to the question of compelled client attendance at ADR, inherent authority and local rules appear to be the primary sources of authority currently available to district and bankruptcy courts. Case law on inherent authority and the scope of local rules in the ADR context continues to develop.[164]

C. What type and degree of participation might be required of parties who attend ADR sessions?

Some local rules require "good faith participation"[165] or "meaningful participation"[166] by those involved in an ADR process. Some commentators

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to require a party to have a representative with full settlement authority present—or at least reasonably and promptly accessible—at pretrial conferences. This applies to the government as well as private litigants." *Id.* at 903; *see supra* notes 12–14, 20 and accompanying text.

162. Fed. R. Civ. P. 83(a); *see also* Fed. R. Bankr. P. 9029.

163. For examples of local rules requiring attorney and client attendance, see *supra* note 139.

164. *See* Robinson v. ABB Combustion Eng'g Servs., Inc., No. 93-3626, 1994 WL 404557, at *1–*2 (6th Cir. Aug. 2, 1994) (finding an abuse of discretion because the district court dismissed the case without a specific finding that plaintiff's failure to attend mediation, where plaintiff's counsel did attend, was willful and without considering less drastic sanctions). *See also supra* notes 12–14, 20 and accompanying text.

165. *See, e.g.,* S.D. Ala. Civ. R. 16.6 (stating that a judge may order parties to participate in good faith in ADR procedures); D. Ariz. Civ. R. 2.11(i)(3) (providing for sanctions for failure to participate in good faith at arbitration hearing); N.D.N.Y. Civ. R. 83.11-5(3) (stating that parties shall participate in good faith in mediation process).

166. *See, e.g.,* D.N.J. Civ. R. 201.1(h) app. M, pt. IV (providing for sanctions for failure to participate in arbitration in a "meaningful manner"); D.N.J. Civ. R. 301.1(f) app. Q, pt. III (providing for sanctions for failure to participate in media-

maintain that ADR would be a futile exercise without good faith participation,[167] that such a requirement can enhance the judge's enforcement ability, and that it is flexible enough to allow the judge to handle unforeseen actions that go against the spirit of ADR. See *infra* section X.C for a discussion of sanctions for lack of good faith participation.

Others, however, see a host of problems with a good faith requirement. Not only is the good faith standard vague and subject to differing interpretations, in the view of some, [168] but a party's claim of bad faith participation might require the court to examine the substance of the ADR sessions and the party's motives, thus compromising confidentiality. Especially problematic is the risk that the neutral would be compelled to testify.[169] See *infra* section VIII for discussion of the risks associated with breaches of confidentiality and *infra* Appendix E.5 for discussion of compelling a neutral's testimony. Others maintain that a good faith requirement for ADR could interfere with each party's choice of how to present its case because the stronger the requirement for good faith participation, the greater the coercion on a party to present its case in a manner that the party might not have selected on its own.[170] Requiring good faith participation also may undermine the philosophy and purpose of most forms of ADR—that is, that ADR is voluntary and nonbinding.

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tion in a "meaningful manner"); *see also* Gilling v. Eastern Airlines, Inc., 680 F. Supp. 169, 171–72 (D.N.J. 1988) (imposing sanctions after mandatory nonbinding arbitration, because party merely summarized evidence and read from depositions, frustrating the local rule requirement for participation in "a meaningful manner").

167. *See* Aspen, *supra* note 37, at 226. *See also* Kimberlee K. Kovach, *Good Faith in Mediation Requested, Recommended, or Required? A New Ethic*, 38 S. Tex. L. Rev. 575, 621–22 (1997) (concluding that, "[w]hether called good faith, 'meaningful participation,' or another similar term, some action to require a specific conduct conducive to the mediation process must be required" and setting forth model rules).

168. *See* Hess v. New Jersey Transit Rail Operations, Inc., 846 F.2d 114, 116 (2d Cir. 1988) (holding that party could not be held in criminal contempt for failing to comply with court order that it make "bonafide offer of settlement," and holding that order requiring good faith offer was too vague).

169. *See* National Mediation Standards, *supra* note 56, § 11.2 commentary.

170. *See, e.g.*, Sherman, *supra* note 118, at 2094.

D. What materials might the parties submit to the neutral before the ADR session begins?

Before the ADR session begins, some courts require that each party send the neutral a short statement or other submission which might include the information listed below.

- The facts of the case.
- A written explanation of the interests and positions of the party.
- An explanation of the legal or factual issues in dispute.
- An identification of issues whose early resolution might reduce appreciably the scope of the dispute or significantly contribute to settlement.
- An identification of discovery that could facilitate meaningful discussions.
- A history of past settlement discussions.
- An estimate of the cost and time that would be expended for further discovery, pretrial motions, and trial.
- A list of witnesses and important exhibits.
- A list of upcoming events in the litigation.

Some local rules specify what should be included in the submissions.[171] Under other procedures, the neutral determines the extent and nature of the submissions after considering the size and nature of the case and often after preliminary discussions with the parties.[172]

The court or neutral may ask the parties to limit the length of ADR submissions (e.g., to ten pages).[173] Local court rules vary in whether the parties should exchange their statements with each other or submit them only to the neutral. Clearly, if counsel know the submissions are going to be seen by the opposing side, they may be more restrained in what they say, but they also may be more honest about factual matters. Furthermore, this practice removes from the neutral the burden of remembering just what is confidential and what is not. On the other hand, counsel may

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171. *See, e.g.,* N.D. Cal. ADR R. 6-7(c) (mediation), 5-8(c) (ENE); W.D. Mich. Civ. R. 16.3(e)(ii) (voluntary facilitative mediation), 16.4(c)(ii) (ENE); N.D. Ohio Civ. R. 16.5(e) (ENE), 16.6(e) (mediation).

172. *See generally* D. Neb. Civ. R. 53.2(d)(2) (mediation); M.D. Pa. Civ. R. 16.8.6(a) (mediation); N.D. Cal. ADR R. 4-8 (arbitration).

173. *See, e.g.,* W.D. Mich. Civ. R. 16.3(e)(ii) (voluntary facilitative mediation); D.N.J. Civ. R. 301.1(e)(2) (mediation); N.D. Ga. Civ. R. 16.7.G(1)(c) (ENE and mediation).

be more revealing of their clients' underlying interests and needs if the statements are prepared only for the neutral. In any case, these statements should never be filed with the court or given to the judge.[174]

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174. *See, e.g.,* N.D. Cal. ADR R. 6-7(b) (Mediation statements "shall not be filed and the assigned Judge shall not have access to them."); E.D.N.Y. Civ. R. 83.11(b)(4) (Mediation statements "are not filed with the Court, nor shall the assigned Judge or Magistrate Judge have access to them.").

VI. Selecting the Neutral

A. What qualifications and standards of conduct should the neutral meet?
B. If the parties select the neutral, what assistance might the court provide?
C. Might the court staff or the judge select the neutral?
D. Some factors to consider in identifying the appropriate neutral
   1. ADR training and experience
   2. Reputation and personal characteristics
   3. Subject-matter expertise
   4. Legal training and experience
E. Might judges, special masters, or examiners be ADR neutrals?
   1. Senior judges
   2. Magistrate judges
   3. Special masters
   4. Examiners
F. Might the assigned judge serve as the ADR neutral?
G. When should the neutral be disqualified for conflicts of interest or bias?
H. Will a nonjudicial neutral have immunity?

Although a number of factors influence the effectiveness of the ADR process, the quality of the ADR neutral is one of the most important factors. The quality of the neutral becomes even more important if participation in ADR is required, if the parties must select a neutral from the court's panel of neutrals, or if the parties must pay a fee to the neutral.

Most federal courts that have established ADR programs have created and manage their own panels or rosters of neutrals.[175] Many courts encourage parties to use neutrals from these panels when a case is referred to an ADR process, but most will also accept party selection of a neutral who is not on the court's panel. In addition, many courts rely on their magistrate judges to conduct settlement sessions, which often involve ADR techniques such as mediation. A few courts employ ADR professionals on staff who serve as neutrals.

175. *See* Plapinger & Stienstra, *supra* note 1, at 71–308 (providing court-by-court descriptions of many aspects of federal district court panels, including qualifications and training requirements to be on the panel, procedures for appointing neutrals to cases, and whether fees must be paid and by whom).

A. What qualifications and standards of conduct should the neutral meet?

By whatever process the neutral is chosen, it is important that courts ensure the quality of the neutrals on their panels. Furthermore, the ADR Act of 1998 requires that "[e]ach person serving as a neutral in an alternative dispute resolution process should be qualified and trained to serve as a neutral in the appropriate [ADR] process."[176] Each district court that authorizes arbitration must certify arbitrators in accordance with court-established and statutory standards, including making arbitrators subject to the disqualification rules under 28 U.S.C. § 455.[177] The ADR Act also requires each district court to adopt "appropriate processes for making neutrals available" to litigants for each category of ADR process offered by the court and to "promulgate its own procedures and criteria for the selection of neutrals on its panels [of neutrals]."[178]

Local rules might specify eligibility qualifications that the court requires prospective neutrals to meet before serving as a neutral. There are also a number of references the court might consult when seeking to identify appropriate qualifications for neutrals appointed in an individual case or for neutrals appointed to court panels or rosters.[179] Most courts have established qualification requirements for membership on their panel of neutrals, such as ADR training, subject matter expertise, and a certain length of time in one's respective profession. Most district court panels are limited to attorneys, but some courts are expanding their panels to include other professionals. See *infra* section VI.D.

Also important are the rules or standards of professional conduct that will govern the neutral. It is important for the neutral and the parties to know what rules govern when the neutral is faced with, for example,

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176. 28 U.S.C. § 653(b) (Supp. 1998). *See also* ADR Task Force of the Court Admin. & Case Management Comm., Guidelines for Ensuring Fair and Effective Court-Annexed ADR: Attributes of a Well-Functioning ADR Program and Ethical Principles for ADR Neutrals (1997), *reproduced infra* Appendix D, pt. II.3 (stating that a court, when establishing a panel of neutrals, "should define and require specific levels of training and experience for its ADR neutrals").

177. 28 U.S.C. § 655(b) (Supp. 1998).

178. *Id.* § 653(a).

179. *See, e.g.,* National Mediation Standards, *supra* note 56, § 6.0; Ensuring Competence and Quality in Dispute Resolution Practice (Society of Professionals in Dispute Resolution 1995); Norma Jeanne Hill, *Establishing and Defining Mediator Qualifications*, 8 World Arb. & Mediation Rep. 226 (1997).

disqualifying him or herself for a conflict of interest or disclosing ADR communications to persons outside the ADR session. Again, local rules might specify some standards. There are also a number of other references the court might consult when deciding what standards of conduct to set for the neutral or for organizations that provide neutrals.[180] *See infra* sections VI.G, VIII.B, X.H.

A description of the processes that can be used to formulate eligibility qualifications and conduct standards for neutrals who serve in court-based programs is outside the scope of this guide. We urge courts that have not already done so to give close attention to these matters in their ADR programs and local rules.

B. If the parties select the neutral, what assistance might the court provide?

Very likely, local rules include information about how the neutral should be selected. And very likely the rules direct the parties to make the selection, as this is the most common practice in the federal courts. Selection by the parties themselves offers several benefits. Most important, it can

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180. *See* ADR Task Force of the Court Admin. & Case Management Comm., Guidelines for Ensuring Fair and Effective Court-Annexed ADR: Attributes of a Well-Functioning ADR Program and Ethical Principles for ADR Neutrals (1997), *reproduced infra* Appendix D, pt. III (stating eight ethical principles for court ADR neutrals). *See also* Model Standards of Conduct for Mediators (American Arbitration Association, American Bar Association & Society for Professionals in Dispute Resolution 1995) [hereinafter Model Standards for Mediatiors]; National Mediation Standards, *supra* note 56, §§ 8.0, 9.4, 12.3. *See generally* Center for Prof'l Responsibility, *Draft Rules and Explanatory Memos for Public Comment* (visited Sept. 12, 2000) <http://www.abanet.org/cpr/cover0500.html> [hereinafter *Draft ABA Rules*] (proposing revisions to ABA Model Rules of Professional Conduct that would govern the conduct of attorneys who act as ADR neutrals or who represent parties in ADR proceedings); CPR-Georgetown Comm'n on Ethics and Standards in ADR, *Proposed Model Rule of Professional Conduct for the Lawyer as Third Party Neutral* (visited June 22, 2000) <http://www.cpradr.org/cpr-george.html> [hereinafter *CPR-Georgetown Comm'n Proposed Model Rule*] (proposing rule for adoption into the ABA Model Rules of Professional Conduct); CPR-Georgetown Comm'n on Ethics and Standards of Practice in ADR, *Principles for ADR Provider Organizations* (visited Oct. 24, 2000) <http://www.cpradr.org/providerprinciples.htm> (proposing principles for responsible practice for ADR provider organizations, including courts); *see also infra* text accompanying notes 302–04.

enhance party confidence in the neutral, increase party satisfaction with the ADR process, and help avoid any appearance of judicial favoritism that might arise if the court selects the neutral. It also may open lines of communication that can serve as a foundation for future compromises and an early investment in the process. If the parties will be paying a fee for the neutral, it may be particularly wise to let the parties select the neutral. *See infra* section VII.C.

In most federal courts, the parties can select the neutral from a panel established by the court or, in a few districts, from a panel maintained by the local bar or the state courts. See *supra* section VI.A; *infra* section VI.D. Local rules generally spell out how the parties make the choice from the panel. Parties may, for example, be permitted to choose any name from the panel, or they may be limited to a subset of names chosen randomly by computer or more selectively by the court's ADR administrator. Such local rules generally also set out the steps to be taken when the parties cannot agree on the neutral. One possibility in these circumstances is that the court will have to make the selection. See *infra* section VI.C.

Although many courts provide a panel of neutrals, few limit party choice entirely to the panel. Thus, there should be little reason for the judge to object if the parties prefer to select their own neutral. If the court does not provide a panel and the parties have no person in mind, the court can instruct them to find a neutral on their own, especially if the court has ordered them to ADR. Letting them cast about has the potential to delay the process, provoke further disagreement between the parties, and reflect poorly on the court. At a minimum, the court should guide the parties to resources in the community, such as a list of not-for-profit ADR organizations or for-profit ADR providers. To avoid an appearance of impropriety, the court will want to give the parties a number of options, rather than direct them to a single provider.

C. Might the court staff or the judge select the neutral?

Some courts have decided to retain authority to select the neutral for some, if not all, ADR procedures.[181] Usually, these districts have a spe-

181. *See* N.D. Cal. ADR R. 4-4(a) (providing procedure for parties to narrow down list of arbitrators, with final selection made by the clerk), 5-3(a) (providing

cialized ADR office and leave the selection of the neutral to their experienced ADR administrators. One rationale for this approach is that in certain situations the courts are in a better position than the parties to determine who is qualified for a specific dispute. Court selection of the neutral also may lend legitimacy to the ADR process. However, it will do so only if the neutrals are well-qualified, the appropriate neutral is appointed to a case, and the parties are persuaded that the court is not serving its own interests, the interests of the neutrals, or the interests of the opposing party.

Such concerns constitute perhaps the strongest argument against putting the selection decision in the hands of the judge who is hearing the case. If the court selects the neutral from an approved panel or if the judge happens to know someone who is well-qualified, this creates the potential for speculation and concern that the court has made the appointment to favor the neutral or the judge. This is especially true if the case involves matters of public interest or the possibility of large fees for the neutral. If parties think the judge has his or her own interests in mind, they may question the wisdom of the decision to refer the matter to ADR, the quality of the neutral, and the promise of confidentiality. Furthermore, if the court selects the neutral, parties may assume that the court is taking responsibility for the quality of that neutral. Absent compelling reasons, the court should leave the selection of the neutral to others.

Few courts, however, would bar a judge completely from selecting the neutral. Under special circumstances, tied to specific policy considerations, judicial selection may be appropriate. For example, the court may want to select the neutral when there is significant inequality in the knowledge or experience of the parties or where party selection of a neutral would cause significant and undesirable delay.[182] Likewise, a case may be of such complexity or size that the court needs to appoint a person with very specialized skills and abundant experience. Even in such circumstances, it is wise to select from a pool of candidates who have

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procedure for ADR administrators to select early neutral evaluators), 6-3(a) (providing for ADR administrators to select mediators); E.D.N.Y. Civ. R. 83.10(e)(4) (clerk of court will select panel of arbitrators at random from court's list of certified arbitrators), 83.11(b)(2)(a) (clerk's office will appoint mediator from the court's panel of approved mediators).

182. *See* National Mediation Standards, *supra* note 56, § 7.1.

had an opportunity to make known their interest in serving or who have been identified by the parties.

If the judge decides to select the neutral, it is best to first look to the court's panel for a candidate. If there is no panel or the judge decides to go outside the panel, the court will need to look for a neutral locally, regionally, or even nationally. The court might contact the bar association, other professional associations, or specialized dispute resolution providers in the private or public sector. Many professional organizations have established panels of ADR neutrals and will provide a list of suitable candidates.

In selecting the neutral, the court takes on a greater responsibility for the quality of the neutral and for making sure the neutral is appropriate for the case. The first step should be to assess the case and the parties to know what kind of neutral is appropriate. This is best done in consultation with the parties. As the court seeks to identify an appropriate neutral, consider the attributes discussed in the next section. See also *supra* section VI.A.

D. Some factors to consider in identifying the appropriate neutral

Below we discuss some of the key attributes to consider when appointing a neutral. These attributes are not only relevant when appointing neutrals to court panels but also when selecting the neutral for individual cases.

1. ADR training and experience

Because the ADR Act requires that each neutral providing ADR in a court program be "qualified and trained" in the appropriate ADR process,[183] the court should not select or appoint someone without appropriate ADR training. The basic training course provides a foundation of ADR skills, specialized skills for the specific ADR process, and exposure to some of the ethical problems that can arise in ADR.[184]

Although it is widely believed that ADR neutrals should receive substantial training, many ADR skills, such as generating creative solutions and improving communication between the parties, are best acquired by

183. 28 U.S.C. § 653(b) (Supp. 1998).

184. Elements of Program Design, *supra* note 94, at 69–70.

experience or are natural to some individuals. It is advisable to determine how often and in what kinds of cases the prospective neutral has served as a neutral. When checking the neutral's experience, emphasis should not be placed on the neutral's "settlement rate." Although settlement may be the goal in the ADR process, making it one of the criteria for selecting neutrals invites them to pressure parties into settlement.

2. Reputation and personal characteristics

A potential neutral may have an excellent reputation or personal characteristics that make him or her more effective and more acceptable to the parties. In some cases, the viability of the ADR process can hinge on this.[185] An essential personal characteristic is skill in communicating, which includes, in the mediation context for example, the ability to facilitate dialogue between the parties. Another highly desirable characteristic is the neutral's ability to generate innovative solutions beyond the remedies available through adjudication. The neutral should also, of course, meet high standards of integrity. Because it may be difficult to determine whether the neutral has such personal characteristics and skills, the court may have to rely on reputation and experience as indicators.

3. Subject-matter expertise

Discussions with the parties may point to the need for an expert in the subject matter of the case. If the parties in a patent case, for example, want an evaluation of the case, the subject matter expertise of the neutral will be important. If the patent case centers on the business relationship

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185. *See* Stienstra et al., *supra* note 39, at 207–08:

> [A]ttorneys who ranked the neutral near or at the excellent end of the scale were significantly more likely to report that the ADR process reduced litigation cost and time, that their case settled through the ADR process, that the outcome was satisfactory and the process fair, that the benefits of using ADR outweighed the costs, and that they would volunteer a case for this form of ADR.

See also Rosenberg & Folberg, *supra* note 49, at 1529 ("Interviews and focus group discussions made it clear that the evaluator's individual characteristics had a noticeable impact on the ENE process and, consequently, on participant satisfaction levels.").

between the parties, however, and not on the patent law issues raised in the claim, the appropriate neutral may be one who can facilitate communication and help generate options that will preserve the relationship. Generally, if the neutral will not be required to express an opinion about the case, subject matter expertise is less important.[186]

4. Legal training and experience

In nearly all federal courts, membership on ADR panels requires a law degree and substantial legal experience.[187] Although there are many advantages to appointing an attorney as neutral,[188] one should not take for granted that an attorney is the best choice. A fundamental role of an attorney is that of advocate. Not all attorneys have difficulty shedding this role, but some do, which could cause problems in a process like mediation. A further disadvantage of requiring legal training is that it shrinks the pool of eligible neutrals, which may be a problem in small districts or districts that cover a large but sparsely populated geographic area. Restricting the pool to lawyers also may exclude many individuals who are exceptionally skilled in ADR and who could be helpful in cases where legal issues are not at the core of the dispute.

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186. *See* Stienstra et al., *supra* note 39, at 238–40 (indicating that, in a mediation program that handled cases ranging from routine to complex, 14% of attorneys thought the mediation process would have been more effective if the mediator had had subject matter expertise, while 61% did not).

187. *See, e.g.*, W.D. Mich. Civ. R. 16.3(b)(ii) (providing that, to be certified as a mediator, one must be an attorney with at least five years of practical experience, general peer recognition, demonstrated interest, sufficient training, a willingness to serve pro bono, and beneficial personal characteristics, such as good communication skills, sensitivity, objectivity, cognitive ability, and dignified behavior); D. Ariz. Civ. R. 2.11(e) (providing that an arbitrator must have been admitted and qualified to practice for not less than five years; must be member in good standing of the bar of any federal district court; and either must have committed at least 50% of his or her professional time to litigation for at least five years, must have substantial experience serving as a neutral, or must have substantial experience negotiating consensual resolutions to complex problems).

188. *See* Glen Sato, *The Mediator-Lawyer: Implications for the Practice of Law and One Argument for Professional Responsibility Guidance—A Proposal for Some Ethical Considerations*, 34 UCLA L. Rev. 507, 514 (1986).

E. Might judges, special masters, or examiners be ADR neutrals?

1. Senior judges

A retired judge's stature can bring immediate benefits to an ADR session in certain situations. The role of an arbitrator, for example, is closely parallel to that of the judge. Retired judges also may be effective in ENE, where evaluation of the case is the purpose of the process. In these ADR processes, a retired judge's decision or evaluation may earn greater credibility and help the parties size up their case more quickly. One problem, however, in appointing a former judge as a neutral is that he or she may have trouble adapting to a role other than that of arbitrator or evaluator.[189] Before appointing a former judge to serve as a mediator, the court might want to determine that the judge is able to step outside the role of judging. Keep in mind, too, that the ADR Act requires that each neutral who serves in a court ADR process should be trained in the ADR process that the neutral will be asked to provide.[190]

2. Magistrate judges

In describing the qualifications and training required for neutrals serving in court-based ADR processes, the ADR Act states that a "district court may use, among others, magistrate judges who have been trained to serve as neutrals in [ADR] processes . . . ." *See* 28 U.S.C. §653(b) (Supp. 1998). Using magistrate judges to conduct ADR procedures holds both promise and pitfalls. Some parties may prefer the authority and experience of a magistrate judge. Furthermore, in some districts magistrate judges may be readily available and appropriately trained for serving as ADR neutrals. Use of magistrate judges trained in ADR also can save a court the effort and concerns that can arise when setting up and using a panel of neutrals from the private sector. For a discussion on ensuring the quality of neutrals on court panels, see *infra* section VI.A.

Some caution might be considered, however, before turning to magistrate judges for ADR services. Perhaps the greatest concern, at least to parties, is the magistrate judge's proximity—or perceived proximity—to

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189. *See* Wayne Brazil, Effective Approaches to Settlement: A Handbook for Lawyers and Judges 21–22 (1988).

190. 28 U.S.C. § 653(b) (Supp. 1998).

the assigned judge.[191] Parties who expect and desire a confidential process may believe that the magistrate judge and assigned judge will discuss the case and that there will be unfavorable consequences when the assigned judge makes subsequent decisions in the case. Courts can prevent this problem to some extent by having a strong local rule on ADR confidentiality that specifically addresses this issue.[192] Or the judge could place a strong confidentiality clause in the referral order. *See infra* section IX.K.

Using magistrate judges also may present a resource issue, particularly for courts with a small number of magistrate judges. If, for example, a case referred to a magistrate judge for ADR does not settle, and if the court's practice is to have magistrate judges handle pretrial matters, the court may find it necessary to refer the case to a different magistrate judge for the remaining pretrial matters—if, for example, the magistrate judge's decisions on legal matters might be affected by confidential information learned during ADR. Or referral to a different magistrate judge may be necessary for those matters where such confidential information might bias or taint the decision.

Courts also should keep in mind that magistrate judges are by training and experience accustomed to making judgments. They may find it difficult to suspend judgment and play a purely facilitative role in processes like mediation. In many cases, evaluative or decision-making skills may not be as effective or appropriate as other ADR techniques. For a discussion of similar concerns regarding senior judges, see *infra* section VI.E.1.

Courts may want to address the concerns identified above by training magistrate judges in ADR techniques and training all judges in the confidentiality issues that might arise when magistrate judges are used as ADR neutrals.

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191. *See* Frank E.A. Sander, *A Friendly Amendment*, Disp. Resol. Mag., Fall 1999, at 11, 22.

192. *See, e.g.*, N.D. Okla. Civ. R. 16.3.E ("The settlement judge will not discuss the substance of the conference with the judge to whom the case is assigned.").

3. Special masters

In a large case where settlement efforts may involve many parties or where someone is needed to administer a class action settlement, the court might consider appointing a special master under Federal Rule of Civil Procedure 53.[193] Because appointments such as these can involve considerable cost for the parties, the judge should consult with them before such an appointment. The judge also will want to keep in mind the Rule 53 provision that the special master submit a report to the court. If the judge decides to request a report from the special master, the judge should make sure the scope of the report is not inconsistent with any confidentiality assurances that might be made in the ADR process.[194] The order appointing the special master might set out any constraints the court wishes the special master to observe in this regard. The order also might provide guidance on what kinds of ex parte communications, if any, are appropriate between the judge and the special master and between the special master and the parties. See *infra* sections IX.M; X.A for discussions on ex parte communications.

4. Examiners

Prior to the 1990s when the appointment of mediators in bankruptcy matters became more widespread, bankruptcy courts occasionally appointed examiners to serve as mediators.[195] Some commentators have stated that the appointment of an examiner to serve as a mediator is un-

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193. *See generally* MCL 3d, *supra* note 62, § 21.52. *See also* Thomas E. Willging, Laural L. Hooper, Marie Leary, Dean Miletich, Robert Timothy Reagan & John Shapard, Special Masters' Incidence and Activity: Report to the Judicial Conference's Advisory Committee on Civil Rules and Its Subcommittee on Special Masters 22–24, 25–27 (Federal Judicial Center 2000) (describing the use of special masters for settlement in a sample of closed federal district court cases); Margaret G. Farrell, *Special Masters*, *in* Reference Manual on Scientific Evidence 575 (Federal Judicial Center 1994) (describing the appointment process and issues related to the use of special masters in cases that involve scientific and technical evidence).

194. *See* Fed. R. Civ. P. 53(e). *See also* Willging et al., *supra* note 193, at 44–55 (discussing judges' instructions to special masters, ex parte communications with special masters, and special masters' reports, including discussion of cases where special masters were mediators).

195. *See generally* 11 U.S.C. §§ 1104(c), 1106(b) (1994).

necessary because other authority exists for appointment of a mediator.[196] In addition, commentators have raised concerns about the appointment of an examiner to mediate because an examiner's investigative functions and duty to report to the court would undermine the impartiality and confidentiality of the mediation process.[197] In the future, it is unlikely that courts will rely on the examiner provisions in the Bankruptcy Code for authority to appoint a mediator since other authority exists. If an examiner is appointed and the examiner's duties include some form of mediation, care should be taken to ensure that the scope of the examiner's report is not inconsistent with any confidentiality assurances that might be made in the ADR process. See *supra* sections I.A.2 and V.A.2.b for a discussion of the authority to refer bankruptcy matters to ADR.

F. Might the assigned judge serve as the ADR neutral?

The *Code of Conduct for United States Judges* provides that "[a] judge may, with consent of the parties, confer separately with the parties and their counsel in an effort to mediate or settle pending matters."[198] The *Code of Conduct* also provides that "[a] judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned . . . ."[199]

Nothing in the *Code of Conduct* specifically addresses the practice of a judge in the role of a neutral in joint ADR sessions with the parties in a case over which that judge will preside at trial. Advisory Opinion No. 95 by the Judicial Conference's Committee on Codes of Conduct does, however, address the practice of judges acting in a "settlement" capacity in a case and subsequently presiding over a trial in that case. That opinion states:

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196. *See* Norton, *supra* note 75, § 146:6; Chapter 11 Theory and Practice, *supra* note 88, § 36.33.

197. Chapter 11 Theory and Practice, *supra* note 88, § 36.33; Norton, *supra* note 75, § 146:17.

198. Committee on Codes of Conduct, Judicial Conf. of the U.S., Code of Conduct for United States Judges Canon 3A(4) (1999) [hereinafter Code of Conduct].

199. *Id.* Canon 3C(1); *see also* 28 U.S.C. § 455(a) (1994).

> Since the drafters of the Code believed it was necessary to expressly permit *ex parte* settlement discussions between judges and parties with their consent, it is reasonable to infer that joint settlement discussions do not contravene the Code. We read the Code of Conduct to acknowledge that judges may engage in a range of permissible settlement activities, and that recusal follows from those activities only where a judge's impartiality might reasonably be questioned because of what occurred during the course of those discussions.[200]

The advisory opinion raises several concerns with respect to a judge's dual role in settlement and trial:

> Settlement practices must be examined on a case-by-case basis to determine their ethical propriety. Factored into this calculus should be a consideration of whether the case will be tried by judge or jury, whether the parties themselves or only counsel will be involved in the discussion, and whether the parties have consented to the discussions or to a subsequent trial by the settlement judge. Judges must be mindful of the effect settlement discussions can have not only on their own objectivity and impartiality but also on the appearance of their objectivity and impartiality. Despite a judge's best efforts there may be instances where information obtained during settlement discussions could influence a judge's decision-making during trial. Parties who have confronted deficiencies in their cases, or who have negotiated candidly as to the value of their claims, may question whether the judge can set aside this knowledge in a case tried to the judge, whereas in a case tried to a jury, there may be less reason to question the judge's impartiality. . . . In the end, a judge's recusal decision following involvement in settlement discussions will be fact specific . . . .[201]

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200. 2 Guide to Judiciary Policies and Procedures, at IV-229 (Administrative Office of the U.S. Courts 1999) (Advisory Opinion No. 95).

201. *Id.*

The concerns discussed in Advisory Opinion No. 95 are at least as great in the ADR context as they are in the settlement conference context.[202]

These issues can be avoided if the case is referred to another judge who will serve as the ADR neutral or to a nonjudicial ADR neutral. There may be situations, however, when it appears to be advantageous for a judge to act in the role of an ADR neutral in one of his or her own cases—for example, in the interests of economy given the judge's familiarity with the facts or issues in a complex case. If that judge proceeds and serves as an ADR neutral and the ADR process does not result in full settlement, he or she should consider whether the case should then be tried by a judge unfamiliar with the settlement discussions.

Some local rules restrict or prohibit judges who participate in settlement discussions from handling a subsequent trial of the case.[203] See *supra* section VI.E.2 for a discussion of having magistrate judges handle settlement and other pretrial matters in a case. Keep in mind, too, that the ADR Act requires each district court to adopt local rules on disqualification of neutrals.[204] *See infra* section VI.G. It is not clear whether this will be interpreted to prohibit the trial judge from serving as an ADR neutral in his or her own case.

Should a judge decide that he or she or another judge can appropriately serve as an ADR neutral in his or her own case, the judge should keep in mind that the ADR Act requires that any ADR neutral must be trained in the ADR procedures to which the case is referred.[205]

G. When should the neutral be disqualified for conflicts of interest or bias?

The ADR Act requires that each district court adopt local rules "relating to the disqualification of neutrals," including, where appropriate, disqualification on the same grounds as those for a judicial officer under 28

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202. *See generally* James J. Alfini, *Risk of Coercion Too Great: Judges Should Not Mediate Cases Assigned to Them for Trial*, Disp. Resol. Mag., Fall 1999, at 11, 13; Sander, *supra* note 191, at 24.

203. *See* S.D. Cal. Civ. R. 16.3(c) (requiring the parties to consent to trial by the settlement judge). At least one local rule prohibits the assigned judge from discussing settlement figures in nonjury cases, unless requested to do so by all concerned parties. *See* N.D. Tex. Civ. R. 16.3(b).

204. 28 U.S.C. § 653(b) (Supp. 1998).

205. *Id.*

U.S.C. § 455 and disqualification under "other applicable law, and professional responsibility standards."[206] The ADR Act specifically requires that arbitrators must be subject to the disqualification rules of 28 U.S.C. § 455 and must take the oath or make the affirmation described in 28 U.S.C. § 453.[207]

All the effort in appointing the neutral can be undermined if there is a likelihood that the neutral has a conflict of interest or bias. Since there are currently no national professional responsibility standards for neutrals serving in federal court ADR programs, it is up to each court and the ADR participants to ensure that any potential conflict of interest is avoided. Local rules may provide a procedure for determining whether conflicts of interest exist.

As a threshold issue, the court should decide which standards of professional responsibility govern the neutral. Rules of professional responsibility for the governing bar may offer some guidance. On the other hand, some argue that special rules of ethics are needed to govern this complex area, where attorneys in particular are called on to balance professional practice and the role of ADR neutral.[208] There are several "model" ADR standards that might provide some guidance.[209]

Conflicts of interest between the neutral and one or more of the parties can arise due to significant current or past personal or professional relationships with any party or attorney involved in the process. The po-

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206. *Id.*

207. *Id.* § 655(b)(1)–(2).

208. *See* Carrie Menkel-Meadow, *Ethics in Alternative Dispute Resolution: New Issues, No Answers from the Adversary Conception of Lawyers' Responsibilities*, 38 S. Tex. L. Rev. 407, 453–54 (1997) (suggesting that special ethics rules for ADR are needed).

209. *See* Model Standards for Mediators, *supra* note 180, Rule III; National Mediation Standards, *supra* note 56, § 8.1(b). *See generally Draft ABA Rules*, *supra* note 180 (proposing revisions to ABA Model Rules of Professional Conduct that would govern the conduct of attorneys who act as ADR neutrals or who represent parties in ADR proceedings); *CPR-Georgetown Comm'n Proposed Model Rule*, *supra* note 180 (proposing rule for adoption into the ABA Model Rules of Professional Conduct). *See also infra* notes 302–04 and accompanying text; ADR Task Force of the Court Admin. & Case Management Comm., Guidelines for Ensuring Fair and Effective Court-Annexed ADR: Attributes of a Well-Functioning ADR Program and Ethical Principles for ADR Neutrals (1997), *reproduced infra* Appendix D, pt. III.2-4 (providing three guidelines for avoiding conflicts of interest).

tential for conflicts may arise, for example, in the following situations: where the neutral has previously arbitrated or mediated any matter in which one of the present parties was a party; where the neutral previously represented a party in the same or a substantially related matter; or where the neutral's law firm has represented or currently represents a party.[210]

Information gathered during the search for a neutral can help eliminate from consideration any persons who are susceptible to a conflict of interest with one of the parties. Because most conflicts of interest are not readily discoverable at the pre-appointment stage, however, the parties and the neutral must do their own search for potential conflicts. The neutral should disclose, preferably in writing, any circumstances that may create or give the appearance of a conflict of interest,[211] including any prior relationship that the neutral or the neutral's firm may have had with any party. Additionally, each party should disclose any prior relationships with the neutral. If such disclosures reveal conflicts of interest, the parties may still retain the neutral if they both agree that the neutral's independence and impartiality are not compromised.

Consider whether any waiver of conflicts of interest should be subject to court approval. If the judge thinks the ADR process might be negatively affected if the neutral remains, the judge should deny the appointment. Furthermore, the court should make it clear that it is the duty of a neutral to continue to disclose conflicts throughout the ADR process.[212]

The safest approach is to disqualify the neutral promptly if any party raises any objection. Courts may have some reluctance to do this if considerable time has already been invested in selecting a neutral, but forcing a neutral on a party can only create problems.

H. Will a nonjudicial neutral have immunity?

The ADR Act provides that arbitrators serving under the statute are entitled to the immunities and protections that the law accords to persons

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210. *See generally* Niemic, *supra* note 2, at 20–27 (reporting incidences of conflicts of interest or bias as observed or perceived by counsel-respondents and mediator-respondents in a survey of mediation in bankruptcy). *See also infra* note 252 for cases holding that an attorney who served as a mediator was disqualified in subsequent litigation from representing one of the parties to the mediation.

211. *See* National Mediation Standards, *supra* note 56, § 8.1(b).

212. *See id.*

performing quasi-judicial functions.[213] The ADR Act has no immunity provision for other neutrals, and there is no other statutory source of immunity for federal court ADR neutrals. One federal court of appeals has found that neutrals serving in an official capacity in a court-based ENE program have absolute quasi-judicial immunity.[214] Some district courts have considered the immunity question in the context of implementing their ADR programs and treat their ADR neutrals as officers of the court who are protected by judicial immunity.[215] A few have incorporated this view into local rules.[216]

Some commentators have expressed concern about immunity for ADR neutrals.[217] Particularly with respect to those who are ordered to use ADR, some have maintained that granting mediators immunity could deny litigants the opportunity to file claims if harm is caused by a neutral's negligent acts or omissions.[218] Others believe that immunity should not be recognized if the ADR neutral has a conflict of interest in the mat-

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213. 28 U.S.C. § 655(c) (Supp. 1998).

214. Wagshal v. Foster, 28 F.3d 1249, 1252–54 (D.C. Cir. 1994) (holding that absolute quasi-judicial immunity extends to a volunteer evaluator/mediator performing official duties in D.C. Superior Court ADR program).

215. Examples include the U.S. District Court for the Western District of Michigan and the U.S. District Court for the District of Rhode Island. *See* Plapinger & Stienstra, *supra* note 1, at 165, 255.

216. *See, e.g.,* D. Ore. Civ. R. 16.4(f) ("During their service, mediators act as officers of the court and are clothed with judicial immunity."); N.D. Cal. ADR R. 2-5(e) ("All persons serving as neutrals in any of the Court's ADR programs are performing quasi-judicial functions and are entitled to the immunities and protections that the law accords to persons serving in such capacity."); E.D.N.C. R. 32.11 ("A mediator appointed by the Court pursuant to these rules shall have judicial immunity in the same manner and to the same extent as a judge."); *see also* Amended General Order M-143 paras. 6.0, 10.3 (Bankr. S.D.N.Y. Oct. 20, 1999).

217. *See generally* Arthur A. Chaykin, *The Liabilities and Immunities of Mediators: A Hostile Environment for Model Legislation,* 2 Ohio St. J. on Disp. Resol. 47 (1986) (maintaining that mediators do not need protection from common law liability).

218. *See, e.g.,* National Mediation Standards, *supra* note 56, § 14.0 & commentary.

ter referred to the neutral.[219] A third issue is whether immunity should be treated differently for compensated and noncompensated neutrals.[220]

219. *See generally* Amanda K. Esquibel, *The Case of the Conflicted Mediator: An Argument for Liability and Against Immunity*, 31 Rutgers L.J. 131 (1999).

220. *See, e.g.,* Cassondra E. Joseph, *The Scope of Mediator Immunity: When Mediators Can Invoke Absolute Immunity*, 12 Ohio St. J. on Disp. Resol. 629, 662–64 (1997) (evaluating whether the Southern District of New York bankruptcy court mediators should be granted quasi-judicial immunity).

VII. Compensating the Neutral

A. Determining the neutral's fee
   1. Options in setting the fee for the neutral
      a. A market-rate fee
      b. A fee set by the court
      c. Pro bono service
      d. Pro bono/fee mix
   2. Questions to consider in setting the fee
B. Dividing the fee among the parties
   1. Letting the parties decide
   2. Equal division among the parties or the sides
   3. Unequal division among the parties
   4. Payment from the bankruptcy estate in bankruptcy cases
C. Fee issues in voluntary vs. mandatory referrals

The ADR Act of 1998 leaves to the courts the decision whether ADR neutrals should serve pro bono or be compensated.[221] If district courts choose to compensate neutrals, they must establish the amount of compensation that "each arbitrator or neutral shall receive for services rendered in each case."[222] Courts must do this in conformity with Judicial Conference regulations,[223] which state as follows:

> All district courts must establish a local rule or policy regarding the compensation, if any, of neutrals 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.[224]

The *Guide to Judiciary Policies and Procedures* also includes two principles approved by the Judicial Conference's Court Administration and

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221. 28 U.S.C. § 658(a) (Supp. 1998).
222. *Id.*
223. *See id.*
224. 1 Guide to Judiciary Policies and Procedures, *supra* note 200, at III-41.

Case Management Committee in its *Guidelines for Ensuring Fair and Effective Court-Annexed ADR*:[225]

- Where an ADR program provides for the neutral to receive compensation for services, the court should make explicit the rate of and limitations on compensation.
- Where 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.

For bankruptcy courts, the ADR Act provisions may not apply.[226] The preferred approach is for local bankruptcy rules to provide procedures for determining the neutral's fee. See *infra* section VII.B.4 for a discussion of payment of the neutral's fee from the bankruptcy estate in bankruptcy cases.

Courts and judges also should consider whether it is appropriate to require parties to pay the neutral's fee when the court, rather than the parties, makes the decision that ADR will be used. See the discussion of this issue *infra* section VII.C.

A. Determining the neutral's fee

If the court does not have specific procedures or fee schedules, the judge will have to determine whether and how the neutral's fee will be paid in a given case. The order referring the case to ADR can describe the fee approach. *See infra* section IX.E. Some approaches used in the courts are listed below.[227]

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225. *Id.*; *see* ADR Task Force of the Court Admin. & Case Management Comm., Guidelines for Ensuring Fair and Effective Court-Annexed ADR: Attributes of a Well-Functioning ADR Program and Ethical Principles for ADR Neutrals (1997), *reproduced infra* Appendix D, pts. II.5, III.8.

226. *See supra* note 17 and accompanying text.

227. *See* Plapinger & Stienstra, *supra* note 1, at 36–56 tbls.4–7, 71–308 (providing district-by-district descriptions).

1. Options in setting the fee for the neutral

a. A market-rate fee

The most common approach used in federal courts that authorize fees is to permit the neutral to charge his or her regular market rate, whether that is a per hour or per session rate. A number of courts using this approach reserve the right to review the reasonableness of the fee.

b. A fee set by the court

Some courts specify the fee the neutral may charge, either an hourly rate (for example, $150 per hour) or an amount per session (for example, $250 per day). Some judges put a cap on total neutral fees.

c. Pro bono service

In some courts, neutrals generally serve pro bono. Some of these courts, however, reimburse the neutrals for out-of-pocket expenses, such as travel.

In courts where neutrals are generally paid for their services, local rules contain special provisions regarding low-income or indigent parties, waiving the fee altogether in certain cases. To provide for this, many courts require those who are selected for the court's panel of neutrals to serve pro bono for a specified number of hours or cases per year.

Some maintain that the quality of the neutral, or at least the quality of the neutral's performance, is better if the neutral is paid. Experience in some courts, however, demonstrates that superior neutrals can be found who are willing to serve pro bono.[228]

d. Pro bono/fee mix

In some courts, neutrals serve pro bono in a case for a specified period of time (e.g., four hours) after which the parties must pay either a court-set or market-rate fee.

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228. *See, e.g.*, Genevra Kay Loveland, *Two ADR Administrators Reflect on Developing and Implementing Court-Annexed Programs*, FJC Directions (Federal Judicial Center, Washington, D.C.), no. 7, Dec. 1994, at 18, 21 (describing programs in the District for the District of Columbia and the Northern District of California).

2. Questions to consider in setting the fee

Below are some questions to consider if the local rules do not specify which fee option to use.

- Are the parties likely to agree on the proper method and rate for compensating the neutral? The court might first consider whether the parties can determine the neutral's fee. Leaving this early decision to the discretion of the parties may help them commit to the ADR process and may set the stage for resolving the matter being referred to ADR. Conversely, leaving the decision to the parties may cause conflict and separate them further.
- Are there advantages to using a per session fee (e.g., payment by the day or half-day) for a particular case? It might be appropriate, particularly for simpler cases, to order or approve a set fee by the day or half-day. An advantage of this method is that the parties may feel less pressure to settle hurriedly. When they know their costs are not going up as each hour passes, they may be more willing to take the time to examine carefully the settlement options before them. Furthermore, parties need not be concerned that the neutral is prolonging the session just to run up the fee. On the other hand, when neutrals are paid by the day or half-day, if the ADR session turns out to be brief, parties may end up paying more than they would if they were paying at an hourly rate. There is also the risk that the neutral will rush the process because the fee will be the same no matter how much time is spent on the process.
- Would payment by the hour be best for a particular case? In some cases, the court or the parties might want a neutral who charges by the hour. Although an hourly fee may place pressure on the participants to rush to settlement in order to save money, payment by the hour may in some situations save parties money if they quickly come to settlement. Also, when the neutral's meter is running, parties may place more value on the time they spend on settlement, trying to use that time as effectively as they can. This might help parties put aside personal grudges or other obstacles in order to reach a mutually beneficial settlement. However, some parties who pay by the hour may be concerned that the neutral is prolonging the session to run up the fee.
- Does the type or size of the case matter? The court might want to consider using different approaches for different types or sizes of

cases. For example, payment by the hour may be an effective arrangement in complex or hard-to-settle cases. Also, in a large, complex case, the judge might want to reserve the right to review the neutral's fee.

- What if the parties cannot afford a neutral? The court also will want to consider the ability of each party to pay for ADR. If one or both of the parties cannot afford to pay a neutral's fee, the court might consider appointing a pro bono neutral or one who is willing to work for a reduced fee. See *infra* section VII.B.3 for a discussion of unequal division of the fee between the parties.

B. Dividing the fee among the parties

Some ADR programs regulate the allocation of costs by splitting the neutral's fee equally among the parties or the sides in a case. Other courts allow parties to negotiate fee allocations among themselves before or during the substantive ADR sessions. If the court's local rules do not determine how to allocate the fee, consider the following:

1. Letting the parties decide

The court may first want to ask the parties if they can decide among themselves how to allocate the fee. If it appears unlikely that the parties will be able to agree, the court may want to ask them for suggestions and ask each party why it prefers its approach. For special concerns regarding fee allocation when one party is not able to pay, but the other is, see the discussion *infra* section VII.B.3 on unequal division among the parties.

2. Equal division among the parties or the sides

If the parties do not decide how to allocate the fee, the most commonly used method is to divide the neutral's fee equally between the parties or by side. Dividing costs equally is a reasonable choice when there are only two parties and each can afford to pay its share. This method can become more complicated in multiparty disputes. When a case has many plaintiffs or defendants, a decision must be made about whether to split the fee equally between the plaintiffs as one group and the defendants as another, or alternatively, to split the fee equally among all parties involved in the case. If the court decides to split the fee equally between

the plaintiffs' group and the defendants' group, the court may want to let each group decide how to allocate its portion of the fee within the group.

3. Unequal division among the parties

Sometimes one party is willing to pay all of the neutral's fee. A party may volunteer to assume the fee, for example, when the other party is not able to pay or in order to encourage a private resolution. The court may want to discourage one party from paying the full fee if each party is able to pay its share. Some believe that parties generally have more commitment to ADR when they know they have to pay for it.[229] When parties bear fees unequally, one or more of the parties may feel that the neutral will become biased in favor of the party paying the larger share. To help ensure neutrality, some maintain that the neutral should not know which party is paying more.

4. Payment from the bankruptcy estate in bankruptcy cases

In a bankruptcy matter, the order of referral to ADR usually approves any payment of the neutral's fee by the trustee or debtor-in-possession.[230] If the bankruptcy estate's portion of the neutral's fee is expected to be relatively small, some courts authorize the trustee's payment of the fee up to a specified cap.[231] Notice and other issues relating to the employment and compensation of professional persons in the bankruptcy context are beyond the scope of this guide.[232]

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229. *See* Erika S. Fine, *Special Masters and Court-Appointed Experts: A Dialogue*, *in* ADR and the Courts, *supra* note 36, at 209, 214.

230. *See generally* Nancy F. Atlas, *Mediation in Bankruptcy Cases* (pt. 1), Prac. Law., Sept. 1995, at 39, 53. *See also* Second Amended General Order No. 95-01 para. 8.2.b (Bankr. C.D. Cal. Aug. 24, 1999) ("the Mediator's compensation shall be . . . subject to the prior approval of the Judge if the estate is to be charged with such expense"); Niemic, *supra* note 2, at 31–32 (reporting that in bankruptcy mediation 20% of mediator-respondents indicated that the bankruptcy estate paid a portion of their fee).

231. *See* Atlas, *supra* note 230, at 55.

232. *Cf.* Chapter 11 Theory and Practice, *supra* note 88, § 36.20 (stating that "one should obtain court approval of the retention of the mediator under 11 U.S.C. § 327 . . . , at least when the estate is to be charged"), *with* Norton, *supra* note 75, § 146:6 (stating that "[t]he mediator is not a professional in the sense provided for under Code § 327").

C. Fee issues in voluntary vs. mandatory referrals

An important consideration in deciding the neutral's fee is whether the ADR referral is voluntary or mandatory. See *supra* section I.D for a discussion of the distinction between voluntary and mandatory ADR. On the issue of fees, some authorities make a sharp distinction between mandatory and voluntary ADR. They argue that, although it is appropriate to require a fee when parties can choose to participate in ADR, it is unacceptable to force the parties to use ADR and then force them to pay for it as well.[233]

Requiring parties to pay for mandatory ADR raises several issues, including:[234]

- A party with very limited resources might be unable to afford the costs of both the ADR sessions and taking the case to trial. Requiring such a party to pay for mandatory ADR might coerce the party into settling[235] and could impair or effectively deny the right to a jury trial.[236]
- The judicial system may be perceived as unfair if it imposes significant fees for mandatory ADR services while court adjudication fees remain modest.[237] If litigants are forced into ADR, the fees they pay to neutrals may appear to be costs for access to the public justice system.
- The fairness of a court's procedures may be called into question when it provides profitable work to private individuals.[238]

Although the ADR Act does not explicitly authorize courts to require parties to pay for court-mandated ADR, it also does not bar compensation

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233. *See* John P. McCrory, *Mandated Mediation of Civil Cases in State Courts: A Litigant's Perspective on Program Model Choices*, 14 Ohio St. J. on Disp. Resol. 813, 826–27 (1999); National Mediation Standards, *supra* note 56, §§ 5.1, 13.1 & commentary.

234. *See* Elements of Program Design, *supra* note 94, at 57–58.

235. *See* Law & Pub. Policy Comm., Society of Prof'ls in Dispute Resolution, Mandated Participation and Settlement Coercion: Dispute Resolution as It Relates to the Courts 16 (1991); *see also* Eisele, *supra* note 15, at 1970, 1976–79.

236. *See* Wayne D. Brazil, *Institutionalizing ADR Programs in Courts*, *in* Emerging ADR Issues in State and Federal Courts 52, 86 (Section of Litigation, American Bar Association 1991); *supra* notes 15–16 and accompanying text.

237. *See* Frank E.A. Sander, *Paying for ADR: To Make It Work, We Have to Provide Funds for It,* A.B.A. J., Feb. 1992, at 105.

238. Brazil, *supra* note 236, at 81–89.

of neutrals in such cases. The ADR Act authorizes courts to require parties to use certain types of ADR,[239] and it also states that courts shall establish the amount of compensation, if any, for neutrals.[240]

In practice, some federal courts do require parties to pay neutrals' fees in court-mandated ADR. If the judge decides to order parties to use ADR and require the litigants to pay the neutral's fee, it is especially important that the court pay attention to the quality of the neutral to help ensure that the parties, who have no choice about using ADR, receive effective ADR services. *See supra* section VI.A, VI.D.

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239. 28 U.S.C. § 652(a) (Supp. 1998).
240. *Id.* § 658(a).

VIII. Confidentiality of ADR Communications

A. What does *confidentiality* mean?
B. What are some approaches to help safeguard ADR communications?
   1. What might the judge do at the time a case is referred to ADR?
      a. Referral orders
      b. Confidentiality agreements
   2. What might the judge do when disclosure issues arise after ADR communications have been made?
C. What exceptions to confidentiality protection might be recognized?
D. What statutes and rules govern whether ADR communications should be protected from disclosure?
   1. Statutes
   2. Federal Rules of Evidence
      a. Rule 403
      b. Rule 408
      c. Rule 501
   3. Federal Rules of Civil Procedure
      a. Rule 26(c)
      b. Rule 45
      c. Rule 68
   4. Local rules on ADR
E. Are sanctions appropriate for breaches of confidentiality?

District courts have an obligation under the ADR Act of 1998 to provide for the confidentiality of ADR processes.[241] Given that this is an unsettled area of the law, there are many factors to consider in referring cases to ADR or in deciding issues concerning the confidentiality of ADR communications.

Confidentiality is generally considered a bedrock principle for most ADR procedures.[242] Thus, participants in court-based ADR are usually

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241. *Id.* § 652(d). *See infra* text accompanying note 261.

242. *See* Bernard v. Galen Group, Inc., 901 F. Supp. 778, 784 (S.D.N.Y. 1995) (stating that the considerations associated with settlement conferences apply with equal force to district court mediation program, citing Lake Utopia Paper Ltd. v. Connelly Containers, Inc., 608 F.2d 928, 930 (2d Cir. 1979) (stating that confidentiality is "essential to the proper functioning" of court-based appellate mediation program)); *cf.* Clark v. Stapleton Corp., 957 F.2d 745, 746 (10th Cir. 1992) (stating that "guarantee of confidentiality is essential to the proper functioning of an appellate [mediation] program").

assured at the outset of the process that their communications will be kept confidential. Some local rules go so far as to say that ADR communications will be treated as privileged.

Assurances of confidentiality are not, however, absolute guarantees. In some recent cases, courts have had to decide whether, and to what extent, other parties in subsequent cases can gain access to ADR communications through discovery. Other courts have considered whether, and to what extent, ADR communications are admissible as evidence at trial. And some courts have had to decide whether to enforce a settlement purportedly reached during ADR. In a number of cases, as discussed *infra* Appendix E, courts have decided that ADR communications could not remain confidential.

A. What does *confidentiality* mean?

In the court context, there is a lack of clarity about what *confidentiality* means. The federal rules of practice and procedure do not provide direct guidance regarding the admissibility or discoverability of ADR communications, and case law is inconsistent. Analysis of the extent of protection is further complicated by the fact that the ADR Act of 1998, while requiring district courts to adopt local rules on ADR confidentiality,[243] does not define confidentiality nor state the scope of protection that Congress intended. The Act does not state whether its confidentiality provision is intended to protect ADR communications from disclosure in court—that is, in the context of discovery and trial—or whether the protection is intended only with respect to disclosure in extrajudicial settings.[244] Many local ADR rules also do not make this distinction.

Does confidentiality mean that information exchanged during ADR sessions is generally not discoverable, that is, unless discoverable independent of the ADR proceedings? Or does it mean that ADR communications are generally inadmissible, unless otherwise discoverable and admissible? If the evidence is inadmissible, is it inadmissible in any legal proceeding or only in the trial of the case in which the ADR session was

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243. 28 U.S.C. § 652(d) (Supp. 1998).

244. *See* Charles Alan Wright & Kenneth W. Graham, Jr., Federal Practice and Procedure: Evidence § 5437 n.15 ("Confidentiality is concerned with extrajudicial disclosures; privilege is concerned with disclosure in court."); *infra* note 367 and accompanying text.

held? In what circumstances should there be exceptions to the protection of confidentiality—for example, should communications involving threats to inflict bodily harm be protected? Should ADR communications be considered privileged and, if privileged, should the privilege be qualified or absolute and should there be exceptions to the privilege? If there is such a privilege, is it held only by the litigants who participated in ADR or by the neutral as well? Under what circumstances can such a privilege be waived?

In the next section we discuss some approaches the judge might consider to help ensure the confidentiality of ADR communications if local rules, the federal rules, or case law do not provide sufficient protection. In the following section we identify exceptions to confidentiality protection that have been recognized or suggested in order to help balance the public interest in protecting the confidentiality of settlement processes and countervailing interests such as the "right to every person's evidence." We then identify the sources of authority that courts have used to determine whether ADR communications should be protected from disclosure. For those who wish to pursue further the scope and limitations of those sources, we provide a discussion of case law applying the statutes and rules that govern confidentiality *infra* Appendix E. Finally, in the last part of this section, we discuss whether sanctions might be appropriate for breaches of confidentiality.

For a discussion of public access to ADR sessions and outcomes, see *infra* section X.F. For a discussion on restrictions on communications between the judge and the neutral, see *infra* section X.A.

There are special considerations in bankruptcy matters because of certain rights of parties in interest who were not the parties referred to the ADR process.[245] For example, ADR settlements reached in bankruptcy matters involving the trustee or bankruptcy estate are subject to the notice and hearing requirements under Rule of Bankruptcy Procedure 9019, which governs the bankruptcy court's approval of a settlement.[246]

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245. *See generally* Norton, *supra* note 75, § 146:4 (describing ways to protect ADR confidentiality in bankruptcy matters and exceptions to that protection).

246. *See* Niemic, *supra* note 2, at 17–19 (reporting that fewer than 5% of survey respondents indicated that mediation confidentiality prevented the bankruptcy judge from learning facts or issues that the judge would have needed to know in deciding whether to approve settlement).

B. What are some approaches to help safeguard ADR communications?

1. What might the judge do at the time a case is referred to ADR?

If the court or the parties in a particular case are concerned about whether local rules or procedures provide sufficient protection for the confidentiality of ADR communications, the judge may want to consider including specific provisions on confidentiality in the referral order and asking the parties to clarify their understandings on this subject in a confidentiality agreement.[247]

a. Referral orders

In the ADR referral order, the judge may want to specify, to the extent permissible under Rule 83(b), the extent to which information exchanged in the ADR process will be considered confidential.[248] The referral order could clarify, for example, what confidential means with respect to the parties in the case, the ADR neutral who conducts the ADR process, and persons who do not participate in the ADR process. However, as noted in the discussion in this section and *infra* Appendix E, this is a complicated issue. More specifically, the referral order could state whether testimony concerning the ADR sessions may be taken from the ADR participants, by

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247. *See* 2 Edward A. Dauer, Manual of Dispute Resolution: ADR Law and Practice § 22.06 (1994); Brazil, *supra* note 189, at 307; Nancy F. Atlas, *Mediation in Bankruptcy Cases* (pt. 2), Prac. Law., Oct. 1995, at 63, 66; *see also* Smith v. Smith, 154 F.R.D. 661, 668–75 (N.D. Tex. 1994) (affirming magistrate judge's decision to quash subpoena served on state court-appointed mediator, where referral order provided that the parties would be bound by the mediation confidentiality rules printed on the order). The incidence of known breaches of confidentiality appears to be infrequent, at least in the bankruptcy context. *See* Niemic, *supra* note 2, at 15–17 (reporting that counsel-respondents indicated that a party disclosed confidential ADR communications in 2.4% or less of the matters referred to bankruptcy mediation and that a mediator disclosed ADR communications in 1.8% or less of the matters referred to bankruptcy mediation).

248. *See* ADR Task Force of the Court Admin. & Case Management Comm., Guidelines for Ensuring Fair and Effective Court-Annexed ADR: Attributes of a Well-Functioning ADR Program and Ethical Principles for ADR Neutrals (1997), *reproduced infra* Appendix D, pt. II.7 (stating that courts "should carefully define the scope of confidentiality intended for information exchanged in its ADR program, striking a balance between absolute protection of ADR process information and the need to avoid shielding misconduct").

whom, and in what circumstances. The referral order also could define what constitutes ADR communications.

The referral order also might tell the parties how to proceed if they believe confidentiality has been or should be breached. Because the judge or the parties may be concerned about whether knowledge of ADR communications might taint the judge's impartiality, consider naming the ADR compliance judge (if the court has one), the ADR administrator (if such duties have been assigned to the administrator), or a judicial colleague to handle questions about the scope of confidentiality.[249] See the discussion on referral orders *infra* section IX.K and on sanctions *infra* section IX.O.

The court needs to be careful not to promise parties more confidentiality than the court has the authority to provide. A referral order stating that ADR communications are to be confidential or privileged may, in reality, simply be a prophylactic to prevent disclosure outside and after the ADR sessions. As discussed *infra* Appendix E.2, there may be circumstances—for example, in different litigation—where a third party, or even one of the participants in ADR, would be allowed to gain access to those communications in discovery or to use them at trial.

b. Confidentiality agreements

The court also might consider requiring the parties and the ADR neutral to enter into a confidentiality/nondisclosure agreement before ADR begins. Some local rules provide a form for such confidentiality agreements.[250] Incorporating a confidentiality agreement into a court order

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249. *See* ADR Task Force of the Court Admin. & Case Management Comm., Guidelines for Ensuring Fair and Effective Court-Annexed ADR: Attributes of a Well-Functioning ADR Program and Ethical Principles for ADR Neutrals (1997), *reproduced infra* Appendix D, pt. II.6 (stating that courts "should adopt a mechanism for receiving any complaints regarding its ADR process and for interpreting and enforcing its local rules for ADR, including the ethical principles it adopts").

250. *See, e.g.,* N.D. Cal. ADR R. 6-11(c) (allowing mediator to ask all parties to sign confidentiality agreement on court form); Second Amended General Order No. 95-01 para. 6.3 (Bankr. C.D. Cal. Aug. 24, 1999) (providing that parties and mediator shall enter into written confidentiality agreement on designated form); Bankr. C.D. Cal. Official Form 708 (1999) (Initial Mediation Confidentiality Agreement stating that, other than signed agreement, written or oral communications will not be admissible or disclosed to anyone outside the Mediation Pro-

might increase the agreement's application with respect to nonparties to the agreement.[251]

2. What might the judge do when disclosure issues arise after ADR communications have been made?

The judge may be asked to resolve confidentiality issues after ADR communications have been made. This may happen in a case the judge has referred to ADR or a case that is different from the one in which the ADR communications were made.

For example, the judge may have to decide whether to admit as evidence documents or statements that were presented in ADR sessions, whether to allow disclosure of such information in discovery, or whether to permit the testimony of a neutral. *See infra* Appendix E. The plaintiff in the instant case may, for example, want copies of the parties' mediation statements prepared for another case in which the instant defendant participated in the mediation. Or the discovery request might be made in a case that involves completely different litigants from those who participated in the mediation. To protect the confidentiality of the ADR communications, the judge could consider using authority under Federal Rule of Civil Procedure 26(c) or 45(c). Some judges, however, have found the benefits of such an action to be outweighed by the importance of bringing all relevant evidence to light. *See infra* section VIII.C.

Confidentiality issues also may arise when deciding motions to disqualify counsel. For example, defendant XYZ Corporation may move to disqualify plaintiff's counsel on the ground that she had access to confi-

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gram, and mediator will not be called to testify or provide materials from the mediation in any proceeding).

251. *See* Rogers & McEwen, *supra* note 116, § 9:23–:24; *see also* Grumman Aerospace Corp. v. Titanium Metals Corp. of Am., 91 F.R.D. 84, 87–88 (E.D.N.Y. 1981) (holding that parties should not be permitted to "contract privately for the confidentiality of documents, and foreclose [third parties] from obtaining, in the course of litigation, materials that are relevant to their efforts to vindicate a legal position"). *See generally* Federal Deposit Ins. Corp. v. Ernst & Ernst, 677 F.2d 230, 232 (2d Cir. 1982) (holding that a confidentiality order can be modified only "if an 'extraordinary circumstance' or 'compelling need' warrants the requested modification").

dential information pertaining to XYZ Corporation when she served as a mediator in an earlier case where XYZ Corporation was a party.[252]

C. What exceptions to confidentiality protection might be recognized?

The issue of confidentiality involves a balancing between the public interest in protecting the confidentiality of settlement processes and countervailing interests such as the "right to every person's evidence." In deciding issues on ADR confidentiality, the court might want to consider whether to permit any exceptions. Some local ADR rules provide for limited exceptions to confidentiality—for example, disclosures as may be stipulated by the parties or by the parties and the neutral,[253] as necessary to report violations of the ADR rule to the ADR compliance judge or ADR administrator,[254] or as are otherwise required by law.[255] State mediation privilege statutes, which are discussed *infra* Appendix E.3.d, often provide exceptions for certain defined circumstances.

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252. *See, e.g., In re* County of Los Angeles, 223 F.3d 990, 997 (9th Cir. 2000) (finding that the law firm's ethical wall for this case was "timely and effective" and holding "that the vicarious disqualification of a firm does not automatically follow the personal disqualification of a former settlement judge, where the settlement negotiations are substantially related (but not identical) to the current representation"). *See also* Fields-D'Arpino v. Restaurant Assocs., Inc., 39 F. Supp. 2d 412, 417–18 (S.D.N.Y. 1999) (disqualifying lawyer's law firm from representing defendant-employer in lawsuit where lawyer served previously as mediator between plaintiff-employee and defendant-employer); McKenzie Constr. v. St. Croix Storage Corp., 961 F. Supp. 857, 861–62 (D.V.I. 1997) (holding that attorney, who served as mediator in unsuccessful mediation before joining a law firm that represents a party in the same case, is disqualified from representing that party, as is that attorney's firm); Poly Software Int'l, Inc. v. Yu Su, 880 F. Supp. 1487, 1494–95 (D. Utah 1995) (holding that attorney and attorney's firm were disqualified from representing plaintiff in dispute with defendant, where attorney had previously mediated dispute involving plaintiff and defendant acting jointly).

253. *See, e.g.,* N.D. Cal. ADR R. 5-12(b) (ENE); N.D. Cal. ADR R. 6-11(b) (mediation); D. Vt. Civ. R. 16.3(k)(2) (ENE).

254. *See, e.g.,* D.N.J. Civ. R. 301.1(b), (f), app. Q.II.B (mediation).

255. *See, e.g.,* N.D. Cal. ADR R. 5-12(b) (ENE); N.D. Cal. ADR R. 6-11(b) (mediation).

Some general subject matter categories that have been discussed as possible exceptions to a blanket confidentiality protection include those listed below:[256]

- significant threats made by a participant to inflict bodily injury;
- significant threats to public health or safety;
- use of, or attempts to use, the ADR process to plan or commit a crime;
- admissions of abuse or neglect, such as spousal abuse or child neglect;
- evidence of professional misconduct or malpractice on the part of an ADR neutral, a disputant, or a representative of a disputant; and
- evidence of fraud, duress, or incapacity regarding the validity or enforceability of a recorded agreement that was reached by the disputants as the result of ADR.

Of course, if evidence is otherwise discoverable, the presentation of that evidence in the course of ADR proceedings does not make that evidence inadmissible or not discoverable.

The Administrative Dispute Resolution Act of 1996, which governs ADR use in federal administrative proceedings, has been referred to in analyzing the extent of ADR confidentiality protection in the federal court context.[257] The statute identifies exceptions to its confidentiality protections. The neutral and parties are prohibited from disclosing dispute resolution communications unless:

- the communication has already been made public; or

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256. *Cf. December 2000 Draft of the Uniform Mediation Act*, § 8 (visited Dec. 26, 2000) <http://www.pon.harvard.edu/guests/uma> [hereinafter *Draft Uniform Mediation Act*] (Drafting Committees on Uniform Mediation Act of National Conference of Commissioners on Uniform State Laws & American Bar Association). The drafting committees intend to submit their draft of a uniform mediation act to the National Conference of Commissioners on Uniform State Laws in 2001. *See CPR-Georgetown Comm'n Proposed Model Rule*, *supra* note 180, Rule 4.5.2 & comment (proposing rule on confidentiality for adoption into the ABA Model Rules of Professional Conduct). *See also infra* text accompanying notes 302, 304.

257. *See In re* Grand Jury Subpoena Dated Dec. 17, 1996, 148 F.3d 487, 492–93 (5th Cir. 1998) (comparing the confidentiality protections of the 1996 Act with other statutory protection for mediation communications as the court balanced "any interest the [participants] have in the confidentiality of their mediation sessions" with "the public interest in the administration of criminal justice").

- a court determines that such testimony or disclosure is necessary to prevent a manifest injustice, help establish a violation of law, or prevent harm to the public health or safety of sufficient magnitude in the particular case to outweigh the integrity of dispute resolution proceedings in general by reducing the confidence of parties in future cases that their communications will remain confidential.[258]

In addition, under the statute, the neutral is prohibited from disclosing any dispute resolution communication or any communication provided in confidence to the neutral unless:

- all parties to the dispute resolution proceeding and the neutral consent in writing, and, if the dispute resolution communication was provided by a nonparty participant, that participant also consents in writing; or
- the dispute resolution communication is required by statute to be made public (but a neutral should make such communication public only if no other person is reasonably available to disclose the communication).[259]

Under the statute, a party to the ADR proceeding is also prohibited from disclosing any dispute resolution communication unless:

- the communication was prepared by the party seeking disclosure;
- all parties to the dispute resolution proceeding consent in writing;
- the dispute resolution communication is required by statute to be made public;
- the dispute resolution communication is relevant to determining the existence or meaning of an agreement or award that resulted from the dispute resolution proceeding or to the enforcement of such an agreement or award; or
- the dispute resolution communication was made by one of the parties (not the neutral) and was provided to, or was available to, all parties to the dispute resolution proceeding.[260]

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258 5 U.S.C. § 574(a)–(b) (Supp. 1998).
259 *Id.* § 574(a).
260 *Id.* § 574(b).

D. What statutes and rules govern whether ADR communications should be protected from disclosure?

Courts have looked to the authorities listed below when deciding issues concerning the confidentiality of ADR communications.

1. Statutes

The ADR Act of 1998 requires that, until such time as a national rule is adopted under the Rules Enabling Act, each district court "shall, by local rule . . . , provide for the confidentiality of the alternative dispute resolution processes and . . . prohibit disclosure of confidential dispute resolution communications."[261] *See infra* Appendix E.3.b. Also, by statute, certain evidence concerning court-based arbitration is inadmissible in the trial de novo unless the evidence would otherwise be admissible in the court under the Federal Rules of Evidence.[262] *See infra* Appendix E.1.a. Many state statutes have provisions that govern the confidentiality of ADR communications. *See infra* Appendix E.3.d(2) and E.5.

2. Federal Rules of Evidence

a. Rule 403

Rule 403 provides authority for balancing probative value with a number of countervailing factors when deciding whether to admit evidence. *See infra* Appendix E.1.b.

b. Rule 408

Rule 408 restricts the admissibility of certain communications, such as offers to settle or acceptance of such offers made in compromise negotiations. This rule, which is cited in many district court local ADR rules, has several limitations. *See infra* Appendix E.1.b, E.2.

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261. 28 U.S.C. § 652(d) (Supp. 1998).

262. *Id*. § 657(c)(3); Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, § 901(a), 102 Stat. 4642, 4661 (1988) (amended 1993, 1994, 1997) (previously codified at 28 U.S.C. § 655(c) (1994)).

c. Rule 501

Rule 501 states the standards for recognizing and applying privileges in federal court. Generally, under Rule 501, in federal question cases the issue is whether federal common law recognizes an ADR privilege. Where matters turn only on substantive questions of state law, state common law or statutory rules of privilege apply. *See infra* Appendix E.3.d.

3. Federal Rules of Civil Procedure

a. Rule 26 (c)

Rule 26(c)'s grant of authority to issue protective orders has been used to limit discovery of ADR communications. *See supra* section VIII.B.2.

b. Rule 45

Rule 45's grant of authority for courts to regulate the issuance of subpoenas and to protect respondents has been used to limit discovery of ADR communications. *See supra* section VIII.B.2.

c. Rule 68

Under certain circumstances a court might use the language of Rule 68, relating to the inadmissibility of unaccepted offers of judgment, to limit the admissibility of ADR communications. *See infra* Appendix E.1.b.

4. Local Rules on ADR

Many local rules provide that ADR communications should be treated as confidential or privileged to some extent. *See infra* Appendix E.1.b, E.2, E.3.c, E.4.

As described *infra* Appendix E, courts have applied these sources of authority in various ways in the ADR context.

E. Are sanctions appropriate for breaches of confidentiality?

Courts have sanctioned or admonished counsel for willfully disclosing to the court statements made by a neutral or settlement offers made by a

party in a session conducted under a court-based ADR program.[263] Some courts have local rules providing for the imposition of sanctions for violation of the court's ADR rules.[264]

Whether sanctions should be imposed and the severity of any sanctions would depend on a number of factors, including whether the mediator explained the extent of the confidentiality rules; whether the mediator asked the parties to sign a confidentiality agreement and whether such an agreement is required by local rule; the extent of willfulness or bad faith involved; and the severity of the impact that the disclosure had on the case. If sanctions are warranted, they might include oral admonition, written reprimand, the assessment of attorneys' fees, the assessment of costs of the mediation process, or mandatory training in mediation techniques and ethics.

The complexity of the issues discussed in this section and *infra* Appendix E suggest that for some time to come judges will be trying to find the appropriate balance between the competing concerns of protecting ADR communications and bringing relevant evidence to light.

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263. *See* Lake Utopia Paper Ltd. v. Connelly Containers, Inc., 608 F.2d 928, 930 (2d Cir. 1979) (denying motion for costs of appeal where movant's brief quoted statements made by court-employed evaluative mediator in violation of court rules on confidentiality); Clark v. Stapleton Corp., 957 F.2d 745, 746 (10th Cir. 1992) (admonishing counsel for recounting, in papers filed with the court, statements made by court-employed mediator at a settlement conference in violation of court's confidentiality rule); Bernard v. Galen Group, Inc., 901 F. Supp. 778, 782–84 (S.D.N.Y. 1995) (sanctioning attorney $2,500 for willfully disclosing to the court settlement offers made in court-based mediation proceeding, where referral order and mediation program rules described the confidentiality of the process); *see also* Paranzino v. Barnett Bank, N.A., 690 So. 2d 725 (Fla. Dist. Ct. App. 1997) (affirming sanction of trial court that dismissed plaintiff's case with prejudice, after plaintiff disclosed to newspaper the settlement offer made by defendant during court-ordered mediation in violation of agreement, state confidentiality statute, and confidentiality rule), *dismissed by* 695 So. 2d 700 (Fla. 1997) (table).

264. *See, e.g.,* Second Amended General Order No. 95-01 para. 7.10 (Bankr. C.D. Cal. Aug. 24, 1999) (for willful failure to attend mediation or other violations of the mediation program); E.D. Mo. Civ. R. 16-6.05(A) (for failure to attend, comply with the referral order, or otherwise cooperate in the ADR process); N.D. Okla. Civ. R. 16.3.J (for failure to comply with the settlement conference order or to participate in good faith in ADR proceedings); S.D. Tex. Civ. R. 20.L (for violations of the ADR rule).

IX. Elements of the Referral Order

A. Authorization for referral
B. Identification of the type of ADR to be used
C. Identification of the neutral or description of the neutral selection process
D. The neutral's responsibilities
E. Compensation of the neutral
F. Submission of materials
G. Attendance and settlement authority
H. Good faith participation
I. Deadlines
J. Interaction with trial processes
K. Confidentiality
L. Communication between the neutral and the judge
M. Ex parte communications between the neutral and the parties
N. Reporting of problems or ethical issues
O. Sanctions
P. Conclusion of the ADR session

After the court and the parties have made the decisions discussed in the preceding sections, the court will want to record them, and perhaps give further direction, in a referral order. The referral order is an important document that sets the ground rules for the ADR process, gives that process structure, and helps prevent problems that might occur without one. A good referral order can also fill in the blanks left by the absence of local rules on topics relevant to the referral, supplement relevant local rules, or simply reinforce the provisions of a local rule.

A good referral order should include sufficient detail about how the process will proceed to ensure that parties have clarity on fundamentals, such as confidentiality and compensation of the neutral. The degree of detail in the referral order can vary depending on the extent to which local rules address various issues and the circumstances of the case. A more detailed order may be appropriate, for example, if the court requires use of ADR in a case or if the parties are having trouble cooperating with each other and need an order setting basic ground rules, such as where ADR sessions will take place. The judge might want to leave the neutral some degree of flexibility, however, to adapt the ADR process to the changing needs of the parties and the dispute, particularly in an ADR process like mediation or early neutral evaluation.

Including more detail in the order may help avoid subsequent challenges to the ADR process, such as disputes over fees. On the other hand, for particularly contentious parties, a detailed order may ultimately provide them additional grounds for disputes. Generally, however, the best protection for the parties and the court is to make sure the items discussed below are covered, if not in local rules, then in the referral order in the individual case.

A. Authorization for referral

Referral orders generally cite the statute or rule that authorizes the court to refer parties to ADR. This is particularly important if the court is requiring the parties to use an ADR process without the consent of all parties. See *supra* sections I.A, V.A.2, and V.B.4, respectively, for discussions of authority to refer cases to ADR, authority to make a mandatory referral to ADR, and authority to compel client attendance.

B. Identification of the type of ADR to be used

Referral orders should identify what type of ADR process will be used. Some referral orders describe the ADR process in great detail, explaining to litigants the goals and methods of ADR.[265] Other orders identify only which ADR process will be used. Most mediation orders do not specify whether the process will be facilitative or evaluative, leaving this issue open for the mediator to work out with the parties. For a process like mediation, the court might want to suggest that the neutral talk with the parties before the ADR session about what they want from the process and how they want it to proceed.

C. Identification of the neutral or description of the neutral selection process

If the neutral has been selected, the neutral's name should be stated in the order. If the neutral has not been selected, the referral order should say how the neutral will be selected. *See supra* section VI.B–C.

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265. See, for example, ADR referral orders for the U.S. district courts for the Western District of Missouri and the Western District of Michigan.

D. The neutral's responsibilities

The referral order might address the scope of the neutral's responsibilities, such as whether the neutral has authority to require clients, as well as attorneys, to be present at the ADR sessions or to determine whether additional time should be allocated to the ADR process. The referral order might also state or refer to the standards of conduct the neutral is expected to meet. *See supra* section VI.A.

E. Compensation of the neutral

If the parties are to pay the neutral, the referral order can state the rate of compensation and the method for allocation of the neutral's fee between the parties. Under the ADR Act of 1998, district courts that choose to compensate neutrals must establish the amount of compensation that "each neutral shall receive for services rendered in each case."[266] Some referral orders state that parties may reallocate the neutral's fee between themselves as part of their negotiated settlement. *See supra* section VII.B.

F. Submission of materials

Some ADR programs require parties to file briefs or papers with the neutral prior to the ADR session. Some local rules specify what should be contained in these statements and how long they may be.[267] The referral order can mention how and when parties should file their submissions and whether the parties should exchange those submissions with each other or provide them ex parte to the neutral. *See supra* section V.D.

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266. 28 U.S.C. § 658(a) (Supp. 1998).

267. *See, e.g.,* N.D. Cal. ADR R. 6-7(c) (instructing attorneys to: list persons with decision-making authority who will attend the mediation session; describe the substance of the suit; summarize the party's views of key liability issues and damages; discuss the key evidence in the case; and identify discovery and motions that promise to contribute most to meaningful settlement negotiations); W.D. Mich. Civ. R. 16.3(e)(iii) (limiting each submission to no more than ten double-spaced pages in length); *see also* D. Ariz. Civ. R. 2.11(h)(2) (instructing parties in arbitration to identify issues to be determined, witnesses to be called, and exhibits to be presented); N.D. Ala. ADR Plan para. IV.B.6 (instructing parties to submit to mediator relevant pleadings and motions, a short memorandum stating legal and factual positions, and any other beneficial materials).

G. Attendance and settlement authority

The referral order should state whether the parties themselves or someone else with settlement authority must be present at the ADR sessions. Some courts allow a representative without full settlement authority to attend the ADR sessions as long as someone with full authority is available by telephone. If local rules do not state whether the neutral can order or waive attendance of the parties themselves (i.e., the clients as well as the attorneys), the judge may wish to clarify this issue, too, in the referral order. *See supra* section V.B.

H. Good faith participation

If the judge in the court's ADR program requires good faith or meaningful participation in the ADR process, the judge may wish to note this requirement in the referral order. *See supra* section V.C.

I. Deadlines

To keep a case on schedule, the court should give the parties a time frame for the ADR process. Some referral orders set dates for commencement and deadlines for completion of the ADR process. Others specify a number of weeks or months, to begin on appointment of the neutral or some other initial step. If deadlines are set, the court may want to be flexible in the event the parties are genuinely close to settlement and request an extension. *See supra* section II.C.

J. Interaction with trial processes

If the case is not going to follow the judge's regular case management schedule during the ADR process, the parties need to know what and how the pretrial process will change. Will the discovery period be tolled during the ADR process? Will scheduled hearings still go forward? Will the trial date be set back? The objective is to make the referral in such a way that, if ADR is unsuccessful, the parties can proceed with the litigation schedule without undue cost or delay. *See supra* section II.C, *infra* section X.E.

K. Confidentiality

The referral order can be used to let the parties know whether ADR communications will be considered confidential. The extent to which communications in ADR proceedings are protected from subsequent disclosure or admissibility is often left unclear by local ADR rules. Federal Rule of Evidence 408, which is referred to in many local rules, offers only limited protection. The judge may want to extend confidentiality beyond the narrow scope of Rule 408 by including in the referral order a recommendation or requirement that the parties and the neutral enter into a written confidentiality agreement prior to the first ADR session. *See supra* section VIII.B.1.

L. Communications between the neutral and the judge

The judge may want to clarify under what restricted circumstances a neutral may communicate with the judge either during or after the ADR process. As a general rule, the neutral should not communicate with the judge. *See infra* section X.A.

M. Ex parte communications between the neutral and the parties

The referral order might make clear the rules that govern communications between the neutral and the parties. If a neutral is a fact finder or decision maker, as in arbitration, ex parte communications are generally as inappropriate as they are between parties and the judge in litigation. In mediation or mediation-like processes, the general rule is that the neutral should not hold private conversations or caucuses with a party except as previously discussed with all ADR parties prior to undertaking such conversations or as provided in the court's referral order. There is, of course, a general exception for communication that concerns scheduling, pre-ADR submissions, or purely administrative matters.[268] See *supra* section VI.E.3 for a discussion on appointing a special master for settlement purposes.

268. *See* Model Standards for Mediators, *supra* note 180, Rules V, VI & cmt.

N. Reporting of problems or ethical issues

During the ADR process, the neutral or the parties might need to speak to someone in the court regarding problems or ethical issues relating to the ADR process. Communication with the assigned judge is risky in these situations because of the possibility that the judge will learn facts about the case or the parties that could undermine impartiality. If the court has an ADR compliance judge, the referral order could require the neutral and the parties to refer such matters to him or her. Or these matters might be handled by the ADR administrator if such responsibilities have been assigned to that person. Absent a compliance judge or qualified ADR administrator, a judge may want to exchange this responsibility with another judge for cases they each refer to ADR. See *infra* section X.H for a discussion of the ethical issues that might arise for neutrals and parties.

O. Sanctions

If sanctions might be imposed (e.g., for lack of good faith participation or for noncompliance with any aspect of the ADR referral order or local ADR rules), the judge may want to let the parties know of that possibility in advance through the referral order. *See infra* section X.C.

P. Conclusion of the ADR process

The referral order could describe the procedure to be followed when concluding the ADR process, especially if local rules are silent on the subject. The parties can be encouraged, for example, to enter into an executed settlement agreement as soon as settlement is reached. If local rules do not tell parties how to inform the court that the ADR process is complete and whether or not settlement has been reached, the judge may want to cover these matters in the referral order. *See infra* section X.I.

X. Managing Cases in the ADR Process

A. Are communications between the judge and the neutral appropriate?
   1. Restrictions on communications
   2. Suggested safeguards for necessary communications
B. How can the court keep the ADR process on track?
C. Might the court impose sanctions for nonattendance, attendance without settlement authority, or absence of good faith participation?
D. How might the judge respond if the parties ask for a decision on an unresolved issue that is impeding settlement?
E. How might the judge handle a dispositive motion that is filed while ADR is under way?
F. How might the court respond to requests for public access to ADR sessions and outcomes?
G. When might the court withdraw a case from ADR?
   1. Reasons for withdrawing a case from ADR
   2. Procedures for withdrawing a case
   3. Alternatives to withdrawing a case
H. What ethical issues may arise for the neutral or parties, and how might the court respond?
I. How should the ADR process be concluded?
   1. Conclusion of ADR when settlement has been reached
   2. Conclusion of ADR when there is no settlement
   3. Conclusion of ADR when a decision is rendered by the neutral

In referring a case to ADR, judges do not, of course, transfer control of the case to the parties or the ADR neutral. Responsibility for case management remains with the judge. Managing a case in ADR is in part a question of keeping the case on schedule while permitting the ADR process to unfold. It is also a question of preventing problems during the ADR process and being prepared to handle any that might arise.

A. Are communications between the judge and the neutral appropriate?

In handling any matters that may arise in cases already in the ADR process, the judge must keep in mind the extent to which it is appropriate to communicate with the neutral and the parties about the ADR process. Unless authorized by law, as in a request for injunctive relief, judges generally do not "initiate nor consider ex parte communications on the

merits, or procedures affecting the merits, of a pending . . . proceeding."[269] The nature and confidentiality of ADR processes require that court communication with ADR neutrals be strictly limited. The ADR Act of 1998 requires each district court, by local rule, to "provide for the confidentiality of [ADR] processes and to prohibit disclosure of confidential dispute resolution communications."[270]

1. Restrictions on communications

Generally, after a case has been referred to ADR, the judge should be informed of only the information listed below:

- The neutral's opinion, without elaboration, that the case is inappropriate for ADR;[271]
- The failure of a party to comply with the order to attend ADR;[272]
- Whether or not the case has settled, without elaboration, at the conclusion of the ADR process.[273] See *infra* section X.I for a discussion on concluding the ADR process.

Many local rules prohibit the neutral from providing the judge with any details of the substance of the ADR sessions unless all parties to the ADR process and the neutral stipulate otherwise.[274] The judge can help

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269. Code of Conduct, *supra* note 198, Canon 3A(4).

270. 28 U.S.C. § 652(d) (Supp. 1998). *See also* ADR Task Force of the Court Admin. & Case Management Comm., Guidelines for Ensuring Fair and Effective Court-Annexed ADR: Attributes of a Well-Functioning ADR Program and Ethical Principles for ADR Neutrals (1997), *reproduced infra* Appendix D, pt. III.7 (stating that neutrals should "protect the integrity" of the ADR process by "refraining from communicating with the assigned trial judge concerning the substance of negotiations or any other confidential information learned or obtained by virtue of the ADR process").

271. *See generally* National Mediation Standards, *supra* note 56, § 12.1.

272. *Id.*

273. *Cf. id.* § 12.2.

274. *See, e.g.,* N.D. Cal. ADR R. 5-12 (providing that early neutral evaluators may not disclose any ENE communications to the assigned judge, except under limited, specified conditions, including stipulation by the parties); E.D.N.Y. Civ. R. 83.11(d)(3) (providing that information about what transpired in the mediation session generally will not be made known to the court, but it may be disclosed by agreement of all parties and, if appropriate as determined by the mediator, the mediator); E.D. Tenn. Civ. R. 16.4(h) (providing that, except as otherwise required by law, mediators may not divulge, to the assigned judge or others, information given to them in confidence without consent of the parties).

the neutral and the parties preserve the confidentiality and integrity of the ADR process by not seeking information or intervening in the ADR process unless approached by the parties themselves through a formal procedure such as a motion. If the neutral has freedom to discuss the inner workings of the ADR process with the judge, litigants may soon conclude that they should not speak freely in the ADR sessions, and both the usefulness of ADR and the credibility of the process could be undermined. Such communications could also risk compromising the neutral's impartiality, as well as the judge's.

2. Suggested safeguards for necessary communications

If communication is necessary between the neutral and the court, generally it is best done in one of the ways listed below.

- In writing, approved in advance by all parties.
- On the record, with notice or a summary of the communication given to all parties.
- By taking the matter to another judge, an ADR coordinator, or another court staff member who is specifically designated to handle ADR matters of this type.[275]

In courts that have given their ADR administrators such responsibility, all communications from the neutral concerning ADR can be directed to the administrator. The best practice is to have the neutral report violations of the court's orders concerning ADR to a judge other than the assigned judge, such as an ADR compliance judge, or to a court official, such as the ADR administrator. Requests for additional time for ADR and other requests to the assigned judge, such as those involving discovery disputes or the status of a ruling on a pending motion, are best made by the parties themselves rather than by the neutral. See *supra* section VIII.B for a further discussion of safeguarding the confidentiality of the ADR process.

One way to assist the court's neutrals in handling the kinds of issues that may arise in ADR is to provide them with a forum for discussion of

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275. *See* National Mediation Standards, *supra* note 56, § 12.3; *see also* N.D. Cal. ADR R. 2-2 (stating that ADR magistrate judge shall hear and determine all complaints alleging violations of the ADR rules); E.D. Tenn. Civ. R. 16.4(p) (stating that ADR administrator is responsible for communications between mediators and the court).

typical and unusual problems. Some courts, for example, organize periodic brown-bag lunches for nonjudicial neutrals, where they can get the advice of other nonjudicial neutrals who may have encountered the same problems. *See infra* section X.H.

B. How can the court keep the ADR process on track?

The court may have to play a continuing role after the ADR referral to ensure that use of ADR does not interfere with the regular litigation schedule. Although the court will not be involved in the substance of the ADR process, the appropriate extent of involvement in other aspects of a case in ADR will vary depending on the circumstances of the case. In some cases, for example, the court may find it useful or necessary to resolve discovery disputes that might impede progress toward settlement. In some cases, for instance, the court might ask the parties for periodic, nonsubstantive reports on whether the parties should continue in ADR, whereas in other cases the court might simply set a deadline and let the parties proceed.

Some local rules establish time periods within which the ADR process must begin and end and permit the judge to extend the period upon motion of a party.[276] If there is no local rule, the extent to which boundaries are set on the time spent in ADR will depend on the judge. The judge can rely on other deadlines in the case to keep the case on track, but the ADR process usually requires its own discipline. A deadline for completion of the process can, for example, encourage serious negotiations and focus attention on settlement. Deadlines also may be more fair to the neutral by circumscribing his or her time commitment, especially if the neutral is serving pro bono. Deadlines should be flexible enough, however, to allow for extensions if the parties are making progress toward settlement.

It is important, however, that deadlines are not structured in such a way that ADR sessions become simply pro forma steps in the litigation process. This would be especially problematic if ADR referrals are mandatory. Pro forma, ineffective ADR processes are a waste of litigant's time and are damaging to the court's reputation.

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276. *See, e.g.,* local rules cited *supra* notes 38, 42.

C. Might the court impose sanctions for nonattendance, attendance without settlement authority, or absence of good faith participation?

The ADR Act of 1998 does not say whether sanctions should ever be used in the context of ADR. A number of courts provide for sanctions through their local ADR rules.[277] One source of authority for such provisions might be inherent judicial authority. *See supra* sections I.A, V.B.4. By analogy, another source of authority might be Federal Rule of Civil Procedure 16(f), which authorizes the judge to impose sanctions if, for example, no appearance is made on behalf of a party at a pretrial conference, if a party or party's attorney fails to participate in a pretrial conference in good faith, or if a party fails to obey a pretrial order.[278] In the context of pretrial conferences as well as ADR processes, sanctions have been imposed for failure to appear and for lack of preparation.[279] Sanctions might include imposition of costs, award of attorneys' fees, exclusion of evidence, denial of a trial de novo, or, under egregious circumstances, dismissal of the case.[280] Sanctions for contempt are normally re-

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277. *See, e.g.*, S.D. Fla. Civ. R. 16.2(E); S.D. Tex. Civ. R. 20(F), (L); W.D. Tex. Civ. R. CV-88 (c), (j). *See also* Fed. R. Civ. P. 83(b).

278. Fed. R. Civ. P. 16(f). *But see* Newton v. A.C. & S., Inc., 918 F.2d 1121, 1126–28 (3d Cir. 1990) (concluding that "Rule 16 authorizes courts to require parties to attend conferences for the purpose of discussing settlement and impose sanctions if they fail to participate in good faith" and that fines imposed violated the public policy that the "'court should never work to coerce or compel a litigant to make a settlement,'" quoting Del Rio v. Northern Blower Co., 574 F.2d 23, 26 (1st Cir. 1978)).

279. *See, e.g.*, G. Heileman Brewing Co. v. Joseph Oat Corp., 871 F.2d 648, 655 (7th Cir. 1989) (en banc) (upholding sanctions against corporation for failure to comply with court order to have "corporate representative" attend pretrial settlement conference, even though attorney was authorized to speak on behalf of principals); Nick v. Morgan's Foods, Inc., 99 F. Supp. 2d 1056, 1064 (E.D. Mo. 2000) (imposing more than $5,000 in sanctions for calculated refusal to prepare mediation memorandum and failing to send to mediation a corporate representative with authority to settle the case); Raad v. Wal-Mart Stores, Inc., No. 97-3015, 1998 WL 272879, at *1, *2 (D. Neb. May 6, 1998) (imposing sanctions against defendant for failure to send corporate representative to mediation); Myers v. Wiederhol, 185 F.R.D. 149, 152 (E.D.N.Y. 1999) (imposing sanctions after plaintiffs failed to appear at mandatory arbitration).

280. *See* Abney v. Patten, 696 F. Supp. 570, 573, 576 (W.D. Okla. 1987) (barring defendant Federal Deposit Insurance Corporation (FDIC) from defending

served for willful violations of court rules or orders.[281] See *supra* sections I.A and V.A.2 for a discussion of authority to compel use of ADR and *supra* section V.C for a discussion of what degree of participation to require.

Some believe that compelling attendance by someone with settlement authority, demanding good faith participation, and sanctioning noncompliance would probably do little to improve the prospects of settlement.[282] Indeed, some suggest that sanctions would result in judicial inefficiency, as valuable court time would be consumed litigating the sanctions issues.[283]

If a party or neutral in ADR is having trouble getting a party to participate, resolution is probably best sought within the ADR session itself, without the judge's involvement. If that fails and if the court's local procedures provide, a party could file a notice or motion of nonparticipation, preferably not with the assigned judge, but with another judge,[284] an ADR administrator, or a specially trained law clerk. To preserve the confidentiality of the ADR process and protect the assigned judge's impartiality, it

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claims against it at trial, and imposing Rule 11 sanctions, because FDIC in violation of court order refused to designate a representative with settlement authority). *But cf.* Robinson v. ABB Combustion Eng'g Servs., Inc., No. 93-3626, 1994 WL 404557, at *1–*2 (6th Cir. Aug. 2, 1994) (finding an abuse of discretion because the district court dismissed the case without a specific finding that plaintiff's failure to attend mediation, where plaintiff's counsel did attend, was willful and without considering less drastic sanctions).

281. *See, e.g., In re* Novak, 932 F.2d 1397, 1408–09 (11th Cir. 1991) (upholding criminal contempt sanction for failure to comply with court-ordered attendance at settlement conference); Hess v. New Jersey Transit Rail Operations, Inc., 846 F.2d 114, 116 (2d Cir. 1988) (holding that party could not be held in criminal contempt for failing to comply with court order that it make "bonafide offer of settlement," and holding that order requiring good faith offer was too vague); *In re* La Marre, 494 F.2d 753, 756 (6th Cir. 1974) (concluding that court had inherent power to order insurance company representative to attend a pretrial session and, on refusal, to enforce the order by contempt proceedings).

282. *See, e.g.,* Sherman, *supra* note 118, at 2094.

283. *See, e.g., id.*

284. *See, e.g.,* D.N.J. Civ. R. 301.1(b) (designating a compliance judge to "entertain any procedural or substantive issues arising out of mediation"); N.D. Cal. ADR R. 2-2 (designating a magistrate judge to "hear and determine all complaints alleging violations of these ADR local rules").

is best that he or she stay out of such disputes until other paths toward resolution have been attempted.[285]

D. How might the judge respond if the parties ask for a decision on an unresolved issue that is impeding settlement?

Sometimes the parties in a case referred to ADR may find that they have settled most issues in the case but that one or two issues remain unresolved and are thus impeding settlement. To protect the confidentiality and impartiality of the ADR process, the judge should not engage in ex parte discussions with any of the participants in the ADR process. The better approach is to have the parties file and brief a motion on the unresolved issues. To aid their settlement discussions, the judge might want to rule on that motion promptly. *See infra* section X.E.

In the non-ADR context, as a means to expedite the motion calendar, some judges issue tentative rulings in the form of a proposed or draft order before a scheduled hearing on a motion.[286] Consider whether this approach is appropriate in the ADR context as well.

If the unresolved issue is a discovery dispute between the parties and this dispute is impeding settlement discussions, the judge might consider issuing an order that would limit discovery during ADR to what the parties need for meaningful participation in the ADR process. Alternatively, the court might ask the parties to try to resolve the discovery dispute as part of the ADR process. *See supra* section II.D.

E. How might the judge handle a dispositive motion that is filed while ADR is under way?

While the ADR procedure is under way, one or more of the parties may file a dispositive motion. If considerable progress toward settlement has been made, the judge may want to avoid disrupting that progress with a ruling. This approach also might conserve the judge's time. There is also

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285. *See* Doe v. Nebraska, 971 F. Supp. 1305, 1307–08 (D. Neb. 1997) (deciding that materials related to the motion for sanctions (for not having authorized representatives appear at court-ordered mediation session) will be kept under seal and will not be made available to the assigned trial judge).

286. *See* Manual for Litigation Management and Cost and Delay Reduction 26–27 (Federal Judicial Center 1992).

the possibility, however, that ruling on the motion will hasten settlement negotiations or even terminate the case. Before ruling on the motion, the court could try to determine whether settlement is likely; to avoid any pressure on or risk of improper communications with the neutral, the court should address this question to the parties (e.g., through a telephone status conference). If the judge has already decided the motion, he or she might notify the parties that he or she is prepared to issue the decision and ask whether they want the decision held or issued. If the judge does not communicate his or her intention to rule on the motion, there may be some risk that the ruling and settlement will occur simultaneously, with potential for confusion about which one is the actual outcome.[287] Regardless of the approach taken, however, the judge should avoid ex parte communications so as not to risk breaching the confidentiality of the ADR process. *See supra* section X.A.

A problem also may arise for the neutral when a dispositive motion has been filed. The parties may, for example, call the neutral or arrive at the ADR session and inform the neutral that the session is unnecessary because a dispositive motion has been filed. A party may take this position in order to stymie the ADR process. A skilled ADR neutral can be effective despite this circumstance and in most situations should nonetheless proceed with the ADR session.

For a discussion of dispositive motions pending at the time of referral to ADR, see *supra* section II.F.

F. How might the court respond to requests for public access to ADR sessions and outcomes?

Court-based ADR sessions typically are not open to the general public.[288] ADR confidentiality policies sometimes conflict with policies concerning

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287. *See* Sheng v. Starkey Labs., Inc., 117 F.3d 1081, 1084 (8th Cir. 1997 (remanding case to federal district court for entry of judgment dismissing the action based on mediated settlement agreement and not based on summary judgment ruling that occurred nearly simultaneously with the settlement).

288. *But see* Judith Resnik, *Whose Judgment? Vacating Judgments, Preferences for Settlement, and the Role of Adjudication at the Close of the Twentieth Century*, 41 UCLA L. Rev. 1471, 1494 & n.87 (1994). In 1994, Professor Resnik conducted a survey of the nine federal district courts with voluntary court-based arbitration programs. Of the eight courts that responded, seven had held court-based arbitrations. "[T]wo districts reported that anyone could attend [arbitra-

public access to information generated by use of the public justice system.[289] However, courts have denied public access to judicial settlement conferences.[290] Courts also have held that settlement devices like summary jury trials are not subject to open court sessions or press access.[291] One commentator has noted that if as formal an ADR proceeding as a summary jury trial does not have to be open to the public, then less structured processes like court-based mediation and nonbinding arbitration do not have to be open to the public.[292] Nonetheless, the constitutionality of denying public access to federal court-based ADR proceedings, other than summary jury trial, has not yet been decided by a federal court.

A public agency that participates in ADR may be required to release certain information or open the ADR sessions to the public under, for example, the federal Freedom of Information Act (FOIA).[293] In the context of a settlement process that did not involve ADR, communications between a federal government agency and another party in furtherance of a

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tions]," three stated that it was up to the parties or arbitrator, and two had no information available on public access. *Id.*

289. *See generally* Elements of Program Design, *supra* note 94, at 98–100.

290. *See* United States v. Town of Moreau, 979 F. Supp. 129, 136 (N.D.N.Y. 1997) (denying a motion by intervenor newspaper to open settlement conferences to the public, because to do so "would delay if not all together prevent a negotiated settlement"), *aff'd*, United States v. Glen Falls Newspapers, Inc., 160 F.3d 853 (2d Cir. 1998); City of Hartford v. Chase, 942 F.2d 130, 135 (2d Cir. 1991) (noting that "past cases make clear that a federal judge has the power to prevent access to settlement negotiations when necessary to encourage the amicable resolution of disputes"); B.H. v. McDonald, 49 F.3d 294, 303 (7th Cir. 1995) (noting that settlement negotiations often take place in private with the help of a mediator and that when a judge plays the role of the mediator the "principle is no different").

291. *See, e.g.*, *In re* Cincinnati Enquirer, 94 F.3d 198, 199 (6th Cir. 1996) (holding that "the first amendment right of access does not attach to a summary jury trial"); *see also* Cincinnati Gas & Elec. Co. v. General Elec. Co., 854 F.2d 900, 903–04 (6th Cir. 1988) (stating that the First Amendment does not mandate access to the summary jury trial, because the process is more akin to a settlement conference than to a trial, and because access would probably hamper the summary jury trial's goal of promoting settlements).

292. *See* Edward F. Sherman, *Confidentiality in ADR Proceedings: Policy Issues Arising from the Texas Experience*, 38 S. Tex. L. Rev. 541, 560 (1997).

293. 5 U.S.C. § 552 (1994). *See generally* Rogers & McEwen, *supra* note 116, § 9:29.

proposed settlement were held to be not exempt from disclosure under FOIA.[294] Some states have passed "access to settlement" or "open meetings" statutes that prohibit secrecy in cases involving public hazards, safety, health, and, in some jurisdictions, public officials.[295]

With respect to public access to agreements that result from mediation, courts appear to follow the doctrine that has developed for settlement agreements.[296] For court-based arbitration, unless a party demands a trial de novo, an arbitration award becomes the judgment of the court, but the award may not be made known to the judge assigned to the ac-

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294. *See* County of Madison v. United States Dept. of Justice, 641 F.2d 1036, 1042 (1st Cir. 1981) (rejecting argument to create a FOIA "settlement exemption" that would be based on equitable grounds of public policy). *But see* Federal Deposit Ins. Corp. v. Ernst & Ernst, 677 F.2d 230, 232 (2d Cir. 1982) (holding that "the FOIA does not apply to a court's order directing an agency not to reveal the terms of an agreement crucial to the settlement of an action").

295. *See* Carrie Menkel-Meadow, *Public Access to Private Settlements: Conflicting Legal Policies*, 11 Alternatives to High Costs Litig. 85, 86 (1993). *Compare* Will Pryor & Robert M. O'Boyle, *Public Policy ADR: Confidentiality in Conflict?*, 46 SMU L. Rev. 2207 (1993) (contending that nonbinding, public policy mediation should be confidential), *with* Thomas S. Leatherbury & Mark A. Cover, *Keeping Public Mediation Public: Exploring the Conflict Between Confidential Mediation and Open Government*, 46 SMU L. Rev. 2221 (1993) (stating that public policy mediation should not be confidential).

296. *See* Rogers & McEwen, *supra* note 116, § 9:29. For examples of the doctrines that have evolved regarding settlement agreements, see Pansy v. Borough of Stroudsburg, 23 F.3d 772, 782 (3d Cir. 1994) (holding that a settlement agreement never filed with or enforced in the district court is not a "judicial record" accessible under the right of access doctrine); Bank of Am. Nat'l Trust & Sav. Ass'n v. Hotel Rittenhouse Assocs., 800 F.2d 339, 345 (3d Cir. 1986) (holding that "[o]nce a settlement is filed in the district court, it becomes a judicial record, and subject to the access accorded such records"). *But see* United States v. Amodeo, 44 F.3d 141, 145 (2d Cir. 1995) (stating that "the mere filing of a paper or document with the court is insufficient to render that paper a judicial document subject to the right of public access . . . [and] that the item filed must be relevant to the performance of the judicial function and useful in the judicial process in order for it to be designated a judicial document"); *Federal Deposit Ins. Corp.*, 677 F.2d at 232 (holding that a confidentiality order can be modified only "if an 'extraordinary circumstance' or 'compelling need' warrants the requested modification," citing Martindell v. International Tel. & Tel. Corp., 594 F.2d 291, 296 (2d Cir. 1979)).

tion until the court has entered final judgment or the action has otherwise terminated.[297]

Settlements reached in bankruptcy matters involving the trustee or bankruptcy estate might receive public scrutiny in the course of any notice and hearing process required by Federal Rule of Bankruptcy Procedure 9019, which governs the bankruptcy court's approval of a compromise or settlement.[298]

G. When might the court withdraw a case from ADR?

In rare instances, the court may need to withdraw a case from ADR either right after the referral or at some point after the ADR process has begun. Many ADR programs provide for a case to be withdrawn from ADR at the discretion of the court.[299]

1. Reasons for withdrawing a case

There are several reasons the court might want to withdraw a case from an ADR process. A case may simply be unsuitable for ADR, which may not be discovered until after the case has been referred. For example, in court programs that automatically refer cases to ADR, such as the mandatory arbitration programs, local rules generally provide for parties to opt out of the process. Even if the court does not have such a program, the court may receive opt-out requests from parties for a variety of justifiable reasons.

The court also may find it necessary to withdraw a case from ADR because of the behavior of the parties. A party may not be participating

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297. *See* 28 U.S.C. § 657 (a)–(b) (Supp. 1998); Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, § 901(a), 102 Stat. 4642, 4660–61 (1988) (amended 1993, 1994, 1997) (previously codified at 28 U.S.C. § 654 (1994)); *see infra* note 315.

298. *See generally* Norton, *supra* note 75, § 146:4 (describing public access to settlement agreements in bankruptcy matters and exceptions to public access).

299. *See, e.g.,* M.D. Fla. Civ. R. 9.03(c) (mediation); S.D. Fla. Civ. R. 16.2.D.4 (mediation); W.D. Pa. Civ. R. 16.2.4.C (arbitration); *see also* Form of General Order, *supra* note 113, § 12.0.

in good faith,[300] may become abusive or threatening in the ADR session, or may attempt to drag out the ADR process through noncooperation.

Mediator misconduct also may present a situation where withdrawal of the case from ADR seems the best option. In such instances, however, the court may want to explore with the parties whether they would benefit from appointment of another mediator.

2. Procedures for withdrawing a case

It will most likely be the neutral or the parties themselves who recognize the need to withdraw a case from ADR. Under many court ADR procedures, the neutral has the authority to terminate the ADR process for reasons that include lack of settlement or a determination that ADR is inappropriate in the given situation.[301] If the district has an ADR compliance judge or has assigned such duties to the ADR administrator, the neutral or the parties could go to this person to request or discuss withdrawal. If the district does not have a compliance judge or has not given the ADR administrator such responsibilities, the neutral or the parties might find an appropriate way to communicate to the judge the need to withdraw the case without compromising the confidentiality or ex parte rules of the ADR process. A simple notice to the judge by the neutral that the ADR process has been completed without settlement, without any mention of why the process is being terminated, may be the appropriate action. *See supra* section X.A.

3. Alternatives to withdrawing a case

Withdrawing a case from ADR may not be the only recourse. Other options depend on the circumstances of a given case and may include the following:

- Appoint a different neutral;
- Switch to a different ADR method;
- Hold a conference with the parties to evaluate the potential benefits of further ADR;

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300. For further discussion of what form of participation might be required of the parties, see *supra* section V.C.

301. *See, e.g.,* D. Mass. Expense and Delay Reduction Plan R. 4.03(d)(4) (mediation); E.D. Pa. Civ. R. 53.2.1.5(f) (mediation).

- Issue an order resolving discovery problems or other matters that may be hindering the ADR process; or
- Set a firm date for trial, but allow the ADR process to continue.

H. What ethical issues may arise for the neutral or parties, and how might the court respond?

Neutrals and parties in cases referred to ADR may, from time to time, encounter situations that fall into a category of problems generally referred to as "ethical issues." Among the kinds of issues that may arise for neutrals or parties—and which, fortunately, arise infrequently—are those described below.

- The neutral becomes aware during a private caucus that a party intends physical violence against the opposing party. To warn the opponent or to notify the appropriate authorities may violate the rules of confidentiality, but a failure to do so may put the person in grave danger.
- A party to a mediation has been ordered by the mediator to produce certain documents for the next mediation session. In the party's view, the documents are irrelevant. Given that this is the third time the mediator has issued such an order, the party suspects the mediator is trying to increase the number of hours spent in mediation and thus the mediator's fee.
- A defendant has made an offer to the plaintiff. In private caucuses, the mediator repeatedly tells the plaintiff to accept the offer because it is higher than could be expected following a trial. The plaintiff feels undue pressure to accept the offer and believes that refusal would put him or her at a disadvantage in further negotiations conducted by this mediator.
- The mediator knows that a recent decision controls the legal question in a case. The attorney whose client would benefit from the decision seems unaware of it and is about to agree to a settlement that is substantially lower than might be expected given the recent decision. Alerting the attorney may risk the mediator's neutrality or the appearance of neutrality, but failing to alert the attorney may result in a miscarriage of justice and a violation of an important mediation principle—informed consent.

- The mediator learns during a private caucus that, prior to the mediation, an attorney had not communicated to his or her client a settlement offer made by the opposing party. As an attorney, the mediator has an obligation under the *Rules of Professional Conduct* to report this apparent ethical violation, but to do so would violate the ADR program's confidentiality rules.

Neutrals or parties in such situations may want advice on how to handle the problem, and they may want to talk about it with the judge assigned to the case. The assigned judge should decline to discuss such matters with the neutrals or the parties. The risk is too great that he or she will learn information about the case and the parties that should not be known by the assigned judge and that could undermine his or her impartiality. See *supra* section X.A for a discussion of restrictions on communications between the assigned judge and the neutral.

There are other ways to give neutrals the assistance they need when faced with an ethical dilemma. The court's confidentiality rule, for example, might include exceptions for threats of violence, attorney misconduct, or evidence of fraud. *See supra* section VIII.C. The court could appoint an ADR compliance judge to counsel ADR neutrals who face ethical dilemmas, or this responsibility could be given to the ADR administrator if that person has the requisite skills and experience. Some courts have organized regular brown-bag lunches where nonjudicial neutrals can discuss, in non-case-specific terms, the problems they have encountered and how they handled them. Problems such as these also should be discussed in the training the court provides for its neutrals.

To some extent, courts and their ADR neutrals are facing quandaries such as those identified here because the various statutes and rules of conduct have not caught up with the rapid expansion in use of ADR. As of this writing, there are three projects under way to develop model codes or rules that will govern neutrals generally, attorneys when they are acting as neutrals, and the overall ADR process. The National Conference of Commissioners on Uniform State Laws (NCCUSL) and the American Bar Association Section of Dispute Resolution are in the process of drafting a *Uniform Mediation Act* to address concerns about widely varying and frequently conflicting statutory provisions that govern mediation across the fifty states.[302] The American Bar Association's Commis-

302. *See supra* note 256.

sion on the Evaluation of the Rules of Professional Conduct, known as "Ethics 2000," is considering new rules that would govern the conduct of attorneys who act as ADR neutrals or who represent parties in ADR proceedings.[303] The CPR-Georgetown Commission on Ethics and Standards in ADR, a joint project of the CPR Institute for Dispute Resolution and Georgetown University Law Center, has proposed revisions to the ABA Model Rules of Professional Conduct to regulate the conduct of attorneys who act as ADR neutrals.[304]

These efforts are not specifically aimed at court-based ADR, but the general provisions regarding conduct of neutrals and the specific provisions regarding the conduct of attorneys who act as neutrals may, if adopted, provide helpful guidance to neutrals who serve on federal court panels, as well as to judges and ADR administrators who may be approached by neutrals or parties seeking advice.

I. How should the ADR process be concluded?

Regardless of the outcome of ADR, the judge should be informed of the outcome as soon as possible after the conclusion of ADR so that the next step in resolving the case can be taken. Local rules often provide the steps to be taken. For example, the neutral or the parties might be asked to inform the court of the following at the conclusion of the ADR process:[305]

- if agreement is reached, report its terms only to the extent needed to be consistent with the court's policies governing settlements in general;
- if the parties do not reach agreement on any matter, report the lack of an agreement without comment or recommendation; and
- if the parties do not reach agreement, identify any pending motions or outstanding legal issues, discovery process, or other action by any party which, if resolved or completed, would facilitate the possibility of a settlement.

Generally, reports submitted by the neutral should be submitted only with consent of the parties.

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303. *See Draft ABA Rules*, *supra* note 180.
304. *See CPR-Georgetown Comm'n Proposed Model Rule*, *supra* note 180.
305. *Cf.* National Mediation Standards, *supra* note 56, § 12.2.

For court-based arbitration, an arbitration award becomes the judgment of the court unless a party requests a trial de novo. The judge is not allowed to know the award until final judgment has been entered or the action has otherwise terminated.[306]

1. Conclusion of ADR when settlement has been reached

Local rules may spell out how the parties are to proceed if they reach settlement. If the local rules do not do so, or the judge has particular preferences about procedures involving settlement, he or she may want to include them in the referral order. *See supra* section IX.P. When the parties reach settlement, they should get the settlement agreement in writing and on the record as quickly as possible.[307]

The judge should decide the circumstances under which he or she will review a settlement. Some settlements will always require the judge's review and approval, such as settlements in class actions and in certain bankruptcy matters.[308] Beyond that, some commentators maintain that it is not the role of the court to evaluate parties' ADR settlements, which are by definition voluntary, just as most settlements in traditional litigation are not subject to judicial review. Others argue that judicial review is appropriate in some circumstances to help ensure that the settlement will endure.

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306. *See* 28 U.S.C. § 657(b) (Supp. 1998); Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, § 901(a), 102 Stat. 4642, 4660–61 (1988) (amended 1993, 1994, 1997) (previously codified at 28 U.S.C. § 654 (1994)).

307. *See, e.g.,* E.D.N.C. R. 32.07(g) (parties in a mediation should write down and sign the essential terms and conditions of the settlement before departing the conference); S.D. Fla. Civ. R. 16.2(F)(2) (counsel shall promptly notify the court of settlement by filing a notice of settlement, signed by counsel, within ten days of the mediation conference). A local rule or the referral order might require that a pre-designated party submit a fully executed stipulation and proposed order to the court within, say, twenty calendar days after the end of mediation. *See, e.g.,* Form of General Order, *supra* note 113, § 11.1.

308. Settlements reached in some bankruptcy matters are subject to the notice and hearing process required by Federal Rule of Bankruptcy Procedure 9019, which governs the court's approval of a compromise or settlement. Fed. R. Bankr. P. 9019.

2. Conclusion of ADR when there is no settlement

Under many local rules, if the neutral determines that it would not be worthwhile to continue the ADR process, the neutral is to notify the court in writing that the parties have not settled the case and that the ADR process is finished.[309] Many local rules specify the limited amount of information that may be communicated to the judge or court in the notice.[310] After receiving such notice, the court could schedule a status conference and ask the parties to submit a statement about what needs to be done next in the case. The court might ask the parties, for example, whether issues can be narrowed or whether the case can be otherwise streamlined because of progress made during the ADR sessions. The court might discuss with the parties how best to take advantage of their investment in the ADR process. A stipulation on any resolved issues may be appropriate. Further steps toward settlement can be suggested, discussed, and potentially decided.

3. Conclusion of ADR when a decision is rendered by the neutral

In ADR processes where the neutral performs an adjudicative role, such as court-based arbitration, the ADR process is concluded when the neutral makes his or her decision and the decision is filed with the clerk of the court. Any party may request a trial de novo within thirty days after the filing of an arbitration award.[311] Alternatively, the parties may accept the arbitration award, which then becomes the binding judgment of the court.[312]

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309. *See, e.g.,* E.D.N.C. R. 32.09(e), (f) (mediation); D.S.C. Civ. R. 16.09(G), (H) (mediation); E.D. Tenn. Civ. R. 16.4(m) (mediation).

310. *See, e.g.,* D.S.C. Civ. R. 16.09(H) (mediator to report in writing whether agreement was reached without disclosing "substance, tenor or other confidential matter"); N.D. Cal. ADR R. 6-13 (mediator to report to ADR Unit the date session was held, whether case settled in whole or in part, whether followup is scheduled, and any stipulations parties have agreed to disclose).

311. *See* 28 U.S.C. § 657(c)(1) (Supp. 1998); § 901(a), 102 Stat. at 4661 (previously codified at 28 U.S.C. § 655 (1994)).

312. *See* 28 U.S.C. § 657(a) (Supp. 1998); § 901(a), 102 Stat. at 4660 (previously codified at 28 U.S.C. § 654(a) (1994)).

Appendix A: Descriptions of the Principal Court-Based ADR Processes

1. Mediation
2. Arbitration
3. Early neutral evaluation
4. Summary jury trial
5. Minitrial
6. Settlement week
7. Case evaluation ("Michigan mediation")
8. Med-Arb

For those who may be less familiar with ADR, we offer definitions of the basic types of ADR processes, recognizing that local variations may alter the picture from court to court.[313] Some ADR procedures are more suitable for some types of cases than others. In section III, *supra*, we discuss case and party characteristics to consider in deciding whether a case is appropriate for ADR, and in section IV, *supra*, we discuss criteria for selecting an ADR process for the case. See *supra* section I.B for a discussion of judicial settlement conferences and ADR. See *supra* section I.D for a discussion of the distinctions between voluntary and mandatory ADR and between binding and nonbinding ADR.

1. Mediation

Mediation is a flexible, nonbinding dispute resolution process in which a third-party neutral, the mediator, facilitates negotiations among the parties to help them resolve the dispute. In mediation, the parties are the decision makers. Mediation is also generally referred to as an interest-based process—in contrast to a rights-based process—because it is designed to help the parties clarify any underlying motivations or interests. The mediator also may help the parties probe the strengths and weaknesses of their legal positions, enhance communications, explore the con-

313. *See* Plapinger & Stienstra, *supra* note 1, at 71–308 (providing court-by-court description of federal district court ADR programs, including, for example, what kind of ADR procedures are offered by each court, whether referral is mandatory or voluntary, whether parties must pay a fee to the neutral, and whether the court has adopted a confidentiality rule).

sequences of not settling, and generate settlement options. Mediation sessions sometimes result in inventive solutions, including those where both sides can profit from the settlement terms. Mediation sessions also are generally confidential, to encourage the parties to discuss any issue that might help resolve the dispute.

Most kinds of civil cases are considered appropriate for mediation, and most federal courts define case eligibility broadly, excepting for example only cases involving a pro se party and cases generally decided on the briefs, such as Social Security appeals and prisoner civil rights cases. Referral to mediation can occur at any stage in the litigation.

The mediator, who may meet jointly or separately with the parties, serves as a facilitator and does not issue a decision or make findings of fact. In the federal district courts, the mediator is usually an attorney approved by the court. In some districts, however, magistrate judges, and occasionally district or bankruptcy judges, who have been trained in mediation techniques, mediate cases. Several district courts also include nonlawyer professionals, such as engineers, on their rosters of court-approved mediators. Similarly, some bankruptcy courts use nonlawyer professionals, such as accountants and appraisers, as court-appointed mediators.

After judicial settlement conferences, mediation is the next most common form of ADR in the federal district, bankruptcy, and appellate courts.

As mediation has developed, distinct mediation strategies or styles have emerged. In classic mediation, the mediator's mission is purely facilitative. The mediator does not give an opinion on the likely outcome at trial, for example, but seeks only to help the parties find solutions to the underlying interests or problems giving rise to the litigation. Generally, in this kind of mediation, mediator expertise in the process of mediation, rather than in the subject matter of the litigation, is viewed as paramount. Some mediation professionals view facilitative mediation as the preferred approach because the mediator preserves the principle of complete impartiality by not giving an assessment or prediction of the outcome of the case at trial.

In the evaluative approach, the mediator is more likely to give a view of the case. The mediator's view of the case—including, for example, an assessment of potential legal outcomes—is used as a settlement tool. This approach generally requires mediators who are experts in the subject

matter of the case. Most evaluative mediators also consider the interests of the parties in attempting to facilitate a settlement.

Many mediators blend facilitation and evaluation, applying each approach in varying degrees at different times during the mediation process, depending on the needs of a given case.[314]

In some federal courts, the referral of certain case types to mediation may be made automatically at a specified stage in the litigation; these mediation programs may be referred to as mandatory programs because of the presumption that these cases will use mediation. Such programs generally provide a method for seeking exemption from mediation. In other courts, the use of mediation may be completely at the discretion of the parties (voluntary mediation) or may be ordered by the judge after discussion with the parties.

2. Arbitration

Unlike mediation, arbitration is an adjudicatory, rights-based process. In federal court-based arbitration, one or three arbitrators hear adversarial presentations, usually in summary form, by each side to the litigation and then issue a nonbinding "award," or decision, on the merits. Witnesses may or may not be called, but exhibits are often submitted to the arbitrators. At a party's request and cost, the hearing may be held on the record. Either party may reject the arbitration award and request a trial de novo in the district court. Arbitration is a fairly formal process, in many ways resembling an expedited court trial.

Mandatory arbitration under the 1988 Act. Most of the federal court arbitration programs were established under a 1988 federal statute (1988 Act), which authorized ten district courts to implement arbitration programs where litigant participation is presumptively mandatory. Eligible cases, which are defined by specific objective case characteristics such as nature of suit, are generally automatically referred to arbitration by court order once the case is filed. Certain types of cases are excluded from mandatory arbitration, such as cases involving violations of constitutional rights or damage claims in excess of a specified dollar amount. In all

314. *See generally* Leonard L. Riskin, *Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed*, 1 Harv. Negot. L. Rev. 7 (1996).

mandatory arbitration programs, the parties are provided an avenue for seeking exemption from the referral to arbitration.

The ten courts authorized to implement mandatory arbitration programs were the following: Northern District of California, Middle District of Florida, Western District of Michigan, Western District of Missouri, District of New Jersey, Eastern District of New York, Middle District of North Carolina, Western District of Oklahoma, Eastern District of Pennsylvania, and Western District of Texas.[315] Several of these ten courts have amended their processes to make them voluntary; one has dropped the program altogether.

Voluntary arbitration under the 1988 Act. The 1988 Act also authorized the Judicial Conference of the United States to designate an additional ten courts to establish arbitration programs in which parties participate voluntarily.[316] Of the courts that have created voluntary arbitration programs under the 1988 Act, some authorize participation in arbitration only if the parties voluntarily come forward, and others automatically refer certain case types to the program but permit parties to opt out with no questions asked.[317] The Judicial Conference approved a list of ten courts in 1990 and delegated authority to the predecessor of its Committee on Court Administration and Case Management to make changes to the list.[318]

Arbitration under the ADR Act of 1998. The ADR Act authorizes voluntary arbitration for all district courts.[319] Among other provisions, referral to arbitration requires party consent, the action may not be based on alleged violations of constitutional rights, jurisdiction may not be based on an alleged deprivation of civil or elective franchise rights, and the re-

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315. Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, § 901(a), 102 Stat. 4642, 4659–63 (1988) (amended 1993, 1994, 1997) (previously codified at 28 U.S.C. §§ 651–658 (1994)). *See generally* Meierhoefer, *supra* note 49 (evaluting the mandatory arbitration programs in existence in the late 1980s).

316. § 901(a), 102 Stat. at 4662.

317. *See generally* David Rauma & Carol Krafka, Voluntary Arbitration in Eight Federal District Courts: An Evaluation (Federal Judicial Center 1994).

318. *See* Reports of the Proceedings of the Judicial Conference of the United States 22 (1990). The list has changed over the years. *See generally* Rauma & Krafka, *supra* note 317, at 8 (identifying the districts with voluntary arbitration programs as of 1994, and evaluating those programs).

319. 28 U.S.C. §§ 651(b), 654(a) (Supp. 1998).

lief sought must consist of money damages not in excess of $150,000.[320] The ADR Act does not alter any arbitration program established under the 1988 Act.[321]

3. Early neutral evaluation

Early neutral evaluation (ENE) is a nonbinding process designed to improve case planning and settlement prospects by giving litigants an early advisory evaluation of the case. Like mediation, ENE is thought to be widely applicable to many types of civil cases, including complex disputes.

In ENE, a neutral evaluator, usually a private attorney with expertise in the subject matter of the dispute,[322] holds a confidential session with the parties and counsel early in the litigation—generally before much discovery has taken place—to hear both sides of the case. The evaluator then helps the parties clarify issues and evidence, identifies strengths and weaknesses of the parties' positions, and gives the parties a nonbinding assessment of the value or merits of the case. Depending on the goals of the program, the evaluator also may mediate settlement discussions or offer case management assistance, such as developing a discovery plan.

The process was originally designed to improve attorneys' pretrial practices and knowledge of their cases by forcing them and their clients to conduct core investigative and analytical work early, to communicate directly across party lines, to expose each side to the other's case, and to consider the wisdom of early settlement.

In some district courts with ENE programs, the ENE sessions occur later, rather than earlier, in the case. Although the term "*early* neutral evaluation" is less apt in such circumstances, the key feature of the process—evaluation of the case by a neutral—remains the same.

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320. *See id.* § 654(a).

321. *Id.* § 654(d).

322. *Compare* N.D. Cal. ADR R. 5-3(a) (requiring subject matter expertise for ENE neutrals), *and* W.D. Okla. Civ. R. 4.1 (stating that ENE neutrals have subject matter expertise), *with* W.D. Mich. Civ. R. 16.4(b)(i) (requiring, for ENE neutrals, at least five years law practice and "general peer recognition for his or her expertise").

4. Summary jury trial

The summary jury trial is a nonbinding ADR process designed to promote settlement in trial-ready cases.[323] A judge presides over the trial, where attorneys for each party present the case to a jury, generally without calling witnesses but relying instead on submission of exhibits. After this abbreviated trial, the jury deliberates and then delivers an advisory verdict. After receiving the jury's advisory verdict, the parties may use it as a basis for subsequent settlement negotiations or proceed to trial.

A summary jury trial is typically used after discovery is complete. Depending on the structure of the process, it can involve both facilitated negotiations, which can occur throughout the planning, hearing, deliberation, and post-verdict phases, and outcome prediction, that is, an advisory verdict. Part or all of the case may be submitted to the jury. The jurors are chosen from the court's regular venire; some judges tell the jurors at the outset that their role is advisory, but others wait until a verdict has been given.

Some judges use this process only for protracted cases where the predicted length of a full trial justifies the substantial resources required by a summary jury trial. Other judges use it for routine civil litigation where litigants differ significantly about the likely jury outcome. The format of this ADR process is determined by the individual judge more than in most ADR procedures. A variant of the summary jury trial is the summary bench trial, where a judge, rather than a jury, issues the advisory opinion.

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323. *See* M.-Daniel Jacoubovitch & Carl M. Moore, Summary Jury Trials in the Northern District of Ohio (Federal Judicial Center 1982) (describing and analyzing summary jury trial methods); *see also* Thomas D. Lambros, *The Summary Jury Trial—Ending the Guessing Game: An Objective Means of Case Evaluation: A Comment on Professor Woodley's Proposal*, 12 Ohio St. J. on Disp. Resol. 621 (1997); Richard A. Posner, *The Summary Jury Trial and Other Methods of Alternative Dispute Resolution: Some Cautionary Observations*, 53 U. Chi. L. Rev. 366 (1986); Thomas D. Lambros, *The Summary Jury Trial and Other Alternative Methods of Dispute Resolution: A Report to the Judicial Conference of the United States Committee on the Operation of the Jury System*, 103 F.R.D. 461 (1984).

5. Minitrial

The minitrial is a flexible, nonbinding ADR process used primarily out of court. A few federal judges have developed their own versions of the minitrial, which is generally reserved for large cases.

In a typical court-based minitrial, each side presents a shortened version of its case to party representatives who have settlement authority—for example, the senior executives of corporate parties. The hearing is informal, with no witnesses and with relaxed rules of evidence and procedure. A judge or nonjudicial neutral may preside over the one-day or two-day hearing. Following the hearing, the client representatives meet, with or without the neutral presider, to negotiate a settlement.

6. Settlement week

In a typical settlement week, a court suspends normal trial activity and, aided by volunteer mediators, sends numerous trial-ready cases to mediation sessions held at the courthouse. The mediation sessions may last several hours, with additional sessions held as needed. Cases unresolved during settlement week return to the court's regular docket for further pretrial or trial proceedings as needed. If settlement weeks are held infrequently and are a court's only form of ADR, parties who want to use ADR may have to look outside the court or may incur additional litigation expenses while cases await referral to settlement week. This can be overcome by regularly offering at least one other form of ADR.

7. Case evaluation ("Michigan mediation")

Case evaluation provides litigants in trial-ready cases with a written, nonbinding assessment of the case's value. The assessment is made by a panel of three attorneys after a short hearing. If the panel's assessment is accepted by all parties, the case is settled for that amount. If any party rejects the panel's assessment, the case proceeds to trial. This arbitration-like process has been referred to as "Michigan mediation" because it was created by the Michigan state courts and subsequently used by the federal district courts in Michigan as well.[324]

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324. *See, e.g.,* W.D. Mich. Civ. R. 16.5.

8. Med-Arb

As the name suggests, the med-arb procedure begins with mediation. If the parties reach impasse or cannot resolve certain issues, they can, with all parties' full agreement, move into arbitration. The parties may, however, be unwilling to speak candidly during the mediation when they know the neutral may ultimately become a decision maker. This can be overcome if two different people serve as mediator and arbitrator. The med-arb process is used more in the private sector than in the court setting, although at least one federal district court authorizes use of med-arb.[325]

325. *See* N.D. Ala. ADR Plan sec. IV.C (The district's ADR Plan appears as Appendix C of the district's Civil Justice Expense and Delay Reduction Plan, which is Appendix I of the district's local rules).

Appendix B: Alternative Dispute Resolution Act of 1998 (as codified)

United States Code
Title 28. Judiciary And Judicial Procedure
Part III—Court Officers And Employees
Chapter 44—Alternative Dispute Resolution

§ 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.[326]

(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.

§ 652. Jurisdiction

(a) Consideration of alternative dispute resolution in appropriate cases.—Notwithstanding any provision of law to the contrary and except as provided in subsections (b) and (c), each district court shall, by local rule adopted under section 2071(a), require that litigants in all civil cases consider the use of an alternative dispute resolution process at an appropriate stage in the litigation. Each district court shall provide litigants in all civil cases with at least one alternative dispute resolution process, including, but not limited to, mediation, early neutral evaluation, minitrial, and arbitration as authorized in sections 654 through 658. Any district court that elects to require the use of alternative dispute resolution in certain cases may do so only with respect to mediation, early neutral evaluation, and, if the parties consent, arbitration.

(b) Actions exempted from consideration of alternative dispute resolution.—Each district court may exempt from the requirements of this section specific cases or categories of cases in which use of alternative dispute resolution would not be appropriate. In defining these exemptions, each district court shall consult with members of the bar, including the United States Attorney for that district.

(c) Authority of the Attorney General.—Nothing in this section shall alter or conflict with the authority of the Attorney General to conduct litigation on behalf of the United States, with the authority of any Federal agency authorized to conduct litigation in the United States

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326. [Editor's note: 9 U.S.C. §§ 1–307 (1994) (federal arbitration statute that provides *inter alia* for the enforcement of arbitration agreements made in certain kinds of transactions).]

courts, or with any delegation of litigation authority by the Attorney General.

(d) Confidentiality provisions.—Until such time as rules are adopted under chapter 131 of this title [28 U.S.C.A. § 2071 et seq.] providing for the confidentiality of alternative dispute resolution processes under this chapter [28 U.S.C.A. § 651 et seq.], each district court shall, by local rule adopted under section 2071(a), provide for the confidentiality of the alternative dispute resolution processes and to prohibit disclosure of confidential dispute resolution communications.

§ 653. Neutrals

(a) Panel of neutrals.—Each district court that authorizes the use of alternative dispute resolution processes shall adopt appropriate processes for making neutrals available for use by the parties for each category of process offered. Each district court shall promulgate its own procedures and criteria for the selection of neutrals on its panels.

(b) Qualifications and training.—Each person serving as a neutral in an alternative dispute resolution process should be qualified and trained to serve as a neutral in the appropriate alternative dispute resolution process. 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 persons who have been trained to serve as neutrals in alternative dispute resolution processes. Until such time as rules are adopted under chapter 131 of this title [28 U.S.C.A. § 2071 et seq.] relating to the disqualification of neutrals, each district court shall issue rules under section 2071(a) relating to the disqualification of neutrals (including, where appropriate, disqualification under section 455 of this title, other applicable law, and professional responsibility standards).

§ 654. Arbitration

(a) Referral of actions to arbitration.—Notwithstanding any provision of law to the contrary and except as provided in subsections (a), (b), and (c) of section 652 and subsection (d) of this section, a district court may allow the referral to arbitration of any civil action (including any adversary proceeding in bankruptcy) pending before it when the parties consent, except that referral to arbitration may not be made where—

(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.

(b) Safeguards in consent cases.—Until such time as rules are adopted under chapter 131 of this title relating to procedures described in this subsection, the district court shall, by local rule adopted under section 2071(a), establish procedures to ensure that any civil action in which arbitration by consent is allowed under subsection (a)—

(1) consent to arbitration is freely and knowingly obtained; and

(2) no party or attorney is prejudiced for refusing to participate in arbitration.

(c) Presumptions.—For purposes of subsection (a)(3), a district court may presume damages are not in excess of $150,000 unless counsel certifies that damages exceed such amount.

(d) Existing programs.—Nothing in this chapter is deemed to affect any program in which arbitration is conducted pursuant to section [sic][327] title IX of the Judicial Improvements and Access to Justice Act (Public Law 100-702), as amended by section 1 of Public Law 105-53.

§ 655. Arbitrators

(a) Powers of arbitrators.—An arbitrator to whom an action is referred under section 654 shall have the power, within the judicial district of the district court which referred the action to arbitration—

(1) to conduct arbitration hearings;

(2) to administer oaths and affirmations; and

(3) to make awards.

(b) Standards for certification.—Each district court that authorizes arbitration shall establish standards for the certification of arbitrators and shall certify arbitrators to perform services in accordance with such stan-

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327. [Editor's note: The word "section" probably should not appear or the intent was to refer to a section of Title IX of the Judicial Improvements and Access to Justice Act, which authorized mandatory arbitration programs for ten district courts and voluntary arbitration programs for another ten district courts. *See supra* Appendix A.2.]

dards and this chapter. The standards shall include provisions requiring that any arbitrator—

- **(1)** shall take the oath or affirmation described in section 453; and
- **(2)** shall be subject to the disqualification rules under section 455.

(c) Immunity.—All individuals serving as arbitrators in an alternative dispute resolution program under this chapter are performing quasi-judicial functions and are entitled to the immunities and protections that the law accords to persons serving in such capacity.

§ 656. Subpoenas

Rule 45 of the Federal Rules of Civil Procedure (relating to subpoenas) applies to subpoenas for the attendance of witnesses and the production of documentary evidence at an arbitration hearing under this chapter.

§ 657. Arbitration award and judgment

(a) Filing and effect of arbitration award.—An arbitration award made by an arbitrator under this chapter, along with proof of service of such award on the other party by the prevailing party or by the plaintiff, shall be filed promptly after the arbitration hearing is concluded with the clerk of the district court that referred the case to arbitration. Such award shall be entered as the judgment of the court after the time has expired for requesting a trial de novo. The judgment so entered shall be subject to the same provisions of law and shall have the same force and effect as a judgment of the court in a civil action, except that the judgment shall not be subject to review in any other court by appeal or otherwise.

(b) Sealing of arbitration award.—The district court shall provide, by local rule adopted under section 2071(a), that the contents of any arbitration award made under this chapter shall not be made known to any judge who might be assigned to the case until the district court has entered final judgment in the action or the action has otherwise terminated.

(c) Trial de novo of arbitration awards.—

- **(1) Time for filing demand.**—Within 30 days after the filing of an arbitration award with a district court under subsection (a), any party may file a written demand for a trial de novo in the district court.

(2) **Action restored to court docket.**—Upon a demand for a trial de novo, the action shall be restored to the docket of the court and treated for all purposes as if it had not been referred to arbitration.

(3) **Exclusion of evidence of arbitration.**—The court shall not admit at the trial de novo any evidence that there has been an arbitration proceeding, the nature or amount of any award, or any other matter concerning the conduct of the arbitration proceeding, unless—

(A) the evidence would otherwise be admissible in the court under the Federal Rules of Evidence; or

(B) the parties have otherwise stipulated.

§ 658. Compensation of arbitrators and neutrals

(a) Compensation.—The district court shall, subject to regulations approved by the Judicial Conference of the United States, establish the amount of compensation, if any, that each arbitrator or neutral shall receive for services rendered in each case under this chapter.

(b) Transportation allowances.—Under regulations prescribed by the Director of the Administrative Office of the United States Courts, a district court may reimburse arbitrators and other neutrals for actual transportation expenses necessarily incurred in the performance of duties under this chapter.

Appendix C: Summary of the Alternative Dispute Resolution Act of 1998

Public Law 105-315
Signed October 30, 1998
Codified at 28 U.S.C. §§ 651–658

1. Section-by-section summary
2. Summary by type of duty required of the courts
   a. Requirements to be incorporated into local rules
   b. Other provisions, requirements, and prohibitions
      (1) Definitions, general authorization, program administration
      (2) ADR neutrals
      (3) Arbitration
   c. Other

The requirements, provisions, and prohibitions of the Alternative Dispute Resolution Act of 1998[328] can be summarized in a number of different ways. Two types of summaries are provided here. The items listed under each are essentially the same but are arranged differently.

The first summary sets out the ADR Act's principal provisions, following the order in which they appear in the Act. The second groups the ADR Act's requirements by the level of duty required of the courts, in part to highlight matters the courts must address in local rules.

The ADR Act of 1998 is codified at 28 U.S.C. §§ 651–658 (Supp. 1998). Before passage of the ADR Act, these U.S. Code provisions were more limited in scope, authorizing mandatory arbitration in ten districts and voluntary arbitration in another ten districts and setting out provisions for implementing those arbitration programs under the provisions of the Judicial Improvements and Access to Justice Act of 1988.[329] The ADR Act of 1998 does not affect any program in which arbitration is conducted under the 1988 Act (*see* 28 U.S.C. § 654(d) (1998)), authorizes

328. Alternative Dispute Resolution Act of 1998, Pub. L. No. 105-315, 112 Stat. 2993 (codified at 28 U.S.C. §§ 651–658 (Supp. 1998)).

329. Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, § 901(a), 102 Stat. 4642, 4659–62 (1988) (amended 1993, 1994, 1997) (previously codified at 28 U.S.C. §§ 651–658 (1994)).

ADR more generally for the district courts, and provides requirements for the referral of cases to arbitration other than under the 1988 Act.

1. Section-by-section summary

Section 651: Authorization of Alternative Dispute Resolution

- **Definition of ADR.** Alternative dispute resolution (ADR) includes any process or procedure, other than an adjudication by a presiding judge, in which a neutral third party assists in resolving the dispute, through processes such as early neutral evaluation, mediation, minitrial, and arbitration (28 U.S. C. § 651(a) (1998)).
- **Requirement to Authorize Use of ADR.** Each district court shall by local rule authorize use of ADR in all civil actions, including adversary proceedings in bankruptcy (§ 651(b)).
- **Requirement to Implement an ADR Program.** Each district court shall by local rule devise and implement its own ADR program to encourage and promote use of ADR (§ 651(b)).
- **Existing ADR Programs.** Courts with existing ADR programs shall examine their effectiveness and adopt such improvements as are consistent with the Act (§ 651(c)).
- **Program Administration.** Each district court shall designate an employee or judicial officer who is knowledgeable in ADR practices and processes to implement, administer, oversee, and evaluate the ADR program. This person may also be responsible for recruiting, screening, and training attorneys to serve as neutrals and arbitrators (§ 651(d)).
- **Title 9.** The ADR Act of 1998 shall not affect the federal arbitration statute that is codified at Title 9 of the United States Code.
- **Federal Judicial Center and Administrative Office Support.** The Federal Judicial Center and the Administrative Office of the U.S. Courts are authorized to assist the district courts in the establishment and improvement of ADR programs by identifying particular practices used in successful programs and providing additional assistance as needed and appropriate (§ 651(f)).

Section 652: Jurisdiction

- **Requirement That Litigants Consider ADR.** Each district court shall by local rule require litigants in all civil cases to consider using ADR at an appropriate stage in the litigation (§ 652(a)).
- **Requirement to Provide at Least One ADR Process.** Each district court shall provide litigants in all civil cases at least one ADR process, including but not limited to mediation, early neutral evaluation, minitrial, and arbitration (§ 652(a)).
- **Compelled Use of ADR.** Any district court that elects to require use of ADR in certain cases may do so only with respect to mediation, early neutral evaluation, and, with party consent, arbitration (§ 652(a)). The ADR Act does not, however, affect any program in which arbitration is conducted under the 1988 Act (§ 654(d)).
- **Cases Exempt From ADR.** Each district court may exempt specific cases or categories of cases from ADR, but shall consult with the bar, including the U.S. Attorney, in defining these exemptions (§ 652(b)).
- **Authority of the Attorney General.** Nothing in section 652 of the ADR Act (as codified) shall alter or conflict with the authority of the Attorney General or any federal agency to conduct litigation (§ 652(c)).
- **Confidentiality.** Until such time as rules are adopted under the Rules Enabling Act, codified at chapter 131 of Title 28, each district court shall by local rule provide for the confidentiality of the ADR processes and prohibit disclosure of confidential ADR communications (§ 652(d)).

Section 653: Neutrals

- **Panel of Neutrals.** Each district court shall adopt appropriate processes for making neutrals available for use by the parties for each category of ADR process offered and must promulgate its own procedures and criteria for the selection of neutrals on its panels (§ 653(a)).
- **Qualifications of Neutrals.** Each neutral should be qualified and trained in the appropriate ADR process. The district court may use, among others, magistrate judges who have been trained in ADR processes, professional neutrals from the private sector, and persons trained to serve as ADR neutrals (§ 653(b)).
- **Disqualification of Neutrals.** Until such time as rules are adopted under the Rules Enabling Act, codified at chapter 131 of Title 28, each district court shall issue rules on disqualification of neutrals, including

where appropriate disqualification under 28 U.S.C. § 455, other applicable law, and professional responsibility standards (§ 653(b)).

Section 654: Arbitration

- **Referral to Arbitration.** A district court may allow referral to arbitration of any civil action, including any adversary proceeding in bankruptcy, when the parties consent, except: in cases alleging violation of a Constitutional right; when jurisdiction is based in whole or part on 28 U.S.C. § 1343; or when the relief sought consists of money damages greater than $150,000 (§ 654(a)).
- **Safeguards in Consent Cases.** Until such time as national rules are adopted under the Rules Enabling Act, codified at chapter 131 of Title 28, the district court shall by local rule establish procedures to ensure that, in any civil action in which arbitration by consent is allowed, consent is freely and knowingly obtained, and no party or attorney is prejudiced for refusing to participate in arbitration (§ 654(b)).
- **Presumption Regarding Monetary Damages.** A district court may presume damages are not in excess of $150,000 unless counsel certifies otherwise.
- **The 1988 Act's Authorization for Twenty Arbitration Programs.** Nothing in the ADR Act of 1998 is deemed to affect any arbitration program conducted under the 1988 Act.[330] (§ 654(d)).

Section 655: Arbitrators

- **Powers of Arbitrators.** An arbitrator shall have the power to conduct arbitration hearings, administer oaths and affirmations, and make awards (§ 655(a)).
- **Certification of Arbitrators.** Each district court that authorizes arbitration shall establish standards for certification of arbitrators and shall certify arbitrators to perform services in accord with those standards. The standards shall include provisions requiring arbitrators to take an oath and to be subject to the disqualification rules of 28 U.S.C. § 455 (§ 655(b)).

330. *Id.*

- **Immunity for Arbitrators.** Arbitrators are performing quasi-judicial functions and are entitled to the immunities and protections afforded to persons serving in such a capacity (§ 655(c)).

Section 656: Subpoenas

- **Subpoenas.** Federal Rule of Civil Procedure 45 applies to subpoenas for attendance of witnesses and production of documentary evidence at an arbitration hearing (§ 656).

Section 657: Arbitration Award and Judgment

- **Filing and Effect of Arbitration Awards.** An arbitration award shall be filed promptly with the clerk of the district court and shall be entered as the judgment of the court after the time for requesting a trial de novo has expired. The judgment shall have the same force and effect as a judgment in a civil action, except it shall not be subject to review in any other court by appeal or otherwise (§ 657(a)).
- **Sealing of the Arbitration Award.** The district court shall by local rule provide that the contents of any arbitration award shall not be made known to any judge who might be assigned to the case until the court has entered final judgment or the action has otherwise terminated (§ 657(b)).
- **Trial De Novo.** Any party may file a written demand for a trial de novo within thirty days after the filing of the arbitration award. The action shall be restored to the docket and treated as if it had not been referred to arbitration. The court shall not admit at the trial de novo any evidence that there has been an arbitration proceeding, the nature or amount of any arbitration award, or any matter concerning the conduct of the arbitration proceeding unless it would be admissible under the Federal Rules of Evidence or the parties otherwise stipulate (§ 657(c)).

Section 658: Compensation of Arbitrators and Neutrals

- **Compensation of Neutrals.** Subject to regulations approved by the Judicial Conference, the district court shall establish the amount of compensation, if any, that each arbitrator or neutral shall receive (§ 658(a)).
- **Transportation Allowances.** Under regulations prescribed by the Administrative Office of the U.S. Courts, a district court may reimburse

arbitrators and other neutrals for actual transportation expenses incurred in performing their duties (§ 658(b)).

Authorization of Appropriations

- **Appropriations.** The ADR Act authorizes such appropriations for each fiscal year as may be necessary to carry out the Act.[331]

2. Summary by type of duty required of the courts

a. Requirements to be incorporated into local rules

- **Requirement to Authorize Use of ADR.** Each district court shall by local rule authorize use of ADR in all civil actions, including adversary proceedings in bankruptcy (28 U.S.C. § 651(b) (1998)).
- **Requirement to Implement an ADR Program.** Each district court shall by local rule devise and implement its own ADR program to encourage and promote use of ADR (§ 651(b)).
- **Requirement That Litigants Consider ADR.** Each district court shall by local rule require litigants in all civil cases to consider using ADR at an appropriate stage in the litigation (§ 652(a)).
- **Confidentiality.** Until such time as rules are adopted under the Rules Enabling Act, codified at chapter 131 of Title 28, each district court shall by local rule provide for the confidentiality of the ADR processes and prohibit disclosure of confidential ADR communications (§ 652(d)).
- **Safeguards in Consent Cases.** Until such time as national rules are adopted under the Rules Enabling Act, codified at chapter 131 of Title 28, the district court shall by local rule establish procedures to ensure that, in any civil action in which arbitration by consent is allowed, consent is freely and knowingly obtained, and no party or attorney is prejudiced for refusing to participate in arbitration (§ 654(b)).
- **Sealing of the Arbitration Award.** The district court shall by local rule provide that the contents of any arbitration award shall not be made known to any judge who might be assigned to the case until the court has entered final judgment or the action has otherwise terminated (§ 657(b)).

331. § 11, 112 Stat. at 2998.

- **Disqualification of Neutrals.** Until such time as rules are adopted under the Rules Enabling Act, codified at chapter 131 of Title 28, each district court shall issue rules on disqualification of neutrals, including where appropriate disqualification under 28 U.S.C. § 455, other applicable law, and professional responsibility standards (§ 653(b)).

b. Other provisions, requirements, and prohibitions

(1) Definitions, general authorization, program administration

- **Definition of ADR.** Alternative dispute resolution (ADR) includes any process or procedure, other than an adjudication by a presiding judge, in which a neutral third party assists in resolving the dispute, through processes such as early neutral evaluation, mediation, minitrial, and arbitration (§ 651(a)).
- **Existing ADR Programs.** Courts with existing ADR programs shall examine their effectiveness and adopt such improvements as are consistent with the Act (§ 651(c)).
- **Program Administration.** Each district court shall designate an employee or judicial officer who is knowledgeable in ADR practices and processes to implement, administer, oversee, and evaluate the ADR program. This person may also be responsible for recruiting, screening, and training attorneys to serve as neutrals and arbitrators (§ 651(d)).
- **Requirement to Provide at Least One ADR Process.** Each district court shall provide litigants in all civil cases at least one ADR process, including but not limited to mediation, early neutral evaluation, minitrial, and arbitration (§ 652(a)).
- **Compelled Use of ADR.** Any district court that elects to require use of ADR in certain cases may do so only with respect to mediation, early neutral evaluation, and, with party consent, arbitration (§ 652(a)). The ADR Act does not, however, affect any program in which arbitration is conducted pursuant to the 1988 Act (§ 654(d)).
- **Cases Exempt From ADR.** Each district court may exempt specific cases or categories of cases from ADR, but shall consult with the bar, including the U.S. Attorney, in defining these exemptions (§ 652(b)).

(2) ADR neutrals

- **Panel of Neutrals.** Each district court shall adopt appropriate processes for making neutrals available for use by the parties for each category of ADR process offered and must promulgate its own procedures and criteria for the selection of neutrals on its panels (§ 653(a)).
- **Qualifications of Neutrals.** Each neutral should be qualified and trained in the appropriate ADR process. The district court may use, among others, magistrate judges who have been trained in ADR processes, professional neutrals from the private sector, and persons trained to serve as ADR neutrals (§ 653(b)).
- **Disqualification of Neutrals.** Until such time as rules are adopted under the Rules Enabling Act codified at chapter 131 of Title 28, each district court shall issue rules on disqualification of neutrals, including where appropriate disqualification under 28 U.S.C. § 455, other applicable law, and professional responsibility standards (§ 653(b)).
- **Compensation of Neutrals.** Subject to regulations approved by the Judicial Conference, the district court shall establish the amount of compensation, if any, that each arbitrator or neutral shall receive (§ 658(a)).
- **Transportation Allowances.** Under regulations prescribed by the Administrative Office of the U.S. Courts, a district court may reimburse arbitrators and other neutrals for actual transportation expenses incurred in performing their duties (§ 658(b)).

(3) Arbitration

- **Referral to Arbitration.** A district court may allow referral to arbitration of any civil action, including any adversary proceeding in bankruptcy, when the parties consent, except: in cases alleging violation of a Constitutional right; when jurisdiction is based in whole or part on 28 U.S.C. § 1343; or when the relief sought consists of money damages greater than $150,000 (§ 654(a)).
- **Presumption Regarding Monetary Damages.** A district court may presume damages are not in excess of $150,000 unless counsel certifies otherwise.
- **The 1988 Act's Authorization for Twenty Arbitration Programs.** Nothing in the ADR Act of 1998 is deemed to affect any arbitration program conducted under the 1988 Act.[332] (§ 654(d)).

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332. § 901(a), 102 Stat. at 4659–63.

- **Powers of Arbitrators.** An arbitrator shall have the power to conduct arbitration hearings, administer oaths and affirmations, and make awards (§ 655(a)).
- **Certification of Arbitrators.** Each district court that authorizes arbitration shall establish standards for certification of arbitrators and shall certify arbitrators to perform services in accord with those standards. The standards shall include provisions requiring arbitrators to take an oath and to be subject to the disqualification rules of 28 U.S.C. § 455 (§ 655(b)).
- **Immunity for Arbitrators.** Arbitrators are performing quasi-judicial functions and are entitled to the immunities and protections afforded to persons serving in such a capacity (§ 655(c)).
- **Subpoenas.** Federal Rule of Civil Procedure 45 applies to subpoenas for attendance of witnesses and production of documentary evidence at an arbitration hearing (§ 656).
- **Filing and Effect of Arbitration Awards.** An arbitration award shall be filed promptly with the clerk of the district court and shall be entered as the judgment of the court after the time for requesting a trial de novo has expired. The judgment shall have the same force and effect as a judgment in a civil action, except it shall not be subject to review in any other court by appeal or otherwise (§ 657(a)).
- **Trial De Novo.** Any party may file a written demand for a trial de novo within thirty days after the filing of the arbitration award. The action shall be restored to the docket and treated as if it had not been referred to arbitration. The court shall not admit at the trial de novo any evidence that there has been an arbitration proceeding, the nature or amount of any arbitration award, or any matter concerning the conduct of the arbitration proceeding unless it would be admissible under the Federal Rules of Evidence or the parties otherwise stipulate (§ 657(c)).

c. Other

- **Title 9.** The ADR Act of 1998 shall not affect the federal arbitration statute that is codified at Title 9 of the United States Code.
- **Federal Judicial Center and Administrative Office Support.** The Federal Judicial Center and Administrative Office of the U.S. Courts are authorized to assist the district courts in the establishment and improvement of ADR programs by identifying particular practices used in suc-

cessful programs and providing additional assistance as needed and appropriate (§ 651(f)).

- **Authority of the Attorney General.** Nothing in section 652 of the ADR Act (as codified) shall alter or conflict with the authority of the Attorney General or any federal agency to conduct litigation (§ 652(c)).
- **Appropriations.** The ADR Act authorizes such appropriations for each fiscal year as may be necessary to carry out the Act.

Appendix D: Guidelines for Ensuring Fair and Effective Court-Annexed ADR: Attributes of a Well-Functioning ADR Program and Ethical Principles for ADR Neutrals

Report of the ADR Task Force of the
Court Administration and Case Management Committee
December 1997

I. Background
II. The Attributes of a Well-Functioning Court-Annexed ADR Program
III. The Ethical Principles for ADR Neutrals in Court-Annexed ADR Programs

[Editor's note: The report set out in this Appendix D is a reproduction. This report predated passage of the Alternative Dispute Resolution Act of 1998.]

I. Background

In June 1995, the Court Administration and Case Management Committee established an ADR Task Force, composed of Magistrate Judge John Wagner (OK-N), Bankruptcy Judge Barry Russell (CA-C), and District Judge Jerome Simandle (NJ), who served as chair. The purpose of the Task Force was to consider the issue of ethical guidelines for private sector attorneys who serve as neutrals in court-annexed ADR programs. This step was prompted by the substantial growth of such programs during the 1990s, programs which at this time are governed only by local rules. The Task Force's concerns were driven largely by rapid change in the district courts, but it recognized that ADR has grown apace in the appellate and bankruptcy courts as well.

To determine the incidence and nature of ethical problems in district court ADR proceedings, the Task Force held a series of meetings with those involved in court-annexed programs, including judges, court ADR staff, attorneys who serve as neutrals, and academics. There was general agreement that the incidence of ethical problems is low but that the combination of rapidly growing programs, sometimes inadequate training of

ADR neutrals, and judges who are unfamiliar with ADR creates a potential for serious ethical breaches.

Through its meetings with the various ADR experts, the Task Force identified four areas where problems are likely to arise when courts use private sector attorneys as ADR neutrals: past, present, and future conflicts of interest; confidentiality of materials and information disclosed during ADR; exposure of the neutral to subpoena to testify in subsequent litigation; and protection of ADR neutrals from civil liability through immunity.

For a number of reasons, the Task Force determined that national ADR ethics rules would be premature at this time. Not only did the ADR experts advise against them, but the Task Force believes there is considerable value in encouraging further experimentation at the local level before national rules, if any, are drafted. Furthermore, some issues, such as immunity and conflicts of interest, are either very complicated, are currently the subject of in-depth study by other organizations, or would require statutory authorization, which the Task Force is not prepared to recommend.

Nonetheless, the Task Force did conclude that it would be useful for the Committee to issue a general statement encouraging courts to give careful consideration to several specific ethical issues and advising the courts on the attributes of a well-functioning court-annexed ADR program. A recommendation to this effect was made and accepted at the June 1996 Committee meeting. The Task Force has subsequently identified the attributes of a well-functioning court-annexed ADR program and has developed a set of ethical principles for ADR neutrals. These are presented below.

II. The Attributes of a Well-Functioning Court-Annexed ADR Program

Our Task Force agrees with the consensus view that a federal court must make a conscious effort to determine whether some type of ADR is an appropriate response to local dockets, customs, practices, and demands for ADR services. We also believe that, for ADR to be most responsive to local conditions, it should be implemented at the local court level (district, appellate, or bankruptcy). There is sufficient breadth in the Federal Rules of Civil Procedure and other legislation, as the Judicial

Conference has found, to foster and support implementation of varying ADR programs in the local courts.

Although we have witnessed the gradual development of a preference for mediation, we have not seen the emergence of a single type of ADR that should serve as a paradigm for all courts and we recommend none here. Nevertheless, the Task Force believes there are common attributes of well-functioning ADR programs that all courts should strive to incorporate into their ADR programs and that should be enunciated through local rules.

At the same time, we recognize the need for flexibility in providing a means for dispute resolution that is informal, inexpensive, and adaptable. ADR is often valued, in fact, as an alternative to rule-bound and costly procedures like motion practice and trial. One cannot lose sight of the fact, however, that federal cases referred to ADR can be factually or legally complicated and can have high stakes. In such an environment, the basic ingredients of a fair and effective court-annexed ADR program should include at least minimal rules with respect to the expectations placed upon the court staff and judicial officers, the appointed neutrals, and the participants (attorneys and litigants).

Both research and anecdote suggest that, to date, litigants in federal court ADR programs have had positive experiences.[333] Our goal is to ensure that this remains true in the future. As use of ADR and understanding of its characteristics continue to grow, we feel that some guidance is both warranted and now possible. Thus, we offer the following eight attributes of a well-functioning court-annexed ADR program, drawn from our discussions with ADR experts, our own experiences, and other sources.[334] Given the critical role played by ADR neutrals, on whom the

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333. [1] [Editor's note: The footnotes in Appendix D are numbered consecutively to be in conformity with the rest of the guide; original footnote numbers from the December 1997 report are in brackets.] Research has consistently shown high attorney and litigant satisfaction with ADR procedures, including the fairness of these procedures. For the most recent research in federal courts, see *Evaluation of Mediation and Early Neutral Evaluation Under the Civil Justice Reform Act* (RAND 1997) and *Report to the Judicial Conference Committee on Court Administration and Case Management: A Study of the Five Demonstration Programs Established Under the Civil Justice Reform Act of 1990* (Federal Judicial Center 1997).

334. [2] Other sources include two symposia offered by the Federal Judicial Center for representatives from district and bankruptcy courts with new or estab-

effectiveness, integrity, and reputation of court ADR rests, we address this attribute of court programs separately in Section III.

1. The local court should, after consultation among bench, bar and participants, define the goals and characteristics of the local ADR program and approve it by promulgating appropriate written local rules.

Comment: The program's structure follows the identification of its goals. The court should identify its needs after consultation with all constituencies, especially the advisory group set up under the CJRA if it is still in operation. The necessity for written guidance is self-evident, and the local rules process provides the surest means of careful promulgation. These rules should contain provisions to address each of the attributes discussed here, with special attention to ethical guidelines for ADR neutrals.[335]

2. The court should provide administration of the ADR program through a judicial officer or administrator who is trained to perform these duties.

Comment: An ADR program does not run itself and cannot succeed without leadership. The selection of cases, administration of the panel of neutrals, matters concerning compensation of neutrals, and ethical problems will need to be addressed from time to time by a person with authority to speak for the court. During the past five years, a number of courts have appointed full-time, professional ADR staff, to whom they have assigned many core ADR functions, such as recruitment and training of neutrals, assignment of cases to neutrals, and evaluation of program effectiveness. Professional ADR staff can be particularly helpful in handling problems that arise in ADR, providing a buffer between the parties, neutral, and assigned judge. Although courts can retain these staff through the use of local funds, additional funding will depend on actions taken by the Judicial Resources Committee and the Judicial Conference of the United States. Where such staff are not available, their im-

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lished ADR programs, as well as the National ADR Institute for Federal Judges, co-sponsored by the Federal Judicial Center, the Center for Public Resources, and the ABA's Litigation Section. A handbook prepared for the Institute, *Judges's Deskbook on Court ADR* (Center for Public Resources 1993), has served as a useful guide for courts interested in ensuring the quality of their ADR efforts.

335. [3] For guidance in designing an ADR program and determining what topics should be covered by local rules, courts are strongly encouraged to consult the *Judge's Deskbook on Court ADR, supra* note [2] (available from the Federal Judicial Center).

portant functions can be and often ably have been performed by an ADR liaison judge. The important point is to have someone who is responsible for the program.

3. When establishing a roster of neutrals for cases referred to ADR, the court should define and require specific levels of training and experience for its ADR neutrals, and appropriate training should be provided through the court or an outside organization. Training should include techniques relevant to the neutral's functions in the program, as well as instruction in ethical duties.

Comment: Court-appointed ADR neutrals are typically experienced attorneys from the local bar or, less frequently, attorneys specializing in an ADR practice. We have found, however, great variability in the training of these appointed neutrals. Some courts require no training, some provide training by judicial officers, and some provide training by expert consultants. No funding for training of attorney-neutrals has been available from central budget sources, so courts have sometimes funded training from local sources, such as bar associations or attorney admission funds, or have required the trainees to bear the cost. The training of a court's ADR neutrals, tailored to the goals and structure of the local program, is an essential ingredient of a well-functioning court-annexed ADR program. ADR neutrals cannot be expected to perform the sensitive functions of their role unless they have the necessary skills. Mediation and other techniques require special insights into the process that may be unavailable to ordinary litigators, no matter how experienced. Training should include instruction on ethics, to increase the sensitivity of the court-appointed neutral to the ethical demands of these duties.

4. The court should adopt written ethical principles to cover the conduct of ADR neutrals.

Comment: Well-defined ethical principles are part and parcel of a well-functioning ADR program and are discussed in greater detail in Section III. Principles addressing past, present, and future conflicts, impartiality, protection of confidentiality, and protection of the trial process all should be included in a court's ADR rules. No national model for such ethical rules has yet emerged. It should be apparent that the American Bar Association's (ABA) Model Rules of Professional Conduct (RPC) (which derive from an adversarial conception of an attorney-client relationship that is not pertinent to an attorney-neutral) and the Code of Conduct for United States Judges (which addresses the ethics of judges who adjudicate cases

by exercise of judicial power) do not precisely fit the roles and functions of the appointed ADR neutral in most court programs. Similarly, the Model Standards of Conduct for Mediators, promulgated in 1995 by the American Arbitration Association (AAA), ABA, and Society for Professionals in Dispute Resolution (SPIDR), provide a helpful and thoughtful guide for mediators generally but not necessarily for mediators in court-annexed programs. Therefore, until national federal rules or guidelines, if any, are promulgated, courts should make certain their local rules spell out the duties of and constraints upon ADR neutrals.

5. Where an ADR program provides for the attorney-neutral to receive compensation for services, the court should make the method and limitations upon compensation explicit. A litigant who is unable to afford the cost of ADR should be excused from any fees.

Comment: Methods of compensation for ADR neutrals vary widely from court to court.[336] 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 rendered free of charge, with a fixed hourly rate thereafter, while still others have a fixed per-case payment schedule (such as in the statutory arbitration courts under 28 U.S.C. § 651, et seq.). [Editor's note: Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, § 901, 102 Stat. 4642, 4659-63 (1988) (amended 1993, 1994, 1997) (previously codified at 28 U.S.C. §§ 651–658 (1994)). After preparation of these Guidelines in December 1997, the ADR Act of 1998 was codified at 28 U.S.C. §§ 651–658 (Supp. 1998). Before passage of the ADR Act in October 1998, these U.S. Code provisions were more limited in scope, authorizing mandatory arbitration in ten districts and voluntary arbitration in another ten districts and setting out provisions for implementing the arbitration programs. The ADR Act of 1998 retains the authority of the twenty districts to refer cases to arbitration (*see* 28 U.S.C. § 654(d) (Supp. 1998)) but it also authorizes ADR more generally for the district courts.] 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 ADR, yet not impose on the ADR neutrals to render sophisticated or prolonged services on a pro bono

336. [4] For the range of fee arrangements used in the district courts, see *ADR and Settlement in the Federal District Courts: A Sourcebook for Judges and Lawyers* 29–56 (Federal Judicial Center 1996).

basis as a matter of course. Where the court draws upon a panel of federal litigators to render service as ADR neutrals, the court must avoid the appearance of an attorney earning a benefit in litigation as a result of service to the court as an ADR neutral.

6. The local court should adopt a mechanism for receiving any complaints regarding its ADR process and for interpreting and enforcing the local rules for ADR, including the ethical principles it adopts.

Comment: Courts have adopted a variety of mechanisms for handling problems in ADR, ranging from the appointment of a compliance judge (or ADR liaison judge) with general supervisory authority to the appointment of an ADR administrator who receives such complaints or other feedback and channels them appropriately to the court. It is important, whatever mechanism is decided upon, that the parties be aware of its availability and that it be relatively speedy and simple. Among the problems such a mechanism can address are failures of a party to attend the ADR session, scheduling difficulties, ineffectiveness of the ADR neutral and ethical problems.

7. The court should carefully define the scope of confidentiality intended for information exchanged in its ADR program, striking a balance between absolute protection of ADR process information and the need to avoid shielding misconduct by participants or neutrals.

Comment: The candor of adversaries in a negotiation process can often depend on the confidentiality of negotiations, although this concern may be lessened in an evaluative or arbitral settlement process involving little or no confidential exchange. The rules of confidentiality and disclosure for attorney-client information under RPC 1.6 [Editor's note: RPC refers to the American Bar Association's Model Rules of Professional Conduct] will generally not apply to negotiations between adverse parties or discussions with an ADR neutral, and likewise Fed. R. Evid. 408 will not render confidential, but merely inadmissible for most purposes, evidence of conduct or statements made in compromise negotiations. In addition, most states have not adopted a statutory ADR privilege and therefore the degree of protection given by a local confidentiality rule will vary.

A blanket rule deeming the entire ADR process confidential has appeal, to protect the need of participants to share settlement facts with each other and with the attorney-neutral without fear that such information will be used against them in another forum. If the ADR process permits *ex parte* communications with the neutral, the participants should be

assured that information imparted in confidence will not be shared unless authorized. A rule of complete confidentiality may be overbroad, however, and therefore costly if, for example, a participant has abused the process or revealed a fraud or crime. As in Rule 408, evidence does not become confidential merely because it was presented to the ADR neutral if it was otherwise discoverable by an adverse party independently of the ADR proceeding.

To avoid the problems of an overbroad rule, the confidentiality rule could provide that (a) all information presented to the ADR neutral is deemed confidential unless disclosure is jointly agreed to by the parties and (b) shall not be disclosed by anyone without consent, except (i) as required to be disclosed by operation of law, or (ii) as related to an ongoing or intended crime or fraud, or (iii) as tending to prove the existence or terms of a settlement, or (iv) as proving an abuse of the process by a participant or an attorney-neutral.

Whatever rule of confidentiality a court chooses, it will be informing the expectations of the ADR participants. The parties' expectations at the outset are material and will shape the ADR neutral's duties of confidentiality, as reflected in suggested Principle 6 below. The AAA/ABA/SPIDR standards, *supra*, thus state as to confidentiality: "A mediator shall maintain the reasonable expectations of the parties with regard to confidentiality." It is best practice to assure that the participants understand the contours of the confidentiality requirements and protections at the outset by having the ADR neutral review the court's rule with them.

8. The court should evaluate and measure the success of its ADR program, perhaps in conjunction with its advisory group.

Comment: In many districts with successful ADR programs, the advisory groups established by the CJRA have had important roles in designing, implementing, and evaluating the court's ADR processes. Whether an advisory group is used or not, however, it remains the responsibility of the local court to ensure that its program provides the quality and integrity of service that is commensurate with the court's aspirations and the parties' expectations. Unless such evaluation and measurement are included, the court may remain unaware of areas in need of improvement.

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These attributes of healthy and responsive ADR programs are not meant to provide an exclusive list. Courts may have needs and goals that go beyond these principles. The Task Force recommends the considera-

tion of these principles as constituting a benchmark for a court-annexed ADR program.

III. Ethical Principles for ADR Neutrals in Court-Annexed ADR Programs

If courts continue to use practicing attorneys as neutrals in court-annexed ADR programs, they must make sure their local rules satisfactorily address the role of the attorney-neutral. Particularly important are rules regarding ethical issues, such as maintaining confidentiality and revealing conflicts of interest. When adopting such rules, courts should make sure the rules are consistent with the type of ADR program established. For example, while existing rules for judges and lawyers operating in advocacy roles may translate to some extent to adjudicative ADR processes such as arbitration, they cannot properly be applied to non-adjudicative ADR processes such as mediation, where the attorney-neutral acts neither as judge nor advocate but rather as a neutral facilitator in a non-binding process. In designing ethical guidelines appropriate to the type of ADR program adopted, courts should be encouraged to consider each of the following principles**.**

1. An attorney-neutral appointed or selected by the court should act fairly, honestly, competently, and impartially.

Comment: This is an objective, not subjective, standard. Should the integrity or competency of an attorney-neutral be questioned, the inquiry should be whether an attorney-neutral has acted fairly, honestly, competently, and impartially. Whether this standard has been met should be measured from the point of view of a disinterested, objective observer (such as the judge who administers the ADR program), rather than from the point of view of any particular party.

The imposition of a subjective appearance standard would unfairly require the neutral to withstand the subjective scrutiny of the interested parties, who, for example, might seek to attack the neutral's impartiality if disappointed by the settlement. As this would undermine the important public interest in achieving binding settlements, there is no intention to impose such a subjective standard under this principle.

2. An attorney-neutral should disqualify himself or herself if there is a conflict of interest arising from a past or current relationship with a party to the ADR process.

Comment: Ordinarily, an attorney-neutral cannot perform effectively as a neutral if there is a past or present representational or other business relationship with one of the parties to the dispute, even if that relationship existed only in connection with entirely unrelated matters. However, such conflicts of interest may be waived by the parties, so long as the particulars of the representational or other business relationship are first fully disclosed on a timely basis. Family relationships, and relationships that give rise to an attorney-neutral's having a financial interest in one of the parties or in the outcome of the dispute, or prior representation with regard to the particular dispute to be addressed in the ADR process, cannot be waived.

The Code of Conduct for United States Judges, which incorporates 28 U.S.C. § 455, provides guidance as to the grounds for disqualification of judges. Although the Code of Judicial Conduct is not directly applicable to the attorney-neutral context, it does set out some guiding principles that can be applied if modified to accommodate the different orientation of an attorney-neutral operating in an ADR, as opposed to a public adjudication, context. Keep in mind, however, that § 455 is expressly required as the appropriate standard when evaluating the actions of arbitrators (28 U.S.C. § 656(a)(2)). [Editor's note: *See* Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, § 901(a), 102 Stat. 4642, 4662 (1988) (amended 1993, 1994, 1997) (previously codified at 28 U.S.C. § 656(a)(2) (1994)). *See also* 28 U.S.C. § 655(b)(2) (Supp. 1998)].

3. An attorney-neutral should avoid future conflicts that may arise after the ADR proceeding is complete. Thus, an attorney-neutral should be barred from representing a party to the ADR proceeding with regard to the same or substantially related matters, as should his or her law firm, except that no future conflict with regard to substantially related matters will be imputed to his or her law firm after the expiration of one year from completion of the ADR process, provided that the law firm shields the ADR neutral from participating in the substantially related matter in any way.

Comment: Parties to an ADR proceeding have a reasonable expectation that they will not be harmed in the future from an ADR neutral's knowledge about them, especially confidential information gained during the ADR process. Thus, this principle would preclude the ADR neutral from representing any other ADR party in the same or substantially related matters, recognizing the sensitive nature of information, opinions, and

strategies learned by the ADR neutral. The same impairment would be imputed to the neutral's law firm in the same case, but it would dissipate with the passage of time, our recommendation being one year, in any substantially related matter. This safe harbor recognizes that it would be far too draconian to automatically preclude the law firm's representation of a prospective client for all time merely because an attorney-neutral in that firm conducted ADR proceedings involving that party in the past, even in a substantially related matter. This provision assumes that the attorney-neutral has observed the duty of confidentiality and that he or she can be screened from any future related matter undertaken by the firm.

A conflict rule that generally disqualifies an entire law firm from representing any party that participates in an ADR proceeding conducted by an attorney in the firm will have severe and adverse effects on court-annexed ADR programs that use active lawyers as neutrals. Finally, because an attorney who serves as a court-appointed ADR neutral does not thereby undertake the representation of the participants as clients in the practice of law, ethical rules governing future conflicts of interest arising from past representation, such as the ABA Model Rules of Professional Conduct 1.9 and 1.10, do not appear to apply.

4. Before accepting an ADR assignment, an attorney-neutral should disclose any facts or circumstances that may give rise to an appearance of bias.

Comment: Once such disclosure is made, the attorney-neutral may proceed with the ADR process if the party or parties against whom the apparent bias would operate waive the potential conflict. The best practice is for the attorney-neutral to disclose the potential conflict in writing and to obtain written waivers from each party before proceeding.

5. While presiding over an ADR process, an attorney-neutral should refrain from soliciting legal business from, or developing an attorney-client relationship with, a participant in that ongoing ADR process.

Comment: This provision prohibits the development of a representational attorney- client relationship, or the solicitation of one, during the course of an ADR process. It is not intended to preclude consideration of enlarging an ADR process to include related matters, nor is it intended to prevent the ADR neutral from accepting other ADR assignments involving a participant in an ongoing ADR matter, provided the attorney-neutral

discloses such arrangements to all the other participants in the ongoing ADR matter.

6. An attorney-neutral should protect confidential information obtained by virtue of the ADR process and should not disclose such information to other attorneys within his or her law firm or use such information to the advantage of the law firm's clients or to the disadvantage of those providing such information. However, notwithstanding the foregoing, an attorney-neutral may disclose information (a) that is required to be disclosed by operation of law, including the court's local rules on ADR; (b) that he or she is permitted by the parties to disclose; (c) that is related to an ongoing or intended crime or fraud; or (d) that would prove an abuse of the process by a participant or an attorney-neutral.

Comment: This provision requires protection of confidential information learned during ADR processes. For this purpose, information is confidential if it was imparted to the ADR neutral with the expectation that it would not be used outside the ADR process; information otherwise discoverable in the litigation does not become confidential merely because it has been exchanged in the ADR process. This principle also permits disclosure of information that is required to be disclosed by operation of law. This provision accommodates laws such as those requiring the reporting of domestic violence and child abuse.

7. An attorney-neutral should protect the integrity of both the trial and ADR processes by refraining from communicating with the assigned trial judge concerning the substance of negotiations or any other confidential information learned or obtained by virtue of the ADR process, unless all of the participants agree and jointly ask the attorney-neutral to communicate in a specified way with the assigned trial judge.

Comment: Courts implementing ADR programs should specifically adopt a written policy forbidding attorney-neutrals from speaking with the assigned trial judge about the substance of confidential negotiations and also prohibiting the assigned trial judge from seeking such information from an attorney-neutral. Docket control should be facilitated by means of the attorney-neutral's report of whether the case settled or not or through other periodic reporting that does not discuss parties' positions or the merits of the case. Such reports should be submitted to the ADR

administrator, judicial ADR liaison, or the court clerk or his or her designee.

Public confidence in both the trial and settlement processes can be undermined if direct communication is permitted between the attorney-neutral and the assigned trial judge regarding the merits of the case or the parties' confidential settlement positions. However, it does no harm to communicate with the trial judge at the joint request of the parties, such as requests for continuances, discovery accommodations, more time to pursue the effort, or administrative closure of the case pending implementation of a settlement agreement.

8. An attorney-neutral should fully and timely disclose all fee and expense requirements to the prospective participants in the settlement process in accordance with the rules of the program. When an ADR program provides for the attorney-neutral to receive a defined level of compensation for services rendered, the court should require the parties to make explicit the method of compensation and any limits upon compensation. A participant who is unable to afford the cost of ADR should be excused from paying.

Comment: If the court intends to require a certain level of *pro bono* service in order to participate as an attorney-neutral in a court-annexed ADR program, the level of the *pro bono* commitment should be explicitly defined. Where courts permit neutrals to charge a fee to ADR participants, disputes about ADR fees, though rare, can be prevented through disclosure at the outset of the fee arrangements.

Appendix E: Discussion of Case Law on the Confidentiality of ADR Communications

1. To what extent have courts found ADR communications inadmissible?
    a. Arbitration
    b. Other ADR processes
2. To what extent have courts found ADR communications not discoverable?
3. To what extent have courts found ADR communications privileged?
    a. The debate about the merits of an ADR privilege
    b. Federal statutes
    c. Local rules
    d. The law of privilege in the context of ADR communications
        (1). Rule 501 and federal common law
        (2). Rule 501 and state law
4. To what extent can local rules protect confidentiality in ADR proceedings?
5. Should the neutral be allowed to testify about ADR sessions?

The complexity of the issues discussed in section VIII of this guide indicates that for some time to come judges will be trying to find the appropriate balance between the competing concerns of protecting ADR communications and bringing relevant evidence to light. Section VIII.D of the guide sets out the statutes and rules that courts have looked to when deciding issues concerning the confidentiality of ADR communications. Courts have applied these sources of authority in various ways in the ADR context.

In this appendix we will discuss case law that points to the scope and limitations of those sources. We will explore issues that lie behind any steps a court and parties may take to protect confidentiality of ADR communications either before or after the ADR process—for example, when deciding how much confidentiality protection to provide in the referral order or when deciding whether or when any ADR communications are discoverable or admissible.

Debate continues as to whether information presented during ADR should be protected from disclosure outside the ADR session. In particular, the questions discussed in this Appendix are whether ADR communications should be viewed as:

- admissible in judicial proceedings;[337]
- generally inadmissible, but discoverable, in judicial proceedings;
- generally not discoverable and not admissible in judicial proceedings; or
- privileged, with certain exceptions to the privilege.

1. To what extent have courts found ADR communications inadmissible?

Below we describe when ADR communications might be inadmissible and the steps some have taken to help protect the confidentiality of those communications.

a. Arbitration

The federal statutes authorizing court-based arbitration bar the admission at the trial de novo of:

- any evidence that there has been an arbitration proceeding,
- the nature or amount of any arbitration award, or
- any other matter concerning the conduct of the arbitration proceeding,

unless the evidence would otherwise—that is, independently—be admissible in court under the Federal Rules of Evidence or the parties have otherwise stipulated.[338] See *infra* Appendix A.2 for a description of the statutory provisions authorizing referral to arbitration. The arbitration award is not made known to the judge assigned to the case until the court has entered the arbitration award as the final judgment or the action has otherwise terminated.[339] Local rules may require that the clerk promptly seal any arbitration award.[340]

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337. *See supra* note 244 and accompanying text.

338. *See* 28 U.S.C. § 657(c)(3) (Supp. 1998); Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, § 901(a), 102 Stat. 4642, 4661 (1988) (amended 1993, 1994, 1997) (previously codified at 28 U.S.C. § 655(c) (1994)); *see supra* note 315. *Cf.* D. Ariz. Civ. R. 2.11(i)(8) ("In the absence of agreement of the parties and except as related to impeachment of a witness, no transcript of the [arbitration] proceedings shall be admissible in evidence at any subsequent trial de novo of the action.").

339. *See* 28 U.S.C. § 657(b) (Supp. 1998); § 901(a), 102 Stat. at 4661 (previously codified at 28 U.S.C. § 654(b) (1994)).

340. *See, e.g.,* N.D. Cal. ADR R. 4-11(c); D. Ariz. Civ. R. 2.11(j)(1).

In some federal courts with arbitration programs, a party to an arbitration hearing may, at its discretion and expense, have a private court reporter record the hearing.[341] This raises the possibility that, at a subsequent trial other than the trial de novo, a court might admit transcribed arbitration hearing testimony into evidence for impeachment or other purposes.[342]

b. Other ADR processes

Federal Rule of Evidence 408 has been read to bar admissibility, but not discoverability, of certain conduct or statements made in "compromise negotiations." Some local rules on ADR incorporate Rule 408 by reference,[343] while others expand the protections of Rule 408.[344] Other local rules, rather than referring to Rule 408, set out confidentiality provisions independent of Rule 408.[345] Some local ADR rules provide that informa-

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341. *See, e.g.*, D. Ariz. Civ. R. 2.11(i)(8) (arbitration); N.D. Cal. ADR R. 4-10(f) (arbitration); E.D. Pa. Civ. R. 53.2(5)(F) (arbitration).

342. *Cf.* AT&T Corp. v. Public Serv. Enters. of Pa., Inc., No. Civ. A. 99-4975, 2000 WL 218347, at *2 (E.D. Pa. Feb. 16, 2000) (denying motion to strike post-arbitration complaint by rejecting defendants' contention that evidence of defendants' conduct "learned" about during arbitration is barred by Fed. R. Evid. 408); AT&T Corp. v. Public Serv. Enters. of Pa., Inc., Nos. Civ. A. 99-4975, Civ. A. 99-6099, 2000 WL 387738, at *2 (E.D. Pa. Apr. 12, 2000) (rejecting defendants' argument that the arbitration transcript was confidential and refusing to enjoin post-arbitration complaint to enforce judgment).

343. *See, e.g.*, D. Vt. Civ. R. 16.3(k) ("The ENE process is treated as a settlement negotiation under Fed. R. Evid. 408."); Bankr. D. Or. Civ. R. 9019-2.E.2 ("Rule 408 of the Federal Rules of Evidence (FRE) shall apply to mediation proceedings.").

344. *See, e.g.*, W.D. Mich. Civ. R. 16.2(e) (various types of ADR); N.D. Cal. ADR R. 6-11 (mediation); General Order No. 97-4 para. 9.1 (Bankr. W.D. Pa. Aug. 13, 1997) (mediation); W.D. Mo. Civ. R. app. para. V (early assessment program); N.D. Cal. ADR R. 5-12 (early neutral evaluation); E.D. Cal. Civ. R. 16-271(g) (early neutral evaluation); D. Vt. Civ. R. 16.3(k) (early neutral evaluation). See also orders referring cases to ADR in the U.S. District Court for the District of Rhode Island.

345. *See, e.g.*, D.N.J. Civ. R. 301.1(e)(4) ("All information presented to the mediator shall be deemed confidential . . . . No statements made or documents prepared for mediation shall be disclosed in any subsequent proceeding or construed as an admission."); S.D. Fla. Civ. R. 16.2.G(2) (making mediation proceedings, including statements made therein, privileged); Second Amended General Order No. 95-01 paras. 6.1 to 6.7 (Bankr. C.D. Cal. Aug. 24, 1999) (providing

tion presented in the course of ADR processes like mediation is generally inadmissible, unless such statements or information would be discoverable independent of the ADR proceedings. *See infra* Appendix E.4 for a discussion of the application of local ADR rules concerning confidentiality.

Although some court decisions have found that Rule 408 governs evidence from different types of settlement processes, including summary jury trials,[346] Rule 408 by itself can be read to provide only limited protection against the admissibility of information presented during an ADR session. Generally, under Rule 408, offers to compromise a disputed claim, responses to those offers, and evidence of conduct or statements made in "compromise negotiations" on a claim are inadmissible to prove the validity or amount of that claim.[347] That language by itself can be read to offer no protection when evidence from an ADR proceeding is presented to prove or disprove anything other than liability or the validity of the claim or its amount.[348] In addition, courts have interpreted Rule 408's term "compromise negotiations" in different ways. Some cases suggest that a discussion occurring during a settlement meeting is not necessarily a compromise negotiation under Rule 408.[349]

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that communications not otherwise discoverable may not be disclosed or introduced in any court proceeding, unless all participants agree in writing or the communication to be disclosed is a settlement agreement that has been recorded, reduced to writing, and signed or that provides for its own disclosure or enforceability).

346. *See* Russell v. PPG Indus., Inc., 953 F.2d 326, 334 (7th Cir. 1991) (finding inappropriate a party's disclosure to court of appeals of information that was intended to remain within the confines of summary jury trial); *see also* United States v. Contra Costa County Water Dist., 678 F.2d 90, 92 (9th Cir. 1982) (holding that evidence of negotiated amount in prior litigation settlement between instant plaintiff and third party was inadmissible under Rule 408).

347. Fed. R. Evid. 408. *See generally* Fed. R. Evid. 408 advisory committee's note (1972 Proposed Rules) (noting the "expansion of the rule herewith to include evidence of conduct or statements made in compromise negotiations, as well as the offer or completed compromise itself").

348. *See* Rogers & McEwen, *supra* note 116, § 9:04.

349. *See, e.g.*, Thomas v. Resort Health Related Facility, 539 F. Supp. 630, 637–38 (E.D.N.Y. 1982) (stating, in context of partial summary judgment motion on back pay damages period, that evidence of employer's unconditional offer to reinstate and employee's rejection during prior settlement meeting is admissible because the offer was not made to compromise the back pay claim); *see also* Rogers & McEwen, *supra* note 116, § 9:05.

Rule 408's "for another purpose" language also can limit the rule's usefulness as a shield against the admissibility of ADR communications. Rule 408 allows the admission of evidence when it is "offered for another purpose, such as proving bias or prejudice of a witness, negativing a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution."[350] This language provides an incentive for parties to recharacterize compromise evidence to fit these exceptions. The language might be used by litigants who were not parties to the ADR proceedings, or even by those who were, to get ADR communications admitted, even though the ADR participants expected, when making the communications, that they would remain confidential. *See infra* Appendix E.3, E.4.

To establish ADR confidentiality protections more specific than Rule 408, consider using one or more of the methods discussed *supra* section VIII.B.1. See also *infra* Appendix E.5 for a discussion on allowing the neutral to testify.

If evidence is not inadmissible under Rule 408, it may still be found inadmissible under Federal Rule of Evidence 403[351] or Federal Rule of Civil Procedure 68.[352] Some appellate courts have called for a Rule 403 balancing analysis when deciding whether to admit evidence from settlement that is not clearly barred by Rule 408.[353]

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350. Fed. R. Evid. 408. *But see* Equal Employment Opportunity Comm'n v. Gear Petroleum, Inc., 948 F.2d 1542, 1545–46 (10th Cir. 1991) (deciding that exclusion of evidence offered for impeachment was not an abuse of discretion when the proffer of evidence "was but a thinly veiled attempt to get the 'smoking gun' letters before the jury").

351. *See* Wayne D. Brazil, *Protecting the Confidentiality of Settlement Negotiations*, 39 Hastings L.J. 955, 982–87 (1988).

352. *See id.* at 1022–23. Federal Rule of Civil Procedure 68 states that evidence of an unaccepted offer that was made under Rule 68 is "not admissible except in a proceeding to determine costs." Fed. R. Civ. P. 68.

353. *See, e.g.*, Weir v. Federal Ins. Co., 811 F.2d 1387, 1395–96 (10th Cir. 1987) (instructing the district judge to balance under Rule 403 the relevance of evidence of the circumstances surrounding a settlement payment with the prejudicial effect of such evidence); John McShain, Inc. v. Cessna Aircraft Co., 563 F.2d 632, 635 (3d Cir. 1977) (finding that district judge did not commit reversible error in admitting a settlement agreement, because the judge was in a position to gauge the relative importance of potential prejudice and probative value of the evidence).

2. To what extent have courts found ADR communications not discoverable?

Some local rules on ADR seem to limit confidentiality protections to prohibiting admissibility of ADR communications, arguably allowing for their production in discovery. Other local rules have established ADR confidentiality protections broader than any provided by Rule 408 and attempt to prevent discovery of ADR communications.[354] However, case law is still developing on how much protection local rules on confidentiality provide. *See infra* Appendix E.4.

Federal Rule of Evidence 408 has been read to bar admissibility, but not discoverability, of certain conduct or statements made in "compromise negotiations."[355] Thus, where confidentiality is protected only by Rule 408, ADR participants are not necessarily insulated from third party discovery of information presented in the course of ADR proceedings.[356] The third party seeking discovery may be a party to the same litigation who did not participate in the ADR process, such as an intervenor or third-party defendant. Or the third party may be one who is not involved in the litigation in question, such as a party in another lawsuit.

Some courts have ruled that ADR communications can be protected from discovery requests, given the public policy interest in protecting confidential communications in court-ordered ADR.[357] There are opposing

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354. *See supra* notes 344–45; *infra* note 370.

355. *See, e.g.*, Alcan Int'l Ltd. v. S.A. Day Mfg. Co., 179 F.R.D. 403, 404 (W.D.N.Y. 1998) (noting that Rule 408 does not limit the discovery of evidence); Computer Assocs. Int'l, Inc. v. American Fundware, Inc., 831 F. Supp. 1516, 1531 (D. Colo. 1993) (recognizing that offers of compromise which are inadmissible at trial under Rule 408 are still discoverable if they might lead to other admissible evidence).

356. Federal Rule of Civil Procedure 26 provides that "[t]he information sought need not be admissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence." Fed. R. Civ. P. 26(b)(1).

357. *See* Folb v. Motion Picture Indus. Pension & Health Plans, 16 F. Supp. 2d 1164, 1170–80 (C.D. Cal. 1998) (balancing needs of confidentiality in mediation against common law presumption of availability of evidence, and adopting a federal mediation privilege under Fed. R. Evid. 501 applicable to all communications made in conjunction with a formal mediation); *see also* Haworth, Inc. v. Steelcase, Inc., 12 F.3d 1090, 1095–96 (Fed. Cir. 1993) (stating that "judicial economy is best served by promoting ADR" and prohibiting a third party from intervening in an ongoing court ADR proceeding to gain access to documents).

views.[358] However, even in the context of settlement negotiations other than ADR, some federal district courts have expanded the protections of Rule 408 by requiring a "particularized showing" before allowing discovery of materials from the negotiations.[359] They found this heightened standard justified by the public policy favoring settlement of disputes which underlies Rule 408.[360] Other district courts, however, have rejected this approach.[361]

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358. *See* Datapoint Corp. v. PictureTel Corp., No. 93-2381D, 1998 WL 25536, at *2 (N.D. Tex. Jan. 14, 1998) (compelling production of mediated settlement agreement from another case despite local rule providing for confidentiality of ADR proceedings, where settlement agreement provided for its confidentiality "unless ordered by the court"); *cf.* Carman v. McDonnell Douglas Corp., 114 F.3d 790, 795 (8th Cir. 1997) (declining to recognize evidentiary privilege for corporate ombudsman, reasoning that benefits of privilege do not outweigh need for obtaining information in litigation); *In re* Grand Jury Subpoena Dated Dec. 17, 1996, 148 F.3d 487, 493 (5th Cir. 1998) (allowing grand jury subpoena of information related to mediation session, stating that "any interest the [participants] have in the confidentiality of their mediation sessions will have to give way to the public interest in the administration of criminal justice"); Ford Motor Credit v. Shockley, Reid & Tyson, No. 93-1037-CV-W-6, 1996 WL 9689, at *1, 1*–*2 (W.D. Mo. Jan. 4, 1996) (commenting on potential disclosure to state bar disciplinary proceedings of information received at a mediation in the court's Early Assessment Program).

359. Lesal Interiors, Inc. v. Resolution Trust Corp., 153 F.R.D. 552, 562 (D.N.J. 1994) (applying the heightened standard and refusing disclosure, after balancing concerns underlying Fed. R. Evid. 408 with those of Fed. R. Civ. P. 26); Fidelity Fed. Sav. & Loan Ass'n v. Felicetti, 148 F.R.D. 532, 534 (E.D. Pa. 1993) (characterizing the heightened standard as "switch[ing] the burden of proof from the party in opposition to the discovery to the party seeking the information"); Morse/Diesel, Inc. v. Fidelity & Deposit Co., 122 F.R.D. 447, 450–51 (S.D.N.Y. 1988) (using the heightened standard analysis, finding that the required "particularized showing" had been made, and ordering disclosure of the settlement materials); Bottaro v. Hatton Assocs., 96 F.R.D. 158, 160 (E.D.N.Y. 1982) (refusing disclosure after requiring "some particularized showing of a likelihood that admissible evidence will be generated by the dissemination of the terms of a settlement agreement").

360. Fed. R. Evid. 408 advisory committee's note (1972 Proposed Rules) (stating that one ground for Rule 408 is "promotion of the public policy favoring the compromise and settlement of disputes").

361. *See, e.g.,* City of Wichita v. Aero Holdings, Inc., 192 F.R.D. 300, 302 n.1 (D. Kan. 2000) (rejecting propositon that a higher burden is placed on a party seeking to discover evidence related to settlement negotiations); Vardon Golf Co. v. BBMG Golf Ltd., 156 F.R.D. 641, 650–51 (N.D. Ill. 1994) (concluding that the *Bottaro* standard overstated the nature of the proponent's burden, and noting the

3. To what extent have courts found ADR communications privileged?

a. The debate about the merits of an ADR privilege

A substantial part of the recent debate over admissibility and discoverability has been about whether ADR communications should be treated as privileged.[362] Few argue for a blanket privilege for ADR communications. Even those who argue that preserving the integrity of settlement processes is a sufficient public policy interest to justify an absolute ADR privilege acknowledge that there may be specific situations in which some other public policy outweighs the general need for the privilege.[363] See *supra* section VIII.C for a discussion of exceptions to confidentiality protections.

Some have called for establishing an ADR privilege to be held by the parties participating in ADR and by the neutral.[364] Others find sufficient protections for ADR communications that fall short of privilege, such as protection against admissibility similar to, or expanded from, that given under Federal Rule of Evidence 408.[365]

Rule 26(b)(1) "reasonably calculated" standard embodied in the Fed. R. Civ. P. rather than requiring a "particularized showing").

362. *See generally* Eric D. Green, *A Heretical View of the Mediation Privilege*, 2 Ohio St. J. on Disp. Resol. 1 (1986); Scott H. Hughes, *A Closer Look: The Case for a Mediation Confidentiality Privilege Still Has Not Been Made*, Disp. Resol. Mag., Winter 1998, at 14; Alan Kirtley, *Best of Both Worlds:Uniform Mediation Privilege Should Draw from Both Absolute and Qualified Approaches*, Disp. Resol. Mag., Winter 1998, at 5; *Draft Uniform Mediation Act*, *supra* note 256, § 6; Atlas, *supra* note 247, at 74 (identifying several "questionable" exceptions that courts may decide to recognize in establishing a mediation privilege). *See also CPR-Georgetown Comm'n Proposed Model Rule*, *supra* note 180, Rule 4.5.2 & comment (proposing rule on confidentiality for adoption into the ABA Model Rules of Professional Conduct).

363. *See generally* Charles W. Ehrhardt, *Confidentiality, Privilege and Rule 408: The Protection of Mediation Proceedings in Federal Court*, 60 La. L. Rev. 91, 121–24 (1999); Kirtley, *supra* note 362; *Draft Uniform Mediation Act*, *supra* note 256, § 8.

364. *See generally* Alan Kirtley, *The Mediation Privilege's Transition from Theory to Implementation: Designing a Mediation Privilege Standard to Protect Mediation Participants, the Process, and the Public Interest*, 1995 J. Disp. Resol. 1; *Draft Uniform Mediation Act*, *supra* note 256, § 5.

365. *See generally* Stephen A. Hochman, *The Uniform Mediation Act–A Radical Approach to Confidentiality*, Conflict Mgmt., Winter 1999, at 3; Green, *supra* note 362; Hughes, *supra* note 362.

b. Federal statutes

Although the ADR Act of 1998 requires that district courts adopt local rules providing for the confidentiality of ADR processes and prohibiting disclosure of confidential ADR communications,[366] the statute does not explicitly establish an ADR privilege. Court decisions have stated that none was intended.[367] Other recent federal statutes more specifically provide for the inadmissibility and non-discoverability of ADR communications. The Individuals with Disabilities Education Act, for example, has a confidentiality provision that provides not only that "[d]iscussions that occur during the mediation process shall be confidential," but also that they "may not be used as evidence in any subsequent due process hearings or civil proceedings."[368] The Administrative Dispute Resolution Act of 1996, which governs ADR used for federal administrative proceedings, protects ADR communications from "discovery or compulsory process."[369] See *supra* section VIII.C for a discussion on this 1996 statute.

c. Local rules

Some district court local rules refer to the privileged nature of ADR communications.[370] Although not necessarily viewing it as "privilege," a dis-

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366. 28 U.S.C. § 652(d) (Supp. 1998).

367. *See* Federal Deposit Ins. Corp. v. White, 76 F. Supp. 2d 736, 738 (N.D. Tex. 1999) (stating that the ADR Act does not create an evidentiary privilege that would preclude a litigant from challenging the validity of a settlement agreement based on events that transpired in the mediation); Olam v. Congress Mortgage Co., 68 F. Supp. 2d 1110, 1123 (N.D. Cal. 1999) (stating that it is not likely that Congress intended to create a mediation privilege by the confidentiality provisions in the ADR Act, given Congress's prior role in determining the language of Fed. R. Evid. 501); Fields-D'Arpino v. Restaurant Assocs., Inc., 39 F. Supp. 2d 412, 418 (S.D.N.Y. 1999) (stating that the ADR Act does not make mediation communications privileged). *See generally* St. Regis Paper Co. v. United States, 368 U.S. 208, 218 (1961) (applying general statutory construction disfavoring a finding of privilege unless specifically stated in the language of the statute).

368. 20 U.S.C. § 1415(e)(2)(g) (Supp. 1998).

369. 5 U.S.C. § 574(a)–(b) (Supp. 1998).

370. *See, e.g.*, S.D. Fla. Civ. R. 16.2.G.2 ("All proceedings of the mediation conference . . . are privileged in all respects."); S.D. W. Va. Civ. R. 5.01(f) ("All proceedings of the mediation conference . . . shall be privileged and not reported, recorded, placed in evidence, made known to the assigned judicial officer or jury, or construed for any purpose as an admission against interest."). *See also* Chief

trict court applied such a rule and found evidence from a mediation inadmissible.[371] This has not, however, been widely tested.

d. The law of privilege in the context of ADR communications

Federal Rule of Evidence 501 governs privileges in federal courts. Under Rule 501, determining whether ADR communications are privileged depends on whose law applies: federal common law or state law. Although there is no widely accepted ADR privilege under federal common law, many state statutes recognize an ADR privilege to one extent or another as discussed below. *See infra* Appendix E.3.d(2).

(1). Rule 501 and federal common law

As a general rule, testimonial privileges are disfavored and may be justified only by a "'public good transcending the normally predominant principle of utilizing all rational means for ascertaining the truth.'"[372] The standard for privileges is governed by "the principles of the common law as interpreted by the courts of the United States in the light of reason and experience."[373] Generally, in federal question cases, the issue is whether an ADR privilege is recognized as federal common law under Rule 501, even if the ADR sessions occur in a federal court that sits in a state that has a statute that provides that ADR communications are privileged. In cases where federal law governs, federal courts can consider state law privileges under the doctrine of comity and might recognize state privileges where this can be accomplished at no substantial cost to federal substantive and procedural policy.[374]

Judge's Form Order of Referral to Mediation para. (8) (N.D. Fla. Apr. 12, 2000) ("All discussions, representations, and statements made at the mediation conference shall be off the record and privileged as settlement negotiations.").

371. Barnett v. Sea Land Serv., Inc., 875 F.2d 741, 743–44 (9th Cir. 1989) (interpreting the Western District of Washington's local rule that states that communications in that court's mediation program are privileged).

372. Jaffee v. Redmond, 518 U.S. 1, 9 (1996) (quoting Trammel v. United States, 445 U.S. 40, 50 (1980)).

373. Fed. R. Evid. 501.

374. *See* Memorial Hosp. v. Shadur, 664 F.2d 1058, 1061 (7th Cir. 1981) (stating that the requirement of Fed. R. Evid. 501 in federal question cases "does not mean . . . that federal courts should not consider the law of the state in which the case arises in determining whether a privilege should be recognized as a

The language of Rule 501 arguably leaves open the question of which law applies when evidence is relevant to both a federal law claim and an element of a claim or defense controlled by state law.[375] Several federal courts of appeals addressing this issue have held that the federal law of privilege governs claims of privilege raised in federal question cases with pendent state law claims.[376]

The federal courts that have protected mediation communications from disclosure in subsequent litigation have, for the most part, done so without finding the need to establish a federal common law privilege. Until the district court holding in *Folb v. Motion Picture Industry Pension & Health Plans* in 1998, no federal court had definitively adopted a mediation privilege as federal common law under Federal Rule of Evidence 501.[377] The *Folb* court balanced the needs for confidentiality in mediation

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matter of federal law"); *In re* International Horizons, Inc., 689 F.2d 996, 1005 (11th Cir. 1982) (stating that considerations of comity did not require that state accountant-client privilege be adopted in federal bankruptcy proceedings); United States v. Gullo, 672 F. Supp. 99, 104, 107 (W.D.N.Y. 1987) (suppressing at a criminal trial all communications made during a community dispute resolution process that operated under a New York state statute).

375. *See Jaffee*, 518 U.S. at 16 n.15 ("[T]here is disagreement concerning the proper rule in cases such as this in which both federal and state claims are asserted in federal court and relevant evidence would be privileged under state law but not under federal law."). *See generally* Fed. R. Evid. 501 advisory committee's note.

376. *See* Pearson v. Miller, 211 F.3d 57, 66 (3d Cir. 2000) (holding that federal privilege law applies for resolution of discovery dispute which concerns material relevant to both federal and state claims); Hancock v. Dodson, 958 F.2d 1367, 1373 (6th Cir. 1992) (holding that "the existence of pendent state law claims does not relieve us of our obligation to apply the federal law of privilege"); Hancock v. Hobbs, 967 F.2d 462, 467 (11th Cir. 1992) (per curiam); von Bulow *ex rel.* Auersperg v. von Bulow, 811 F.2d 136, 141 (2d Cir. 1987); *Memorial Hosp.*, 664 F.2d at 1061 n.3. *Cf.* Motley v. Marathon Oil Co., 71 F.3d 1547, 1551 (10th Cir. 1995) (looking to state law in deciding privilege questions as to state causes of action where plaintiff asserted both federal and state race discrimination claims); Wm. T. Thompson Co. v. General Nutrition Corp., 671 F.2d 100, 104 (3d Cir. 1982) (applying federal rule favoring admissibility to federal and state law claims, and stating that that "holding does not, of course, preclude resort to state law analogies for the development of a federal common law of privileges in instances where the federal rule is unsettled").

377. 16 F. Supp. 2d 1164, 1171 (C.D. Cal. 1998); *see also Gullo*, 672 F. Supp. at 104, 107 (suppressing at a criminal trial all communications made during a community dispute resolution process that operated under a New York state stat-

against the common law presumption of availability of evidence and adopted "a federal mediation privilege applicable to all communications made in conjunction with a formal mediation."[378] The case involved a federal question with pendent state claims.

In another case, however, the U.S. Court of Appeals for the Fifth Circuit found there to be no evidentiary privilege to prevent disclosure to a grand jury of documents relating to mediation sessions conducted pursuant to the confidential mediation provision of the federal Agricultural Credit Act.[379] Because of that decision, proposals have been made to amend the statute to expand the protection of the act's confidentiality provisions.

In the labor mediation/conciliation context, in cases where the federal neutral was subpoenaed to testify, some courts have concluded that complete exclusion of the neutral's testimony was necessary to the preservation of an effective system of labor mediation. Courts balanced the public interest in maintaining the impartiality and effectiveness of the federal mediation/conciliation process with the benefits to be derived from the neutral's testimony.[380] See *infra* Appendix E.5 for a discussion on allowing the neutral to testify.

Future cases likely will test whether there is a need for a federal ADR privilege and whether that need outweighs the common law presumption of availability of evidence.[381]

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ute; and finding that grand jury indictment, based in part on those statements, should not be dismissed).

378., 16 F. Supp. 2d at 1170–80.

379. *In re* Grand Jury Subpoena Dated Dec. 17, 1996, 148 F.3d 487, 492 (5th Cir. 1998) (stating that federal Agricultural Credit Act requirement that mediation sessions remain "'confidential' does not necessarily mean 'privileged'").

380. *See, e.g.,* NLRB v. Joseph Macaluso, Inc., 618 F.2d 51, 55 (9th Cir. 1980) (finding that "[a]ny activity that would significantly decrease the effectiveness of [the Federal Mediation and Conciliation Service] could threaten the industrial stability of the nation"); Maine Cent. R.R. v. Brotherhood of Maintenance of Way Employes, 117 F.R.D. 485, 486–87 (D. Me. 1987) (following principles of *Joseph Macaluso*). *But see* Drukker Communications, Inc. v. NLRB, 700 F.2d 727, 731–34 (D.C. Cir. 1983) (concluding that National Labor Relations Board (NLRB) should have issued the requested subpoena of an NLRB agent, and reasoning that the parties' need for the testimony outweighed any potential harm to the future effectiveness of NLRB agents). *See generally* Kirtley, *supra* note 362.

381. For discussion of this balancing, see *Joseph Macaluso*, 618 F.2d at 54–56; *Folb*, 16 F. Supp. 2d at 1170–80; Smith v. Smith, 154 F.R.D. 661, 670–75

(2). Rule 501 and state law

Rule 501 provides that where claims and defenses turn only on substantive questions of state law, state law on privilege applies.[382] Nearly all, if not all, states and the District of Columbia have adopted statutory provisions providing for a mediation privilege for at least certain kinds of disputes. Only about half of the states, however, have enacted confidentiality protections for mediation that are of general application.[383] Moreover, the nature of the statutory privileges varies significantly from state to state. Many state statutes not only block the admissibility of ADR communications at trial but also protect against compelled disclosure in discovery and other proceedings.[384] Some statutes explicitly provide that the privilege cannot be waived unless all parties to the ADR proceeding and the neutral consent in writing.[385] Some state statutes provide for an ADR privilege to be held by the parties participating in ADR and by the neutral.

As of this writing, the National Conference of Commissioners on Uniform State Laws and the American Bar Association's Section of Dispute Resolution are in the process of drafting a model uniform mediation act to address concerns about widely varying and conflicting mediation statutes across the fifty states. The December 2000 draft of the uniform act included a mediation privilege to be held by the mediator and by each of the parties to the mediation. The draft specifically excluded from protection certain disclosures, such as threats to commit violent acts, that the drafters deemed to be in the interest of justice.[386] See *supra* section VIII.C for a discussion of exceptions from confidentiality protections.

(N.D. Tex. 1994) (neither adopting nor rejecting a federal common law mediator privilege).

382. Fed. R. Evid. 501 & advisory committee's note.

383. *See November 2000 Draft of the Uniform Mediation Act* § 2 reporter's working notes (visited Dec. 26, 2000) <http://www.pon.harvard.edu/guests/uma/press.htm>.

384. *See* Rogers & McEwen, *supra* note 116, § 9:10, app. A (containing a comprehensive listing of state statutes).

385. *See, e.g.*, Colo. Rev. Stat. Ann. § 13-22-307(2)(a) (WESTLAW through 1st Reg. Sess. 1999). *See generally* Rogers & McEwen, *supra* note 116, app. A.

386. *Draft Uniform Mediation Act*, *supra* note 256, § 8.

Some lawyers oppose a statutory ADR privilege that would go far beyond the protections provided in Federal Rule of Evidence 408.[387]

4. To what extent can local rules protect confidentiality in ADR proceedings?

District court local rules provide for the confidentiality of ADR communications in a variety of ways.[388] As of this writing, we have yet to see the full impact of the ADR Act of 1998[389] on local rulemaking in federal district courts. It is not clear how far courts will go, under the authority of Federal Rule of Civil Procedure 83, in using local rules to establish protections for confidentiality or how court decisions will interpret those local rules.

Nor has it been well established to what extent a federal court's local ADR rule's confidentiality provisions will protect the confidentiality of ADR communications that occur under that court's ADR program.[390] Some recent district court opinions suggest that, under certain circumstances, local rule provisions may not fully protect ADR communications from disclosure. In a 1999 case, where state law was applied in deciding the admissibility of ADR communications, the opinion described the effect that Federal Rule of Evidence 501 could have on a federal district court's attempts to safeguard the confidentiality of ADR communications in a case the court had referred to its mediation program. The court noted that, when state substantive law applies, the federal court must apply state privilege law—even if that means that the mediation communica-

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387. *See generally* Green, *supra* note 362, at 36; Hughes, *supra* note 362, at 16; Hochman, *supra* note 365, at 3.

388. *See supra* notes 343–45 and accompanying text.

389. 28 U.S.C. § 652(d) (Supp. 1998).

390. *See* Olam v. Congress Mortgage Co., 68 F. Supp. 2d 1110, 1124–25 (N.D. Cal. 1999) (stating that "even when a local rule adopted by a federal district court . . . offers more protection to mediation communications than would be offered by the law of the state where the district court sits, the federal court must apply state privilege law when state substantive law is the source of the rule of decision on the claim to which the proffered evidence from the mediation is relevant"); Barnett v. Sea Land Serv., Inc., 875 F.2d 741, 744 (9th Cir. 1989) (finding evidence of settlement inadmissible under local ADR rule, and stating that "ruling is reached only under the language of Western District of Washington Local Rule 39.1 and is not meant to be a general pronouncement on when binding settlements are reached in other cases, disputes and forums").

tions will not receive as much protection as they would have received by applying the federal court's local rule.[391]

And in a 1998 case, where the federal common law of privileges governed, the issue was whether pre-litigation mediation communications were discoverable. The district court decided to recognize a mediation privilege as federal common law. In so doing, the court stated that without such a privilege the district court's local ADR rule did not prevent communications made in mediation proceedings from being discovered by a third party in subsequent litigation.[392]

In a 1996 unreported decision, a district court noted that it will not be presumed that that court's local rule on ADR confidentiality intended to frustrate subpoenas issued by other courts or governmental bodies.[393] The court, however, stated that state courts and administrative agencies owe some degree of comity to rules and orders of the federal district court.[394]

5. Should the neutral be allowed to testify about ADR sessions?

Some decisions have protected mediators from being compelled to testify about ADR sessions, applying for example Federal Rule of Evidence 501 or 601.[395] Others have not.[396] Decisions have noted the importance of

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391. *See Olam*, 68 F. Supp. 2d at 1124–25 (stating that "[p]arties to a mediation sponsored by a federal court located in a state that had rejected the notion that mediation communications should be protected could not feel confident . . . that what they said during the mediation would not be disclosed in subsequent proceedings to enforce purported settlement contracts, even if the district court's local rule purported to promise absolute confidentiality"); *cf.* Willis v. McGraw, 177 F.R.D. 632, 633 (S.D. W. Va. 1998) (establishing "bright-line rule" that "the Court will not involve itself under any circumstances in sorting out disagreements amongst the parties emanating from the mediation process").

392. *See* Folb v. Motion Picture Indus. Pension & Health Plans, 16 F. Supp. 2d 1164, 1175 (C.D. Cal. 1998) (stating that "[i]n the absence of a federal mediation privilege, that assurance of confidentiality [in C.D. Cal. local rule on the confidentiality of nonjudicial dispute resolution proceedings] does little, in the face of third-party discovery, to protect those parties choosing mediation").

393. Ford Motor Credit v. Shockley, Reid & Tyson, No. 93-1037-CV-W-6, 1996 WL 9689, at *1, *1 (W.D. Mo. Jan. 4, 1996) (commenting on requested disclosure to state bar disciplinary proceedings of information received at a mediation in the court's Early Assessment Program).

394. *Id.*

395. *See* Haghighi v. Russian-Am. Broad. Co., 945 F. Supp. 1233, 1235 (D. Minn. 1996) (applying Minnesota privilege statute and Fed. R. Evid. 501 and 601

avoiding compelled testimony by the mediator. One recent decision further stated that the mediator, in addition to the parties, held a privilege against compelled testimony under state statute. The court nonetheless allowed the mediator's testimony.[397]

Prior to these cases, federal court decisions that have precluded neutrals from testifying have done so principally in the context of labor mediation, relying, for example, on National Labor Relations Board regulations prohibiting mediators from testifying about bargaining sessions they attend.[398]

Some state statutes have privilege or testimonial incapacity provisions that explicitly insulate mediators from compelled testimony that would require disclosure of communications made during the mediation process.[399] See *supra* Appendix E.3.d(2) for a discussion of state mediation privilege statutes.

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in refusing to permit mediator to testify at evidentiary hearing on motion to enforce settlement agreement), *rev'd on other grounds*, 173 F.3d 1086 (8th Cir. 1999); Smith v. Smith, 154 F.R.D. 661, 670–75 (N.D. Tex. 1994) (neither adopting nor rejecting a federal common law mediator privilege, yet affirming magistrate judge's decision quashing subpoena served on state court-appointed mediator); Wilson v. Attaway, 757 F.2d 1227, 1245 (11th Cir. 1985) (upholding trial court's refusal to permit mediator for federal Community Relations Service to be required to testify, because authorizing statute provides for confidentiality).

396. *See, e.g., In re* March, 1994–Special Grand Jury, 897 F. Supp. 1170, 1173 (S.D. Ind. 1995) (ordering mediator to respond to the grand jury subpoena and to testify, finding that strong interest in fact finding in criminal trial outweighs any benefits of recognizing the state mediation privilege).

397. *See Olam*, 68 F. Supp. 2d at 1137–39 (unsealing court-employed mediator's testimony, because it "was essential to doing justice" and to preserving the integrity of the mediation process, where plaintiff in protracted litigation had claimed she was under undue pressure during mediation); *cf. Willis*, 177 F.R.D. at 633 (establishing "bright-line rule" that "the Court will not involve itself under any circumstances in sorting out disagreements amongst the parties emanating from the mediation process").

398. *See, e.g.*, NLRB v. Joseph Macaluso Inc., 618 F.2d 51, 55–56 (9th Cir. 1980) (approving revocation of a subpoena that would have required a Federal Mediation and Conciliation Service mediator to testify in an NLRB enforcement proceeding). *See supra* note 380 and accompanying text.

399. *See* Rogers & McEwen, *supra* note 116, § 9:13, :33, app. A.

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