

ADR IN FEDERAL COURT: THE VIEW FROM BROOKLYN

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The Eastern District of New York (EDNY) offers both voluntary mediation and mandatory arbitration with a right to a trial de novo. The district once provided early neutral evaluation as well, but discontinued it because of lack of demand. Approximately 10 percent of all civil cases filed in the district are referred to court-annexed alternative dispute resolution, with a settlement rate of over 50 percent. An ADR administrator manages each program, working closely with an oversight judge selected by the district's chief judge. Because of limited funding, the program operates without support staff and tries to wring every last drop of efficiency from technological advances, such as Internet postings, electronic case filing, and computer-generated notices. Although the district has a crowded docket, the purpose of ADR is not simply to ease congestion. Quite to the contrary, its primary goal is to offer litigants a fair, inexpensive, and efficient means of settling a dispute that they were unable to solve on their own. This is especially true of mediation, which offers parties the opportunity to take control of their destiny and fashion a remedy to fit their specific case.

In the federal district courts, alternative dispute resolution (ADR) programs frequently reflect the district's culture. Factors such as geography, caseload, types of cases, local bar practices, and attitudes of both judges and lawyers toward settlement heavily influence the types of ADR a court will offer and whether ADR is perceived as an integral part of the legal process. This is certainly true of the Eastern District of New York (EDNY), where ADR has been utilized since 1986. At various times during this period, litigants could select from arbitration, early neutral evaluation, and mediation, as well as traditional settlement conferences with a judge. In addition, the extensive use of magistrate judges to manage the court's civil docket has influenced the development of ADR. Today, the EDNY offers mandatory, nonbinding court-annexed arbitration and mediation. To understand this court's evolving programs, a brief description of the court is in order.

The Eastern District of New York includes three of the five boroughs of New York City (Brooklyn, Queens, and Staten Island) and all of Long Island. Its main courthouse sits at the foot of the Brooklyn Bridge, with a large divisional courthouse in Central Islip, Long Island. Approximately eight million people live in the district, and the distance from Staten Island to the town of Montauk on the East End of Long Island is just over 130 miles.

The district has a heavy criminal docket, in part because of two international airports, Laguardia and John F. Kennedy, which are magnets for international drug couriers, and to a lesser extent because it is home to La Cosa Nostra. Each year the district hosts lengthy racketeering trials of major organized-crime figures. For many years, the EDNY has had one of the highest weighted caseloads per judge in the coun-

try. The court has thirteen active district judges, eight senior district judges, and fourteen magistrate judges.

To help manage its crowded docket, the district relies heavily on magistrate judges to prepare, and in many instances try, civil cases, thus freeing district judges to attend to the demands of the speedy-trial rules governing the pace of criminal cases. Under its local rules, the EDNY randomly assigns a district judge and a magistrate judge to each civil (and criminal) case at the time of filing and automatically refers all civil cases to the assigned magistrate judge. The magistrate judge typically conducts the initial scheduling conference, supervises discovery, and oversees settlement proceedings in all civil cases. Where the parties consent, the magistrate judge will decide dispositive motions and, if the matter does not settle, preside over the trial. In most instances, the litigants will not see the district judge until a dispositive motion is filed or the case goes to trial—and in some instances not at all. As a result it is frequently the magistrate judges who are most familiar with the court's civil docket and who decide whether a particular case should be included in the court's alternative dispute resolution program.

ARBITRATION

In January 1986, the EDNY was one of ten district courts authorized by federal statute (28 U.S.C. §§ 651-658) to provide mandatory, nonbinding arbitration in cases where money damages total \$100,000 or less exclusive of costs and interest. The program has operated continuously for over nineteen years, although the arbitration cap has since been raised to \$150,000. Today, only one other district, the Eastern District of Pennsylvania, continues to offer mandatory arbitration. According to the most recent statistics, 254 cases, or 4.9 percent of all civil filings, were referred to arbitration in 2004. During that same period, 199 cases were terminated, 71 cases went to hearing, and there were 35 requests for a trial de novo. A substantial number of cases settled before or as a result of the arbitration.

Under the EDNY's Local Rules, all civil cases are eligible for compulsory arbitration except for "social security cases, tax matters, prisoners' civil rights cases and any action based on an alleged violation of a right secured by the Constitution of the United States or if jurisdiction is based in whole or in part on Title 28, U.S.C. § 1343." Local Rule 83.10 (d)(1). (See www.nyed.uscourts.gov/adr.)

Every case is presumed to be within the cap, unless plaintiff's counsel certifies at the time of filing the complaint that the damages exceed \$150,000. If there is no certification, the clerk's office automatically refers the case to arbitration. As a practical matter, the magistrate judge reviews the damages claims at the initial conference and during subsequent meetings with the litigants. It is not unusual for a judge to add or remove a case from arbitration after evaluating the claims with the lawyers at various stages of the litigation. In fact, under Local Rule 83.10 (e)(2), the court must exempt cases from arbitration where "the objectives of arbitration" will not be served, and specifically where the case presents complex or novel issues, or legal questions predominate over factual issues.

The program allows for a substantial degree of creativity. By stipulation, parties can agree to arbitrate a case that does not fit within the \$150,000 cap. Moreover, the rules permit parties to tailor the arbitration to their needs. For example, they may choose to bifurcate the arbitration and decide liability or damages alone. Or they may stipulate to “baseball arbitration,” where each party proposes a damages amount and the arbitrator must select one, or they may enter into a “high-low” agreement limiting the range of the arbitrator’s award. To save on trial costs, the parties are free to submit expert reports rather than live testimony.

The Local Rules provide that the arbitration hearing must be held within 120 days after the answer has been filed, on the theory that alternative dispute resolution in smaller damages cases should result in a quick disposition. In practice, judges will work with the parties to establish a realistic discovery and arbitration schedule. Personal injury cases, which comprise a large percentage of arbitrated cases, often require more time for discovery because they depend on the production of medical records, which in the New York City area typically require up to sixty days to obtain. Despite diligent efforts, a defendant may not learn the identity of all relevant medical providers until the plaintiff’s deposition. Preparation of expert reports may take another sixty days after the close of fact discovery.

Discovery disputes may also delay the arbitration hearing. Although the rules optimistically anticipate minimal court involvement with cases in arbitration, arbitrators report that judicial intervention is essential to keeping a case with discovery problems on track. Thus, it is the practice of most judges to advise parties at the initial conference that they should contact the court immediately in the event of unresolved discovery disputes. Similarly, the 120-day rule is suspended when a dispositive motion is filed.

Arbitrators are selected at random by the court’s arbitration clerk from a panel of neutrals screened by the court’s ADR administrator and approved by a “certifying judge” designated by the chief judge. Under the Local Rules, each arbitrator must be an attorney admitted to practice in the EDNY and have been a member of the bar for a minimum of five years. All applicants are interviewed by the ADR administrator and required to complete a questionnaire indicating their experience as a lawyer and an arbitrator and identifying every EDNY judge before whom they have appeared. The candidates’ names are then forwarded to each judge in the district for evaluation. The certifying judge then reviews the applications and judges’ comments, contacts references, and makes the final decision. Once appointed, arbitrators are afforded immunity from suit “to the maximum extent permitted by applicable law.” Local Rule 83.10 (c). Arbitrators receive token compensation: \$250 per case, “by or pursuant to the order of the Court.” Local Rule 83.10 (b).

At the arbitration hearing, the rules of evidence apply, and the parties have subpoena power under Federal Rule of Civil Procedure 45 to compel the testimony of witnesses. After the arbitration is completed, the arbitrator docket the award, and the parties have up to thirty days to request a trial de novo. The requesting party

must post a nominal bond in the amount of the arbitrator's fees (\$250); this is forfeited if the party does not obtain a more favorable result after trial or if the presiding judge finds that the request for a trial *de novo* was made in bad faith.

There is a wall of confidentiality between the arbitration and the judicial process. Litigants are prohibited from disclosing the arbitrator's decision to a judge assigned to the case until after the case has closed. Evidence concerning the arbitration hearing or award is not admissible at trial, Local Rule 83.10 (h)(3), and contact between the assigned judges and the arbitrator before, during, and after the hearing is forbidden.

MEDIATION AND EARLY NEUTRAL EVALUATION

Court-annexed mediation and early neutral evaluation (ENE) began in the EDNY in 1992. From the outset, referrals to ENE far outnumbered referrals to mediation. During the first year, only four cases went to mediation, and the number increased to seven between January and November 1994 ("Mediation Efforts," 1993; Plappinger and Stienstra, 1996:194). In 1996 the court appointed a committee to evaluate the effectiveness of the mediation and ENE programs. Finding that mediation was "by far the preferred and most widely used consensual ADR procedure" and was more effective in settling cases, the committee recommended that ENE be discontinued (EDNY Advisory Group, 1996:13). The court agreed. Implicit in this decision was an acknowledgment that in a district where two judges—a district judge and a magistrate judge—are assigned to each case, litigants can readily obtain a neutral evaluation from the judge who will not be trying the case. Assigned randomly at the time a case is filed, the magistrate judge supervises discovery and is typically the judicial officer most familiar with the case before trial. Parties often ask the magistrate judge to conduct a settlement conference and will make it clear that they expect the judge to provide an assessment of the respective strengths and weaknesses of their positions.

Under Local Rule 83.11 (b)(1), the assigned district judge or magistrate judge may "designate" a case for mediation, or the parties may consent to mediation by stipulation so ordered by the court. Unless good cause is shown, the mediation must be completed within six months. In most cases, the parties are asked to select a mediator from the court's mediation panel within fourteen days; the mediators are listed on the court's Web site by name and by area of expertise. If the parties cannot agree, the ADR administrator makes the selection. There are two reasons for leaving the choice to the parties. First, the parties are encouraged to work collaboratively. Choosing a mediator is the first small step toward reaching an agreement, a recognition of a mutual interest in the process. Second, the burdens on the ADR administrator, who has no secretary or support staff, are eased. The parties are also free to agree to private mediation outside the court at their own expense.

The court's mediation Web site contains instructions for mediators and counsel, forms, and answers to frequently asked questions. Each party must provide the

mediator a confidential pre-mediation statement at least seven days before the mediation, outlining key facts and legal issues in the case. Trial counsel is required to attend the mediation session with a client with settlement authority. Like arbitration, mediation is confidential; neither counsel nor the mediator may discuss the proceedings with any judge of the court while the case is pending.

Mediators, like arbitrators, are appointed to the EDNY panel by the supervising ADR judge following interviews and screening by the ADR administrator and an opportunity for review by each of the court's judicial officers. Mediators must be attorneys admitted to practice in the EDNY, have at least five years experience as lawyers, and have completed at least two days or sixteen hours of training from a recognized ADR organization, academic institution, or court. When the mediation program first began, mediators were permitted to charge market rates for their services. However, in 1996 the advisory committee studying court mediation concluded that cost was the principal reason why few cases were referred to mediation and recommended that "it would be helpful in getting the program off the ground if mediators served *pro bono*" (EDNY Advisory Group, 1996:13). As a result, mediators now serve without compensation and are free to refuse appointment in a particular case. Each panel member is encouraged to accept up to two cases per year. Mediators also enjoy the same immunity from suit as arbitrators.

Since 1996, referrals to mediation have increased significantly. The most recent statistics show that in 2004 participation reached about 250 cases per year, or about 4.9 percent of civil filings. During the last year, approximately 95 percent of referrals to mediation were made by magistrate judges and only 5 percent by district judges (Mediation Report, 2003-04). As explained above, this is largely a result of the role of the magistrate judges in preparing cases for trial and their involvement in the settlement process. During 2004, nearly 62 percent of all mediation referrals were composed of civil-rights cases—employment discrimination (25 percent of all referrals) and Section 1983 causes of action—and tort cases (23 percent). More than 57 percent of employment-discrimination cases settled as a result of mediation, while the settlement rate for Section 1983 matters was just under 40 percent. (See Mediation Report, 2003-04, for complete statistics.)

OBSERVATIONS AND ISSUES

For the most part, personal injury cases with relatively minor injuries go to arbitration. Litigants often prefer arbitration where there is a sharp dispute over key facts, such as the cause of an accident (was the light red or green?), or where experts disagree as to the value of an injury. Because the parties can submit expert reports in lieu of live testimony, arbitration offers litigants an attractive and inexpensive way to test their evaluations of a case. More than one-half of all cases referred to arbitration settle during or after the hearing. Parties seeking arbitration are usually looking for a neutral assessment of the case from start to finish. Mediation, by contrast, works best

where questions of law or fact aren't controlling and can be surprisingly effective where the parties have a continuing relationship, whether personal or professional, or other discernible common interests.

All told, about 10 percent of the district's civil cases are referred to ADR each year. At first blush, that number seems small. Wouldn't both the court and litigants benefit if more cases were sent to arbitration or mediation? The answer turns on a number of factors, including the use of judicial settlement conferences and the resources available for court ADR. First, many of the cases that are not referred to ADR settle. Because each civil case has two judges—a district judge and a magistrate judge—litigants often feel comfortable discussing settlement with the magistrate judge, because they can keep settlement negotiations confidential from the district judge, who may at some point be asked to decide a summary-judgment motion or conduct a trial. Many magistrate judges discuss settlement as often as possible, beginning with the initial conference, following up at each subsequent meeting with the parties, and finally scheduling extended settlement conferences when they identify a propitious moment. In fact, a good case can be made for treating these judicial settlement conferences as a form of ADR. A number of the judges in the district have been trained as mediators and offer either evaluative settlement conferences or facilitative mediations, depending on the needs of an individual case and the litigants' requests. In fact, in some district courts all mediation is conducted by magistrate judges.

In addition, some litigants prefer judges to mediators and arbitrators because of what they view as "the authority of the robe." In their eyes, a judge's evaluation of their case carries greater weight than that of a neutral and can provide a powerful impetus to settle. The magistrate judge, in particular, is familiar with the case, knows the law, and will not reveal confidences to the district judge in the event the case does not settle. Counsel often beg judges to "twist arms" or to suggest compromises that they are afraid to recommend to their own clients for fear of appearing weak. Thus, if one were to include judicial mediations and settlement conferences in the ADR statistics, the numbers would increase significantly.

Second, it is unclear whether the EDNY could manage a larger ADR program with the resources currently available. Because of limited funding, a single ADR administrator, relying on seasonal law-student interns, runs the mediation program. There is no support staff to help answer the telephone, appoint mediators, monitor deadlines, schedule mediations, evaluate mediators' performance, develop training programs, or handle the myriad substantive and clerical tasks needed to run a quality mediation program. One arbitration clerk performs similar tasks for cases referred to arbitration. Even with the help of the oversight judge, this skeleton staff has all it can handle to maintain quality ADR programs.

The court has tried to maximize its resources by taking advantage of the newly installed electronic case-filing (ECF) system to automate the ADR program wherever possible. Because all documents and orders in every case must now be filed electronically, there is a huge database at our disposal. To help understand how to use this

information to eliminate tasks and compensate for the lack of support staff, the EDNY requested a consultation from the Federal Judicial Center's Program in Consultation on Mediation, through which the FJC trained about two dozen ADR administrators and judges (including the author) across the country to evaluate and assist other districts in creating or improving their mediation programs.

At the EDNY's request, experts from two district courts and the FJC met with the EDNY's ADR personnel, clerk's office, automation department, and oversight judge to explore ways to automate the ADR programs. Although still a work in progress, the results to date include a system that allows both the ADR program and chambers to track the progress of a mediation and flag key dates, for example, to notify the ADR administrator when the fourteen-day period for the parties to select a mediator has elapsed. In addition, mediators have been added to the contact list for each case they mediate, so they are kept up to date on every order. Similarly, all procedural matters surrounding the mediation, including scheduling, are posted on the docket sheet to enable chambers and the ADR administrator to track the case more easily—without revealing any confidential details of the mediation. Finally, the court has developed a comprehensive Web site with the Local Rules, frequently asked questions, the names and specialties of ADR panel members, instructions to mediators and parties, and evaluative questionnaires.

As the district's ADR programs continue to grow, questions about resources will inevitably arise. Any significant expansion would require additional staff, but funding is not available now or likely in the foreseeable future. Referring substantially more cases to ADR would likely require increasing the size of the arbitration and mediation panels. Recruiting, screening, and overseeing panels of skilled neutrals, already a challenge at existing levels, would undoubtedly be more difficult without a corresponding increase in staff. Other districts share similar concerns. As the FJC's experience with its Consultations in Dispute Resolution program confirms, the EDNY is not alone in wondering how it can maintain a quality court-annexed ADR program without substantial staff or money.

Even at present levels, the EDNY, like most courts, works hard to develop and maintain its panels of qualified neutrals. Quality assurance is a serious concern, which the court attempts to address through periodic training as well as evaluations of the performance of its panel members. Because of budgetary constraints, the EDNY relies on the generosity of private individuals and organizations who donate their services at vastly reduced cost to provide periodic training to its ADR panels. The court sponsors at least two seminars each year on a topic of interest to neutrals, and more-lengthy training programs every two to three years to update skills, discuss recurring problems, review the Local Rules, and explore issues unique to ADR in a court setting. The court also organizes an annual reception to honor neutrals who have served on its panels and sponsors occasional lunches with mediators to discuss issues of concern and to enable participants to share their experiences with the court and their colleagues. Recently, the court began publishing a quarterly electronic

newsletter to advise members of the mediation panel of current issues and ADR-related events at the courthouse.

Because the court lacks the staff to observe mediation and arbitration sessions, litigants are asked to complete detailed evaluations after the close of each arbitration or mediation. The results are tabulated and used to evaluate the neutrals. All results are kept confidential, for the court's use only.

Mediator compensation is the next big issue on the horizon for this court. As noted earlier, although mediators were once compensated, they currently serve pro bono. Now that the mediation program has matured, the court is investigating compensation schemes in other courts and is seriously considering a plan that would require litigants to share the cost of a mediator. The trend in other courts is to provide some compensation for mediators, on the theory that the parties, who would split the cost of the mediation, will benefit from dramatically lower transaction costs if the case settles. Some courts require mediators to donate their preparation time along with the first three or four hours of the mediation, with any subsequent time reimbursed either at the mediator's market rate or a set rate. Others allow the mediator to charge a court-imposed fee from the outset, while still others permit the mediator to bill at his or her market rate. Even if such a change were adopted, however, each mediator would still be required to serve without compensation if the parties could not afford to pay.

Court ADR has emerged from its infancy and become an integral part of the judicial system. The question is no longer whether ADR will survive within the judiciary, but what form it should take as litigants become increasingly comfortable with court-sponsored alternatives to litigation and judges learn to trust them more and more. **jsj**

REFERENCES

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