



Future Trends in State Courts

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Alternative Dispute Resolution Act of 1998: Seeds of Change in the Federal District Courts

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On October 30, 1998, the President signed into law the Alternative Dispute Resolution Act of 1998 (Act),^[1] authorizing the use of alternative dispute resolution (ADR) in federal courts and imposing a number of requirements on the courts. The Act is the latest in a series of federal court ADR developments that began over 30 years ago, when three district courts began using court-connected arbitration for cases with small monetary claims. In 1988, Congress gave courts explicit authority to use arbitration, the first statutory provision for ADR in the federal courts, but limited that authority to 20 districts.^[2]

Two years later, Congress passed the Civil Justice Reform Act of 1990 (CJRA)^[3] that covered all 94 federal district (trial) courts and prompted great expansion of ADR in these courts. In response to explicit instructions to consider using ADR to reduce litigation cost and delay,^[4] at least two-thirds of the district courts adopted local rules or orders on ADR, and nearly half established mediation programs. Though some judges continued to question whether ADR was necessary or appropriate for their districts, developments during the '90s in response to the CJRA—and a changing litigation environment—institutionalized ADR in many federal district courts.

The CJRA sunset in 1997, and with it went any explicit authorization or requirement for federal court ADR. In a final report to Congress on the courts' implementation of the Act, the Judicial Conference, the federal courts' policymaking body, recommended that "local districts continue to develop suitable ADR programs, including nonbinding arbitration."^[5] Congress responded in 1998 with the Act, convinced, as the Act's findings state, that ADR "has the potential to provide...greater satisfaction of the parties, innovative methods of resolving disputes, and greater efficiency in achieving settlements."^[6]

So today, after three acts of Congress, not only do many federal district courts have considerable experience with ADR, but all 94 are also authorized and, in fact, specifically directed to provide ADR to civil litigants. At the same time, perhaps recognizing the great diversity in litigation cultures across districts, the Act gives the courts considerable discretion in deciding how to implement its requirements.

Scope of the ADR Act

An important threshold question before we consider the Act's requirements is whether it applies to both district and bankruptcy courts. Nearly all the Act's provisions specifically address the district courts, with only two references to adversary proceedings in bankruptcy, both made in the context of defining the term "civil action."^[7] This could mean the Act does not apply to bankruptcy courts generally, but only to bankruptcy matters where the district court has withdrawn its referral of the case to the bankruptcy court. It could mean instead that parties in an adversary proceeding in the bankruptcy court should use the district court's ADR program if the bankruptcy court has no program. Or it could mean that the Act's requirements apply to bankruptcy courts, too, because they are units of the district courts. Congress has not clarified the Act's intention, nor has the Judicial Conference issued an official interpretation or policy statement. What is clear is that the Act does not prohibit bankruptcy courts from developing ADR programs.^[8]

With this context in mind, what does the Act require?

It authorizes use of ADR. The Act's basic provision states that "each United States district court shall authorize, by local rule...the use of alternative dispute resolution processes in all civil actions, including adversary proceedings in bankruptcy" (§ 651(b)).

It requires at least one ADR process in each district. Having established that courts must authorize use of ADR, the Act requires each district court to provide litigants at least one ADR process (§ 652(a)). While courts are permitted to offer two, three, or more types of ADR, they are required to provide only one.

The Act defines ADR. What is ADR? Under the Act, it is any process or procedure, other than judicial adjudication, in which a neutral third party assists in resolving the dispute. It may include such processes as early neutral evaluation, mediation, minitrial, and voluntary arbitration (§ 651(a)). This broad definition appears to leave room for judges to serve as neutrals, and for settlement conferences to satisfy the requirement of a nonadjudicatory process.

It requires courts to implement their own ADR programs. To "encourage and promote use of ADR," the Act directs each district court to "devise and implement" by local rule "its own" program (§ 651(b)). In effect, courts must establish a structure for providing ADR services, intended by Congress, perhaps, to make access to ADR a practical reality.

It requires litigants to consider ADR. Each district court must, by local rule, require litigants in all civil cases to consider using ADR at an appropriate stage in the case (§ 652(a)). In other words, although the Act does not require parties to use ADR, it does want courts to make litigants take seriously the possibility of using it.

The Act authorizes mandatory ADR. District courts are explicitly given authority to require parties to go to ADR. This authority is limited, however, to mediation and early neutral evaluation (§ 652(a)). Participation in arbitration may not be compelled, except in 10 courts authorized by the 1988 statute (§ 654(d)).^[9]

It permits courts to exempt cases. Courts have full discretion to exempt specific cases or categories of cases from ADR, but they must consult with the bar, including the U.S. Attorney, in defining these exemptions (§ 652(b)). Under this flexible provision, court ADR programs can range from very comprehensive (applying to all cases) to very limited (applying to only a few selected case types).

It requires courts to make neutrals available. In another effort to make court ADR processes a viable option, the statute directs each district court to adopt appropriate processes for making neutrals available to parties for each category of ADR process. In addition, each court must promulgate its own procedures and criteria for selection of the neutrals on its panels (§ 653(a)).

The Act requires courts to establish qualifications for their neutrals. The Act gives courts considerable discretion in deciding what type of training and experience neutrals should have. Courts may, for example, use magistrates trained in ADR processes, professional neutrals from the private sector, and persons trained to serve as neutrals (§ 653(b)). Recognizing that each ADR process is different, the Act specifies that each neutral should be qualified and trained in the appropriate process. This requirement and the preceding one impose on courts considerable responsibility for ensuring the quality of their neutrals.

It directs courts to prevent conflicts of interest. Recognizing the potential for conflicts of interest, particularly because many neutrals also practice law, the Act directs each district court to issue local rules for disqualifying neutrals for conflicts of interest. Standards that might be used include 28 U.S.C. § 455, other applicable law, and professional responsibility standards (§ 653(b)). Local rules will apply until national rules are adopted under chapter 131 of Title 28. There are no current plans to promulgate national rules.

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It directs courts to protect confidentiality. Speaking to an issue that lies at the heart of ADR, the Act directs each district court to provide for the confidentiality of its ADR processes and to prohibit disclosure of confidential communications. This step is to be taken, too, by local rule until such time as the Judicial Conference adopts national rules regarding confidentiality (§ 652(d)). Again, there are no present plans to issue such rules.

The Act requires a program administrator. To help ensure that court ADR programs are well managed and of high quality, the Act requires each district court to designate an employee or judicial officer who is knowledgeable about ADR to implement, administer, oversee, and evaluate the program. Among this individual's duties may be recruiting, screening, and training attorneys to serve as neutrals (§ 651(d)).

It requires courts to address the question of compensation of neutrals. The Act neither requires nor prohibits payment of neutrals, but it does require districts to establish the amount of compensation, if any, that each arbitrator or neutral shall receive (§ 658(a)). This must be done under guidelines issued by the Judicial Conference.^[10]

It requires the courts to address the question of transportation allowances. Under regulations prescribed by the Administrative Office of the U.S. Courts, a district court may reimburse arbitrators and neutrals for actual transportation expenses incurred in performing their duties (§ 658(b)).

The Act requires existing ADR programs to conform to its requirements. Although the Act's requirements will fall most heavily on courts without ADR programs, courts with existing programs

cannot ignore the Act. They are required to examine their program's effectiveness and adopt such improvements as are consistent with the Act (§ 651(c)). Most district courts already authorize use of ADR, and many have a court-connected ADR program in place.^{[111](#)}

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The Act provides for support from national court agencies. The Act authorizes the Federal Judicial Center (FJC), the judiciary's research and education agency, and the Administrative Office of the U. S. Courts to assist the district courts in establishing and improving their ADR programs (§ 651(f)). Several steps have already been taken to provide information and assistance to the courts, including an FJC broadcast to the courts on the Act's requirements and an FJC conference for the court ADR administrators.

The Act authorizes appropriations. The Act authorizes such appropriations for each fiscal year as may be necessary to carry out the Act. No appropriations have been made.

The Act makes various provisions regarding arbitration. The ADR Act is an amended version of the arbitration statute first adopted in 1988, which authorized 20 federal district courts to establish court-annexed arbitration programs. Those programs, which include 10 that may order parties to use arbitration (the so-called "mandatory" arbitration courts), are not affected by the Act (§ 654(d)). Any other district wanting to establish an arbitration program must do so within the Act's requirements, which permit use of arbitration only with party consent.

The Act sets out a number of specific requirements for courts that establish a voluntary arbitration program. These include restrictions on types of cases that may be referred to arbitration, limits on arbitrator powers (which include subpoena powers), standards for certifying arbitrators, a grant of immunity to arbitrators, directions for handling the arbitration award, and assurance of the right to trial de novo (§§ 654-657).

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Matters That Must Be Addressed in Local Rules

The statute requires that seven of its provisions be incorporated into local rules:

- Authorization to use ADR
- Implementation of an ADR program
- Requirement that litigants consider using ADR
- Provisions to ensure confidentiality
- Provisions to establish standards for disqualification
- Assurances that arbitration is by consent
- Procedures for keeping an arbitration award confidential from the assigned judge until the case terminates

Why these provisions and not others should be set out in local rules is not clear, but the second, implementation of an ADR program, is so broad that it in effect subsumes many of those not specifically identified as needing a local rule, such as case eligibility, method of referral, and neutral qualifications and availability. Where a matter must be addressed in local rules, the Act preserves the primacy of the statutorily authorized rulemaking process by directing that local rules be adopted in accordance with section 2071(a) of Title 28.

Implications of the ADR Act

If federal courts—at least the district courts—had any doubts about their authority to establish ADR programs, those doubts should be dispelled by the ADR Act. And if any judges—again, at least district judges—had any doubts about their authority to compel litigants to use mediation or early neutral evaluation, those doubts, too, can be put aside in light of the new Act.

Even so, the Act is unlikely to bring sweeping changes in the courts because many had already established ADR programs. It is plausible, in fact, that those courts that did not implement ADR when the authority to do so was provided by the CJRA found little need to do so. If their circumstances have not substantially changed, we might expect their response to the ADR Act to be limited as well. One possibility for such courts, clearly presented to them by the Act, is to ask magistrate judges to be the court's ADR providers.

In other courts we can expect a refinement of local rules, such as those addressing confidentiality and conflicts of interest, although changes in this arena may owe as much to the maturing of ADR and the ongoing debate about ADR ethics as they will to the Act. We may also see an increased number of cases going to ADR simply because the Act makes ADR much more visible in the federal courts, but here, too, it will be difficult to separate the Act's impact from the general trend toward greater awareness and use of ADR.

For Federal district courts that are enthusiastic about ADR or that have been hoping to expand their programs, the Act gives them support. For courts that are less certain about ADR or find it unnecessary, the Act gives them the latitude to fashion a more modest response. In this context, will the Act have consequences for state courts? ADR programs are so responsive to local conditions that the Act's impact on state courts would be indirect at best, arising, for example, from changes in the local federal court that seep into the local litigation culture. In other words, if little happens in the federal courts in response to the Act, there will be little that could influence the state court, at least in general civil cases. In fact, both courts may reflect a general lack of interest in, even opposition to, ADR. On the other hand, in local culture open to ADR, the Act—or its main tenets—could prove to be the stimulus for further ADR developments for civil litigants in both state and federal courts.

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

[2]. Section 901, Title IX, Judicial Improvements and Access to Justice Act, Pub. L. 100-702, 102 Stat. 4659 (1988), as amended by section 1 of Pub. L. 105-53 (1997) (authorization of mandatory arbitration programs for ten district courts and voluntary arbitration programs for ten district courts; previously codified as 28 U.S.C. §§ 651-658 (1994)).

[3]. Civil Justice Reform Act of 1990, Pub. L. No. 101-650, 104 Stat. 5090, Dec. 1, 1990, (as amended by Pub. L. 105-53, § 2, Oct. 6, 1997, 11 Stat. 1173), codified at 28 U.S.C. §§ 471-482.

[4]. *Id.*, at § 473(a)(6). ADR was the last of six case management principles Congress urged the courts to consider adopting.

[5]. Judicial Conference of the United States, The Civil Justice Reform Act of 1990: Final Report (May 1997), at p. 38.

[6]. Alternative Dispute Resolution Act of 1998, Pub. L. No. 105-315, 112 Stat. 2993 (1998), Findings and Declaration of Policy.

[7]. Alternative Dispute Resolution Act, *supra* note 1, at §§ 651(b) and 654(a) (1998).

[8]. A substantial number of bankruptcy courts have either set up their own ADR programs, 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. For a description of bankruptcy ADR programs, see Robert J. Niemic, *Mediation in Bankruptcy, the Federal Judicial Center Survey of Mediation Participants: Report to the Advisory Committee on Bankruptcy Rules* (Washington, D. C.: Federal Judicial Center, 1998), pp. 5-6.

[9]. See *supra* note 2 for 1988 statute.

[10]. The guidelines were issued November 15, 1999 and may be found in the *Guide to Judiciary Policies and Procedures*, Vol. I, Chapter III, pp. 41-42.

[11]. 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* (Washington, D.C.: Federal Judicial Center & Center for Public Resources, 1996).

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